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Upcoming Changes to Criteria for Computing 90% Threshold for Compulsory Acquisition

Introduction

On 18 April 2023, the [Companies, Business Trusts and Other Bodies \(Miscellaneous Amendments\) Bill 2023](#) ("**Bill**") was tabled for first reading in Parliament, and is expected to be tabled for second reading in May 2023. Among other key changes, the Bill seeks to revise the exclusion criteria for the computation of the 90% threshold requirement for compulsory acquisition under section 215 of the Companies Act 1967 ("**CA**").

The compulsory acquisition provision under section 215 of the CA allows an acquiror ("**acquiror**") in a takeover offer who has acquired a very substantial number of shares in the target company (the "**target company**") to compulsorily acquire the shares of the minority dissenting shareholders. This allows the acquiror to convert the target company into a wholly-owned subsidiary, an important right if the objective of the takeover is to delist the target company.

Section 215 of the CA provides that the acquiror is entitled to exercise the right to compulsorily acquire the shares of any dissenting shareholders in the target company when the takeover offer for all the shares in the target company has been approved by shareholders who hold at least 90% of the shares of the target company ("**90% threshold requirement**").

Currently, shares held by the following persons on the date of the offer are excluded when computing the 90% threshold requirement:

- (a) the acquiror;
- (b) a nominee on behalf of the acquiror;
- (c) a related corporation of the acquiror;
- (d) a nominee of the related corporation of the acquiror; and
- (e) the target company (holding such shares as treasury shares).

The proposed amendment to section 215 of the CA will expand the scope of shareholders whose shares will be excluded from the computation of the 90% threshold requirement to, in broad terms, also cover shares owned by related parties who are controlled by the acquiror and shares owned by related parties who control the acquiror (as elaborated further below).

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This Update covers (a) the background to the proposed amendment to section 215 of the CA; and (b) the proposed amended 90% threshold requirement.

Impetus for Change

In January 2018, the Accounting and Corporate Regulatory Authority ("**ACRA**") set up the Companies Act Working Group ("**CAWG**") to review several areas of the CA to ensure that Singapore's corporate laws and regulatory framework remain competitive.

The "[Report of the Companies Act Working Group](#)" ("**Report**") contained, among others, a recommendation to review the threshold for the compulsory acquisition of shares under section 215 of the CA and proposed a revised exclusion criteria for the computation of the 90% threshold requirement. A public consultation exercise, titled "[Public Consultation Paper on Proposed Amendments to Companies Act](#)" ("**Consultation**"), ran from 20 July 2020 to 17 August 2020 and sought feedback on, among other matters, the Report's proposed revised exclusion criteria for the computation of the 90% threshold requirement.

By way of background, concerns had been voiced, by academics, lawyers and others, that the limited exclusions under section 215 of the CA enabled the circumvention of the 90% threshold requirement, diluted the protection afforded to minority shareholders, and created different rules depending on whether the acquiror was a body corporate or an individual. Notably, CAWG's Report raised that there had been instances where acquirors who already held substantial shares in the target company had taken advantage of the limited scope of the section 215 exclusions to satisfy the 90% threshold requirement more easily.

CAWG gave the example of an individual who is a controlling shareholder of a target company setting up a special purpose vehicle to make an offer for the shares of the target company. The shares held by the controlling shareholder could be counted towards the computation of the 90% threshold requirement, even though the acquiror controlled the special purpose vehicle. The controlling shareholder may also control other body corporates which hold shares in the target company, and these shares would also be counted towards meeting the 90% threshold requirement.

This would be in contrast to the situation whereby if the controlling shareholder makes the offer in his or her own capacity. In that scenario, the shares held by the controlling shareholder would not be counted towards the computation of the 90% threshold requirement, which makes it more difficult for the controlling shareholder to satisfy the 90% threshold requirement.

In its [Response](#) to the Consultation, ACRA and the Ministry of Finance accepted the majority of CAWG's proposals regarding the revised criteria for the computation of the 90% threshold requirement, which will be in line with similar concepts in the CA and the Singapore Code on Take-Overs and Mergers.

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Proposed 90% Threshold Requirement

The Bill is drafted with reference to the feedback received in response to the Consultation and expands the scope of the exclusions under section 215 of the CA. Under the Bill, the shares held or acquired by the following persons will also be excluded when computing the 90% threshold:

- (a) a person who is accustomed or is under an obligation whether formal or informal to act in accordance with the directions, instructions or wishes of the acquiror in respect of the target company;
- (b) the acquiror's spouse, parent, brother, sister, son, adopted son, stepson, daughter, adopted daughter or stepdaughter;
- (c) a person whose directions, instructions or wishes the acquiror is accustomed or is under an obligation whether formal or informal to act in accordance with, in respect of the target company; and
- (d) a body corporate that is "controlled" by the acquiror or a person mentioned in paragraphs (a), (b) and (c) above ("**Excluded Persons**"). A body corporate is "controlled" by the acquiror or Excluded Persons if: (i) the acquiror or Excluded Persons is entitled to exercise or control the exercise of not less than 50% of the voting power in the body corporate or such percentage of the voting power in the body corporate as may be prescribed, whichever is lower; or (ii) the body corporate is, or a majority of its directors are, accustomed or under an obligation whether formal or informal to act in accordance with the directions, instructions or wishes of the acquiror or Excluded Persons.

At present, there is no indication as to when the amendments to section 215 of the CA will take effect.

Concluding Words

The proposed amendments to section 215 of the CA in the Bill strike a fair balance between affording sufficient protection to minority shareholders by addressing the discrepancy between the rules that apply to offers made by individuals and body corporates, whilst ensuring the amendments to section 215 of the CA do not make it overly stringent or unduly onerous for companies to restructure or for acquirers to obtain full ownership for the target company.

If you have any queries on the proposed amendments to section 215 of the CA, or any other related matter, please feel free to contact our team members below who will be happy to assist.

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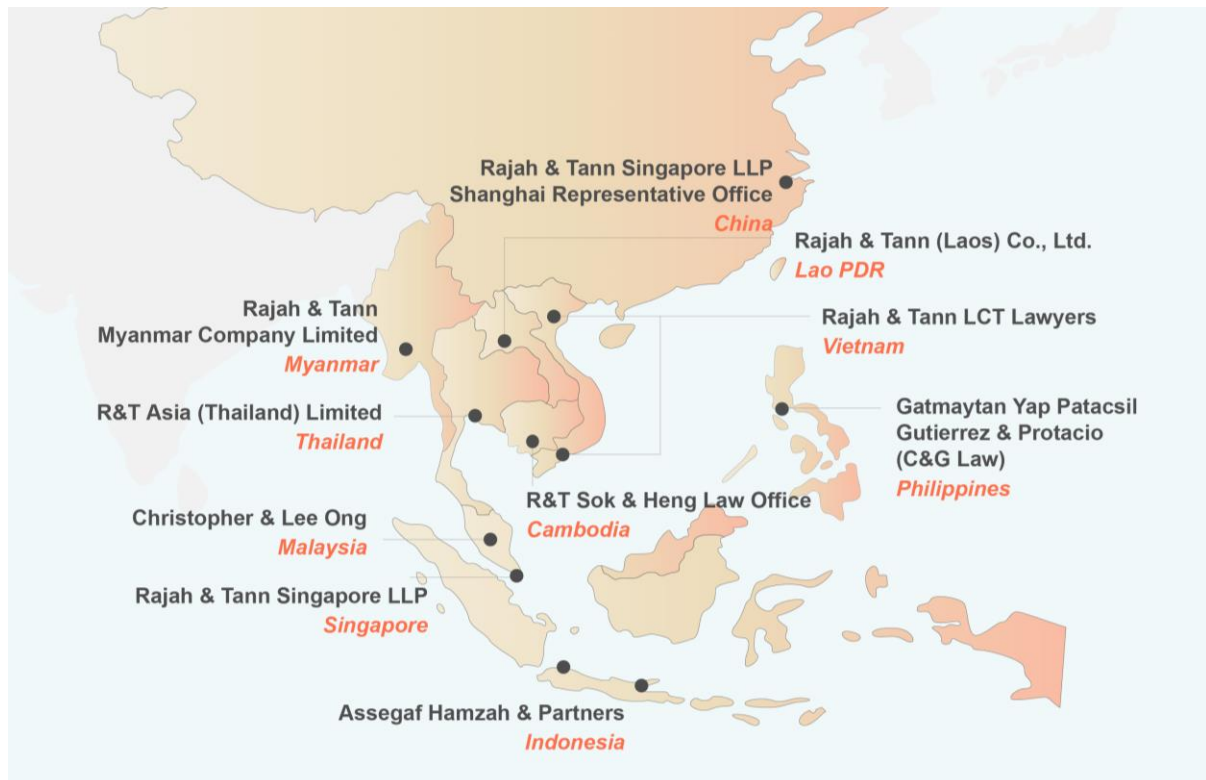
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