

FAQS ON THE PROPOSED AMENDMENTS TO THE COMPANIES ACT

BROAD POLICIES FOR THE INTRODUCTION OF COMPANIES BILL

1. **When was the review of the Companies Act initiated?**

The review of the Companies Act began in December 2003 when SSM established the Corporate Law Reform Committee as part of SSM's strategic direction to develop a dynamic and conducive regulatory environment for businesses in Malaysia.

2. **What are the objectives for the establishment of CLRC?**

SSM established the CLRC to spearhead the review of the Companies Act 1965 with the following objectives:

- To create a legal and regulatory structure that will facilitate business; and
- To promote accountability and protection of corporate directors and members taking into account the interest of other stakeholders, in line with international standards.

3. **Are there any other factors that were taken into account by CLRC in recommending the changes to be made to the Companies Act besides the objectives sated above?**

When reviewing and recommending changes to the Companies Act, the CLRC has also taken into consideration the following factors:

- Modernising the law by taking into account the advances made in information and communication technology (ICT);
- Reducing the costs of compliance;
- Reducing duplications and conflicts that exists between the various corporate regulatory bodies;
- Simplifying the existing operational processes of a company; and
- Simplifying the current legislative language as used in the Act.

4. **Was the public consulted during the process of formulating recommendations of changes to the Companies Act by CLRC?**

Yes. CLRC had, throughout the Law Reform Programme, issued a total of 12 consultative documents for public consultation. Such consultation process is vital to ensure that the views and feedback of the industry and stakeholders are taken into consideration when formulating the recommendations. This is especially important since the proposed recommendations will have a direct impact on the business community. The views and feedback play a significant part in ensuring that the proposed recommendations will facilitate and promote business growth.

5. **What are the outcomes of the reform process conducted by CLRC?**

CLRC has forwarded 188 recommendations to SSM on the proposed changes that should be implemented to the Companies Act. SSM's Board accepted 183 out of the 188 recommendations which were consolidated into 19 policy statements which, then, would be the basis for the amendments to the Companies Act 1965.

6. **What is the scope of the 188 recommendations by CLRC?**

The CLRC's recommendations covered all aspects of the legal framework relating to the administration of companies ranging from incorporation of companies, management, capital, shares, charges, corporate governance, winding-up, rescue mechanisms to enforcement and sanctions.

7. **What are the 19 Policy Statements formulated based on the CLRC's recommendations?**

- ❖ Modernizing the Companies Act;
- ❖ Facilitating & Modernizing Entrance into the Corporate Sector;
- ❖ Migration to No Par Value Regime and paid up capital;
- ❖ Facilitating the Management & Restructuring of the Company's Share Composition;

- ❖ Simplifying & Facilitating Internal Decision Making Process;
- ❖ Strengthening the Corporate Governance Structure in Relation to the Affairs of the Directorship of a Company;
- ❖ Reinforcing The Roles, Functions & Obligations of the Company Secretaries;
- ❖ Establishment of a Registration Regime for Practicing Company Secretaries;
- ❖ Integrating the Contents of the New Companies Act with the Notions & Elements of Corporate Responsibility;
- ❖ Enhancement of Shareholders' Rights & Protection;
- ❖ Strengthening the Corporate Governance Structure Through Refinement of Auditors' Role & Responsibilities;
- ❖ Reaffirming the Importance of Audited Financial Statements & the Timely Disclosure of such Information;
- ❖ Strengthening Good Corporate Governance Practices Through Enhancement & Refinement of Rules Pertaining to Transactions Involving Directors & Substantial Shareholders;
- ❖ Simplifying, Refining & Expediting the Winding Up Process;
- ❖ Modernizing Insolvency Law by Introducing Corporate Rescue Mechanisms to Revive Financially Troubled Companies;
- ❖ Restructuring the Concept of Scheme of Arrangements Between a Company and its Creditors;
- ❖ Refining The Role of Receivers/Receiver & Managers;
- ❖ Refining the Current System of Registration of Charges by Improving the Procedures and Processes Involved; and
- ❖ Modernizing the Enforcement Regime.

8. **What are the basic philosophies adopted in modernizing the Companies Act?**

- The introduction of a new legal framework applicable to all companies;
- Simplifying laws and procedures for companies based on private/public distinction and facilitating the growth of private companies; and
- Removing obstacles and facilitating the growth of private companies.

9. **Are there any provisions that will be introduced to facilitate and modernize the entrance into the corporate sector?**

Yes. In order to facilitate and modernize the entrance into the corporate sector, the following provisions will be introduced:

- Conferment of companies with full capacity of a natural person. However, companies may elect/decide to have their object clauses should they wish to limit their capacity. Notwithstanding, non-profit making companies would still required to specify their objects.
- Introduction of the concept of a single member company where a company can be incorporated by only one member and that member can also be the director; and
- Fee to incorporate a company will be based on the type of companies.

10. **What are the provisions that will be introduced to remove the obstacles in incorporating a company?**

- The process of incorporating a company currently consist of several procedures thus making the incorporation process becomes unduly complicated and may be seen as unnecessary obstacles. By examining the process, some of the procedures could be simplified or removed to provide simple and easy incorporation process.
- Under the current regulatory structure, the current name reservation process will be made optional with the introduction of guaranteed name approval name concept. Through the guaranteed name approval process, persons intending to incorporate a company will have the option to

use the name they have proposed or if such name is not approved, to use the company registration number.

- Removing the requirement for Memorandum & Articles at the point of incorporation. A company will have the option whether to adopt its own Articles of Association and such adoption could be done after its incorporation. In view of this, some provision of current Table A will be adopted as substantive law.
- To further simplify the incorporation process, all statutory declaration by Promoters/Directors which previously required to be executed before a Commissioners' of Oath is now replaced with statement of compliance.
- At the same time, the law also liberalise the qualification of secretaries to include directors. Directors can also act as secretaries for private companies (PROVISO: same person cannot act as both director/secretary relating to actions that require to be done by both a director and secretary). If compliance is not observed, Registrar is empowered to direct a company to appoint a qualified company secretary.
- The law will also introduce a single incorporation template as opposed to the current regime where several documents (name search approval, statement of compliance by company secretary, statutory declaration by directors, and Memorandum and Articles of Association) are required for the purposes of incorporation. The incorporation process can be completed by the promoter /shareholder/director without having to require a company secretary to do so;
- The requirements for certificates of incorporation and company seals will be made optional ; and
- Most importantly, SSM will also be leveraging on the advent of ICT for the purposes of incorporation and lodgements.

11. **What are the benefits offered through the introduction of the No Par Value (NPV) regime?**

- Companies will no longer be required to state its authorised share capital.

- The NPV regime will bring about simplification of accounts where share premium accounts and reserves will no longer be applicable. (During the transitional period, companies will be given the opportunity to utilise the amount standing in credit in their share premium accounts for specific purposes such as to write off preliminary expenses of a company and to use for redemption of shares).
- Companies will no longer subject to lengthy and costly procedures to increase share capital.

12. **What are the provisions that will be introduced in facilitating the management and restructuring of the company's share composition?**

- The law will introduce an alternative procedure for the reduction of capital where the directors are required to make a solvency statement to be approved by shareholders of the company. This procedure is in addition to the current procedure where a reduction of capital can only be carried out if a confirmation from the Court has been obtained.
- Similarly, the rules relating to share buyback and financial assistance provisions are also enhanced by introducing solvency tests before a company is allowed to carry out such corporate exercises.
- To facilitate the disposal of treasury shares as a result of share buyback exercise, the limitation that such disposal be carried out on the stock exchange will be removed by allowing treasury shares to be sold through private treaty in accordance to the Bursa Malaysia Listing Requirements.

13. **What are the new features that will be introduced to simplify and facilitating internal decision making process?**

- Removing the mandatory requirement for private companies to hold Annual General Meeting. Public companies will still be required to convene Annual General Meetings;
- Simplification of decision making process for private companies where Annual General Meeting will no longer

required under the law. Decisions to be passed at meetings or through written resolutions;

- Restructuring the policies pertaining to written resolution procedures for private companies towards abolishing the rule of unanimity in passing written resolutions;
- Simplifying and clarifying the rules relating to meeting procedures;
- lifting the prohibition on person(s) who can be appointed as proxies and facilitating the affairs of proxies during general meetings;
- liberalizing the modes of voting during general meetings through the recognition of best practices; and
- reducing the required threshold for the purpose of convening/requisitioning of general meetings.

14. **What other new features that could be expected from the new Companies Bill?**

The decoupling of annual return and submission of financial statements will be introduced. Annual Returns are to be submitted on the anniversary of incorporation. Meanwhile, financial statements are to be circulated to members within 6 months of the company's financial year end and a copy of which will be lodged to the Registrar.

15. **What are the proposed amendments that will strengthen the corporate governance structure in relation to the affairs of the directorship of a company?**

- clarifying the relationship between the board of directors and shadow directors;
- clarifying the minimum age for directorship i.e. 18 years old and abolishing the maximum age for directorship. Appointment or re-appointment of directors will be based on their qualifications and merits
- revising the residency requirement for directorship;
- restructuring the rules pertaining to the appointment, resignation and removal of directors;

- codifying the requirement for remuneration of directors of public companies to be sanctioned;
- Stricter rules relating to directors' remuneration
 - Members' agreement will be required for remuneration of directors' of public companies.
 - Members will have the right to inspect the contract of service for directors' of public companies.
 - Only disinterested members can approve payment for loss of office for directors' of public companies
- providing members the right to inspect directors' contract of service with public companies;
- requiring any payment for loss of office of directors of public companies to be approved by disinterested members;
- clarifying the rules relating to exemption and indemnification of directors' and officers'/auditors' liability; and
- enhancing the rules relating to disqualification of director.

16. **What are the provisions that will reinforce the roles, functions and obligations of the company secretaries?**

- Retaining the appointment of qualified company secretary as well as allowing company director/s who are responsible for fiduciary duties to act in the best interest of the company to act as company secretary of private companies (subject to the provision that the same person cannot act as both director/secretary relating to actions that require to be done by both a director and secretary);
- For public companies, appointment of qualified company secretary is mandatory;
- In ensuring compliance and public confidence in the accuracy of corporate register, the Registrar is empowered to direct a company to appoint a qualified company secretary if compliance with the provisions of the Companies Act is not observed.

17. **What is the purpose of the proposed establishment of a registration regime for practicing company secretaries?**

- The registration regime is established for the following reasons:

- to obtain the accurate information on named company secretaries as not all members of the prescribed bodies render company secretarial services; and
- to ensure that the standards of professionalism and competency amongst company secretaries remain high.
- As we move towards a developed nation in 2020, the profession of company secretaries must be able to discharge their responsibilities to the expected level of professionalism and competency irrespective of their background qualification. The issuance of practicing certificate to any person intending to act as company secretary will address issues of incompetency and “habitual offender”. Any secretary who display lack of professionalism and competency will risk their practicing certificate being revoked.
- The role of prescribed bodies will remain intact in that they will continue to supervise and monitor their members who will be qualified to act as secretary.

18. In line with integrating the content of the new Companies Act with the notions and elements of corporate responsibility, what are the changes moving forward?

Currently, there are various laws relating to CR (Environmental Law, Employment Relations Law, Consumer Protection, Labour Laws); Ratified UN Conventions relating to CR (UN Convention No. 8 (Elimination of Discrimination against Women), UN Convention No. 11 (Children’s Rights), ILO Convention no. 138 (Minimum Age); Bursa Listing Requirements – PLCs which provides statement on CR activities in Annual Report – Rule 9.25 read together with Item 29 of Appendix 9C; and Khazanah Nasional Berhad – GLCs (Silver Book: Achieving Value through Corporate Responsibility).

In future, the directors’ report will cover additional matters including policies on internal control and corporate responsibility which would be covered under the business review report.

Under the business review element, directors are encouraged to report on matters relating to risks faced by the company, future projections and KPI as well matters policies on environmental

matters affecting their business, policies on their employees and social and community issues.

19. **What are the enhancements made under the new Companies Bill in relation to shareholders' rights and protection?**

The enhancements of shareholders' rights and protection are as follows:

- clarifying the application of rules relating to oppression of members' rights;
- refining the application of statutory derivative actions; and
- reforming the rules relating to variations of class rights and preference shareholders.

20. **How is the corporate governance structure strengthened through the refinement of auditors' role and responsibilities?**

The corporate governance structure can be strengthened through refinement of auditors' role and responsibilities by:

- retaining the mandatory requirement for the appointment of auditor(s) for all types of companies. However, the Registrar will be empowered to determine certain criteria to exempt the application of audit requirement;
- introducing a new regime for the appointment of auditors for private companies in view of the proposal to lift the requirement for holding annual general meetings;
- enhancing the rules relating to the resignation of auditors;
- relying on industry practice for mandatory audit rotation of audit firms; and
- granting access to auditors on all communications relating to any resolutions which the company proposes to pass by way of the written resolution procedure.

21. **What are the proposed amendments with regard to reporting and audited financial statements?**

The new Companies Bill proposes to reaffirm the importance of audited financial statements and the timely disclosure of such information.

This can be achieved by the following mode:

- (i) realignment of accounting provisions with the approved accounting standards
 - (a) removal of Ninth Schedule;
 - (b) reliance on approved accounting standards;
 - (c) enhancement of Directors' Report where necessary.

- (ii) clarification of dividend rules:
 - (a) dividend distribution can be made if after the distribution is made the company satisfies the following solvency test:
 - (b) the company is able to pay its debts as they become due in the normal course of business when the dividend is declared or paid; and
 - (c) the value of the company's assets is greater than the value of its liabilities.

22. **How is good corporate governance practiced through rules pertaining to transactions involving directors and substantial shareholders?**

The new Companies Bill proposes that good corporate governance practices can also be strengthened through enhancement and refinement of rules pertaining to transactions involving directors and substantial shareholders by way of:

- rules relating to substantial property transactions and persons connected with directors or substantial shareholders; and
- disclosure principles to avoid conflict of interests.

23. **What are the amendments done or to be done to simplify winding up process?**

The amendments are as follows:-

- (a) Shortening the time taken to wind up a company;
- (b) Introducing and defining the parameters for exempt dispositions;
- (c) Refining the concept of undue preference transactions;
- (d) Preserving the assets of the company;
- (e) Increasing the threshold for statutory amount of debts to prevent abuse by creditors;
- (f) Empowering the Court to terminate winding up proceedings to ascertain the status of a company;
- (g) Enhancing the roles of liquidators to facilitate the smooth process of liquidation;
- (h) Enhancing the rights of creditors;
- (i) Reaffirming the rules relating to preferential debts; and
- (j) Providing adequate protection to employees as unsecured creditors.

24. **What are the proposed mechanisms under the insolvency law?**

The following alternative corporate rescue mechanisms to revive financially troubled companies are to be introduced under the insolvency law:-

- (a) The judicial management scheme (JM); and
- (b) The corporate voluntary arrangement (CVA).

25. **Is there anything done to provisions related to scheme of arrangement?**

The concept of Scheme of Arrangements between a company and its creditors will be restructured.

26. **What are the changes made on provisions related to Receivers or Receivers and Managers?**

The changes are as follows:

- (a) Clarifying the status and power of receivers; and
- (b) Introducing new provisions relating to liability, indemnity and priority over receiver's costs.

27. **What effort has been taken in terms of provisions related to Charges?**

Effort is taken to refine the current system of registration of charges by improving the procedures and process involved.

28. **What are the changes in terms of enforcement regime?**

The following are changes in terms of enforcement regime

- (a) Introducing the concept of civil and administrative proceedings for selected types of breaches of the Companies Act alongside criminal sanctions;
- (b) Criminal sanctions to be imposed against the officers responsible instead of the company; and
- (c) Refining the rules pertaining to disqualification of directors.

29. **What are the benefits/expected outcome with the introduction of the new Companies Act?**

The existing Companies Act has been in existence for almost five decades old. The proposed Companies Bill will take into consideration the dynamic business environment in today's global scenario and as well as the exponential growth of the Malaysian economy. The Companies Bill will also be consistent with global standards and ensure that the route for starting a business in Malaysia will be cheaper and competitive which in turn will enhance and support the growth of SMEs in Malaysia.

TECHNICAL QUESTIONS

Single member/single director company

1. Can a single member/single director company be incorporated as a public company?

No, a single member/single director company can only be incorporated as a private company. Although a public company can be incorporated with only a single member, the minimum requirement for directors of a public company is two.

2. Can a single member/director can also be the secretary of the company?

Yes, a person who is a single director (who is also the single member) can act as the secretary of the company. However, the Companies Bill prohibits acts in dual capacity i.e. where the act is required to be done by both a director and a secretary, that act must be executed by two different persons.

Incorporation, Memorandum & Article of Association, etc

3. The Companies Bill will introduce a superform for incorporation. What is actually the superform?

The superform is an electronic template which will replace the various form currently required for incorporation process (i.e. Form 6, Form 48A and M&A)

For incorporation process, a person is required to provide a set of information as follows:

4. Can a company submit the M & A at the point of incorporation?

In general, a company is only allowed to submit its constitution after incorporation. However, in cases of a company limited by guarantee (CLBG), it is required to submit its constitution at the point of incorporation.

5. What is the effect of a company need not have a constitution (M&A) on existing companies?

Under the Companies Bill, new companies have the option whether or not to have a constitution. If a new company decides to have a constitution, the constitution must be lodged with SSM after its incorporation.

For existing companies, the law continues to recognise the current M & A. If the existing companies decides not to have a constitution, the company must pass a resolution to that effect. Similarly, a company must also pass a resolution to amend any part of its constitution should the company wish to harmonise its constitution with the provisions of the Companies Bill. For example, a private company may want to amend provisions relating to minimum directorships from current 2 to 1).

6. Can a company secretary be appointed at the point of incorporation?

The appointment of company secretary at the point of incorporation is optional. In any event, a company secretary must be appointed within 30 days after a company has been incorporated.

7. What is the rationale for migration to the new par value regime?

- Nominal or par value is only applicable at the point of issuance of shares. The actual value of a company will vary in accordance with the current situation faced by the company
- The issued price of shares will be determined by the current value of the company, factors affecting the business of the company and the capital that the company is seeking to raise
- The nominal value of the shares will not accord protection to the shareholders, instead the rights of shareholders are attached to the shares.
- This includes the right to attend, speak and vote at meetings of shareholders and the right to dividends
- The rights of shareholders depend on the number of shares held and not the value of shares when it was first purchased.

8. How does the board of directors determine the price for issuance of shares?
- Basically when a company allot new shares, it seeks to raise additional capital to fund its business activities.
 - There is no one correct way to determine the share price of a company. One way could be based on the financial statements of the company. Using the financial statements, you can perform a quantitative analysis to determine the share price. At the same time, there are also some qualitative analysis that a company may want to use. The prospects, the risks associated with the company, issue of control etc.
 - In determining the share price, the board of directors must bear in mind that they have to do so in the best interest of the company.

Accounts, Audit and Reporting

9. Decoupling of Financial Statements and Annual Return – What are the timeframe for filing of Financial Statements and Annual Returns?
- The Companies Bill has de-coupled the filing requirements of audited financial statements and Annual Returns.
 - The audited financial statements are required to be lodged with SSM as follows:
 - (a) In the case of private companies, within 1 month after the audited financial statements have been circulated to members; and
 - (b) In the case of public companies, within 1 month after the audited financial statements have been tabled at the AGM.
 - The Annual Returns are required to be lodged with SSM within 30 days of the anniversary of a company's incorporation date.

10. In the foreseeable future, are Malaysian companies ready to move into an era where audit is not mandatory? When?
- The Companies Bill empower the Registrar to exempt certain categories of companies from having to appoint auditors. At this juncture, the categories for such exemptions have not been determined. Public consultation will be carried to determine the categories or thresholds, as the case may be.

Meetings and Decision Making

11. How does General Meeting Requirements change under the Act?
- Under the Companies Bill, the requirement for Annual General Meeting for private companies has been done away with. This means that a private company is no longer required to hold AGM in every calendar year. All meetings of a private company are known as meeting of members.
 - However, the requirement for AGM for public companies is maintained.
12. Shifting towards Written Resolution Regimes - What is the new Majority Written Resolution Procedure?
- The written resolution procedures are applicable only to private companies. The written resolutions are passed in accordance to the required majority as though it is passed at an actual meeting.
 - This means that if the written resolution is an ordinary resolution, a simple majority of members who are eligible to vote is sufficient to pass the resolution. Whereas, a special resolution will require 75% or more of members who are eligible to vote to pass the resolution.

Boardroom Excellence

13. Directors' fee in a private company is to be approved by the Board but the director must be notified accordingly. Can shareholders object to the decision of the Board and more so if the Board consists

of directors who are also shareholders or persons nominated by shareholders?

- The provision of the law allows a shareholder holding at least 10% of the total voting rights to object to the decision of the Board in so far as directors' fees are concerned. This is in line with the general principle that the shareholders are a different body to that of the Board. The objection must also be for the reasons that the payment is not fair for the company.
- The position of the law clearly allows a shareholder who is also a director to object to the decision of the Board. This will allow scenarios where that director/shareholder may not be present at the Board meeting and he now wishes to object, albeit on a different capacity.

14. Why is there a shift in policy in allowing interested parties to vote in related party transactions in a private company?

- The prohibitive policy is premised on the fact that companies should not be transacting with an interested party unless it has been approved at a general meeting. The prohibitive policy is lifted for private companies where shareholders who are interested in the transaction could also take part in approving the transaction. In changing the policy, the Government has taken into considerations that there are many genuine transactions that could not be effected by the current prohibitive policy. In particular, the private companies could not have access to the available resources because such resources are held by interested parties and could not be utilised due the requirements that the resolution must be passed by uninterested shareholders only.
- As such, the Government is of the view that whilst the policy requiring prior shareholders' approval should be maintained, the shareholders should be given the option to proceed with the transactions with full knowledge that the transactions would involve related party, and there should have the full responsibility in approving such transactions.