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10 AUGUST 2020

Companies (Amendment) Bill 2020 — Beneficial Ownership

On 29 July 2020, the Companies Commission of Malaysia (better known by its Malay abbreviation, **SSM**) released a consultative document, seeking feedback on proposed amendments to the Companies Act 2016 (**CA 2016**).

The key amendments to the CA 2016, as introduced in the consultative document, are the enhancement of provisions in relation to corporate rescue mechanisms as well as the beneficial ownership reporting framework, intended to bring Malaysia in tandem with international best practices. For the purposes of this e-Alert, only proposed amendments relating to beneficial ownership will be discussed.

1. Definition of ‘beneficial owner’

In Malaysia, the concept of “beneficial owner” (**BO**) was first introduced by the CA 2016 and BO is defined as “*the ultimate owner of the shares and does not include a nominee of any description*”.¹ Since its inception, the definition of BO has been identified by the Financial Action Task Force (**FATF**) as inadequate as it fails to take into consideration that beneficial ownership should go beyond the mere ownership of shares.

The proposed new s 56B aims to deal with this issue where the definition of BO has been amended to mean “*a natural person who ultimately owns and controls a company and include an individual who exercises ultimate effective control over a company*”.

This proposed revised definition provides clearer guidance on how to determine a BO as the definition is wide enough to include both ownership based on shares and control over a company.

2. Introduction of Register of Beneficial Owners

Following the Guidelines for the Reporting Framework for Beneficial Ownership of Legal Persons (**Guidelines**) published by the SSM in February this year, the proposed new s 56C requires a register of BO to be maintained by all companies² to record all information relating to beneficial ownership. It is noteworthy that the same rule is applicable to foreign companies, ensuring that there is no information gap for all companies registered or incorporated under the CA 2016.

Under the same provision, companies are required to lodge any changes to the beneficial ownership information within 14 days from the date of change of information.³

3. Empowering companies to obtain beneficial ownership information

The current provisions of the CA 2016 only enable the company to obtain beneficial ownership information from its members. In line with the FATF's recommendations that a BO should be identified not only from the perspective of voting shares, but also from the perspective of the power to control a company in the absence of voting rights, the proposed new s 56D empowers the company to issue a notice to obtain beneficial ownership information from not only its members, but also from any persons believed to be a BO or believed to have information of a BO, for purposes of recording such beneficial ownership information in the register of BO.

4. Imposing obligation on BO to notify company

The CA 2016 does not impose any obligation on the BO himself/herself to notify the company of his/her status as BO of the company.

The proposed new s 56E compels a BO to submit beneficial ownership information to the company with or without notices set by the company through issuance of notices under the proposed new s 56D and self-declaration by the BO himself/herself.

5. Requirement for foreign companies to provide beneficial ownership information during registration

Amendments will be made requiring foreign companies to lodge beneficial ownership information during the registration stage, evidentially by inserting the obligation to submit beneficial ownership information as part of the information to be submitted for registration under the proposed new s 562(1)(fa).

6. New policy on Register of Members of foreign companies

² Companies incorporated and registered under the CA 2016
³ CA 2016, s 51

The current s 568 of the CA 2016 only requires a foreign company to keep a branch register in Malaysia if it has a share capital and has a member who is a resident in Malaysia.

The proposed new s 568 will replace the current provision wherein foreign companies are required to keep and maintain a “register of members of foreign companies” in Malaysia to record information of local and foreign shareholders, similar to the policy of a register of members pursuant to s 50 of the CA 2016.

Following this proposed amendment to s 568 of the CA 2016, all reference made to “branch register” will be replaced with “register of members of foreign companies”.⁴

7. Requirement for beneficial ownership information to be submitted together with annual return

The Companies (Amendment) Bill 2020 also proposes to include beneficial ownership information as part of the information to be submitted together with the annual return in order to ensure that companies lodge the beneficial ownership information with the Registrar on at least a yearly basis and that such information is updated annually.

8. Exemption from the beneficial ownership reporting framework

Consistent with the Guidelines, the proposed new s 56A provides that beneficial ownership reporting is not applicable to:

- (a) Companies licensed under the Financial Services Act [Act 758], Islamic Financial Services Act 2013 [Act 759], a prescribed development financial institution under the Development Financial Institution Act 2002 [Act 618] or a licensed money services business under the Money Services Business Act 2011 [Act 731].
- (b) Any company —
 - (i) which is registered or approved under Part II, licensed under Part III, or recognised under Part VIII of the Capital Markets and Services Act 2007; and
 - (ii) which is approved under Part II of the Securities Industry (Central Depositories) Act 1991.
- (c) Companies whose shares are quoted in a stock exchange, either local or foreign exchange.
- (d) Companies whose shares are deposited in the central depository pursuant to the Securities Industry (Central

Depositories) Act 1991 [Act 453], provided that the shares in the company remain deposited with the central depository.

Conclusion

The Bill, if gazetted, will be the second amendment to the CA 2016 since it came into force on 31 January 2017. The proposed amendments in respect of the BO reporting framework are certainly welcomed as they provide more clarity in terms of the definition and structure as well as address the concerns as to the practicality of the BO reporting framework under the CA 2016.

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Published by the Corporate Department

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