COMPANIES ACT REFORMS

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On 3 October 2012 the Ministry of Finance ("**MoF**") announced it had published its response to the Report of the Steering Committee ("**SC**") for the Review of the Companies Act ("**Act**"). We have set out below background to the review and highlighted some key proposed changes we will be focusing on in our coverage of the amendments as the legislative process progresses.

A. Background

The MoF appointed the SC in October 2007 to undertake a detailed review of the Act with the aims of reducing regulatory burdens and retaining an efficient and transparent corporate regulatory framework. In April 2011 the SC submitted its final report to the MoF, comprising of 217 recommendations. Between June to October 2011 the MoF conducted a public consultation on the SC's report and after reviewing the relevant inputs in relation to each of the 217 recommendations, the MoF in its 3 October 2012 response accepted 192 recommendations and modified 17 recommendations.

The MoF plans to table the amendment Bill in Parliament to implement the changes by end of this year and will seek public feedback on the draft Bill this year. MoF intends to implement the changes to the Act in two phases: first, amend the Act to implement the accepted recommendations and then to rewrite the Act to rationalise the provisions and improve clarity.
MoF's response can be found here. Generally, the proposed changes cover the following areas:

- Directors
- Shareholders' Rights and Meetings
- Shares, Debentures, Capital Maintenance, Schemes, Compulsory Acquisitions and Amalgamations
- Accounts and Audit
- General Company Administration
- Registration of Charges
- Certain new issues

B. Highlighted topics

1. Non-voting Equity Shares

Background
The Act currently makes a distinction between "preference shares" and "equity shares" for certain purposes, which has the effect of requiring voting rights to be given to a share which carries any right to

participate beyond a specified amount in any distribution whether by way of dividend, or on redemption, in a winding up, or otherwise.

Proposed changes

The definition of "preference shares" will be deleted and a company will be allowed to determine what voting rights should attach to its shares (subject to further consideration whether the safeguards for non-voting shares in section 180(2) of the Act are still relevant to be included in the Act).

If these changes are implemented, it will be easier to structure investment vehicles with non-voting shares that participate in the equity beyond a fixed amount, which will facilitate the use of different classes of shares commonly seen in fund structures and other arrangements involving equity funding of private companies.

2. Shadow Directors

Background

The term "shadow director" is not used in the Act but the definition of "Director" includes "person in accordance with whose directions or instructions the directors of a corporation are accustomed to act", which is commonly referred to as a shadow director.

Proposed changes

The term "shadow director" will not be separately defined as the existing definition of "Director" already encompasses shadow directors. Instead, it has been recommended that the definition of "Director" should be amended to clarify that a person who controls the majority of the directors will be deemed to be a director.

This change seems to have potential significance in considering the range of persons who may be found to be within the definition of a "Director". The existing definition of a "Director" expands the application of provisions regarding directors to a person who exercises influence over board decisions but the apparent suggestion that a person may be a "Director" (and, for example, owe director's duties to the company) by virtue simply of being in a position to control the majority of the directors, say by virtue of holding sufficient voting power to remove them, irrespective seemingly of whether or not the person has in fact given instructions to or exercised influence over the directors seems to have potential to cast the net of director's liability wider than it has been hitherto under conventional notions of corporate governance.

3. Financial Assistance Whitewash

Background

The Companies Act prohibits companies from giving financial assistance for the acquisition of their own (or their holding company's) shares, apart from narrow exceptions, unless the company goes through one of the prescribed "whitewash" procedures, the most commonly used of which requires the directors to make a solvency statement looking forward 12 months.

Proposed changes

Reflecting the approach taken in other jurisdictions like the UK, it has been recommended that the prohibition should be removed for private companies and continue to apply only to public companies and their subsidiaries. In relation to public companies, a new exception is proposed to allow a public company or its subsidiary to assist a person to acquire shares in the company or holding company of the company if giving the assistance does not materially prejudice the interests of the company or its shareholders or the company's ability to pay its creditors. What "materially prejudice" means in this context is not defined however the term is derived from the Australian Corporations Act and Australian case law suggests this is a question of fact to be answered in each case, which may create some uncertainties in the application of the exception. The Act will also be reviewed to see if the list of excepted transactions should be updated.

This development in the Act will, in practice, facilitate the restructuring and M&A in relation to Singapore companies, certainly private companies, and, in particular, help reduce the transaction costs of acquisitions funded with debt where the target provides security for the acquisition finance since a whitewash would no longer be required.