LEGAL UPDATE

LEGISLATION UPDATE

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IMPENDING PROVISIONS IN THE SINGAPORE COMPANIES ACT RELATING TO DUTIES OF CHIEF EXECUTIVE OFFICERS

Background to the Companies (Amendment) Act 2014

In October 2007, a Steering Committee was set up by the Ministry of Finance to carry out a fundamental review of the existing Singapore Companies Act (Chapter 50) ("**Companies Act**"). The review was aimed at reducing regulatory burden on companies, providing for greater flexibility in business and developing a corporate regulatory framework that is both efficient and transparent. These changes are intended to support Singapore's growth as an international business and investment hub.

During the review process, the Ministry of Finance and the Accounting and Corporate Regulatory Authority of Singapore ("**ACRA**") conducted two public consultations in May 2013 and October 2013 respectively, inviting feedback on the draft Companies (Amendment) Bill.

In September 2014, the review of the feedback received during the two rounds of public consultation was completed and the Companies (Amendment) Act 2014 ("**Amendment Act**") was passed in Parliament on 8 October 2014. These amendments have been gazetted on 1 December 2014 but no date has yet been fixed for its coming into force, although they are widely expected to come into force in the second quarter of 2015.

Implementations relating to Chief Executive Officers

This update highlights the provisions of the Amendment Act which set out the role and duties of a Chief Executive Officer ("**CEO**"). This update is not meant to be exhaustive and specific legal advice should be sought in each case. In this update, the male pronoun is used in respect of a CEO purely for the sake of convenience.

CEO defined in the Companies Act

For the first time since the inception of the Companies Act, a formal definition for the term "Chief Executive Officer" is introduced via the Amendment Act. The Amendment Act provides that a CEO, in relation to a company, means any one or more persons, by whatever name described, who:

(a) is in direct employment of, or acting for or by arrangement with, the company; and

(b) is principally responsible for the management and conduct of the business of the company, or part of the business of the company, as the case may be.

This definition of CEO replaces and clarifies the more traditional concept of "manager" used in the Companies Act to refer to "the principal executive officer of the company for the time being by whatever name called and whether or not he is a director", and primarily defines the CEO by his executive role in the management and conduct of the business of the company. The definition of CEO further makes clear that it is possible for a company to be treated as having "one or more" CEOs at any given time regardless of the title and position given to such persons. A CEO need not necessarily be a director or managing director of the company.

Introduction of disclosure requirements for CEOs of non-listed Singapore companies

Prior to the Amendment Act coming into force, the CEO of a Singapore listed company or a foreign

corporation with primary listing on SGX-ST ("**Listed Corporation**") is required to disclose certain shareholding interests in the Listed Corporation in which he serves as CEO. When the Amendment Act comes into effect, this disclosure requirement will be extended to CEOs of non-listed Singapore companies as well.

Furthermore, prior to the Amendment Act, a CEO (who is not also a director) of a Singapore company, whether listed or unlisted, is not statutorily required to disclose to the company any conflicts of interests or his interests in transactions or proposed transactions. When the Amendment Act comes into effect, CEOs of all Singapore companies will be statutorily obligated to disclose these matters.

The impending and increased disclosure requirements for a CEO reflects the reality of influence that a CEO has over company decisions and the need to further strengthen corporate governance in Singapore.

These disclosures are elaborated in sub-paragraphs (a) to (c) below.

(a) Shareholding interests in the company and personal information

The Amendment Act provides that every CEO of a non-listed Singapore company shall give notice in writing to the company:

(i) of particulars relating to shares, debentures, rights, options and contracts as are necessary for the purposes of compliance by the company with the relevant provisions of the revised Companies Act relating to the keeping of share registers (to be elaborated below);

(ii) of any change in particulars referred to in paragraph (i) above; and

(iii) of such events and matters affecting or relating to himself as are necessary for the purposes of compliance by the company with the relevant provisions of the revised Companies Act relating to the keeping of register of CEOs (to be elaborated below).

For the purposes of the disclosure of shareholding interests, the Amendment Act provides that:

(i) the CEO of a company shall be deemed to hold or have an interest or a right in or over any shares or debentures which his spouse or his child of less than 18 years of age holds or has an interest in; and

(ii) any contract, assignment or right of subscription shall be deemed to have been entered into or exercised or made by, or a grant shall be deemed as having been made to, the CEO if they are entered into, exercised or made by, or a grant is made to, the CEO's spouse or child below the age of 18 years.

The position in respect of a CEO (who is not also a director) of a Listed Corporation is slightly different. Pursuant to the Securities and Futures Act (Chapter 289) ("**SFA**"), a CEO (who is not also a director) of a Listed Corporation shall give notice in writing to the Listed Corporation of the particulars of his interests, and changes in interests, in:

(i) shares and debentures in the Listed Corporation;

(ii) rights or options (together with any other person's rights or options, if applicable) in respect of the acquisition or disposal of shares in or debentures of the Listed Corporation;

(iii) contracts which entitle him a right to call for or make delivery of shares in the Listed Corporation; and

(iv) other prescribed securities.

For the purposes of disclosure under the SFA with respect to a Listed Corporation:

(i) its CEO is deemed to have an interest over any securities which his spouse, or his children, adopted children or step-children below the age of 21 years hold or have an interest in; and

(ii) any contract, assignment or right of subscription shall be deemed to have been entered into or exercised or made by, or a grant shall be deemed as having

been made to, the CEO if they are entered into, exercised or made by, or a grant is made to, the CEO's spouse, or children, adopted children or step-children below the age of 21 years.

Interestingly, under the SFA, the interests of, and contracts entered into by, a CEO's child under 21 years are deemed to be the interests of and contracts entered into by the CEO of a Listed Corporation. In contrast, under the Amendment Act, the interests of, and contracts entered into by, a CEO's child under 18 years are deemed to be the interests of and contracts entered into by the CEO of a non-listed Singapore company.

(b) Interest in transactions or proposed transactions

Generally, the Amendment Act provides that every CEO of a Singapore company who is in any way, whether directly or indirectly, interested in a transaction or proposed transaction with the company shall as soon as is practicable after the relevant facts have come to his knowledge:

(i) declare the nature of his interest at a meeting of the directors of a company; or

(ii) send a written notice to the company containing details on the nature, character and extent of his interest in the transaction or proposed transaction with the company. This written notice is to be given as soon as is practicable after the date on which he became a CEO or, if already a CEO, the date on which he became, directly or indirectly, interested in the transaction or proposed transaction.

The Amendment Act states that unless the Constitution of the company provides otherwise, a CEO shall not be deemed to be interested in any transaction or proposed transaction by reason only that:

(i) he has guaranteed or joined in guaranteeing any loan to the company; or

(ii) the transaction or proposed transaction is entered into between the company and its related corporation, the latter of which he is also a CEO.

(c) Conflicts of interest

The Amendment Act further provides that every CEO of a company who holds any office or possesses any property whereby, whether directly or indirectly, any duty or interest might be created in conflict with his duties or interests as CEO must:

(i) declare at a meeting of the directors of the company the fact and the nature, character and extent of the conflict; or

(ii) send a written notice to the company setting out the fact and the nature, character and extent of the conflict. This written notice is to be given as soon as is practicable after the date on which he became a CEO or, if already a CEO, after he commenced to hold the office or to possess the property.

For the purposes of disclosure of interest in transactions and proposed transactions (as discussed in sub-paragraph (b) above) and conflicts of interest (as discussed in sub-paragraph (c) above), the following points should be noted:

(i) These new disclosure requirements are generally applicable to CEOs of all Singapore companies, regardless of whether such companies are listed or unlisted.

(ii) An interest of a member of the CEO's family, which includes the CEO's spouse, children, adopted children and stepchildren, must be treated as an interest of the CEO.

(iii) The Amendment Act provides that the directors of a company must permit a CEO of the company who is not a director to attend a meeting of the board of directors to make a declaration for the purposes of complying with these disclosures. In lieu of making a declaration at a meeting of the board of directors, a CEO may opt to send a written notice to the company as outlined above.

Differences in disclosure obligations between CEOs and directors

The statutory disclosure requirements for CEOs differ from those applicable to directors of Singapore companies, particularly in the disclosure of shareholding interests. Some of these differences are highlighted below.

Firstly, directors of Singapore companies (both listed and unlisted) are required to disclose participatory interests, but CEOs of Singapore companies and CEOs and directors of foreign corporations are generally not required to disclose participatory interests. Participatory interests refer to units in collective investment schemes (such as REITs and public unit trusts).

Secondly, the CEO of a Singapore company or the CEO or director of a foreign corporation is required to disclose his shareholding interests in respect of that Singapore company or foreign corporation (as the case may be), whereas the director of a Singapore company (both listed and unlisted) is generally required to disclose his shareholding interests in the Singapore company *and its related corporations*.

Obligations on the company to keep register of shareholding interests of CEO

New provisions under the Amendment Act mandate the keeping of a company register showing with respect to each CEO of a company particulars of:

(a) shares in that company of which the CEO is the registered holder or in which he has an interest and the nature and extent of that interest;

(b) debentures of the company which are held by the CEO or in which he has an interest and the nature and extent of that interest;

(c) rights or options of the CEO or those of the CEO and another person or other persons in respect of the acquisition or disposal of shares in the company; and

(d) contracts to which the CEO is a party or under which he is entitled to a benefit, being contracts under which a person has a right to call for or to make delivery of shares in the company.

Obligations on the company to keep register of CEOs

The Amendment Act mandates the keeping of a register of the company's CEO, modifying the existing provision which requires a register of managers to be lodged with the Registrar. In particular, the new provision explicitly states that the register must contain the full name, residential address (or, at the CEO's option, an alternate address), nationality, identification, date of appointment and date of cessation of appointment of its CEOs and these matters will be matters of public record accessible on the ACRA register. The Amendment Act sets out the duty of a company to provide information on its CEOs and the corresponding duty of CEOs to provide the requisite information to the company.

Another related amendment pursuant to the Amendment Act is the protection accorded to the residential address of CEOs (alongside those of directors or company secretaries). A director, CEO or company secretary will be allowed to enter an alternate address in the registers of directors, CEOs or secretaries instead of his residential address. The amendments provide that this alternate address must be one at which the individual can be located. Under this arrangement, the Registrar will maintain a confidential list of residential addresses of those individuals who choose to disclose their alternate address on the public ACRA register. The Amendment Act also reserves the right of the Registrar to replace the alternate address with the residential address in limited circumstances (e.g. if the individual cannot be located at the alternate address).

STANDARD OF CARE OF CEOS

Currently, a director of a company has a statutory duty to act honestly and use reasonable diligence in the discharge of the duties of his office at all times. The Steering Committee's recommendation to apply such standards of care to CEOs was ultimately not adopted by the Ministry of Finance. In rejecting the recommendation of the Steering Committee, the Ministry of Finance highlighted that

the CEO is usually a director of the company in practice, and even if not formally appointed, the CEO may be considered a de facto director and thus be subject to the statutory duty.

Besides the statutory duty outlined above, directors of a company also owe fiduciary duties to the company at common law. This includes the duty to act in good faith in the company's best interests, having regard to the interests of its various stakeholders such as members and employees, the duty to avoid putting himself in a position of conflict with the company, the duty to act for a proper purpose and the duty not to fetter his discretion (for instance, by contracting with a third party to vote in a particular way at board meetings).

In addition, at common law, the directors of a company owe the duty of skill, care and diligence in the performance of their role as directors. The extent of the duty of skill varies depending on the circumstances, the size and the business of the particular company and the experience or skills that the director held himself out to possess in support of his appointment to the office. The standard of care and diligence expected of a director is objective – a director must exercise the same degree of care and diligence as a reasonable director found in his position.

Under Singapore and English law, the extent to which such common law duties apply to non-director CEOs of a company appears unclear. In contrast, the Canadian Supreme Court has endorsed the position that the common law duties of directors applied equally to individuals acting in a senior management capacity. In Australia, the fiduciary and other duties of corporate officers have been significantly broadened by statute, beginning with the Australian Companies Act 1981 which extended the duty of honesty and diligence to executive officers of a company who are not directors.

In addition, a fiduciary relationship could arise out of the specific terms of a CEO's contract of employment and the particular duties and responsibilities undertaken by him.

EXECUTIVE SUMMARY

The Amendment Act sets out specific statutory provisions relating to CEOs, their rights and obligations, as well as a company's concomitant duty to keep public records of information relating to its CEOs. Under the Amendment Act and the SFA, a CEO will generally be required to disclose his and his family members' interest in securities of the company (but not of the company's related corporations), interests in transactions or proposed transactions with the company, and conflicts of interest with his duties as CEO arising from any other office or property held by him. The Amendment Act brings the Companies Act in line with the framework adopted for CEOs of public listed companies in Singapore and further strengthens the corporate governance regime in Singapore.

If you have any questions or comments on this article, please contact:

Ron Cheng
Director, Corporate & Finance
T: +65 6531 2230
E: ron.cheng@drewnapier.com

Ron Cheng is a Director with the Corporate & Finance Department of Drew & Napier LLC. Ron has practised corporate and commercial law with leading law firms in Singapore and Australia.

Ron's practice areas include mergers and acquisitions, corporate finance, and funds. Ron has advised listed and unlisted companies, banks, consortiums and individuals on a range of issues involving investments in Singapore.

Ron graduated from the National University of Singapore in 2002 with Honours. He is an Advocate & Solicitor of Singapore, a Solicitor of England & Wales and a Barrister & Solicitor of Victoria.

Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733
T : +65 9726 0573 (After Hours)
F : +65 6535 4906