AMENDMENTS TO THE COMPANIES ACT TO IMPROVE TRANSPARENCY OF COMPANIES

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Background

Following a review of the Companies Act by the Ministry of Finance ("**MOF**") and the Accounting and Corporate Regulatory Authority ("**ACRA**") in 2016, the Companies (Amendment) Bill 2017 was passed in Parliament on 10 March 2017. The amendments may be categorized broadly as follows:

1. proposed amendments to reduce the regulatory burden and improve the ease of doing business; and
2. proposed amendments to improve the transparency of companies.

This article focuses on the latter category of amendments, which were implemented on 31 March 2017.

Current regime regarding the transparency of companies

Currently, sections 190 and 191 of the Companies Act require public companies to maintain a register of shareholders at their registered offices. Division 4A of Part V of the Companies Act requires ACRA to maintain an electronic public register of shareholders of private companies.

While professional intermediaries such as company service providers and financial institutions are required to maintain beneficial ownership and control information of their clients, there is no requirement for locally-incorporated companies to maintain such information.

1. Key amendments to improve the transparency of companies

(1) Requirements relating to controllers of locally incorporated companies and foreign companies registered in Singapore

Following the amendments to the Companies Act, companies incorporated or registered in Singapore are required to maintain registers of controllers at prescribed places. The aim is to make the ownership and control of corporate entities more transparent and reduce opportunities for the misuse of corporate entities for illicit purposes.

Controllers who have to be identified in the register

Generally, controllers who have to be identified in the register are, in relation to a company, either an individual who or legal entity which has a significant interest in, or significant control over, the company ("**registrable controllers**").

An individual or legal entity has significant control over a company if the individual or the legal entity:

1. holds the right, directly or indirectly, to appoint or remove the directors or equivalent persons of the company or foreign company who hold a majority of the voting rights at meetings of the directors on all or substantially all matters;
2. holds, directly or indirectly, more than 25% of the rights to vote on those matters that are to be decided upon by a vote of the members or equivalent persons of the company or foreign company; or
3. has the right to exercise, or actually exercises, significant influence or control over the company.

Further, an individual or legal entity has a significant interest in a company having a share capital:

1. if the individual or legal entity, as the case may be, has an interest in more than 25% of the shares in the company or foreign company; or
2. if
    - the individual or legal entity, as the case may be, has an interest in one or more voting shares in the company; and
    - the total votes attached to that share, or those shares, is more than 25% of the total voting power in the company or foreign company.

Section 7 of the Companies Act applies to determine whether a person has an interest in shares, and

includes interests in shares held by a body corporate in which a person or its associates has an interest in 20% of its shares. An individual or a legal entity has a significant interest in a company or foreign company that does not have a share capital if the individual or legal entity holds, whether directly or indirectly, a right to share in more than 25% of the capital, or more than 25% of the profits, of the company or foreign company.

Duty of company and foreign company to obtain information and maintain registers of controllers

With the amendments to the Companies Act, locally incorporated companies and foreign companies are now required to do the following unless otherwise exempted:

1. take reasonable steps to identify their registrable controllers and obtain information on their registrable controllers, by sending out notices to anyone:
    - whom they know or have reasonable grounds to believe to be registrable controllers; or
    - who knows the identity of the registrable controllers or is likely to have that knowledge;
2. maintain registers of controllers at prescribed places, such as their registered offices or their registered filing agent's registered offices;
3. ensure that the registers of controllers are up to date by updating the registers within 2 days of receiving information on the controllers;
4. declare in their annual return filed with ACRA that their registers of controllers are kept up to date; and
5. make registers of controllers available to the Registrar and law enforcement authorities upon request and not to the public.

Any person who receives a notice from the company should:

1. provide his particulars to the company if he is a registrable controller; or
2. provide such other information as may be prescribed.

The particulars of individual controllers to be prescribed are likely to include:

1. full name;
2. residential address;
3. nationality
4. identification number e.q. IC or passport number;
5. date of birth; and
6. date on which the person becomes, and if applicable, the date on which the person ceases to be a controller.

The particulars of corporate controllers to be prescribed are likely to include:

1. name;
2. if applicable, Unique Entity Number or other similar identification numbers;
3. address of registered office;
4. legal form of the entity and the law by which it is governed;
5. if applicable, the register of companies in which it is entered (including details of the state, country and the entity's registration number in that register); and
6. date on which the person becomes, and if applicable, the date on which the person ceases to be a controller.

An addressee is not required to provide any information that is subject to legal privilege.

Duty of company and foreign company to keep information up-to-date

If a company or foreign company knows or has reasonable grounds to believe that a relevant change has occurred in the particulars of a registrable controller, the company or foreign company must give notice to the registrable controller to confirm if there has been a change and find out details of the change.

Tracing of controllers

To avoid duplicative reporting, the intention of the amendments seemed to be that companies can stop the tracing of the controllers once the tracing reaches a locally incorporated company that also maintains the register of controllers or is exempted from the regime.

In addition, tracing would stop when it reaches corporations whose shares are listed for quotation on an approved exchange in Singapore as they are subject to the substantial shareholding requirements under the Securities and Futures Act.

However, the actual language of section 386AC(c) does not appear to achieve this result and means the requirement to trace to ultimate controllers applies unless every level of the corporate chain of ownership above meets the requirements of that sub-section.

Scope of application

The list of companies that are exempted from the regime is as follows:

1. a public company whose shares are listed for quotation on an approved exchange in Singapore;
2. a company that is a Singapore financial institution;
3. a company that is wholly owned by the Government;
4. a company that is wholly owned by a statutory body established by or under a public Act for a public purpose;
5. a company that is a wholly-owned subsidiary of a company mentioned in (a)-(d); and
6. a company whose shares are listed on a securities exchange in a country or territory outside

Singapore and which is subject to:

1. regulatory disclosure requirements; and
2. requirements relating to adequate transparency in respect of its beneficial owners, imposed through stock exchange rules, law or other enforceable means.

The following foreign companies are also exempted from the regime:

1. a foreign company that is a Singapore financial institution;
2. a foreign company that is a wholly-owned subsidiary of a foreign company that is a Singapore financial institution;
3. a foreign company which shares are listed on a securities exchange in a country or territory outside Singapore and which is subject to:
    1. regulatory disclosure requirements; and
    2. requirements relating to adequate transparency in respect of its beneficial owners, imposed through stock exchange rules, law or other enforceable means.

Date of implementation and transitional arrangements

The amendment in relation to the register of controllers took effect from 31 March 2017.

To help companies prepare to comply with the new requirement, existing companies are given a transitional period of 60 days from the date of commencement of the new law to set up the register of controllers, after which they must have and continue to maintain the required registers.

Companies incorporated on or after 31 March 2017 had up to 30 days to set up the register.

For more guidance on the basic requirements pertaining to the register of controllers, please contact us.

Consequences of a failure to comply

If a company or foreign company fails to comply with the above requirements, the company or foreign company, and every officer of the company or foreign company who is in default, shall each be guilty of an offence and shall each be liable on conviction to a fine not exceeding $5,000.MOF and ACRA have clarified that the company will not be liable for an offence if the controller fails to reply to the notices sent. The law makes it an offence only if companies fail to send out notices to anyone whom they know or have reasonable grounds to believe to be controllers, or knows the identity of the controllers or is likely to have that knowledge.

Duty of controllers to provide and update information

A duty is also imposed on registrable controllers. A person who knows or ought reasonably to know that

the person is a registrable controller in relation to a company or foreign company must:

1. notify the company or foreign company, as the case may be, that the person is a registrable controller in relation to the company or foreign company;
2. state the date, to best of the person's knowledge, on which the person became a registrable controller in relation to the company or foreign company; and
3. provide such other information as may be prescribed.

In addition, a person who is a registrable controller in relation to a company or foreign company must notify the company or foreign company of any relevant change in the prescribed particulars.
A person need not comply with these requirements if the person has received the relevant notice from the company or foreign company and has complied with the requirements of the notice within the time specified in the notice for compliance.

A person who fails to comply with these requirements shall be liable on conviction to a fine not exceeding $5,000.

(2) The requirement for foreign companies registered in Singapore to maintain a public register of shareholders

Currently, foreign companies registered in Singapore are required to include shareholder information in a branch register in Singapore, if the shareholder is resident in Singapore and upon the shareholder's application.
Pursuant to the amendments, a foreign company registered in Singapore on or after 31 March 2017 must, within 30 days after it is registered:

1. keep a register of its members (setting out certain prescribed particulars such as the names and addresses of the members) at its registered office in Singapore or at some other place in Singapore; and
2. lodge a notice with the Registrar specifying the address at which the register of members is kept.

A foreign company registered in Singapore before 31 March 2017 is required to do the same within 60 days after 31 March 2017.

(3) The requirement for a liquidator to retain records of wound up companies for 5 years instead of 2 years

Where a company is being wound up, the liquidator shall retain all books and papers of the company and of the liquidator that are relevant to the affairs of the company at or subsequent to the commencement of the winding-up of the company for a period of 5 (instead of the current requirement of 2) years from the date of dissolution of the company and at the expiration of that period may destroy them.

(4) Removal of the option for companies to destroy records early if they are wound up by their members or creditors

The option for the records of a company referred to in the paragraph above to be destroyed earlier than the prescribed period after the dissolution of the company

1. in the case of a members' voluntary winding up, as the company by resolution directs; and
2. in the case of a creditors' voluntary winding up, as the committee of inspection, or, if there is no such committee, as the creditors of the company direct, will be removed.

However, a company may destroy the records of the company before the end of the prescribed period if directed by the Court in the case of a winding-up by the Court.

(5) The requirement for officers of struck off companies to retain accounting records and registers of beneficial owners for five years

Currently, struck off companies are not required to keep records. However, pursuant to the amendments, where the name of a company has been struck off and the company dissolved under section 344 or 344A of the Companies Act, a person who was an officer of the company immediately before the company was dissolved must ensure that all books and papers of the company are retained for a period of at least 5 years after the date on which the company was dissolved.

(6) Declaring void the issuance and transfer of bearer shares and share warrants by foreign companies registered in Singapore

Currently, locally incorporated companies are prohibited from issuing bearer shares and share warrants. There is no such express provision for foreign companies registered in Singapore. Pursuant to the amendments, any allotment, issue, sale, transfer, assignment or other disposition in Singapore of any bearer share or share warrant by a foreign company registered in Singapore will be void.

Further, no civil proceedings may be brought or maintained in any court for or in respect of any bearer share or share warrant allotted, issued, sold, transferred, assigned or disposed by a foreign company registered in Singapore.

(7) The requirement for nominee directors to disclose their nominee status and nominators to their companies

Currently, the Companies Act imposes certain disclosure requirements on directors to disclose information to their companies. There is no requirement for nominee directors to disclose their status or their nominators to their companies or law enforcement authorities. To mitigate the risks of money laundering

and terrorist financing, the amendments require nominee directors to disclose their nominee status and their nominators to their companies. This is also in line with international standards set by the Financial Action Task Force and the Global Forum of Transparency and Exchange of Information for Tax Purposes.

A director is a nominee if the director is accustomed or under an obligation whether formal or informal to act in accordance with the directions, instructions or wishes of any other person.
Pursuant to the amendments, a director of a company:

1. who is a nominee must inform the company of that fact and provide such prescribed particulars of the person for whom the director is a nominee within 30 days (or 60 days if the company was incorporated before 31 March 2017) after the date of incorporation; and
2. who becomes a nominee must inform the company of that fact and provide such prescribed particulars of the person for whom the director is a nominee within 30 days after the director becomes a nominee.

A director of a company mentioned above must inform the company:

i. that he ceases to be a nominee within 30 days after the cessation; and
ii. of any change to the particulars provided to the company under that subsection within 30 days after the change.

A company must keep a register of its directors who are nominees in such form and at such place as may be prescribed.

A brief comparison with similar proposed legislative amendments in Hong Kong

The Financial Services and Treasury Bureau in Hong Kong has recently conducted a public consultation which ended on 5 March 2017 relating to proposals to enhance the transparency of beneficial ownership of Hong Kong companies, The conclusions to the consultation were released on 13 April 2017, and the proposals are targeted to be introduced by way of two amendment bills into the Legislative Council in the 2016-17 legislative session. The proposals, similar to the amendments to the Singapore Companies Act, include requiring such companies to maintain a register of persons with significant control over the company (a PSC register) (the "**Hong Kong Amendments**").

The proposed definition of a "beneficial owner" in the Hong Kong Amendments is largely similar to the definition of a "controller" in the amendments to the Singapore Companies Act (the "**Singapore Amendments**"), except that it expressly includes a company or individual who has the right to exercise, or actually exercises, significant influence or control over the activities of a trust or a firm that is not a legal person, but whose trustees or members satisfy any of the definitions of a "beneficial owner" in relation to the company, or would do so if they were individuals.

There are some key differences between the amendments proposed in both jurisdictions, of which some are elaborated on below.

First, in relation to the Hong Kong Amendments, to facilitate the cooperation of companies with law enforcement agencies in determining beneficial ownership, it has been proposed that companies are required to enter into the PSC register details of an authorised person responsible for providing information and further assistance to the law enforcement agencies when the need arises. There is no similar requirement under the Singapore Amendments.

Further, under the Hong Kong Amendments, there is no duty imposed upon beneficial owners to proactively identify themselves and inform the company of the relevant required particulars. The rationale is that to do otherwise would put an onerous burden on persons forming, owning or controlling companies, which would affect the competitiveness of Hong Kong's business environment. This is in contrast to the requirement for controllers to provide information under the Singapore Amendments.

Another significant difference is that the Hong Kong amendments allow for public inspection of the PSC register. It has been proposed that the PSC register should be available for inspection by any member of the company or person on the register without charge, or other members of the public on payment of a fee, at the company's registered office or any other place in Hong Kong as determined by the company. This is in contrast to the position under the Singapore Amendments, where, subject to directions given by the Registrar or an officer of ACRA under the Companies Act, a company or foreign company is not allowed to disclose, or make available for inspection, a register or any particulars contained in the register to any member of the public.

Concluding remarks

These amendments illustrate Singapore's ongoing efforts to maintain its high corporate governance standards and strong reputation as a trusted and clean financial hub, while at the same time maintaining the confidentiality of information by limiting access to the register of controllers solely for the purpose of investigating offences.