

FREQUENTLY ASKED QUESTIONS

COMPANIES (AMENDMENT) ACT 2024 [ACT A1701]

POLICY 1: WIDENING THE APPLICATION OF CORPORATE RESCUE MECHANISM [(CVA) AND (JM)]

1. What is corporate rescue mechanism and its purpose?

The Companies Act 2016 introduces the corporate rescue mechanism framework in the form of corporate voluntary arrangement (CVA) and judicial management (JM). The corporate rescue mechanism framework aims to protect the interests of all stakeholders, including the company, creditors, and shareholders, while providing a structured and transparent process for financially distressed companies to weather the financial storm.

2. What is CVA?

CVA provides a consensual statutory restructuring tool that is presently available to private companies only. The CVA process enables company experiencing financial difficulties to enter into a plan or an arrangement with the creditors without the need to have the plan or arrangement being approved by Court. Upon filing of CVA to the Court, a moratorium of 28 days will kick-in which protects the company from any legal proceedings including the petition to wind up the company. The moratorium period can be extended to a maximum period of 60 days. The moratorium period is critical to allow the company and its creditors to consider the plan or arrangement with the objective of rehabilitating the company.

Currently, the availability of CVA as a rescue mechanism is limited only to private companies that do not create charge over their assets or undertaking.

3. What is JM?

JM allows for the appointment by the Malaysian High Court of a judicial manager over an insolvent corporate debtor, in circumstances where it can be shown that there is a reasonable prospect of, inter alia, preserving all or part of the company as a going concern and where interests of creditors would be better served than on a winding up.

Currently, the Court has not approved any application by public listed companies for JM due to the ambiguity in the current provision.

4. What is the objective of amending section 395 of the Companies Act 2016?

The amendment of section 395 aims at widening the application of CVA to all companies including companies which have created a charge over their property or undertaking. The existing framework already offer sufficient safeguards to address the interests of all stakeholders including secured creditors.

5. What is the objective of amending section 403 of the Companies Act 2016?

The amendment to section 403 is aimed to clarify that judicial management can be applied by all companies including public listed companies.

6. Are there still any restrictions after sections 395 and 403 have been amended?

The amendments to sections 395 and 403 aim at allowing all companies to utilise CVA or JM should they face financial difficulties. However, companies which are regulated by Central Bank of Malaysia and companies which are licensed,

approved or registered under the Capital Market and Services Act 2007 [Act 671] and the Securities Industry (Central Depositories) Act 1991 [Act 453] are not eligible to utilise CVA and JM as they are subject to specific financial and governance policies and safeguards imposed on them by the Central Bank of Malaysia or Securities Commission Malaysia, respectively.

POLICY 2: STRENGTHENING THE CORPORATE REHABILITATION FRAMEWORK:

(A) Enhancement of provisions relating to scheme of arrangement or compromise (SOAC)

7. What is a scheme of arrangement or compromise (SOAC)?

A scheme of arrangement or compromise is a process commonly used by financially distressed companies for purposes of restructuring their debts, while receiving the benefit of court-supervised restraining orders that restrict the commencement of any legal proceedings including any petition to wind up the company. A scheme of arrangement or compromise allows for the court-approved scheme to be imposed on all creditors and members, provided the statutory voting majorities have been obtained.

SOAC is not exclusively intended for financially distressed companies and is also widely utilised by solvent entities.

8. What is the rationale for strengthening the SOAC framework?

In Malaysia, the SOAC framework is the most widely used mechanism to rehabilitate a financially distressed companies due to various reasons such as the familiarity of the corporate sector with the SOAC framework and the fact that the directors are still in control of the management of the companies. Thus, the directors are incentivized to propose a rehabilitation plan which has a high probability rate of success.

As such, the Companies (Amendment) 2024 has introduce provisions to accord a more comprehensive framework at par with international practices to ensure that SOAC can be used as a more effective rehabilitation tool for companies facing financial difficulties.

9. What are the main policies introduced under the proposed amendments?

Amongst the significant policies introduced under the proposed amendments are as follows:

- (a) The introduction of automatic moratorium period for companies applying a restraining order under SOAC;
- (b) The provision on restraining order by related company that play an integral part in the rehabilitation plan;
- (c) The provision of rescue financing;
- (d) The provision relating to cram down; and
- (e) The mandatory appointment of insolvency practitioners to oversee the rehabilitation plan.

10. Why is the introduction of automatic moratorium important?

The Companies (Amendment) Act 2024 introduces new subsection 368(1A) which will give companies applying for restraining order under SOAC an automatic moratorium upon filing of such application for a maximum of two months or until the Court decides on the application, whichever is earlier.

During the moratorium, the company is protected from legal proceedings including the petition to wind up the company. In other words, the company will be continuously protected until the restraining order is granted by the Court.

11. Is there any specific safeguard to protect creditors' right given that automatic moratorium and restraining orders would restrict creditors from taking actions against the company?

To prevent abuse of process whereby the application for restraining orders can be used to continuously deprive or prejudice the rights of creditors, the Companies (Amendment) Act 2024 introduces a policy that no restraining order would be granted by the Court if an order has been granted in the preceding twelve months involving a rescue financing, a cram down, an approval of the proposed scheme without a meeting of creditors or when a related company makes an application for a restraining order in relation to a proposed scheme.

12. What is the significance of allowing a related company to be protected by a restraining order?

In some circumstances, restructuring does not involve just one company. In a larger restructuring of a group of companies, some other entities may be involved although they may not be part of the SOAC itself.

Recognising this situation, the Companies (Amendment) Act 2024 introduces new section 368A where a related company can apply for a restraining order on similar terms with the company undergoing SOAC provided that the company plays an integral part in the SOAC; that SOAC will be frustrated if actions are taken against the related company and that the creditor of the related company will not be prejudiced if a restraining order is granted.

13. What is rescue financing and its significance in a SOAC?

Under new section 368B, rescue financing is defined as financing that is necessary for the survival of a company that obtain the financing or that the financing is

necessary to achieve a more advantageous realisation of the assets of a company that obtain the financing, than on a winding up of that company.

Rescue financing allows the debtor company to continue doing business, pay its suppliers and other creditors. In other words, in some circumstances, rescue financing is critical in ensuring the proposed scheme will be successful.

In cognizance of the fact that often financially distressed companies face higher cost of borrowing as banks or financial institutions become more wary to provide fresh loans without some of protection, a new policy is introduced to provide better protection to parties giving the rescue financing.

As such, under the proposed section 368B, the Court is empowered to order the debt arising from any rescue financing to be secured against the property of the company on certain conditions. In the event the company is wound up, debts arising from rescue financing are given super priority over all other debts in the event of a winding up.

14. What is a cram down and why it is important under the enhanced SOAC framework?

A cram down is a mechanism that will allow the Court to compel dissenting creditors to be bound by the proposed scheme of arrangement. The aim of a cram down is to ensure that companies in distress will have a successful scheme with less interference and at the same time accord protection to the dissenting creditors.

The Companies (Amendment) Act 2024 introduces new section 368D which allows an application for cram down to be made to the Court provided that:

- (a) The scheme is approved by a majority representing at least 75% of the total value of the creditors or members or class of members that are present and voting at the meeting; and
- (b) The scheme is fair and equitable to each class of dissenting creditors and does not unfairly discriminate between the classes of creditors.

An application for a cram down must ensure that the dissenting creditors will receive at least a value equal to their approved claims as compared to if the company was to be in liquidation.

15. What is the importance of the role of insolvency practitioners in SOAC under the Companies (Amendment) Act 2024?

The Companies (Amendment) Act 2024 introduces a new policy through an amendment to section 367 that the appointment of insolvency practitioners is mandatory when a company proposing an SOAC made an application involving a rescue financing, a cram down, an approval of the proposed scheme without a meeting of creditors or when a related company makes an application for a restraining order in relation to the proposed scheme.

The Companies (Amendment) Act 2024 emphasizes the important role of insolvency practitioners to oversee the proposed scheme and report of its status to the Court before the scheme is approved. This is to ensure a higher chance that the proposed scheme would be successful.

(B) Enhancement of other provisions relating to CVA/JM/SOAC

16. What are other provisions which are introduced to enhance the corporate rehabilitation framework?

Amongst the significant amendments introduced to enhance the corporate rehabilitation framework under the Companies Act are as follows:

- (a) Allowing the Court to extend the duration of the judicial management order beyond 12 months;
- (b) Allowing companies which have obtained judicial management order the access to rescue financing;
- (c) Minimising loss faced by companies in insolvent proceedings by allowing secured creditors to recover assets in certain circumstances; and
- (d) Ensuring companies in insolvent proceedings continue to be supplied with essential goods and services to reduce disruption in their operations.

17. Why must the duration of the judicial management order be allowed beyond 12 months?

Subsections 406(1) and (2) provide that the duration of the judicial management order would be for a period of 6 months from the date of the making of the order. This period can be extended for another 6 months on application by the judicial manager to the Court.

In certain circumstances however, more time is required to allow the appointed judicial manager to present a comprehensive revitalizing plan for a financially distressed company. Thus, amendments are introduced to these subsections to allow sufficient time not limited to a maximum of 12 months for the judicial manager to carry out his duties such as to make appropriate recommendations in accordance with the terms as imposed by the Court.

18. What is the main objective and benefit of the new section 415A relating rescue financing under the Companies (Amendment) Act 2024?

The main objective of the new section 415A is to allow a company under judicial management to obtain rescue financing, similar to the policy introduced for companies proposing a scheme of arrangement with its creditors (SOAC). With the introduction of this new provision, the Court is empowered to order the debt arising from any rescue financing to be secured against the property of the company on certain conditions. In the event the company is wound up, debts arising from rescue financing are given super priority over all other debts in the event of a winding up.

19. What is the main aim of new section 398A and new subsection 411(5) relating to recovery of property by secured creditors?

The main aim of new section 398A and new subsection 411(5) is intended to provide relief to the company by allowing secured creditors to take possession, exercise any rights or recover secured property during a moratorium in a voluntary arrangement or judicial management based on the circumstances of the property. For example, the secured creditors can take back perishable goods or any machinery on a lease agreement that are not used by the company during the voluntary arrangement or judicial management process. To this effect, the perishable goods would not go into waste and the supplier would not have to invoice the amount to the company. In the case of the machinery, it would not be

left idle and would fall into disrepair if the company has limited resources to ensure that the machinery is maintained in good condition. This action would also allow the company to reduce any debts with the secured creditor with regards to those secured property.

20. What does section 430A provide to both supplier and the company when the company becomes subject to the proceedings in relation to a compromise or arrangement, a voluntary arrangement or a judicial management?

For a company that becomes subject to the proceedings in relation to a compromise or arrangement, a voluntary arrangement or a judicial management, section 430A provides that an insolvency related clause in any contract for the supply of essential goods and services cannot be exercised against the company merely because the company becomes subject to those proceedings.

What this mean is that under the new section 430A, suppliers will have to continue to fulfil their commitments under their contract so that companies can continue trading through the rescue process, including making it easier for companies to maintain supply of contracts that are essential for the continuation of the business. Essential supply of contracts proposed under this new section would include supply of water, electricity or gas.

POLICY 3: STRENGTHENING THE BENEFICIAL OWNERSHIP REPORTING FRAMEWORK

21. What is a beneficial ownership reporting framework?

Beneficial ownership reporting framework is a framework that imposes obligation on companies to obtain, verify and record information of their beneficial owners. The beneficial ownership information must be kept up to date by companies and lodged with the Registrar as required. Currently, the beneficial reporting requirements is governed under sections 51 and 56 of the Companies Act 2016.

22. What is the rational of introducing a new beneficial ownership framework through the Companies (Amendment) Act 2024?

The current beneficial ownership reporting framework must be enhanced to address the gaps in the Companies Act 2016 to be in line with international standards i.e. the Financial Action Task Force (FATF) and the Organisation for Economic Co-Operation and Development (OECD) as well as international best practices. The main objective of those standards is to combat money laundering, terrorist financing and shall include other illegal activities such as corruption and tax evasion.

The new framework will close of the current gap of the current definition of beneficial owner which does not cover the control of companies other than shares.

23. What are the differences between the existing beneficial ownership reporting framework and the new framework under the Companies (Amendment) Act 2024?

Under the Companies (Amendment) Act 2024, a new comprehensive beneficial ownership reporting framework is introduced through the introduction of a whole new Division 8A of Part II which covers:

- (i) the criteria of a beneficial owner, as provided under section 60A;
- (ii) register of beneficial owners, as provided under section 60B;
- (iii) power of a company to obtain beneficial ownership information from its members and any person who is identified as beneficial owner or has information relating to a beneficial owner of the company, as provided under section 60C; and
- (iv) duty of an individual to notify a company of his status as a beneficial owner of the company and the obligation includes to notify any changes to the individual's status as the beneficial owner and particulars recorded in the register of beneficial owners, as provided under section 60D.

24. Who is a beneficial owner of a company under the new framework?

Under section 60A of the Companies Act 2016, a beneficial owner of a company is defined as an individual or natural person who ultimately owns or controls a company through ownership of shares in the company and shall include a person who exercises ultimate effective control over the company.

The Registrar will issue a guideline for the purposes of identifying a beneficial owner.

25. What are the criteria of a beneficial owner?

There are 6 criteria under the new framework that will assist companies to determine their beneficial owners:

- **CRITERIA A**

If the individual holds directly or indirectly in not less than 20% of the shares of the company;

- **CRITERIA B**

If the individual holds directly or indirectly in not less than 20% of the voting shares of the company;

- **CRITERIA C**

If the individual has to exercise ultimate effective control whether formal or informal over the company or the directors or the management of the company;

- **CRITERIA D**

If the individual has the right or power to directly or indirectly appoint or remove a director(s) who holds the majority of the voting rights at the meeting of directors;

- **CRITERIA E**

If the individual is a member of the company and, under an agreement with another member of the company, controls alone a majority of the voting rights in the company; or

- **CRITERIA F**

If the individual has less than 20% of shares or voting rights but exercises significant control or influence over the company.

The above criteria will be specified in the Guidelines which will be issued by the Registrar as provided under section 60A.

26. How do you identify an individual as a beneficial owner?

An individual is identified as a beneficial owner if he or she fulfills any one of the criteria above. This may be determined through records of the company such as constitution, register of members, minutes and resolutions as well as other documents suggesting control or influence.

A company can name more than one (1) beneficial owner based on its findings.

27. What is the significance of the amendments to the Companies Act 2016 to the corporate sector in Malaysia?

The enhancement of the beneficial reporting framework will promote corporate transparency in Malaysia and increase transparency of beneficial ownership information lodge with the Registrar. A comprehensive and complete beneficial ownership information will assist law enforcement agencies in Malaysia in their investigations against serious crimes committed through business entity.

28. Are the relevant provisions of the beneficial ownership reporting framework under the Companies (Amendment) Act 2024 applicable to all companies?

Yes. Those provisions will be applicable to all companies incorporated and registered under the Companies Act 2016, unless exempted.

Certain categories of companies will be exempted from the beneficial ownership reporting requirement if such companies have similar reporting obligations under any written laws to avoid duplication of reporting requirements. The exemption will

be made by the Minister of KPDN through an order published in the Gazette as provided under section 60E of the Companies Act 2016.

However, the exempted companies will still have the obligation to notify the Registrar of its exempted status and to provide the information of its senior management, to the Registrar.

29. Are the relevant provisions relating to the beneficial ownership reporting framework under the Companies (Amendment) Act 2024 applicable to foreign companies registered under the Companies Act 2016?

Yes. The framework is also applicable to foreign companies registered under the Companies Act 2016.

As stipulated under section 573A of the Companies (Amendment) Act 2024, Division 8A of Part II shall be applicable to foreign companies including the obligation to annually submit beneficial ownership as provided under paragraph 576(2)(*ha*) and the obligation to keep the register of beneficial owners under paragraph 576(2)(*hb*) of the Companies (Amendment) Act 2024.

30. Are there any exemptions given to any company regarding beneficial ownership reporting?

Currently there is no exemption granted to any company from beneficial ownership reporting under the Companies Act 2016, although there are provisions allowing the Minister to do so. This is because for the time being there is no other law that provides for the same reporting of beneficial ownership as stated in the latest amendment in the Companies Act 2016.

31. Who should be responsible for the beneficial ownership information of a company under the new beneficial ownership reporting framework?

The board of directors, company secretaries, agents, members of the company, beneficial owners and any person who received any notice under section 60C of the Companies Act 2016.

32. Who can have access to the register of beneficial owners kept at the company's level?

Under subsection 60B(9) of the Companies Act 2016, the following persons will have access to the register of beneficial owners:

- (a) Law enforcement agencies and competent authorities in carrying out law enforcement activities based on the respective written laws;
- (b) Beneficial owner; and
- (c) Persons authorised by the beneficial owner.

Any person or class of persons who have access to the register of beneficial owners kept at the registered office will be gazetted by the Minister of KPDN through an order published in the Gazette as provided under subsection 60B(9) of the Companies Act 2016.

33. Who can have access to the register of beneficial owners or in short, RBO, lodged with the Registrar?

Under subsection 60B(9) of the Companies Act 2016, the following persons will have access to the beneficial ownership information lodged with the Registrar:

- (a) Law enforcement agencies and competent authorities in carrying out law enforcement activities based on the respective written laws;

- (b) Beneficial owner;
- (c) Persons authorised by the beneficial owner;
- (d) Public authorities; and
- (e) Reporting institutions gazetted under the Companies Act 2016.

Any person or class of persons who have access to the beneficial ownership information lodged with the Registrar will be gazetted by the Minister of KPDN through an order published in the Gazette as provided under subsection 60B(9) of the Companies Act 2016.

34. How to identify beneficial owner(s) of a company which is controlled by a statutory body?

A statutory body is a creature of law and is capable of holding shares in a company. In determining who is the beneficial owner in a company which is controlled by a statutory body, the same approach must be used as if the company were controlled by another body corporate.

Therefore, the individual who exercises ultimate control over the statutory body should be regarded as the beneficial owner of the company. In situation where decisions are made collectively, every board member of the statutory body may be named as beneficial owner.

Nevertheless, the company is advised to take reasonable steps to identify its beneficial owner(s) correctly based on the documents kept by the company such as the constitution, register of members, minutes of meetings or company's resolutions that give control to any individual.

35. If a person is named as a beneficial owner, does that mean that the person is associated with carrying out any illegal activities?

The policy relating to beneficial ownership reporting is intended to assist law enforcement agencies in combatting the misuse of companies as a front for illegal activities and not to associate an individual who has been named as beneficial owner with risks and legal liabilities.

36. When is the enforcement date of the beneficial ownership provisions under the Companies (Amendment) Act 2024?

The enforcement date of the beneficial ownership provisions is effective on 1 April 2024.

37. What should be expected by companies when the new beneficial ownership provisions under the Companies (Amendment) Act 2024 are enforced?

When the new beneficial ownership provisions under the Companies (Amendment) Act 2024 are enforced, companies will be given 3 months period to lodge the latest beneficial ownership information with the Registrar through an online platform. SSM will advise further details in due course.

POLICY 4: ENHANCEMENT OF CORPORATE GOVERNANCE & PRACTICES

38. What are the objectives of amending the Companies Act 2016 from the perspective of corporate governance?

As part of continuous effort to ensure high level of governance among companies are maintained, improvements to several provisions in the Companies Act 2016 are made towards promoting compliance and facilitating the ease of business based on the current needs of the corporate community.

39. What are the main amendments to the Companies Act 2016 that will have major impact to the corporate community?

- (i) Under section 612A, SSM's official website can be used to advertise and publish information in lieu of the statutory requirements to advertise or publish such information in widely circulated newspaper throughout Malaysia. This policy is aimed at overcoming practical issues when the circulation of physical newspapers throughout Malaysia is no longer available as well as towards reducing the high cost of advertising;
- (ii) Under subsections 264(4A) and (4B), the Registrar is empowered to issue guidelines to ensure that the principle of auditors' independence is maintained in relation to the appointment of auditors who have spouses working in the company or group of companies to be audited by the auditor's firm; and
- (iii) Under subsections 433(4D) and (4E), liquidators are required to report their details to the Registrar once their license has been approved by the Accountant General's Department.