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Our Ref: LS/RLR/Committees/CPC/2020/ACRA/TL/jc/jl

17 August 2020

Accounting and Corporate Regulatory Authority
10 Anson Road
#05-01/15 International Plaza
Singapore 079903

BY EMAIL : ACRA_Public_Consultation@acra.gov.sg

Dear Sirs,

Public Consultation on proposed amendments to the Companies Act

1. We refer to the Accounting and Corporate Regulatory Authority ("ACRA") public consultation on the proposed amendments to the Companies Act ("the Consultation").

2. The Law Society of Singapore's Corporate Practice Committee 2020 ("LSS CPC") has considered the Consultation paper and prepared the enclosed submission in response. The submission is supported by the Council of the Law Society of Singapore.

3. If you have any questions or require further assistance on the matter, please contact Ms Ting Lim, Manager of the Representation and Law Reform Department by email at huiting@lawsoc.org.sg.

4. Thank you.

Yours sincerely,

Ting Lim
Manager, Representation & Law Reform Department
For and on behalf of the Corporate Practice Committee

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17 August 2020

The Law Society of Singapore's Corporate Practice Committee's ("LSS CPC") feedback to Accounting and Corporate Regulatory Authority's Public Consultation Exercise on Amendments to the Companies Act released on 20 July 2020 ("Consultation Exercise")

Defined terms used herein shall have the same meaning as ascribed to the Report of the Companies Act Working Group (or CAWG) dated 15 May 2019.

S/N	Issue	Comments of LSS CPC	Recommendations of LSS CPC
1	**DEMATERIALISATION OF PHYSICAL SHARE CERTIFICATES** **Recommendation 1.2** To facilitate dematerialisation of shares of non-listed companies, ACRA should consider keeping the register of members for non-listed public companies that wish to dematerialise their shares. **Question 1.2**: Would an electronic register of members/shareholders of non-listed public companies, similar to that currently maintained by ACRA for private companies under section 196A be an appropriate approach to facilitate dematerialisation of shares of non-listed companies?	We support dematerialisation of shares as the right move for the CA in the digital economy. However, we do not advocate that it should be mandatory for ACRA fto keep the register of members for non-listed public companies and the latter should have the option to maintain the register of members in physical form at its registered office. There are two reasons: (1) certain non-listed public companies maintain branch register of members outside Singapore to facilitate transfer of shares by overseas members. No stamp duty in Singapore is payable for such transfers. If ACRA maintains the only register of members, the share transfer forms have to be lodged with ACRA and would become subject to stamp fees; and (2) if the register of members kept by ACRA should be modelled after the Electronic Register of Members (EROM) maintained for private companies today and would be subject to public inspection, this would divulge information hitherto not accessible to non-members of the public company, such as particulars of all shareholders	To make it optional and not mandatory for ACRA to keep the register of members for non-listed public companies.

		and their shareholdings on a real-time basis, history of allotments and history of share transfers. This may reveal commercially sensitive information for such companies and make Singapore public companies less attractive as a business vehicle. For completeness of discussion, as of today public companies that lodge annual returns or audited accounts would disclose their shareholders' names and shareholdings in such filing. However, such information is given as of the date of last financial year and might be outdated by the time the information becomes publicly accessible many months later.	
2	**DIGITAL MEETINGS** **Recommendation 1.3** The CA should be amended to introduce an enabling provision that clarifies that unless the constitution provides otherwise, a company may hold general meetings digitally and in more than one location. It may be necessary to amend certain specific provisions in the CA to address any ambiguity as to how shareholders' rights may apply to digital meetings.	Section 180(1) gives every member of a company the right to "attend" and to "speak" on any resolution before a meeting. We are concerned that for a digital meeting, minority shareholders should not face technical barriers (such as need to purchase video-conferencing software) in exercising their statutory rights to attend and speak at the meeting. The CAWG noted that section 392(3) currently already allows members to apply to the Court to invalidate a proceeding (including a general meeting), and this safeguard should continue to apply to digital general meetings. The CAWG also observed that the threshold for invalidation under section 392 that is applied by the Court is a high one and opined that it should remain so in	ACRA shall issue best practice guidelines for companies that wish to convene digital meetings on the minimum standards to be observed to ensure accessibility to small shareholders. If any of the best practice guidelines is not observed, this should give rise to an onus on the company to demonstrate why the meeting should not be invalidated if challenged by a member under section 392(3).

		order to provide greater certainty to companies that intend to hold digital general meetings. It is not uncommon to encounter glitches or IT issues when attempting to use video-conferencing software especially those that are available without a paid subscription. We are concerned that minority shareholders who are less savvy with modern IT may be genuinely disadvantaged when attempting to participate in digital meetings. Hence, the onus should be on the company that wishes to convene a digital meeting to demonstrate that it has a system that readily and inexpensively permit participation by small shareholders in digital meetings. After all, the choice of convening a digital meeting and the selection of the vendor of the video-conferencing solution would typically be made by the directors without consulting small shareholders. The case law behind section 392(3) was created in a different era and we query whether it is equitable to maintain a high threshold for invalidation of a digital meeting.	
3	**Recommendation 1.6** The CA should be amended to make it mandatory for all companies to accept proxy instructions given by electronic means instead of leaving this to be stipulated in the company's constitution.	It would be good to clarify that the new provision does not require acceptance of all proxies submitted by electronic means as this potentially encompasses a wide variety of means in which the proxy is submitted from a duly completed and signed proxy form sent by email to an email or WhatsApp message with information which may not be clear or of dubious origin. It would also be an administrative nightmare if a company does	The CA should be amended to make it a default rule that the board of directors should have discretion whether to accept proxy instructions by specific electronic media or to make rules with a view to ensuring the authenticity or clarity of the proxy instructions.

		not specify the electronic means that is acceptable.	
4	**REVIEW OF FINANCIAL REPORTING REQUIREMENTS** **Recommendation 2.10** The small company audit exemption criteria should be refined by removing the criterion of number of employees from the current small company definition. The CAWG opined both of the following requirements for the immediate past two financial years: (a) total annual revenue not exceeding $10 million; and (b) total assets not exceeding $10 million, should be met in order for a small company to continue to be exempted from audit.	Although it is correct that some businesses could enter into manpower outsourcing arrangements to reduce the number of employees, as a whole, we believe the number of employees of a company is still relevant across many industries (e.g. manufacturing, hospitality and retail operations) as a proxy for the scale of a company's business undertaking. The CAWG noted that it is not easy to verify the number of employees of a company since it is not required to be disclosed in the financial statements. However, in the context of Singapore, CPF and IR8A income tax submission records could be used as documentary evidence of the number of employees of a company. Therefore, we would urge a consideration of the proposal to eliminate the criterion of the number of employees. If ACRA remains of the view that the number of employees should not be considered, then we would advocate that a small company should meet only **either** the revenue test or the total asset test and **not both**. Based on current law, many Singapore investment holding companies that hold assets like real estate or passive investments in securities meet the criteria of being exempted from audit because they have no employees and their revenue do not exceed $10mil. With the proposed revised criteria, as long as their assets	We would urge a consideration of the proposal to eliminate the criterion of the number of employees. In the alternative, since the CAWG has the "aim of promoting a more pro-business environment", we believe making the remaining two criteria a disjunctive test and not a conjunctive test would continue to attract international businesses to use Singapore incorporated companies as their investment holding vehicles.

		holding exceed $10mil, they have to be audited even if they do not generate any revenue.	
5	**Recommendation 2.11** The "small group" concept in the current small company audit exemption should be removed for the purposes of the small company audit exemption. The criteria for the small company audit exemption should continue to apply on a consolidated basis to parent companies.	Under current law, a Singapore company that does not meet the "small company" criteria but belongs to a group that meets the "small group" criteria will be exempted from audit. In practice, this is useful where the Singapore company's assets or revenue comprise loans to, securities in, or income from, related corporations as in a consolidation exercise to prepare the group financial statements, such inter-company transactions are eliminated. Without such a "small group" concept, the individual members of the group that are incorporated in Singapore would have to make an ad-hoc submission to ACRA to be exempted from audit which is a cumbersome process. We do not understand the meaning of the statement: "criteria for the small company audit exemption should continue to apply on a consolidated basis to parent companies". We wish to highlight that a Singapore company might be a subsidiary of a foreign incorporated company and still be exempted from audit under the "small group" concept. If the "small group" company is removed and the CA exempts Singapore holding companies from audit using consolidated financial statements, this concession would not avail Singapore subsidiaries whose holding entities are established outside Singapore since the CA	Again, since the CAWG has the "aim of promoting a more pro-business environment", we would urge a consideration of the proposal to eliminate the "small group" concept.

		cannot apply to non-Singapore incorporated companies on matters like audit requirements.	
6	**Recommendation 2.12** The criteria for the small non-publicly accountable company audit exemption and eligibility to prepare reduced/simplified financial statements should be applied on a "look-through" basis for companies which are trustee-managers of non-listed business trusts, such that the assets and revenue of both the trustee-manager and the business trust are taken into account in the assessment. **Question 2.12a**: Should special criteria such as that in Recommendation 2.12 be applied in order to assess the size of a trustee-manager and its business trust?	The CA does not apply to registered or non-registered business trusts. The CA applies to a Singapore company who acts as a trustee-manager of a business trust but insofar as the CA requires that Singapore company to audit its financial statements, it should require only the proprietary assets of the trustee-manager to be audited and not those assets that are held on trust for the unitholders of the business trust. With the above as the background, we do not understand Recommendation 2.12 as the CA does not impose audit requirements on the business trust.	N.A.
7	**ALTERATION OF SHARE CAPITAL** **Recommendation 5.1** Section 71 should be amended to allow the directors of a company to alter the share capital of the company by increasing its share capital or capitalising its profits, without issuing new shares, and without the need for an ordinary resolution approving the alteration**.**	We welcome the flexibility for a Singapore company to accept capital contribution from a shareholder without issuing any new share. This puts Singapore in the same position as jurisdictions such as Delaware. However, we are concerned that the proposal to allow the company to increase its share capitalisation without a members' ordinary resolution sanctioning it may create unfairness. For some companies established by international fund managers or investors, the constitution or	Modify Recommendation 5.1 by requiring a members' ordinary resolution sanctioning the capital contribution.

		shareholders' agreement may provide that dividends shall be distributed pro rata based on the amount of capital contributed by each shareholder, and not based on the same dividend amount per share; or certain class of shares may be given a liquidation preference based on the amount of capital paid up on that class of shares in priority to other classes. In these instances, the constitution or shareholders' agreement will also provide that the company may not issue more shares (in order to increase the capital contributed by a controlling shareholder) without undertaking a rights issue or obtain majority shareholders' approval. If this Recommendation is implemented, such carefully calibrated rights would be side-stepped and unfairness may result.	
8	**REVIEW OF FINANCIAL ASSISTANCE PROHIBITION AND EXCEPTIONS** **Recommendation 5.5** The CA should be amended to introduce an exception to the prohibition against financial assistance where a company takes any of the following actions to implement a take-over with the intention to take a company private: (a) seeking the consent or waiver of any person under or in connection with (or any amendment to) existing contractual arrangements to which the company is a party; or (b) making payment of any fees and expenses, incurred in good faith and in the ordinary course of commercial dealing, to	We support this Recommendation.	N.A.

	third parties (including financial institutions).		
9	**REVIEW OF FINANCIAL ASSISTANCE PROHIBITION AND EXCEPTIONS** **Recommendation 5.7** Debt refinancing should be an exception to the prohibition against financial assistance under section 76(1). **Question 5.7**: The exception is proposed to be drafted to provide that the refinancing or repayment of any existing debt owed by the company (including the refinancing or redemption of the company's debt securities) where such existing debt has become due and payable as a consequence of the acquisition of shares in that company by any person, would not constitute financial assistance. Is the proposed scope of this exception appropriate?	Most practitioners would not have thought that the refinancing of existing debt or early repayment of existing debt would constitute financial assistance by a company. We would not have objected to codifying the above legal position if it serves to clarify whatever doubt that remains on this issue. However, if the codified exception applies only to refinancing or repayment of existing debt that has become **due and payable** (as suggested by Question 5.7), then it raises the question that **early** refinancing or prepayment of debt that is **not yet due** may in certain circumstances constitute financial assistance. That would completely go against the grain of the prevailing legal opinion.	It is very common for listed companies to refinance their debt early in order to take advantage of lower interest rates or just to demonstrate to investors that they have strong credit strength. It would be a disservice for the implementation of this Recommendation to create a doubt on a widely held position. We recommend dropping this Recommendation.
ACRA'S PROPOSED AMENDMENTS TO THE COMPANIES ACT AND SUBSIDIARY LEGISLATION			
10	**STREAMLINE AND CLARIFY FINANCIAL REPORTING REQUIREMENTS FOR COMPANIES AND FOREIGN COMPANIES** Section 201(12)	It would be good if ACRA gives guidance on how it exercises its discretion.	N.A.

	The financial statements or consolidated financial statements of a company need not comply with any requirement of the Accounting Standards, if the company has obtained the approval of the Registrar to such non-compliance (section 201(12)). ACRA proposes to grant the Registrar the power to exempt a company from compliance with any or all of the requirements in the Accounting Standards and require the company to comply with other accounting standards. The proposed amendment will provide clarity on the scope of the Registrar's and Minister's powers in relation to exemptions from any or all of the requirements of the Accounting Standards and substitution with other accounting standards.		
11	**REGISTRAR'S POWER TO UPDATE THE REGISTER ON ANY CHANGE TO THE APPOINTMENTS OF DIRECTORS AND SECRETARIES** Section 173 and 173A The Registrar keeps a register of the company's directors and a register of the company's secretaries (sections 173(1)(a) and 173(1)(c)). Companies are required to notify the Registrar of any change in the	ACRA's proposal should go further than granting the Registrar the power to update the registers on changes in the appointments of directors and secretaries at his discretion. Directors' appointments are dependent on the passing of resolutions by the board or the shareholders. However, we have observed that the online filing system gives directors so appointed great latitude to change their mind after such an appointment because they are required to log in to the system to confirm their	If the current practical veto is given to directors, we suggest that section 173A should place an obligation on such directors to confirm their appointment and it is clarified that once appointed, they are under that obligation. While these directors may resign after their appointment, that should not detract from their duty to notify ACRA of their appointment and subsequent resignation. There should be appropriate fines for such directors and an appropriate remedy for companies

	appointment of any director or secretary (section 173A(1)(b)(i)). ACRA proposes to grant the Registrar the power to update the registers on changes in the appointments of directors and secretaries at his discretion. The proposed amendment will enhance the accuracy of information maintained in these registers. The current CA does not provide that (a) the Registrar can amend these registers upon being notified of changes in appointments; or (b) the Registrar has the discretion not to amend the registers on changes in appointments e.g. after considering conflicting information from other government agencies.	appointment. If not, the system would not be updated.	which are stymied by the online system and errant directors.
12	**CRITERIA FOR RE-DOMICILIATION** Regulation 7 of the Companies (Transfer of Registration) Regulations 2017 A foreign corporate entity must satisfy any two of the following criteria before it can re-domicile to Singapore: (a) the value of its total assets exceeds S$10 million; (b) its annual revenue exceeds S$10 million;	Same comments as #4 above. While we appreciate the congruency of mirroring the criteria of small company audit exemption, one would have thought that since the legislative intention behind the CA amendments is the "aim to create a more pro-business environment", the amendments should not result in less international corporations being able to qualify for redomiciliation to Singapore. The revised criteria means the following foreign corporations cannot qualify:	We recommend not making any amendment to Regulation 7.

	(c) it has more than 50 employees. The above criteria mirror the criteria of small company for audit exemption under the CA. ACRA proposes to remove the criterion of more than 50 employees.	(a) those with more than 50 employees and substantial intellectual property assets in R&D stage that does not generate any revenue; and (b) those with more than 50 employees and infrastructure assets under development that does not generate any revenue. Surely the above examples are corporations where the Singapore government would like to encourage redomiciliation to bring more economic benefits to Singapore.	