

HIGHLIGHTS OF THE COMPANIES (AMENDMENT NO. 2) BILL

1.1 Background

The draft Companies (Amendment No.2) Bill 2004 covers the following:

- Abolishing the concept of par value and authorised share capital;
- Introducing an alternative capital reduction process which does not require court sanction;
- Liberalising the financial assistance restrictions to allow financial assistance to be provided under additional circumstances;
- Allowing share-buyback to be funded out of profits as well as capital where supported by a solvency statement;
- Allowing repurchased shares to be held as treasury shares; and
- Introducing a more effective and efficient statutory form of merger/amalgamation process.

In relation to the 6 areas of reform highlighted above, we set out below the present position in the Companies Act, the proposed changes and the issues raised for public consultation.

1.2 Abolition of Par Value of Shares and Authorised Capital

Currently, all shares issued by a company must have a par value which is the minimum amount of money that shareholders are statutorily required to put into the company. The company is also required to report the registered capital in its Memorandum of Association. The registered capital acts as a pre-planned ceiling on the maximum amount of capital and maximum number of shares the directors can issue. The reason is that the authorised capital gives certainty to shareholders of his ownership and degree of control over the company. However, the law presently allows the company to increase its authorised capital at relative ease, usually with an ordinary resolution. The company is also required to report the increase in its authorised capital to the regulators. The impact of the abolition of authorised capital means that companies are no longer limited by an upper limit on the shares that a company may issue, for a start.

Clause 9 of the Bill abolishes the concept of par value shares. It also provides that the abolition applies to shares issued before the date of amendment as well. This means that upon commencement of the amendment, all companies in Singapore will not have a par value for their shares. The transitional provisions

provide that the outstanding amount in the share premium account and capital redemption reserve becomes part of the company's share capital, and there are limited uses for the amounts standing to the credit of its share premium account immediately before the date of amendment.

As for abolition of authorised capital, Clause 13 of the Bill abolishes the need for a company to report its increase in share capital when it goes beyond the registered capital. However, we have retained during consultation the requirement to report the registered capital in the Memorandum, which will be the share capital that the company has reported that it will be starting with. The company may increase their capital and there is no reporting to the regulators required.

Throughout the Bill, consequential amendments are made to implement the abolition of par value shares and four specific issues are raised for public consultation. The issues raised are –

- *Clause 10: Whether we should impose an additional reporting requirement for consideration unpaid on the shares at the point of allotment?*
- *Clause 11: Should Section 67 be repealed totally or some basic conditions such as authorisation by the articles to allow payment of commissions should be retained?*
- *Clause 24: Is the amendment necessary in view of the fact that the substantial shareholdings are likely to remain unchanged under the new section 83?*
- *Clause 26: Is it necessary to impose the disclosure requirement of consideration unpaid on shares in parallel to clause 10 of the Bill?*

1.3 Reduction of Share Capital Without a Court Order

Currently, Section 73 requires a company to obtain the court's approval before it may reduce its share capital. The reason for court supervision is to ensure that creditors are not prejudiced by this capital reduction. However, the Company Legislation and Regulatory Framework Committee ("CLRFC") took the view that Singapore should introduce an alternative and simplified process of capital reduction. The new Division 3A will allow companies to reduce their share capital without a court order subject to certain conditions, and in particular, if supported by a solvency statement.

The draft Bill makes a distinction between reduction of share capital by public companies and private companies. Public companies, for example, are

subjected to fairly stringent requirements, such as publicity of the proposed reduction. The issues raised for public consultation are:

- *Clause 21: Do you think that the differences in requirements for reduction of share capital for public and private companies are justified? How would these new provisions compare with the current regime which is retained under the new Section 78I in this Bill?*

1.4 Giving of Financial Assistance

A company is generally prohibited from giving financial assistance to third parties to acquire shares in the company. The proposed amendments to Section 76 will allow companies to give financial assistance to third parties if shareholders unanimously agree and the assistance given is less than 10% of the paid up capital. The financial assistance should also be supported by a solvency statement, as in the case of a capital reduction without a court order.

Clause 16 introduces the proposed new sub-sections 76(9A) to (9B) which will set out the conditions under which a company may give financial assistance, and sub-sections (9C) to (9D) contain the safeguards for the interests of the company, its members and its creditors.

1.5 Redemption of Preference Shares Using Capital

Companies are currently allowed to redeem their preference shares out of profits or a fresh issue of shares. The proposed amendment to Section 70 will also allow a company to do so out of capital provided the directors have made a solvency statement.

1.6 Reforming the Share Buyback Regime

Since 1998, share buy-backs by companies have been allowed. The CLRFC considered if share buy-backs should only be funded out of distributable profits. The CLRFC finally recommended that the share buy-backs should be funded out of distributable profits or capital. But if it is the latter, it has to be supported by a declaration of solvency. Please refer to note for 1.9.

Companies will be allowed to buy back shares out of profits or capital provided the company is solvent. The amendments have included a test for solvency which is essentially a combined cash-flow test and an assets-over-liabilities test. You would note that the test is also required for 1.3, 1.4 and 1.5. The issues raised for public consultation are:

- *Clause 19 (relating to Section 76F): Should the solvency test for share buybacks under Section 76F (when the company buys back out of capital*

or profits or a combination of both) be identical to the test in Section 7A?

1.7 Introduction of Treasury Shares

Hitherto, all shares bought back by the company must be cancelled immediately upon re-acquisition by the company. The new Sections 76H-76K will allow the company to hold these re-acquired shares in treasury instead of cancelling them. To prevent any abuse of these treasury shares, the proposed new Section 76J suspends the voting and dividend rights of the treasury shares.

The issues raised for public consultation are:

- *Clause 19 (relating to Section 76L): Do you think the 12 month period is too long? What do you suggest is an appropriate period? We propose that the company should dispose or cancel the shares within one month.*
- *Clause 19 (relating to Section 76J): Is it necessary or desirable to expressly provide for share splits of treasury shares (see Section 76J(5)(b))?*
- *Clause 19 (relating to Section 76K): Do you think that the uses of treasury shares should be expanded further? We have received suggestions for additional uses but we are concerned that there are no accounting standards for additional uses of treasury shares. Are these valid concerns?*
- *Clause 43 (relating to Section 76K): Do you agree with the above restrictions (contained under Section 403) imposed on profits that are payable as dividends to shareholders?*

1.8 Mergers and Amalgamations

The CLRFC noted that the provision for amalgamation of companies under supervision by the court (Section 212) was seldom used in practice as the courts applied this provision restrictively. It recommended adopting a regime for amalgamation of companies without a court order for a more efficient amalgamation process. The new Sections 215A to 215J, based on the New Zealand Companies Act, set out the procedures to be adopted for amalgamation of all types of companies, including holding companies and their subsidiaries. The amalgamation must be supported by two solvency statements from each amalgamating company.

In the first solvency statement (referred to in Section 215I), the directors of each amalgamating company must state that the *amalgamating* company:

- has no ground on which it can be found to be unable to pay its debts; and
- the value of the *amalgamating* company's assets is not less than that of its liabilities.

In the second solvency statement (referred to in Section 215J), the directors of each amalgamating company must state that the *amalgamated* company:

- will be able to pay its debts as they fall due 12 months after the amalgamation; and
- the value of the *amalgamated* company's assets will not be less than that of its liabilities.

The issues raised for public consultation are:

- Clause 39 (relating to proposed Sections 215I to 215J): *Would you agree that the solvency test to be adopted should be consistent with that crafted under Section 7A? If you disagree could you suggest how the solvency test should be constructed?*

1.9 Solvency Test

Almost all the amendments mentioned above require a solvency statement that confirms the solvency status of the company in question. The proposed new Section 7A sets out the matters directors must consider when making a solvency statement referred to in the new Division 3A, Section 76 and Section 70. The solvency tests for share buy-backs and amalgamations (similar to that in Section 7A) are found in Section 76F and Section 215I-J respectively.

The solvency statement requires the directors to declare that:

- the company will be able to pay its debts as they fall due 12 months from the date of the statement; and
- the value of the company's assets will not be less than the value of its liabilities after the transaction.

The issue raised for public consultation is:

- *Clause 5: Do you agree that the solvency test (modelled after the UK Bill 2002) should require the directors to take into account all liabilities including contingent and prospective liabilities?*

Note: The CLRFC had recommended that the transactions above must be supported by a "declaration of solvency". The term used in the draft Bill, however, is a "solvency statement" as defined in Section 7A and Sections 215I-J.