

## REGISTRAR'S INTERPRETATION NO. 1 OF 2017

### SECTION 64A – PUBLIC COMPANIES

- (i) APPLICABILITY TO ALL SHARES WITH DIFFERENT VOTING RIGHTS;
- (ii) APPROVAL BY SPECIAL RESOLUTION UNDER SECTION 64A(3);
- (iii) SCOPE OF APPROVAL UNDER SECTION 64A(3); AND
- (iv) NOTICE OF GENERAL MEETING UNDER SECTION 64A(4)

#### Summary

1. This Registrar's Interpretation serves to clarify that for public companies:
  - a. Section 64A of the Companies Act applies to all shares that carry different voting rights (including preference shares with voting rights which are different from those attached to ordinary shares);
  - b. The requirement under section 64A(3) for approval by members of the public company by special resolution may be satisfied:
    - (i) where a company passes one special resolution to approve both (i) the issuance of shares under section 161 and (ii) the issuance of shares with different voting rights as required by s64A(3); or
    - (ii) where a company passes a special resolution to approve a general mandate authorising the issuance of shares with different voting rights, with no specific validity period;
  - c. Section 64A(3) requires a special resolution to be passed to approve a proposed issuance of shares with different voting rights but it does not require a separate special resolution to be passed for each separate issuance of a class or classes of shares by the public company; and
  - d. Section 64A(4), which requires a public company to specify on any notice of general meeting the rights in respect of classes of shares with different voting rights, does not apply if no shares of that class are issued or outstanding.

#### Explanation

#### **Section 64A applies to shares with different voting rights**

2. Section 64 provides for the general position that, subject to any written law to the contrary, a share in a company confers on the holder of the share the right to one vote on a poll at a meeting of the company on any resolution (referred to as an "ordinary share").

3. Section 64A provides that public companies may issue different classes of shares with different voting rights only if (i) the public company's constitution provides for the issue of the class or classes of shares and sets out in respect of each class of shares the rights attached to that class of shares, and (ii) the members of the public company approved the issuance by special resolution.

4. Section 64A implements Recommendations 3.4 and 3.5 of the *Report of the Steering Committee for Review of the Companies Act*<sup>1</sup>, which recommended that companies should be allowed to issue non-voting shares and shares with multiple votes and was accepted by the Ministry of Finance in *Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act*<sup>2</sup>.

5. The intention underlying section 64A is to implement safeguards that apply where public companies seek to issue shares with different voting rights<sup>3</sup>. Section 64A applies to "shares", which is defined under section 4(1) to mean "share in the share capital of a corporation and includes stock except where a distinction between stocks and shares is expressed or implied".

6. Therefore, section 64A applies where shares with different voting rights are sought to be issued by public companies (including but not limited to shares that confer special, limited, conditional, or no voting rights). Preference shares are usually understood to be shares that confer preferential rights in respect of certain matters over ordinary shares (e.g. rights to payment of dividends and return of capital in a liquidation), and may have certain voting rights or none at all<sup>4</sup>. Where preference shares with voting rights which are different from those attached to ordinary shares are sought to be issued by a public company, section 64A would apply to such shares.

### **Requirement under section 64A(3) for approval by members of the public company by special resolution**

7. One of the safeguards sought to be implemented through section 64A was subjecting the issuance of shares with different voting rights to a higher approval

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<sup>1</sup> Issued in June 2011 and available at: <https://www.acra.gov.sg/legislation/legislative-reform/listing-of-consultation-papers/public-consultation-on-the-review-of-the-companies-act-and-regulatory-framework-for-foreign-entities>.

<sup>2</sup> Issued on 3 October 2012 and available at: <https://www.acra.gov.sg/legislation/legislative-reform/companies-act-reform/ministry-of-finance-completes-review-of-the-companies-act>.

<sup>3</sup> See paras 14-15 in page 3-3 of *Report of the Steering Committee for Review of the Companies Act* and paras 71-72 in pages 43-44 of *Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act*.

<sup>4</sup> See *Re S Q Wong Holdings (Pte) Ltd* [1987] SLR(R) 286 at [24]; *Walter Woon on Company Law* (Sweet & Maxwell, Revised 3rd Ed, 2009) at para 11.63; Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 12.051; and Yeo et al, *Commercial Applications of Company Law in Singapore* (Wolters Kluwer, 5th Ed, 2015) at pages 409-410.

threshold<sup>5</sup>. Section 64A(3) implements this safeguard by requiring the issuance of such shares to be first “approved by the members of the public company by special resolution”. Given that the approval under s64A(3) takes the form of a special resolution, it must comply with the provisions in Part V, Division 3 of the Companies Act<sup>6</sup>.

8. Section 161 requires the directors of a company to obtain the prior approval of the company in general meeting before exercising any power of the company to issue shares. It is common for directors to procure general approval from the company to issue shares by means of an ordinary resolution passed at the annual general meeting<sup>7</sup>. An ordinary resolution is a resolution passed by a simple majority of those present and voting<sup>8</sup>, and, unlike the case for special resolutions, the Companies Act does not expressly prescribe thresholds and requirements that must be fulfilled in order to pass ordinary resolutions.

9. Where a company passes an ordinary resolution that (i) approves the issuance of shares under section 161 and (ii) purports to also approve the issuance of shares with different voting rights as required by section 64A(3), the ordinary resolution would not satisfy section 64A(3) because section 64A(3) requires a special resolution to be passed to approve the issuance of shares with different voting rights, and the special resolution must comply with the requirements set out in section 184, which are by default more stringent than that for ordinary resolutions.

10. Where a company passes a special resolution to (i) approve the issuance of shares under section 161 and (ii) approve the issuance of shares with different voting rights as required by section 64A(3), the special resolution may be allowed to satisfy both sections 161 and 64A(3).

11. As sections 161 and 64A(3) are two separate provisions which operate concurrently, the requirements of both sections can also be satisfied by the passing of two separate resolutions, as follows:

- a. for the purposes of section 161, (assuming the company’s constitution does not impose a higher threshold) an ordinary resolution to approve a general mandate authorising the issuance of all shares, which (in accordance with section 161, which prescribes the validity period of a resolution which is passed for these purposes), will lapse at the next

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<sup>5</sup> See footnote 3.

<sup>6</sup> Part V Division 3 of the Companies Act contains provisions that apply to special resolutions, including the requirement for the resolution to be passed by a majority of not less than three-fourths of members (section 184) and the requirement to register a copy of the special resolution with the Registrar within 14 days after passing the special resolution (section 186).

<sup>7</sup> *Walter Woon on Company Law* (Rev 3<sup>rd</sup> ed, 2009) at para 11.80.

<sup>8</sup> *Walter Woon on Company Law* (Rev 3<sup>rd</sup> ed, 2009) at para 6.67.

annual general meeting or the expiration of the period within which the next annual general meeting is required by law to be held; and

- b. for the purposes of section 64A(3), a special resolution to approve a general mandate authorising the issuance of shares with different voting rights, with no specific validity period (as no validity period is prescribed for a resolution which is passed for these purposes).

**Section 64A(3) requires a special resolution to be passed to approve issuances of shares with different voting rights, but it does not require a separate special resolution to be passed for each separate issue of a class or classes of shares**

12. Section 64A(3) requires a proposed issuance of shares with different voting rights to be approved by the members of the public company by special resolution. The word “issuance” in section 64A(3) suggests that section 64A(3) is not satisfied by a special resolution approving the creation of a new class of shares. Under section 64A(1), different classes of shares may be issued only if the constitution sets out the rights of each class of shares. Under section 26(1), amendment of the constitution is by special resolution. Any special resolution to amend the constitution to satisfy section 64A(1) therefore does not by itself satisfy the section 64A(3) requirement of a special resolution for the issuance of shares.

13. The intention underlying section 64A(3) is to subject issuances of shares with different voting rights to a higher approval threshold<sup>9</sup>. Section 64A(3) or Part V, Division 3 of the Companies Act does not require a separate special resolution to be passed for each separate issuance of shares by the public company. Therefore, for example, where a public company has more than one class of shares with different voting rights, a special resolution may be passed under section 64A(3) at the company’s annual general meeting to approve generally the issuance of shares with certain specified voting rights .

**Section 64A(4) does not require a public company to specify on its notice of general meeting the rights in respect of classes of shares with different voting rights that are neither issued nor outstanding**

14. Section 64A(4) requires a public company to specify on its notice of general meeting the rights in respect of classes of shares with different voting rights “*[w]here [the] public company has one or more classes of shares that confer special, limited or conditional voting rights, or that confer no voting rights*”. The word “has” in section 64A(4) may be read so that section 64A(4) refers to the existing shares that the public company has issued or are outstanding, and not the classes of shares that the public company may issue as provided for in its constitution.

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<sup>9</sup> See footnote 3.

15. The intention underlying section 64A(4) is to introduce a safeguard so that information on the voting rights for each class of shares must accompany the notice of meeting at which a resolution is proposed to be passed<sup>10</sup>. This safeguard ensures that persons entitled to receive notice of a general meeting of the public company are informed about the voting rights of each class of shares which may be exercised at the general meeting. It accords with the intention underlying section 64A(4) to read section 64A(4) so that a public company is not required to specify on its notice of general meeting the rights in respect of classes of shares with different voting rights that are neither issued nor outstanding, because there will be no voting rights to be exercised in respect of such shares at the general meeting.

### **Further clarification**

16. If you have any clarifications, you may contact ACRA's Helpdesk at 62486028.

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<sup>10</sup> See para 15 in page 3-3 of *Report of the Steering Committee for Review of the Companies Act*, para 72 in page 44 of *Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act*, and the Second Reading (Response) Speech by Mrs Josephine Teo, Senior Minister of State for Finance and Transport, on the Companies (Amendment) Bill (8 October 2014), available at:

[https://www.acra.gov.sg/docs/default-source/news-events-documents/2014/response-speech-companies-\(amendment\)-bill.pdf](https://www.acra.gov.sg/docs/default-source/news-events-documents/2014/response-speech-companies-(amendment)-bill.pdf).