COMPANIES ACT 2016 – FREQUENTLY ASKED QUESTIONS

(updated on 4 August 2017)

A. ENFORCEMENT DATE OF THE COMPANIES ACT 2016 AND TRANSITIONAL ISSUES

1. Please clarify if the entire Companies Act 2016 will be effected on 31 January 2017 or only the six services in MyCoid 2016 will be effected on 31 January 2017?

Answer:

Once enforced on 31 January 2017, all provisions in the Companies Act 2016 will take effect except section 241 and Division 8 of Part III. The six services under MyCoID is to facilitate the incorporation of companies under the new Act and related matters.

2. What is the procedure for filing Annual Returns for companies having AGMs prior to the commencement of the Companies Act 2016?

Answer:

(a) For companies having AGM before 31 January 2017, the companies are required to submit the AR in accordance with the requirements under the Companies Act 1965.

(b) With the exception of companies having the anniversary of the incorporation date on 31 January 2017, companies with anniversary of incorporation in January 2017 are not required to submit the Annual Return in 2017 as the Companies Act 2016 has yet to take effect. Such companies' first submission of Annual Return in compliance with the new Act will only happen in 2018.

3. With the decoupling of Financial Statements and Annual Returns submission, what will happen to the Financial Statements which have not been finalized and filed to Companies Commission Malaysia for previous years?

Answer:

Companies are still required to fully comply with the provisions under section 169 of the Companies Act 1965 in line with the transitional provision under subsection 620(4) of the Companies Act 2016.

B. CONSTITUTION (MEMORANDUM & ARTICLES OF ASSOCIATION)

1. What happens to existing companies with memorandum & articles of association which were incorporated under Companies Act 1965?

Answer:

Under section 619(3) of the Companies Act 2016, for existing companies already registered under the previous law, their M&A remains valid and enforceable under the Companies Act 2016, unless otherwise resolved by the company. The company may decide whether to revoke entirely the Constitution or amend certain clauses.

If the existing company decides to revoke the existing M&A and NOT to have a specific constitution, the company must pass a resolution to that effect. In that scenario, under section 31(3) of the Companies Act 2016, the company, each director and member shall have the rights, powers, duties and obligations as set out in the Companies Act 2016.

Similarly, a company must also pass a resolution to amend any part of its constitution should the company wish to harmonise its constitution with the provisions of the Companies Act 2016. For example, a private company may want to amend provisions relating to minimum directorships from current 2 to 1.

2. Since M&A is optional, if an existing public company intends to do away it's M&A, what is the procedure? Is shareholders' approval required? To notify SSM and other regulators such as BNM for FI?

Answer:

Except for a company limited by guarantee, a public company has the option of whether to have a constitution or not. As such, in cases where an existing public company (other than a company limited by guarantee) opts to do away with its constitution, it must obtain approval from its shareholders.

The company is required to notify SSM of its decision. It is advisable for public companies which are subject to the requirements of other written laws

to observe such requirements, including the resolution for doing away with the constitution or informing the respective regulators/authorities as the case may be.

3. With no constitution how can the public be assured when dealing with companies. Companies can start new businesses anytime.

Answer:

Although a company is not required to have a constitution, it is still required to notify the Registrar of its nature of business or when there is a change to the company's nature of business. This information will be publicly available.

4. Since object clauses are now less significant, can we abolish the Memorandum of Association and adopt only the Articles of Association?

Answer:

Yes, a company may adopt partially of its existing Memorandum of Association or Articles of Association as its constitution. Such adoption must be approved by the members.

5. What is the procedure applicable for existing companies to contract out from its Memorandum and Articles of Association?

Answer:

Under the general transitional provisions (section 619(3)) existing companies may contract out from its Memorandum and Articles of Association by passing a resolution to that effect.

6. If a company is incorporated without a constitution, how is the majority of signatories to a resolution being determined?

Answer:

In cases where a company does not a constitution, the company may rely on the following:

(a) Passing a resolution of members/shareholders – sections 290 to 296; and

(b) Passing a resolution of board – paragraphs 9-12 of the Third Schedule of the Companies Act 2016.

7. If a company opted to adopt a constitution, does the constitution need to be lodged?

Answer:

Yes, the constitution must be lodged with the Registrar. Similarly, any amendment/alteration to the constitution must also be lodged.

8. If a company opts to have constitution post incorporation, does it need to be stamped? Alternatively, if a company adopts a constitution for the very first time in any time during the life of a company, do we need to stamp the constitution at least once?

Answer:

A company which opts to adopt a constitution will need to stamp the constitution. The e-stamping service is available through the MyCoID 2016 Portal.

9. Can a company pursuant to section 36 amend, abolish or alter its constitution, all under a single resolution? *(updated on 9 June 2017)*

Answer:

A company must pass a separate resolution each, for the following exercise:

(a) amend its constitution;
(b) abolish its constitution; or
(c) alter its M&A or constitution by simultaneously replacing them entirely with a new constitution.

10. Can the date of adoption differ from the date of resolution for the purpose of adopting a constitution under section 32? *(updated on 9 June 2017)*

Answer:

The date of adoption shall be the date of resolution. Any dates other than the date of resolution will be disregarded.

11. What is the procedure if a company intends to abolish its existing M&A and will only adopt a new constitution at a later date? *(updated on 9 June 2017)*

Answer:

The company is required to pass a resolution to abolish the M&A pursuant to section 36. Once the company is ready to adopt a new constitution, it must then pass a resolution under section 32. The date of adoption shall be the date of resolution.

12. Does the company need to stamp its new constitution:

(i) if the company adopts a new constitution after it has abolished its existing M&A; or

(ii) if the company replaces simultaneously its existing M&A with an entirely new constitution? *(updated on 19 June 2017)*

Answer:

Unless the company intends to replace simultaneously its existing M&A to an entirely new constitution, the company needs to stamp the new constitution upon its adoption.

C. INCORPORATION

1. Can a single member/single director company be incorporated as a public company?

Answer:

No, a single member/single director company can only be incorporated as a private company. Although a public company can be incorporated with only a single member, the minimum requirement for directors of a public company is two.

2. Can a single member/director can also be the secretary of the company?

Answer:

Yes, a person who is a single director (who is also the single member) can act as the secretary of the company. However, the Companies Act 2016 prohibits acts in dual capacity i.e. where the act is required to be done by

both a director and a secretary, that act must be executed by two different persons.

3. Under the new Act can a foreigner in Malaysia i.e non-citizens /non-residents be allowed to form a company as sole shareholder/director?

Answer:

A foreigner can form a company as the sole shareholder. However, if he also wants to be the sole director of the company, he has to fulfil the requirement under section 196(4) Companies Act 2016, in that he must ordinarily reside in Malaysia, by having a principal place of residence in Malaysia.

4. Can we incorporate a company by single corporate body since the new Companies Act 2016 allows for a single member and director?

Answer:

Yes.

5. For directorship under the new Companies Act, why does the residential status still being required?

Answer:

Under the Companies Act 2016, section 196(4) provides the requirement for a director that he must ordinarily reside in Malaysia by having a principal place of residence in Malaysia. This requirement is only applicable to the minimum number of directors (in the case of a private company, at least one. In the case of a public company, at least two).

6. Can companies switch between having a single director to multiple directors and back again anytime they like?

Answer:

Yes, provided there are no restrictions as contained in the constitution of the company and the follow the requirements as stipulated in the Companies Act 2016.

7. What will happened to a company if a single director who is also the single shareholder passed away?

Answer:

In the event a single director who is also the single director passed away, the company secretary has the duty under section 209(3) to call a meeting of next of kin for the purposes of appointing a new director. If the next of kin failed to appoint a director within 6 months of the death of the director, the Registrar may direct the company to be struck off the register.

8. What is the definition of "next of kin" referred to under section 209(3)?

Answer:

The "next of kin" referred to under section 209(3) is not defined in the Companies Act 2016. However, for the purposes of the section, a Practice Note will be issued to address the definition.

9. What are the differences between a private limited company, sole proprietor and limited liabilities to run a business?

Answer:

Besides limited liability status, a company is required to fully comply with the provisions of the Companies Act 2016. The Companies Act provides a more structured approach which codifying the requirements of establishing, managing and dissolving a company. Such requirements include the keeping, preparing and auditing of its financial statements and other corporate governance provisions (disclosures, rules of conflict, reporting, etc.) contained in the Companies Act 2016.

Therefore, running a business as a company can be said to be more credible because of such assurance which is required under the law.

10. The Companies Act 2016 introduces a super form for incorporation. What is actually the super form?

Answer:

The super form is an electronic template which will replace the various form currently required for incorporation process (i.e. Form 6, Form 48A and M&A under the previous Companies Act 1965). The form is accessible through the MyCoID 2016 Portal.

Section 14 of the Companies Act 2016 provides for the incorporation process. Amongst others, a person is required to provide a set of information as follows:

☐ Name of proposed company;

☐ Status of private or public company;

☐ Nature of business;

☐ Proposed registered address; and

☐ Details of the proposed directors, members & company secretary.

11. Can a company submit the Memorandum & Articles of Association (M&A) at the point of incorporation?

Answer:

In general, a company is only allowed to submit its Constitution after incorporation. The company may adopt a Constitution by way of a special resolution and lodge the Constitution with SSM within 30 days after it is adopted by the company.

Under section 38 of the Companies Act 2016, a company limited by guarantee ('CLBG') must submit its Constitution at the point of incorporation.

12. Can a company secretary be appointed at the point of incorporation?

Answer:

The appointment of a company secretary at the point of incorporation is optional. Under section 236 of the Companies Act 2016, the Board must appoint a company secretary within 30 days from the date of incorporation of a company.

D. <u>DOCUMENTS TO BE KEPT</u>

1. When is it required to lodge the form under section 47(2) of the Companies Act 2016?

Answer:

There is no requirement to lodge the form under section 47(2) for any changes made prior to the commencement of the Companies Act 2016 on 31 January 2017.

In the event that the change was made after the commencement date, the form under section 47(2) must be lodged within 14 days from the date of such change.

If no change was made after the effective date until the date of the Annual Return, any related information should be updated in the Annual Return.

2. If a company has five different places where accounting records are kept, is the company required to lodge five different notifications or one notification stating the different locations?

Answer:

The company is required to lodge separate notification for each location. But if there are other statutory books or documents stated under section 47 that are also kept at the location, it is sufficient to lodge only one notification by stating the different types of documents being kept at that location.

3. If a company operates and keeps its accounting records in many branches, is the company required to notify SSM of the locations where the accounting records are being kept?

Answer:

The obligation to notify the Registrar where the accounting records are not kept at the registered office of the company covers situations where the accounting records are kept permanently either for the purposes of preparing the financial statements or for storage.

4. Section 232 requires a public company or its subsidiary shall keep and maintain a copy of every director's service contract for inspection at the registered office. Does the registered office means at the address of the subsidiary company? *(updated on 9 June 2017)*

Answer:

Yes, directors' service contracts are to be kept at the respective registered office or if it is centralized, need to notify SSM that the contract is kept at Public company/holding.

5. Does the company's name need to be displayed at the place where the accounting records are kept? *(updated on 9 June 2017)*

Answer:

Section 30(1)(a)–(c) is referred. The company is expected to display the name and company number at the place where the accounting records are kept.

6. Must a company notify SSM the location where the accounting records are kept, if the accounting records or other records are kept at all regional offices, outlets and warehouse? *(updated on 9 June 2017)*

Answer:

Where a company operates and keeps its accounting records in many branches, the company is required to notify SSM of the locations where the accounting records are being kept to the extent where such accounting records are kept ***permanently*** either for the purposes of preparing the financial statements or for storage.

7. What does the term "financial records" in the Companies Act 2016, refers to? *(updated on 9 June 2017)*

Answer:

The word "financial records" under section 68 (Annual Return) refers to financial statements.

E. NOTIFICATION OF PARTICULARS AND CHANGE IN REGISTER OF DIRECTORS, MANAGER AND SECRETARIES

1. In the notification under section 58, Note 1 states the requirement that a resolution to be attached where necessary. Does this means that any change of particulars such as expiry date of passport would also require a board resolution etc.?

Answer:

Resolutions is only required to be attached where there is a change in the appointment or removal of a director. Changes relating to the particulars of a director or officer such as the passport number, address etc. will not require any resolution.

2. Director's Service Address *(updated on 9 June 2017)*

If a director does not have any business address or e-mail address and his residential address is the only address used for communication, must the company notify SSM the service address?

Answer:

Yes "service address" as defined under s.2 is linked to S.58 (*similar to the previous Form 49 - with additional info on service address*). In this case the notification must be made to notify that the residential address and the service address are the same address. if there is a change in the name/residential/any prescribed particulars address these changes must be notified to SSM as well.

3. Does service address include telefax, any electronic transmission or messenger application? *(updated on 9 June 2017)*

Answer:

Service address is defined under section 2 as "service address'', in relation to a director, means an address, electronic or otherwise, provided to the company to which any communication may be sent.

F. DIRECTOR

(i) Retirement Of Director *(updated on 26 April 2017)*

1. Since there is no AGM for Sdn Bhd, how to deal with the retirement of director at AGM as provided under the existing Articles of Association, i.e. 1/3 of the directors must retire at every AGM?

The previous AGM resolution under section 129(2) of the Companies Act 1965 was worded as "xxx be hereby re-appointed to hold office until the next AGM". With the abolishment of age limit, shall the public company just re-appoint the said director at 2017 AGM? Or do nothing as he will continue to be a director as per section 619(1) of the Companies Act 2016?

Answer:

In cases where a private company's Articles of Association (Constitution) deals with the retirement of directors at AGM, then the company must hold

AGM to ensure that the provisions of the Articles of Association are met, until the company resolves otherwise.

With the abolition of restriction of maximum age of directors (section 129 of the Companies Act 1965), a public company is required to pass a resolution to enable the director to continue in office at the forthcoming AGM. The application of section 619(1) is limited to recognise the appointment of directors under the new Companies Act 2016 including any limitation or conditions attached with the appointment.

(ii) Boardroom Excellence

1. Directors' fee in a private company is to be approved by the Board but the director must be notified accordingly. Can shareholders object to the decision of the Board and more so if the Board consists of directors who are also shareholders or persons nominated by shareholders?

Answer:

The provision of the law allows a shareholder holding at least 10% of the total voting rights to object to the decision of the Board in so far as directors' fees are concerned. This is in line with the general principle that the shareholders are a different body to that of the Board. The objection must also be for the reasons that the payment is not fair for the company.

The position of the law clearly allows a shareholder who is also a director to object to the decision of the Board. This will allow scenarios where that director/shareholder may not be present at the Board meeting and he now wishes to object, albeit on a different capacity.

2. Why is there a shift in policy in allowing interested parties to vote in related party transactions in a private company?

Answer:

The prohibitive policy is premised on the fact that companies should not be transacting with an interested party unless it has been approved at a general meeting.

The prohibitive policy is lifted for private companies where shareholders who are interested in the transaction could also take part in approving the transaction.

In changing the policy, the Government has taken into considerations that there are many genuine transactions that could not be effected by the current prohibitive policy.

In particular, the private companies could not have access to the available resources because such resources are held by interested parties and could not be utilised due the requirements that the resolution must be passed by uninterested shareholders only.

As such, the Government is of the view that whilst the policy requiring prior shareholders' approval should be maintained, the shareholders should be given the option to proceed with the transactions with full knowledge that the transactions would involve related party, and there should have the full responsibility in approving such transactions.

(iii) Directors Fees and Benefits

1. Does benefit payable to directors under S230 includes any types of benefits including driver, tele-communication device, medical benefits, training benefits, D&O insurance, discount given for Director to purchase the company's products, e.g. staff discount for house and car, benefits-in-kind ("BIK") given to a salaried Executive Director e.g. leave passage, maid, children's education fees, company car etc. or benefits that are convertible into cash? *(updated on 9 June 2017)*

Answer:

Benefit that requires shareholders' approval are benefits which arises from the appointment to the office of a director.

2. **Does the BIK as stated in his employment contract of a executive director falls under the director's benefit and require shareholders approval?** *(updated on 9 June 2017)*

Answer:

In the case of salaried Executive Director's entitlement etc, if such entitlement or benefit arises from him being appointed to the office of director, then the entitlement (including BIK) or benefits must be approved by shareholders. But if such entitlement (including BIK) are given due to his office as Executive/Management position then shareholders' approval is not required.

(iv) Directors Power to Allot Shares

1. **Does Dividend Reinvestment Plan fall under the exemption of members' approval for allotment under Section 75(2)(a)?** *(updated on 9 June 2017)*

Answer:

No, Dividend Reinvestment Plan does not fall under the exemption list under section 75(2).

G. EXECUTION OF DOCUMENTS

1. With common seal requirement being optional, do you think conflict between 2 teams in boardroom would become more rampant i.e 2 directors may sign off a transaction without the Board's approval?

Answer:

The fact that common seal requirement is optional under the law is irrelevant as the directors still have a duty to act within their proper authority. Sections 210–234 of the Companies Act 2016 provide for directors' duties and responsibilities. Directors who breach these requirements may face civil and/or criminal enforcement actions.

2. If a company opts not to have common seal, would other Government authorities, for example the Land Office still requires the company to use common seal during registration?

Answer:

The fact that the company opted not to have a common seal does not override the provisions of such requirement under any other written laws. As such, the company may adopt a common seal when it becomes necessary to comply with the requirements of other written laws, for example when dealing with the Land Office.

3. What is the ambit and scope of section 66 with regards to the execution of document?

Answer:

Section 66 should be read in totality to which the scope is intended to cover the execution of documents which are required under any written law/regulations or agreement to be executed under common seal.

This means that where there is a requirement under any written law/regulations or agreement requiring the documents to be executed by affixing the common seal, the company the following option:

(a) by affixing the common seal in accordance with the conditions or limitations in the constitution; OR

(b) by signature in accordance with section 66 i.e. signed by two authorized officers, one of whom must be a director or in the case of a single director, by that director in the presence of a witness.

Any document which is executed without a common seal but in accordance with section 66 would have the same effect as if it was executed under the common seal.

H. ANNUAL RETURN

1. What is the correct format for lodgement of Annual Returns/Financial Statements for companies having FYE before the commencement of the Companies Act 2016?

Answer:

The lodgement of Annual Returns/Financial Statements are as follows:

Date of AGM/Circulation of Financial Statements	Lodgement Format	Example of Endorsement on Financial Statemer	
		Private Company	Public Compar
Date of AGM **before 31 January 2017**	State the date of AGM; (Lodgement format: Companies Act 1965)	"These Audited Statement of Accounts of the Company with Qualified/ Unqualified Auditors' Report for the year ended dd/mm/yyyy were tabled at the Annual General Meeting held on dd/mm/yyyy" …… (Directory/ Secretary)	"These Audited State Accounts of the Comp Qualified/ Unqualified Auditors' Report for t ended dd/mm/yyyy w tabled at the Annual Meeting held on dd/m …… (Directory/ Secre

Circulation of Financial Statements before **31 January 2017**, AGM **held on or after 31 January 2017**	State the date of circulation of Financial Statements and AGM; (Lodgement format: Companies Act 1965)	"These financial statements and reports of the company with Qualified/ Unqualified Auditors' Report for the financial year end dd/mm/yyyy were circulated on dd/mm/yyyy and tabled at AGM held on dd/mm/yyyy" …… (Directory/ Secretary)	"These financial state and reports of the co with Qualified/ Unqu Auditors' Report for t financial year end dd/mm/yyyy were ta AGM held on dd/mm/ …… (Directory/ Secre
Circulation of Financial Statement after or on **31 January 2017,** AGM held after **31 January 2017**	State the date of circulation of Financial Statements for private companies. (Lodgement format:Companies Act 2016)	"These financial statements and reports of the company with Qualified/ Unqualified Auditors' Report for the financial year end dd/mm/yyyy were circulated on dd/mm/yyyy " …… (Directory/ Secretary)	"These financial state and reports of the co with Qualified/ Unqu Auditors' Report for t financial year end dd/mm/yyyy were ta AGM held on dd/mm/ …… (Directory/ Secre

2. What is the format of the annual report and financial statements (FS) for companies having annual periods ended on or before 30 January 2017 and subsequent FS? *(updated on 3 April 2017)*

Answer:

With the decoupling of financial statements (FS) and annual return submissions, annual reports which have been issued after Companies Act 2016 has come into operation may be accepted if it complies with applicable auditing and accounting standards and subject to the following:

i. Financial statements for annual periods ended on or before 30 January 2017

Financial statements for annual periods ended on or before 30 January 2017 shall comply with the Companies Act 1965. The Directors' Report, Statement by Directors, Statutory Declaration and Auditors' Report ("accompanying reports") dated on or before 31 July 2017 for these financial statements may be prepared as follows, either -

(a) in compliance with the requirements under the Companies Act 1965; or

(b) in compliance with the requirements under the Companies Act 2016.

The accompanying reports which are dated after 31 July 2017 must be prepared in compliance with the requirements under the Companies Act 2016.

ii. Financial statements for annual periods ended on or after 31 January 2017

The financial statements for annual periods ended on or after 31 January 2017 and the accompanying reports for these financial statements must be prepared in compliance with the requirements under the Companies Act 2016.

I. RETURN OF ALLOTMENT OF SHARES (ROA) AND REGISTER OF MEMBERS (ROM) *(updated on 6 March 2017)*

1. Do all Return Of Allotment (ROA) or formerly known as Form 24 must be lodged online through MyCoID System?

Answer:
Yes, all Return of Allotment of Shares (ROA) occurring after 31 January 2017 must be lodged online (MyCoID 2016).

2. If the company has period for the date of allotment, what is the date used for the calculation of late lodgement?

Answer:
If the company has period for the date of allotment, the date of lodgement of the calculation are calculated the earliest date of the allotment.

3. If I had lodged the ROA, do I need to lodge the ROM?

Answer:

Yes. The ROA is simply to update the information on the allotment of shares. Whereas the ROM is for the updates on the members information.

4. Can I lodge the ROA and the ROM over the counter because I have not registered as a user registration?

Answer:

No. Please register as a user registration beforehand at any nearest SSM office.

5. Can I lodge the ROM and the ROA and if there is still a document query?

Answer:

No. Please check the status of each query through e-query link: http://www.ssm.com.my/en/status-query

6. What is the fee charged for the lodgement of ROA and ROM?

Answer:

Currently, there is no fee until notified further by SSM.

7. Who can lodge the ROA and the ROM?

Answer:

Only the company secretary of a company and who has been registered as a user registration can make the lodgement.

8. What if the ROA and the ROM is found to contain errors.

Answer:

Correction of the information can be made by amendment under the provision of section 602(1) of the Companies Act 2016.

9. Do I need to update the list of members through the ROM in which it occurred before 31 January 2017? Does the payment for late lodgement rates apply?

Answer:

Yes. Late lodgement payment is only imposed for event dates which occurred after 31 January 2017.

10. When do I need to lodge the ROM if there is a change in the register of members?

Answer:

The ROM needs to be lodged within 14 days from the date of the change (Refer section 51(1) of the Companies Act 2016)

11. Is the Extension of Time (EOT) applicable for the ROA and the ROM?

Answer:

Yes. The company may apply for an EOT under section 609(2) of the Companies Act 2016. A guideline on the EOT will be issued by SSM.

12. Can the company secretary who is blacklisted lodge the ROM and ROA?

Answer:

No. Please ensure that you are not blacklisted by referring to the Compliance Division.

13. If a have a problem during or after the lodgement of ROA and ROM is made, how do I overcome this?

Answer:

Please email to enquiry@ssm.com.my or contact the contact center line 03-7721 4000.

14. Will SSM provide a user manual for the ROA and ROM?

Answer:

Yes. It will be updated from time to time.

15. If the allotment is non-cash (otherwise) should the supporting document be provided?

Answer:

Yes. The company still needs to provide the supporting document and uploaded in the MycoID in pdf and tiff format.

16. If the allotment of shares or the changes to the information of members occurred before 31 January 2017, can I send it through online?

Answer:

No. A document dated before 31 January 2017 should be lodged in the format of Form 24 as required under the Companies Act 1965.

17. Can I park two (2) prices on the 'price per share' for a same type of share in one ROA? If not, why?

Answer:

No. This is because the 'price per share' refers to the market value.

18. What if in the ROA the 'price per share; refers to a different type of share on the same date? Should the price per share be the same or otherwise?

Answer:

If the 'price per share' refers to a different type of share, a different 'price per share' is allowed to be used.

J. AUDITOR

(i) FIRM OF AUDITORS

1. How to notify / register new firm of auditors with the Registrar?

Answer:

A new firm of auditors shall notify the Registrar by lodgement of form **"Registration of Firm of Auditors"** as stated in Schedule B of the Practice Directive No. 1/2017 within 30 days from the date of commencement of business.

2. How to update changes of the firm of auditors' information with the Registrar?

Answer:

The firm shall notify the Registrar through lodgement of form "**Notification of Change in the Register of Firm of Auditors"** as stated in Schedule B of the Practice Directive No. 1/2017 which indicate the relevant alteration/changes within 30 days form the alteration/changes date.

(ii) DEEMED RE-APPOINTMENT OF AUDITORS

1. How would the auditor and shareholders know that the existing auditor has been deemed re-appointed under Section 270?
Notice of Objection on the deemed re-appointment shall be received by the company at least 30 days before circulation of Audited Financial Statements. How would the members know when will be the circulation date in accordance with Section 258(1)? [within 6 months from the FYE for Sdn Bhd; at least 21 days before AGM]. *(updated on 9 June 2017)*

Answer:
A company has the obligation to appoint an auditor for every financial year. In cases where a company has already appointed an auditor, the auditor ceases to hold office 30 days from the circulation of the financial statements unless he is re-appointed.

A casual vacancy as a result of an auditor ceasing in office can be filled by the board of directors or through an actual re-appointment by the shareholders (must be stated in the constitution)

If there is no appointment either by the board or shareholders, the auditor is deemed to be re-appointed unless there is an objection received from the shareholders at least 30 days **before** the financial statements are circulated. [The auditor ceases to hold office 30 days **after** the FS circulated].

Based on the timeline above, it should be a matter of best practice for the company to inform the auditors and shareholders that an existing auditor is deemed to be re-appointed if there is no objection received within the timeframe stipulated.

(iii) RESIGNATION OF AUDITOR

1. What action should be taken by the auditor if you want to resign in a company according to section 281(1) Companies Act 2016?

Answer:

The auditor of a company may resign his office by giving a notice in writing at the company's registered office.

2. What are the responsibilities of the auditor under section 284 Companies Act 2016 after notice of resignation was given at the company's registered office?

Answer:
The auditor may submit a statement of circumstances of his resignation to the Registrar within 7 days from the submission of his notice of resignation.

3. What is the responsibilities of the company after receiving the notice of resignation from the auditor?

Answer:

In accordance with section 282(1), the company shall send a copy of the notice of resignation to the Registrar within 7 days from receiving the notice of resignation from the auditor.

4. When is the auditor's term of office end after the notice of resignation given at the company's registered office?

Answer:

Based on section 281(2) Companies Act 2016, the auditor's term of office end after 21 days from which the notice is given or from the date as may be specified in the notice.

(iv) REMOVAL OF AUDITOR

1. What are the documents required to be lodged by the company to the Registrar with regards to removal of auditor from office?

Answer:
The company is required to lodge the following documents with the Registrar:

(a) a copy of the special notice of such intended removal immediately upon receipt of the notice as required under section 277(2) Companies Act 2016; and

(b) a notice of the fact of removal within 14 days from the date the resolution is passed under section 276 Companies Act 2016 which is in accordance with section 278(1) CA2016.

K. REGISTRATION OF SECRETARY

1. Is it mandatory for a qualified person who act as a secretary to register with SSM under section 241 Companies Act 2016 before he can act as a secretary after the Act come into operation on 31 January 2017?

Answer:

No. For the time being, the qualified person does not require to register as a company secretary with SSM since Companies Act 2016 comes into operation on 31 January 2016 except for section 241 and Division 8 of Part III of the Act.

L. ACCOUNTS, AUDIT, ANNUAL GENERAL MEETINGS

1. In the foreseeable future, are Malaysian companies ready to move into an era where audit is not mandatory? When?

Answer:

Under section 255 (3) of the Companies Act 2016, the Registrar may exempt certain class of companies from compliance with requirements relating to financial statements. The categories for such exemptions shall be released soon.

2. Is audit exemption applicable to a private company which is a subsidiary of a public listed company?

Answer:

Generally, the law requires every company to appoint an auditor for each financial year. However, under section 267(2) of the Companies Act 2016, the Registrar is empowered to exempt certain categories of private companies from having to appoint an auditor for a financial year. However, the Registrar has yet to invoke this provision and therefore, the audit requirement is still mandatory for all companies.

3. Is a private company which is a subsidiary of a public listed company required told AGM?

Answer:

The requirement to hold annual general meeting is only applicable to public companies. Therefore, this requirement does not apply to a private company which is a subsidiary of a public listed company.

4. Circulation of First Set of Audited Financial Statements for Sdn Bhd *(updated on 9 June 2017)*

Section 248(1)(a) states that the Directors shall prepare the Audited Financial Statements within 18 months from the date of incorporation.

Circulation of financial statements for Sdn Bhd under Section 258(1)(a) is within 6 months from the financial year end. The Act doesn't state that the circulation of the first set of Financial Statement must be within 18 months from date of incorporation.

Hence, based on Section 258, the first set of Financial Statements of Sdn Bhd could be circulated after 18 months but within 6 months from financial year end?

Answer:

Yes, for the first set of Financial Statements for a private company, the preparation **must be made** within 18 months after its incorporation but may be circulated beyond the 18-month period (so long as the circulation is made within 6 months from the financial year end).

5. When will the audit exemption for companies fulfilling the criteria takes effect? *(updated on 4 August 2017)*

Answer:

The audit exemption will be applicable for a private company's financial statements with annual periods commencing on or after the dates stated in the Practice Directive 3/2017 (PD 3/2017) for the respective categories of companies.

There are 3 categories of companies, namely **dormant companies, zero-revenue companies and threshold-qualified companies**.

The annual periods' **commencement dates** for these categories of companies are as follows –

(a) **Dormant companies incorporated on or after 31 January 2017 – financial periods commencing 31 January 2017** where election not to audit its financial statements will be triggered for financial periods commencing on or after 31 January 2017.

(b) **Dormant companies incorporated on or before 30 January 2017 – financial periods commencing 1 September 2017** where election not to audit its financial statements will be triggered for financial year ended 31 August 2018;

(c) **Zero-revenue companies – financial periods commencing 1 January 2018** where election not to audit its financial statements will be triggered for financial year ended 31 December 2018.

(d) **Threshold-qualified companies – financial periods commencing 1 July 2018** where election not to audit its financial statements will be triggered for financial year ended 30 June 2019.

6. How does a company that satisfies the audit exemption criteria elects for the first time not to have an audit (transitional period) after the Practice Directive 3/2017 takes effect? (Example - Dormant companies) *(updated on 4 August 2017)*

Answer:

All private companies governed by the Companies Act 2016 are required to appoint an auditor under section 267(1) of the CA 2016. However, the Registrar can exempt any private companies from audit if it satisfies the criteria set by the Registrar.

For a company that qualifies as a dormant company and wishes to elect for an audit exemption, the company must first assess its audit exempt financial

period commencing after the exemption takes effect to see whether it fulfils the requirements set in the practice directive for the current and immediate past periods.

Example 1

Company A Sdn Bhd is a private entity incorporated on 1 September 2015 and its financial year end is 31 August.

A Sdn Bhd is a dormant company and its first financial period eligible for audit exemption is financial year commencing 1 September 2017.

The company prepared its financial statements for 31 August 2016, 31 August 2017, 31 August 2018 and 31 August 2019 and it is dormant since incorporation.

A Sdn Bhd can elect not to audit its financial statements for financial year ended (FYE) 31 August 2018 (Financial year commencing from 1 September 2017 to 31 August 2018) and FYE 31 August 2019. However, the company is still required to audit its FS for FYE ended 31 August 2016 and 31 August 2017.

Example 2

Company B Sdn Bhd is a private entity incorporated on 1 August 2015 and its financial year end is 31 July.

B Sdn Bhd is a dormant company and its first financial period eligible for audit exemption is financial year commencing 1 September 2017.

The company prepared its financial statements for 31 July 2016, 31 July 2017, 31 July 2018 and 31 July 2019 and it was dormant since incorporation.

B Sdn. Bhd. can elect not to audit its financial statements with financial year ended 31 July 2019 (Financial statements commencing from 1 August 2018 to 31 July 2019). The company is still required to audit its FS for FYE ended 31 July 2016, 31 July 2017 and 31 July 2018. The financial statements commencing from 1 August 2017 to 31 July 2018 (FYE 31 July 2018) are not eligible for audit exemption because the financial year commences before 1 September 2017.

Example 3

Company C Sdn Bhd is a private entity incorporated on 1 April 2017 and its financial year end is 31 August.

C Sdn Bhd is a dormant company and its financial period eligible for audit exemption are financial periods commencing 31 January 2017.

The company prepared its financial statements for 31 August 2017 and 31 August 2018 and it was dormant since incorporation.

C Sdn. Bhd. can elect not to audit its first financial statements with financial period from 1 April 2017 to 31 August 2017 and also for the subsequent financial statements with financial year ended 31 August 2018 (Financial statements commencing from 1 September 2017 to 31 August 2018). The company can continue to elect not to audit its future financial statements so long as it satisfies the criteria for audit exemption under any one of the 3 categories of companies.

Example 4

Company D Sdn Bhd is a private entity incorporated on 1 April 2017 and its financial year end is 31 August.

D Sdn Bhd is a dormant company and its financial period eligible for audit exemption are financial periods commencing 31 January 2017.

The company prepared its financial statements for 30 June 2018 and 30 June 2019 and it was dormant since incorporation.

D Sdn. Bhd. can elect not to audit its first financial statements with financial period from 1 April 2017 to 30 June 2018 and also for the subsequent financial statements with financial year ended 30 June 2019 (Financial statements commencing from 1 July 2018 to 30 June 2019). The company can continue to elect not to audit its future financial statements so long as it satisfies the criteria for audit exemption under any one of the 3 categories of companies.

7. How do companies determine their number of employees? *(updated on 4 August 2017)*

Answer:

The number of employees is based on the number of full-time employees employed by the company at the end of each relevant financial years.

8. If a company has corporate shareholders and meet the criteria, can they enjoy the company audit exemption? *(updated on 4 August 2017)*

Answer:

For a company to elect to be exempted from audit, it must be a private company that satisfies the Malaysian Accounting Standards Board's definition of private entity and the criteria applicable to the company to qualify for the audit exemption. A private company which has corporate shareholders but fulfils the criteria can enjoy the audit exemption for the relevant years.

9. Does a company that elects to be exempted from audit no longer has obligations in the preparation and filing of financial statements with SSM? *(updated on 4 August 2017)*

Answer:

No. The company is still obliged to prepare and circulate financial statements within the time period stated in the Companies Act 2016. Thereafter, the company is required to lodge the unaudited financial statements with SSM within 30 days after circulation. The financial statements prepared and lodged with SSM must comply with applicable approved accounting standards.

10. How does a company determine its total assets and total revenue? *(updated on 4 August 2017)*

Answer:

The total revenue and total assets of a company would be determined by the applicable accounting standards and stated as the total revenue or total assets in the financial statements of the company for each relevant financial years but excluding the accounting entries as specified in Practice Directive 3/2017.

11. Can a private exempt company that elects to lodge a certificate relating to its status as an exempt private company (EPC) with SSM choose to elect to be exempted from audit? *(updated on 4 August 2017)*

Answer:

No. An exempt private company cannot elect to be exempted from audit if it chooses to lodge an EPC certificate with SSM in lieu of financial statements. However, an exempt private company is eligible to elect for audit exemption provided the company satisfies the criteria and lodges its unaudited financial statements with SSM.

12. Do I need to apply for audit exemption and what is the form to complete? *(updated on 4 August 2017)*

Answer:

Similar like exempt private companies, you need not apply for audit exemption with SSM. A company is eligible for audit exemption if it satisfies the criteria set in Practice Directive 3/2017 and it can elect to do so. The company can always appoint an auditor to conduct an audit if there is a need for it as it is not prohibited from engaging one.

M. ANNUAL RETURNS AND FINANCIAL REPORTING

1. Decoupling of Financial Statements and Annual Return – What are the time frame for filing of Financial Statements and Annual Returns?

Answer:

The Companies Act 2016 de-couples the filing requirements of audited financial statements and Annual Returns.

The audited financial statements are required to be lodged with SSM as follows:

(a) In the case of private companies, within 30 days after the audited financial statements have been circulated to members; and
(b) In the case of public companies, within 30 days after the audited financial statements have been tabled at the AGM.

The Annual Returns are required to be lodged with SSM within 30 days of the anniversary of a company's incorporation date.

2. What is the procedure for filing of past financial statements to the Registrar? *(updated on 13 July 2017)*

Answer:

Lodgement of multiple sets of audited financial statements

There are situations where companies failed to lodge their financial statements (FS) for past years to the Registrar and these companies intend to lodge these FS pursuant to the Companies Act 2016. For purpose of illustrations below, FS for past years means on lodgement date, the lodgement of FS has exceeded the time allowed to lodge with the Registrar.

The lodgement may be accepted subject to compliance with the following guidelines:

(A) For private companies–

FS for past years where on lodgement date, the lodgement has exceeded the time allowed to lodge with

the Registrar as prescribed under section 165(4) of the Companies Act 1965 [CA 1965] or section 259 of the Companies Act 2016 [CA 2016].

If a company has not sent and/or tabled its FS at its AGM prior to 31 January 2017, then the company may circulate these FS to members in the manner as prescribed under section 257 and 259 of the Companies Act 2016 and lodge the FS with the Registrar within 30 days from the date of circulation.

The lodgement need not be accompanied by FS of the current financial year for the purpose of lodgement of FS for past years. However, if the FS of current financial year is available for lodgement, the FS for past years may be lodged together with the FS of current financial year.

Illustration I:

XYZ Sdn Bhd has not been holding its AGM in calendar years 2015 and 2016. Its financial year end is 31 December.

On 30 June 2017, XYZ Sdn Bhd circulated the following:

(a) audited FS for financial year ending 31 December 2014;
(b) audited FS for financial year ending 31 December 2015;
(c) audited FS for financial year ending 31 December 2016.

XYZ Sdn Bhd is required to lodge its FS for 2014, 2015 and 2016 within 30 days from circulation date in compliance with section 259 of the CA 2016.

Illustration II:

OPP Sdn Bhd has not been holding its AGM in calendar years 2014, 2015 and 2016. Its financial year end is 31 May.

On 30 June 2017, OPP Sdn Bhd circulated the following:

(a) audited FS for financial year ending 31 May 2014
(b) audited FS for financial year ending 31 May 2015
(c) audited FS for financial year ending 31 May 2016.

On 30 November 2017, OPP Sdn Bhd circulated the audited FS for financial year ending 31 May 2017.

OPP Sdn Bhd is required to lodge its FS for 2014, 2015, 2016 and 2017 within 30 days from circulation date in compliance with section 259 of the CA 2016. Hence there will be 2 lodgements of FS with the Registrar in 2017, namely before 30 July 2017 and 30 December 2017 due to the company circulating the FS twice in 2017.

(B) For public companies–

FS for past years where on lodgement date, the lodgement has exceeded the time allowed to lodge with the Registrar as prescribed under section 165(4) of the Companies Act 1965 or section 259 of the Companies Act 2016.

If a company has not sent/tabled its FS at its AGM prior to 31 January 2017, then the company may circulate and table these FS to members in the manner as prescribed under section 257 and 258 of the Companies Act 2016 and lodge the FS with the Registrar within 30 days from the date of its annual general meeting.

However, for the purpose of lodgement of FS for past years, the lodgement need not be accompanied by FS of the current financial year.

Illustration III:

ABC Bhd has not been holding its AGM in calendar years 2015 and 2016. Its financial year end is 31 December.

On 30 June 2017, ABC Bhd tabled the following FS at its AGM:

(a) audited FS for financial year ending 31 December 2014;
(b) audited FS for financial year ending 31 December 2015;
(c) audited FS for financial year ending 31 December 2016.

ABC Bhd is required to lodge its FS for 2014, 2015 and 2016 within 30 days from AGM date in compliance with section 259 of the CA 2016.

Illustration IV:

DEF Bhd has not been holding its AGM in calendar years 2014, 2015 and 2016. Its financial year end is 31 May.

On 30 November 2017, DEF Bhd tabled the following FS at its AGM:

(a) audited FS for financial year ending 31 May 2014.
(b) audited FS for financial year ending 31 May 2015.
(c) audited FS for financial year ending 31 May 2016.

However, DEF Bhd did not table the audited FS for financial year ending 31 May 2017 as it was not ready for tabling on AGM date.

DEF Bhd is required to lodge its FS for 2014, 2015 and 2016 within 30 days from AGM date in compliance with section 259 of the CA 2016.

(C) For public and private companies–

i. Where FS was sent out on a date which is on or before 30 January 2017 and AGM was held on or after 31 January 2017.

The company is required to comply with the provisions of the CA 1965 for lodgement of FS purposes even though the FS was lodged with the Registrar on or after 31 January 2017.

Illustration V:

GH Sdn Bhd has not been holding its AGM in calendar years 2015 and 2016. Its financial year end is 30 September.

On 30 January 2017, GH Sdn Bhd sent out the following FS:

(a) audited FS for financial year ending 30 Sept 2014.
(b) audited FS for financial year ending 30 Sept 2015.
(c) audited FS for financial year ending 30 Sept 2016.

AGM is held on 28 February 2017.

GH Sdn Bhd is required to lodge its FS for 2014, 2015 and 2016 within one month from AGM date in compliance with section 165 of the CA 1965.

ii. Where circulation of FS or holding of AGM (where applicable) is carried out on or after 31 January 2017.

The company is required to comply with the provisions of the CA 2016 for lodgement of FS purposes.

iii. Where FS was sent and holding of AGM was carried out on or before 30 January 2017.

The company is required to comply with the provisions of the CA 1965 for lodgement of FS even though the FS was lodged with the Registrar on or after 31 January 2017.

3. Under Section 68(6) of the Companies Act 2016, the company is allowed to lodge a statement stating that there is no change in any of the matters stated from previous years. Is this a substitution to the company's annual return for that particular year?

Answer:

The statement issued under section 68(6) of the Companies Act 2016 means that there is no change to the matters required to be disclosed under section 68(3). The statement itself, which is signed by the director or company secretary, is sufficient as a substitute for the annual return for that particular year.

4. With the new format of the Annual Return, is it possible for an existing company to submit an unchanged Annual Return for the first Annual Return due to be lodged? *(updated on 13 July 2017)*

Answer:

No, it is not possible as the format has changed from the Annual Return in the 1965 Act. Therefore, all companies are required to lodge the Annual Return for the first time it is due under the 2016 Act.

5. What is meant by "financial records" under section 68?

Answer:

For the purposes of section 68, "financial records" refers to any financial statements of the company.

6. For change of business during the financial year. Any rules that company need to comply with before the change? I believe shareholders resolution is needed. Any forms need to be filed with SSM?

Answer:

A company must notify any change of the nature of its business within fourteen (14) days after such change.

N. SHARES

(i) SHARES AND NO PAR VALUE REGIME

1. What is the rationale for migration to the new par value regime?

Answer:

Nominal or par value is only applicable at the point of issuance of shares. The actual value of shares in a company varies in accordance with the current situation faced by the company;

The issued price of shares will be determined by the current value of the company, factors affecting the business of the company and the capital that the company is seeking to raise;

The nominal value, per se, does not accord protection to the shareholders. Instead the rights of shareholders are attached to the shares, which are the right to attend, speak and vote at meetings of shareholders and the right to receive dividends; and

The rights of shareholders depend on the number of shares held and not the value of shares when it was first purchased.

2. In a no par value regime, how would the Board of Directors determine the pricing for issuance of shares?

Answer:

In an ordinary corporate scenario, a company allots new shares in order to raise additional capital to fund its business operations;

The valuation method to determine the share price would vary between companies. One way could be based on the financial performance of the company. Using the financial statements as the guide, the Board may perform a quantitative analysis to determine a proportionate share pricing. At the same time, there are also some qualitative analysis that a company may want to use. The prospects, the risks associated with the company, issue of control etc.

In determining the share pricing, the Board must also consider all issues and act in the best interest of the company.

(ii) SUBSTANTIAL SHAREHOLDER *(updated on 9 June 2017)*

1. Notification of substantial shareholder under section 141. How will a substantial shareholder "serve" the notice under section 141 to SSM? Can it be by fax or email?

Answer:

Via mail/post or over the counter (until notification by SSM is given to allow for notification by email)

2. Lodgement will be done by substantial shareholder or through company secretary? Does it attract payment of RM100 under item 48 in the Schedule of Fee?

Answer:
By substantial shareholder and there is no fee for notification.

2. What are the documents fall under item 48 of the Schedule of Fee?

Answer:

Item 48 refers to any applications/requests for Registrar to approve/take action

3. How does the 3 or 5 days' notification period apply if the acquisition or change of substantial interest is on Friday and Monday is a public holiday? Can we apply the concept in Interpretation Act, i.e. excluding Sunday and public holidays?

Answer:

The computation of 3 or 5 days should be based on section 54 of the Interpretations Act 1948 and 1967 as follows:

"Section 54 (1) of the Act 388

In computing time for the purposes of any written law—

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is a weekly holiday or a public holiday (referred to in this subsection as excluded days) the period shall include the next following day which is not an excluded day;

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and

(d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time."

4. Substantial shareholder will now need to give two (2) notices, one under sections 137, 138 or 139 and another one under section 141? Why can't the substantial shareholder submit to SSM the same notice served to the company, instead of submitting another form under section 141?

Answer:

Notices must be submitted via notification under section 141 by attaching notices issued under sections 137, 138 and/or 139 respectively.

5. If the notification under section 141 is to be lodged by the secretary of the company [as referenced in section 134(2)], does it mean that the secretary will have to lodge two (2) documents, one under section 141 (on the same day when the notice under sections 137, 138 or 139 has been given to the company) and another one under Section 51 on changes to the Register of Members assuming it is a non-listed company (within 14 days)?

Answer:

Lodgement under section 141 is to be lodged by the substantial shareholder. Changes to the Register of Members under section 51 must be lodged by company secretaries within 14 from the changes entered into ROM.

O. MEETINGS AND DECISION MAKING

(i) GENERAL MEETING/WRITTEN RESOLUTIONS

1. What are the changes to the General Meeting Requirements under the new Act?

Answer:

Under the Companies Act 2016, the requirement for Annual General Meeting for private companies has been done away with. This means that a private

company is no longer required to hold AGM in every calendar year. All meetings of a private company are known as meeting of members.

However, the requirement for AGM for public companies is maintained.

2. Shifting towards Written Resolution Regimes - What is the new Majority Written Resolution Procedure?

Answer:

Under the Companies Act 2016, the procedures for written resolutions are provided under sections 297–308.

The written resolution procedures are applicable only to private companies. The written resolutions are passed in accordance to the required majority as though it is passed at an actual meeting.

This means that if the written resolution is an ordinary resolution, a simple majority of members who are eligible to vote is sufficient to pass the resolution. Whereas, a special resolution will require 75% or more of members who are eligible to vote to pass the resolution.

3. Section 290(2) states that, resolution of members of a public company shall be passed at a meeting of members, does that mean public company can no longer pass a Members' Circular Resolution? Since there is no provision equivalent to section 147(6) of the Companies Act 1965, for wholly-owned subsidiary's general meeting, will a physical meeting need to be convened? ie notice, attendance list and minutes to be prepared accordingly? *(updated on 9 June 2017)*

Answer:

Yes.

Section 147(6) of Companies Act 1965 is not adopted under Companies Act 2016 due to the introduction of the single member, single director company concept.

For a **private company** which is a wholly-owned subsidiary of a public company – such company can pass a written resolution.

But if it is a **public company** which is wholly owned by a private company then, resolutions cannot be passed via written resolution. There need to be a properly convened 'physical' meeting attended by the corporate representative of the private company who is attending meeting of the public company. Hence, notice, attendance list and minutes are to be prepared accordingly.

(ii) PROXY FORMS *(updated on 18 April 2017)*

1. What is the appropriate timeframe to deposit proxy forms?

Answer:

Subsection 334(3) of the Companies Act 2016 regulates the time period for lodgment of proxy forms or instrument.

For a proxy form or instrument to be valid, it must be deposited not less than 48 hours before the time for holding the meeting or adjourned meeting (48-hour rule) or in the case of a poll, not less than 24 hours before the time appointed for the taking of the poll (24-hour rule).

Subsection 334(3) refers to two different time period:

(a) The time for holding the meeting or adjourned meeting which *refers to the time as set out in the notice of meeting of when the meeting shall be held*; and
(b) The time appointed for taking of the poll which *refers to the time fixed by the chairman of the meeting for the purpose of taking the poll*.

The two different time periods refer to two different events and accordingly the different time frame for depositing the proxy forms or instrument would apply accordingly.

When a notice of meeting was given, it contains the date and time for the meeting to take place and does not contain any time appointed for the taking of the poll. Instead the time appointed for taking of the poll will only be decided by the chairman of the meeting during the time when the resolutions are to be put to vote at the meeting after due dealing with the business of the meeting as set out under subsection 332(2) of the Companies Act 2016.

Subsection 332(2) of the Companies Act 2016 sets out the rule relating to when the poll shall be taken. It is provided in the said subsection 332(2) that the poll if duly demanded shall be taken:

(i) forthwith; or
(ii) after an interval or adjournment; or
(iii) otherwise as the chairman directs.

If the poll is taken forthwith after the discussion of the business (there is no time appointed for taking the poll), the members and proxies present shall cast the votes and the meeting is concluded after the poll and the result declared.

However, where the chairman of the meeting decides to hold a poll taking on a later time or date, the time fixed for taking the poll does not constitute an adjournment of meeting but only regarded as "mere enlargement" or "a continuation" of the meeting.

Therefore the 48-hour rule requiring proxy forms or instruments to be deposited before the time for holding the meeting or adjourned meeting does not apply to instances where the chairman of a meeting has decided to hold a poll at a later time/date.

Instead, for members who wish to change proxies to cast the poll at the time appointed for the taking of the poll, the law allows them to deposit the proxy forms or instruments not less than 24 hours before the appointed time.

2. What if the constitution of a company provides that the deposit of proxy form or instrument must be at least 48 hours before the time for the holding of meeting AND the time appointed for the taking of the poll?

Answer:

The 48-hour rule is valid for the deposit of proxy forms or instruments for attendance of the meeting.

However, the company must still observe the 24-hour rule to allow members to deposit proxy forms or instrument if the chairman has decided to hold a poll at a later time/date.

P. DIVIDEND AND SOLVENCY TEST

1. Since dividend is declared by the Directors, there shall be no differentiation between interim dividend and final dividend, unless the Constitution (e.g. Table A) provides otherwise?

Will this consider inconsistency with the Companies Act 2016? *(updated on 9 June 2017)*

Answer:

The Companies Act 2016 does not differentiate between Interim and final dividends, but every declaration of dividends will trigger the requirements under section 132. Unless the Constitution provides otherwise.

(eg art 98 of Table A under Companies Act 1965 – the company may in general meeting (shareholders' approval is required), art 99: directors from

time to time may declare dividend without shareholders' approval) both exercises will trigger section 132 of Companies Act 2016.

2. Dividend can be made out of available profits if the company is solvent. What is the basis of the solvency test? Will the solvency test be effected on the date of declaration? *(updated on 9 June 2017)*

Answer:

Only cash flow test, please refer to section 132(3).

The solvency statement although made at the point of declaration (authorization), the solvency status should continue after distribution is made which is within 12 months immediately after distribution is made. Based on section 132(2), (3) and (4).

There can also be recovery of distribution, refer to section 133. Hence directors are to make decision in the best interest of the company.

3. The Companies Act 2016 is silent on the validity period of the Solvency Statement for share buyback under section 127. Can we interpret that the validity period of the Solvency Statement is the same as that provided under section 112(2)? ie for share buyback, the Solvency Statement shall be valid for 6 months?

The Solvency Statement for share buyback will no longer need to be lodged with SSM under Companies Act 2016, but a Notice of Share Buyback shall be lodged with the SSM within 14 days pursuant to section 127(16)?

Answer:

Refer to section 112(2)(b) validity period for solvency statement for share buyback is 6 months from the date of the solvency statement.

Format of solvency statement for all (4) corporate exercises are available at SSM's website (refer to Schedule B – for section 113 template)

Yes – only the notification to be lodged to the Registrar (at SSM) within 14 days from the purchase of the shares (buyback)

OTHERS

1. Please clarify the word "day" referred to "calendar day" or "market day of a stock exchange" since this disclosure relates to quoted securities ? Does it mean that serving a notice can be done by way of notification to the Registrar?

Answer:

In the absence of any specific definition, reference to the computation of "day" can be made to section 54 of the Interpretations Acts 1948 and 1967 as follows:

"Section 54 (1) of the Act 388

In computing time for the purposes of any written law—

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is a weekly holiday or a public holiday (referred to in this subsection as excluded days) the period shall include the next following day which is not an excluded day;

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and

(d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time."

2. If prior approval of the Board has been obtained to effect the Directors & Officers Insurance ("D&O Insurance") for its Directors and Officers as per section 289(5), do the Directors have to contribute to pay the premium or cost of insurance in order to enjoy the protection of indemnification under this section? *(updated on 9 June 2017)*

Answer:

Payment of premium is not provided under the CA2016 but the wordings of overall S.289 is for the company to indemnify and effect insurance – would mean that the company is to contribute and pay for the premiums but only for the purposes of S.289

3. "Next of Kin" for One Person Company is not defined under the Act. Any guidelines from SSM? *(updated on 9 June 2017)*

Answer:

Next of Kin is not defined under CA2016, but intention of the law is to cover persons who are to make decision as to whom to be appointed as director in place of the deceased sole-director (next of kin definition will be based on general/dictionary interpretation, which comprised of closest living blood relatives of the deceased sole-director).