ACRA LEGAL DIGEST

January 2005, Issue No. 7

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A WORD FROM THE EDITORIAL TEAM

Welcome to the seventh issue of our Digest.

It is the season of public consultation.This issue will highli ght three different consultation exercises launched by MOF, ACRA and CCDG. The public consultation sought feedback on a wide range of issues, from the amendments to the Companies Act to corporate governance issues and the administrative procedures for striking-off a company.

As the general public is usually not privy to comments received in a public consultation exercise, we will be publishing selected comments in this issue of the Digest. As we treat all comments received in the strictest confidence, we have not mentioned the identities of the respondents and edited the comments for the purposes of publication.

In displaying these edited comments, we hope to showcase the dynamism and enthusiasm of the business community in helping the Government and public agencies to develop our corporate regulatory framework. We also encourage you to participate in the public consultation conducted by the CCDG on proposed revisions to the Code of Corporate Governance. The public consultation will end on 15 February 2005.

All information contained herein is correct at the time of publication. Please do not hesitate to send us your comments or suggestions for future topics to: www.acra.gov.sg/feedback.

The Editorial Team
Accounting and Corporate Regulatory Authority
17 January 2005

1. PUBLIC FEEDBACK ON THE COMPANIES (AMENDMENT NO. 2) BILL 2004

1.1 Background

In September 2004, the Ministry of Finance launched a public consultation for the Companies (Amendment No. 2) Bill 2004. This Bill, which will be re-titled the Companies (Amendment) Bill 2005, will implement most of the remaining recommendations of the Company Legislation and Regulatory Framework Committee (CLRFC). Please see Issue No. 5 for highlights of this Bill. Two previous Companies (Amendment) Bills have implemented the other CLRFC recommendations. See Issue No. 2 & 3.

Compared to the public consultation on the first Bill implementing the CLRFC recommendations, the number of respondents was considerably smaller. However, we were most delighted to receive extremely insightful comments on the Bill with meticulous attention given to details, even down to the exact sub-paragraph of the individual clauses.

Since Issue 5 had already outlined the major provisions of the Bill, we will highlight the salient comments received in this issue of the Legal Digest

1.2 Abolition of Authorised Capital and Par Value

We had raised a specific query about Section 63 (whether additional disclosure on unpaid consideration should be disclosed). The answers received were generally in the affirmative.

On Section 67, responses were mixed. Some advocated its repeal which other argued for its retention. Those in favour of its appeal cited case law and the relevant accounting standard (i.e. the Financial Reporting Standards or FRS) in support.

There were also several comments on the transitional provisions and various suggestions for improvement. They include provision of a deeming provision to abolish registered capital for companies for ease and convenience, abolition of need to seek approval from members for increase in capital, and inclusion of consideration unpaid in the share certificate.

1.3 Solvency Statement (Section 7A and Section 215I & J)

In the draft Bill released for public consultation (the "draft Bill"), a new term "prospective liabilities" was introduced. The UK Draft Companies Bill requires

the directors of a company to take into account both contingent and prospective liabilities when making a solvency statement. "Prospective liabilities" is not defined in the UK legislation although there have been judicial decisions on its meaning. The term is also used in the Australian Corporations Law.

The general consensus of the respondents was that the term "prospective liabilities" would introduce some uncertainty into the solvency test. It was also not a term found in the accounting standards, unlike "contingent liabilities".

1.4 Financial Assistance by the Company (Section 76)

The CLRFC recommended further liberalising the restrictions on a company providing financial assistance to third parties to acquire its shares. The draft Bill required the directors to pass a unanimous resolution in favour of the provision of financial assistance.

We have, however, taken note of the comments from various quarters that requiring the directors to pass a unanimous resolution for this purpose may deter companies from taking advantage of these new provisions.

1.5 Share Buy-backs (Sections 76B & 76F)

The Companies Act has since 1998 allowed companies to buy back their shares, subject to certain safeguards. These safeguards include buying back out of profits and a total cap of the number of shares that can be bought back. The major inroad in this draft Bill is allowing companies to buy back the shares out of either profits or capital provided the company is solvent. Hitherto, a company was only permitted to use profits for the buy-back.

One difference that should be highlighted between Section 76F, which deals with the solvency test for companies undertaking share buy-backs, and the solvency statement in Section 7A is that Section 76F is a continuing test. Directors must continue to be satisfied that the company is solvent before approving a purchase or acquisition of the shares.

1.6 Treasury Shares (Sections 76H to 76J)

The provisions relating to treasury shares attracted a fair number of comments, owing perhaps to their novelty in our company law.

The proposed Section 76L requires a company to dispose of any treasury shares that exceed 10% of the total issued share capital. We sought feedback on an appropriate time frame for the disposal of such treasury shares. We received a

wide spectrum of suggestions, from one month to 12 months. However, what was almost unanimous among the respondents was the suggestion that, whatever the time frame, the Registrar should have the power to extend the period for disposal of the treasury shares.

In a previous consultation exercise as well as the current one, respondents had requested that Section 76J should expressly provide for share consolidation in addition to sub-division of shares (share splits).

It was also brought to our attention that Section 76J should be fortified by amending various other Sections to explicitly state that treasury shares do not confer a right on the company to vote at meetings.

We had also asked respondents to comment on whether the accounting standards could cover the uses of treasury shares. The respondents generally felt that the uses of treasury shares should either be prescribed by legislation or not prescribed at all. Accounting standards should only deal with the accounting of the treasury shares when they are used, not how they are used.

Another major issue raised as a query in the public consultation was in relation to the proposed amendment to Section 403. The proposed amendment is intended to prevent companies from using profits gained from the sale or disposal of treasury shares to pay dividends. The proposed new provisions cover, *inter alia*, the following scenarios:

(a) If a portion of profits are used to buy back shares which are then held in treasury, the amount of those profits used for the purchase cannot be paid as dividends.
(b) If the treasury shares are subsequently sold or disposed of, the consideration received may be payable as dividends to the extent of the original purchase price paid by the company for those treasury shares.
(c) However, following from (b), any consideration received in excess of the original purchase price shall not be payable as dividends.

Section 190 will also be amended to take into account the situation when a company holds treasury shares. The company will be required to enter its name in the register of members under Section 190. There was some concern raised over this issue as to whether a listed company, which shares are in the name of the Central Depository (Pte) Limited, should also be subject to this requirement. It should be noted that the CDP is only a bare trustee, and Section 130D deems persons named in the Depository Register as members. Companies who purchase and hold their own shares in treasury would also be deemed members and should accordingly be subject to Section 190.

1.7 Reduction of Share Capital (New Division 3A)

Even before this public consultation in September 2004, we have been receiving comments that there should not be a distinction in treatment between private and public companies, particularly in respect of the publicity requirements. Respondents also pointed out and questioned this apparent discrepancy in this consultation exercise. It was argued by the respondents that creditors of private companies should be given the same protection as that of public companies, especially since the accounts of certain private companies need not be audited.

The sources for the new provisions were cited in the draft Bill. Respondents would have noted that these provisions were adapted from the draft UK Companies Bill. However, we appreciate the difficulties identified by the respondents the UK provisions may cause if they are incorporated into our draft Bill as they are without further modifications.

1.8 Mergers and Amalgamations (New Sections 215A to 215J)

The feedback on these provisions generally focussed on drafting issues. In particular, one respondent noted that Section 215B(1)(b) should require a company to state the name of the proposed amalgamated company whether or not it is the same as that of one of the amalgamating companies. The reason why the sub-section was drafted as such is that a proposed new name in the amalgamation proposal is subject to approval by the Registrar, unlike an existing name.

Respondents also pointed out some possible ambiguity in Sections 215I and 215J. We will be examining these and other provisions to improve their clarity. It should be noted that the solvency statement referred to in Sections 215I to 215J is essentially the same as that in Section 7A, except that certain modifications were necessary to take into account the creation of the amalgamated company.

1.9 Conclusion

We wish to thank all the respondents to the public consultation exercise who had so selflessly given their time and effort to improve the Bill.

2 CONSULTATION ON STRIKING-OFF A COMPANY

2.1 Introduction

The power of the Registrar to strike the names of companies off the register as provided for under Section 344 of the Companies Act has provided many companies with a cheaper and faster alternative to winding-up. With the introduction of Bizfile, the striking-off process has been automated and applications are processed more efficiently than under the manual system. ACRA is always seeking to simplify our procedures and rules to benefit business community.

To this end, ACRA launched a consultation exercise on simplified procedures for striking-off a company. This consultation exercise was relatively less public than the other two consultation exercises highlighted in this issue, involving only selected focus groups. Readers should take note that striking-off is largely an administrative process, although the changes proposed may require legislative amendments.

2.2 Issues Raised For Consultation

In our consultation, we had put forth three broad areas for discussion:

(a) Simplified Application Form for Striking-off

Instead of scanning and attaching audited accounts and other financial statements, applicants could enter the relevant information in the electronic form itself.

Respondents' views

Respondents generally supported this proposal. One respondent suggested that directors should make a statutory declaration in support of the application. There were also calls for more information to be provided in the application form, such as basic financial highlights of the company and date the company ceased business activities.

(b) Objections to the Striking-off Application

Upon receipt of an objection to a striking-off application, the current procedure is that the Registrar will delay the striking-off for 2 months, and after that time, if the objection is not resolved and cleared, the striking-off application will be rejected.

In cases where the objections are frivolous or vexatious, the applicant is unfairly prejudiced by the delay or termination, as the case may be. Even for valid objections, creditors may not be inclined to take legal action to recover their debts, and merely delay or frustrate the striking-off application. We proposed that creditors should provide some proof of the debts owed to them when making an objection.

Respondents' views

There was wide support for the above proposal. Respondents agreed with the need to provide documentary evidence and reasons for objecting to the striking-off. They differed only in the type of proof required. Common suggestions were copies of invoices and purchase orders but there was also a suggestion to certify the proof of such debts with statutory declarations.

The respondents felt that the Registrar should wait for a period of one to three months for the objection to be resolved (that is, for the liabilities to be settled) before proceeding with the striking-off application.

(c) Restoration of Struck-off Company by the Registrar

We also asked for comments on whether the Registrar should be given the power to restore a company which had been struck-off. Currently, only the court may restore a company under Section 344(5). This proposal will mean that the Companies Act must be amended. Restoration by the Registrar would be an alternative to restoration by the court and applicants will be given a choice as to which they prefer.

We pointed out that there may be certain circumstances in which restoration by the Registrar is not appropriate, for example, when the striking-off was effected under Section 344(3) in the course of a court winding-up, the restoration should be ordered by the court.

Respondents' views

The feedback received was unanimous. All the parties consulted strongly supported the proposal that the Registrar be given powers to restore a struck-off company. There were further suggestions on the procedures involved, such as safeguards to ensure that this more flexible process of restoration was not abused. Applicants should be required to provide documentary evidence to justify the restoration, and the prescribed conditions to be fulfilled for a restoration by the Registrar should be fully satisfied.

2.3 Conclusion

Again, we wish to thank everyone who contributed to the consultation exercise. We are carefully studying the comments received.

3 PUBLIC CONSULTATION ON PROPOSED REVISIONS TO THE CODE OF CORPORATE GOVERNANCE

The Council on Corporate Disclosure and Governance (CCDG) launched a public consultation on the proposed revisions to the Code of Corporate Governance (the "Code") on 1 December 2004.

3.1 Background

The Code was first issued on 21 March 2001 by the Corporate Governance Committee, a private-sector-led committee set up by the Ministry of Finance. The Government accepted the Code in April 2001. Listed companies are currently required under the Singapore Exchange Listing Rule to describe in their annual reports their corporate governance practices with specific reference to the principles, as well as to disclose and explain any deviations from any guidance notes to the Code. The objective of the CCDG's review is to introduce improvements to the Code, taking into account feedback received since the inception of the Code and international developments in corporate governance.

3.2 Highlights of Key Proposals

Proposal	Description
1	The Code should be structured in the form of "Principles", "Guidance Notes" and "Commentaries". Listed companies will not be required to disclose and explain any deviation from the commentaries.
2	The current requirement of independent directors making up at least one-third of the Board shall be retained.
3	It is being considered if the following relationship should be included in the Code as an additional example of a case where a director will be deemed to be non-independent: - *Where a director is, or who is directly associated with, a substantial shareholder (with interest of 5% or more in the voting shares of the company).*

Proposal	Description
	It is also being considered whether, in the example under the existing Guidance Note 2.1(b) of the Code which would deem a director not to be independent, the term "immediate family member" should be replaced with "close family member". The term "close family member" is defined in the Commentary to include immediate family members[1], as well as individuals whose relationships with the director extend beyond the immediate family, where such relationships could impair the director's independence. Additionally, the relationships under the proposed Guidance Note 2.1(c) and (d) of the Code whereby a director will be deemed non-independent will be extended to capture business relationships with close family members of the director. The criteria for independence under Guidance Note 2.1(d) will also be further extended to include significant payments made to, or received from related companies. The following threshold of S$200,000 will remain status quo: Where a director or a close family member of the director is a substantial shareholder of, a partner in, or a director or executive officer of, any for-profit business organisation that makes significant payments to, or receives significant payments from the company or any of its related companies, the director will be deemed non-independent. As a guide, payments[2] aggregated over any financial year in excess of S$200,000 should generally be deemed significant. The existing S$200,000 threshold for significant payments will be retained.
4	The respective roles of the Board, the Chairman and non-executive directors in the Code will be expanded to provide greater guidance to listed companies.
5	Companies should consider appointing an independent non-executive director to be the lead independent director, particularly where the Chairman and the CEO is the same person, or where the Chairman and the CEO are related by close family ties. The lead independent director (if appointed) should be available to shareholders if they have concerns which communication through the normal channels of the Chairman, CEO or Finance Director has failed to resolve or for which such

[1] As defined in the Listing Manual of the Singapore Exchange to mean the spouse, child, adopted child, step-child, brother, sister and parent.

[2] Payments for transactions involving standard services with published rates or routine and retail transactions and relationships (for instance credit card or bank or brokerage or mortgage or insurance accounts or transactions) will not be taken into account, unless special or favourable treatment is accorded.

Proposal	Description
	contact is inappropriate.
6	Companies should provide shareholders with a description of the process for the selection and appointment of new directors to the board. This should include disclosure on whether the company conducted an independent search for directors as part of the nomination process.
7	Non-executive directors should be responsible for the performance evaluation of the Chairman, taking into account the views of the executive directors.
8	It is being considered that the Board should set up a Remuneration Committee ("RC") comprising entirely of non-executive directors, the majority of whom, including the chairman, should be independent. If the definition of independence proposed earlier is adopted, then independence here means independence from management and substantial shareholders, and free from any business relationships with the company. For companies with a single controlling shareholder, it may be appropriate to have a Remuneration Committee Chairman who is independent of management and free from any business relationships with the company only.
9	The RC will continue to play an advisory role. The RC will recommend to the Board a framework of remuneration and specific remuneration packages for each director and CEO (if the CEO is not a director). The RC will review the remuneration of senior management.
10	The company should disclose the exact remuneration of each director. For top five key executives (who are not directors), as well as employees who are immediate family members of a director or the CEO, and whose remuneration exceed S$150,000 during the year, the disclosure will continue to be in bands of S$250,000.
11	The current requirement that the Audit Committee ("AC") should comprise at least three directors, all non-executive, the majority of whom, including the chairman, should be independent, should be retained.
12	The AC should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters.
13	Companies are encouraged to amend their Articles of Association to avoid imposing a limit on the number of proxies for nominee companies so that shareholders who hold shares through nominees can attend AGMs as proxies.
14	Resolutions on substantially separate issues should be kept separate. Companies should avoid "bundling" resolutions unless resolutions are interdependent and linked so as to form one

Proposal	Description
	significant proposal. Where such resolutions are "bundled", companies should explain the reasons and the material implications.
15	The external auditors should be present to address shareholders' queries about the conduct of the audit and the preparation and contents of the auditors' report.
16	There is no need to include aseparate section on the roles of institutional investors in the Code.
17	There is no need for the Code of Corporate Governance to recommend that companies prepare minutes or notes of meeting, which include substantive comments or queries from shareholders and responses from the board and management, and make these minutes or notes available to shareholders. The proposal is to leave the matter to companies to decide whether they want to provide such minutes to their shareholders.

3.3 Further Information

The public consultation paper is posted on the CCDG website at http://www.ccdg.gov.sg/news/consultation.htm.

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