LEGAL UPDATE

Recent amendments to the Companies Act — an overview for listed and non-listed public companies

9 March 2015

For any queries relating to this article, please contact:

Adrian Chan
DID: +65 6557 4814
adrianchan@leenlee.com.sg

Lun Chee Leong
DID: +65 6557 4829
luncheeleong@leenlee.com.sg

Authors:

Lun Chee Leong

Tan Hong Chia

Introduction

The Companies (Amendment) Act 2014 (the "Amendment"), which introduced the largest number of changes to the Companies Act ("CA") since its enactment in 1967, is expected to come into force this year. The Amendment is expected to be implemented in stages and the exact date(s) of commencement will be notified in the Gazette (the "Commencement").

This update provides an overview of some of the changes that are of particular relevance to listed and non-listed public companies.

Changes to provide greater business flexibility

Repeal of the "one-share one-vote" restriction

Presently, Section 64(1) of the CA imposes a "one-share one-vote" restriction on equity shares issued by public companies. The Amendment will allow public companies to issue shares with differing voting rights, such as special, limited or conditional voting rights, or with no voting rights, subject to certain safeguards.

However, SGX-listed companies should note that they are still subject to the prohibition against dual-class share structures, which is currently being reviewed in light of the Amendment.

Public companies should note the following:

- The voting rights attaching to each class of shares will have to be specified in the company's Constitution.
- The Constitution must provide for the issue of the classes of shares and each issuance of shares which confer special, limited, conditional or no voting powers must be approved by its members by special resolution.
- The safeguards include protecting the right of holders of non-voting shares to have at least one vote per share on the following resolutions from negation or alteration:
    - ❖ A resolution to wind up the company

- A resolution to vary the rights of non-voting shares

Selective off-market acquisition of a company's own shares

Presently, Section 76D of the CA provides an exception to the general prohibition against companies acquiring their own shares by allowing companies, except for listed companies, to make selective off-market acquisitions.

After the amendment, the Section 76D exception will be available to listed companies. This will allow listed companies, for instance, to make discriminatory purchases of odd-lot shares from its shareholders.

Financial assistance

The existing prohibition against a company providing financial assistance for the acquisition of its shares ("FA Prohibition"), and the exceptions to it, are complex and have caused uncertainty and difficulties in structuring transactions.

The Amendment will allow public companies and their subsidiaries to provide financial assistance for the acquisition of its shares if doing so does not "materially prejudice" the interests of the company, its shareholders or the company's ability to pay its creditors.

The Amendment also introduces provisions to clarify that the FA Prohibition does not apply to the sponsoring of an odd-lot scheme by a listed company under which any shareholder may purchase or sell shares for the sole purpose of rounding off any odd-lots he owns.

Indemnification of directors

Presently, companies are unable to indemnify their officers (including directors) against any liability for negligence, default, breach of duty or breach of trust "in relation to the company". This rule has been interpreted to include indemnifying against claims brought by third parties (on top of claims brought by the company against its own officer/ director).

After the Amendment, companies will be allowed to indemnify its officers (including directors) against claims brought by third parties, subject to certain exclusions, such as indemnifying against:

- liabilities to pay regulatory penalties and fines;
- liabilities incurred in defending criminal proceedings in which the officer is convicted; and
- liabilities incurred in defending civil proceedings brought by the company in which judgment is given against the officer.

Changes to improve corporate governance

Duty of disclosure of CEOs

The Amendment impose certain directors' duties of disclosure, such as the duty to disclose conflicts of interests, shareholdings, debentures and interests in shareholdings in the company under the existing Sections 156 and 165 of the CA on Chief Executive Officers ("CEOs") of companies.

This recognizes the key role that CEOs, who may not be directors, play in the management of companies, and the consequent need to ensure that they are held to similar standards as directors.

CEOs of listed companies, who are already subject to duties of disclosure under the Securities and Futures Act, should note that they will be exempt from disclosure under the amended Section 165.

CEOs of non-listed public companies should note that the scope of their Section 165 duties of disclosure is narrower than that of directors under the amended CA. For instance, they will not be required to disclose their interests in the securities of related corporations.

Appointment of multiple proxies

Presently, a member of a company is only entitled to appoint up to 2 proxies to attend and vote as his proxy at meetings of the company, and a proxy only has the right to vote on a poll and not on a show of hands.

After Commencement, a member which is a "relevant intermediary" will be entitled to appoint more than 2 proxies, and will thus be able to appoint a different proxy in respect of different blocks of shares held by it. This will benefit investors whose shares are held through nominees which are prescribed as "relevant intermediaries" under the amended CA (such as banks providing nominee services and the Central Provident Fund Board ("Indirect Investors")), by allowing them to attend and vote at shareholders meetings.

Companies should note the following:

- Companies cannot opt out of the multiple proxies regime for Indirect Investors through their Constitutions.
- Only proxies appointed by a relevant intermediary, and not all proxies, have the right to vote on a show of hands.
- The cut-off time for filing of proxies will be extended from 48 to 72 hours (whether or not the company's Constitution has been amended to reflect this). This will give companies more time to process the proxy forms.
- The extension of the cut-off time applies to all proxies and all companies, and applies whether or not multiple proxies are appointed by a relevant intermediary.

- Apart from giving Indirect Investors the right to participate in general meetings, the Amendment does not enable them to enjoy other membership rights directly.

Auditors required to seek permission from ACRA to resign

Under the amended CA, the resignation of auditors of listed companies before the end of their term of office will only be effective with ACRA's permission. Listed companies will be also required to send a copy of the auditor's written statement of its reasons for the resignation to every member.

Listed companies should note that:

- this rule applies to auditors of their subsidiary companies as well; and
- the company must call a general meeting not more than 3 months from the date of the auditor's resignation to appoint a replacement auditor.

Changes to reduce regulatory burden

Uniform solvency test

Under the amended CA, a uniform solvency test based on the existing Section 7A solvency test will be applied for the provision of financial assistance, redemption of preference shares, capital reduction and share buybacks by all companies.

In addition, it will no longer be necessary to comply with the prescribed solvency requirements in all cases of capital reductions which do not involve:

- a reduction or distribution of cash/ assets by the company; or
- a release of any liability owed by the company.

Electronic transmission of notices

The Amendment also liberalizes the rules for the electronic transmission of notices and documents by a company or its directors to a member, by introducing an implied and deemed consent regime.

A member will be treated as having given implied or deemed consent as follows:

Implied consent	Deemed consent
The Company's Constitution provides: • for the use of electronic communications; • specifies the manner which it is to be used; AND	
• provides that the member shall agree to receive notices and documents electronically; and • provides that the member shall not have a right to elect to receive a physical copy.	• specifies that the member will be given an opportunity to elect within a specified time whether to receive the notice or document by way of electronic communications or as a physical copy; and • the member, having being given an opportunity to make this election, fails to do so within the specified time.

ACRA has indicated that safeguards will be contained in subsidiary legislation. For instance, documents relating to take-over offers and rights issues shall not be transmitted electronically.

Under the proposed subsidiary legislation, if the Constitution of the company is not amended to make use of the new regime, the existing rules, including applying Sections 387A and 387B will continue to apply.