LEGAL UPDATE

Recent amendments to the Companies Act — an overview for private companies

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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 private companies.

Changes to provide greater business flexibility

Loan to directors

Currently, a company other than an exempt private company is prohibited from making a loan to its directors, their connected persons and related corporations. This prohibition extends to entering into a guarantee or providing any security in connection with a loan made to the company's directors. After the Amendment takes effect, this prohibition will not apply if prior shareholders' approval is given for the loan, guarantee or security. However, the interested director and his family members must abstain from voting.

The existing prohibition against a company providing financial assistance for the acquisition of its shares will also be abolished for private companies, except for private companies whose holding company or ultimate holding company is a public company. The complexity of the prohibition and its exceptions has caused uncertainty and difficulties in structuring transactions and its abolition will reduce delay and legal costs.

Issue of shares

The Amendment also provides that companies may issue shares for no consideration. This is a technical amendment for clarity and is not intended to modify the current law relating to issuances of shares.

Whilst it will be rare for companies to issue shares for no consideration, some situations where this may be intended are:

- issuing shares to recognise services previously performed such as by a promoter in setting up the company. In such cases, the consideration rendered would be past and cannot form proper consideration; and

- where bonus shares are issued without capitalizing an amount standing to the credit of the company's reserves.

Directors should note that although they are not obliged to issue shares for the highest price that may be obtained, they owe a fiduciary duty to consider whether the consideration is adequate, taking into account factors such as the fair value of the shares.

An interesting question is whether an allotment of shares for no consideration may constitute an allotment of shares "as fully or partly paid up otherwise than in cash", and trigger the requirement to lodge the contract evidencing the entitlement of the allottee under Section 63B of the amended CA (Section 63(4) of the existing CA).

Changes to reduce regulatory burden

Audit exemption for "small companies"

Presently, only exempt private companies (which are private companies with not more than 20 members and which shares are not held by any corporation) with a revenue of less than $5 million in a financial year ("FY") need not conduct an audit of their accounts and are consequently not obliged to appoint auditors.

The Amendment replaces the audit exemption for exempt private companies with an audit exemption for "small companies". A company is a "small company" from a FY (and for every FY until it ceases to be a "small company") if it is a private company throughout the FY and satisfies any 2 of the following 3 quantitative criteria for each of the 2 immediately preceding FYs (the "QC"):

- the revenue of the company for each FY does not exceed $10 million;

- the value of the company's total assets at the end of each FY does not exceed $10 million; and

- the company has at the end of each FY not more than 50 employees.

A "small company" will cease to be a "small company" from a FY if it is not a private company at any time during the FY or does not satisfy the QC for each of the 2 FYs immediately preceding that FY, except if it is a company that has not reach its 3rd FY after incorporation or Commencement.

To illustrate this, the example of a private company that remains as a private company from FYs 2020 to 2024 and which meets the QC for FYs 2020, 2021 and 2024 but not for FY 2022 and 2023 is considered as follows:

	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
Meets the QC	Yes	Yes	No	No	Yes

Whether qualified as a "small company"			Yes	Yes	No

- The company will qualify as a small company in FY 2022 despite not meeting the QC in that FY as it satisfies the QC for each of the 2 immediately preceding FYs (which are FYs 2020 and 2021 in this example) and has not ceased to be a "small company".

- However, the company will cease to be a "small company" from FY 2024 because it does not meet the QC for each of the 2 consecutive FYs immediately preceding FY 2024 (which are FYs 2022 and 2023 in this example).

Transitional mechanism

For the 1st and 2nd FYs after the Commencement and for private companies that have not reached their 3rd FY after incorporation, the Amendment provides a slightly different transitional mechanism as follows:

A private company is a "small company" from the 1st FY and from the 2nd FY after the Commencement if it is a private company throughout the FY and satisfies the QC for that 1st FY or 2nd FY respectively.

Register of members to be maintained electronically by ACRA

Presently, companies are required to keep a register of members. After the Amendment, the register of members for private companies will be maintained by ACRA in electronic form.

The ACRA register of members will be updated with any change that is required or authorized to be lodged with ACRA under the CA, and shall be prima facie evidence of the matters therein.

Transitional mechanism

Existing private companies will be required to lodge with ACRA the information required to be included in the electronic register of members within the earlier of:

- 6 months after Commencement; or

- the date on which the first annual return is required to be lodged after Commencement (the "Section 196B Lodgement").

Existing private companies are also required to continue to keep its register of members for a period of 7 years after the last member referred to in the register ceases to be a member, but need not update it with changes occurring on or after the date of the Section 196B Lodgement.

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 members, by introducing an implied and deemed consent regime.

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.

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.

Companies should note that if the Constitution of a company is not amended to make use of the new regime, the existing rules will continue to apply.

Financial statements

Presently, company officers are statutorily required to send the company's financial statements to members not less than 14 days before the annual general meeting ("AGM"). The Amendment will allow the statements to be sent less than 14 days before the AGM if all persons entitled to receive notice of the AGM agree.

Changes to improve corporate governance

Disqualification of directors

The Amendment introduces a provision to disqualify a person from acting as a director, if 3 or more companies in which he is a director are struck off within 5 years as a result of ACRA initiated reviews. This reinforces the message that the onus to wind up defunct companies lies on company directors.

Other changes

Filing of annual return

The Amendment also clarifies that the deadline of 30 days for the filing of the annual return for companies which have dispensed with the holding of its AGM starts on the later of the date on which:

- a copy of its financial statements were sent to all persons entitled to receive notice of general meetings; or
- all resolutions by written means were passed.

The Constitution

The Amendment will also merge the articles of association and memorandum of a company into a document called the "Constitution".

For existing companies, no action is required as the existing articles will be deemed to be contained in the company's Constitution.