

Client Alert

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Malaysia Proposes Mandatory Disclosure of Beneficial Ownership of Companies: Issuance of Exposure Draft on the "Guidelines for the Reporting Framework for Beneficial Ownership of Legal Persons"

The Malaysian Companies Act 2016 ("MCA") was amended several years ago, and as part of the revamp, a new provision granting the power to a company to enquire into the beneficial owner of the shares in a company was inserted. This is supplemented by the power granted to the Companies Commission of Malaysia ("CCM"), Bursa Malaysia Securities Berhad (the stock exchange) and the Securities Commission of Malaysia to direct that a company makes such an enquiry.

CCM had on 8 November 2019, issued an exposure draft of the Guidelines for the Reporting Framework for the Beneficial Ownership of Legal Persons ("Exposure Draft"). The Exposure Draft provides guidance on the companies that will be required to make enquiries on beneficial owners ("BO"), the requisite information for completing the register of beneficial ownership ("BO Register") ("BO Information"), and the documents required to be maintained as evidence of steps taken to verify the BOs.

Companies should be aware of its obligation to maintain and submit its BO Information together with its annual return. There is also a requirement to notify CCM within 14 days of any change to its BO Information.

While the Exposure Draft is still in a draft form, the salient provisions that have been proposed under the guidelines are set out below.

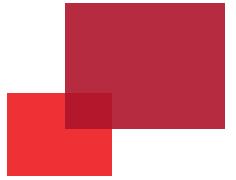
(1) The requirement to obtain BO Information applies to all companies (save for certain types of exempted companies)

The reporting framework proposed by the Exposure Draft applies to all companies incorporated in Malaysia and foreign companies registered under the MCA. Financial institutions, public listed companies and companies whose shares are deposited in the central depository are exempted from the proposed reporting framework.

(2) Reasonable measures to identify BO information

Companies are required to take reasonable measures to identify their BOs. These include:

- (a) reviewing all documents and information available at the company's level (e.g., register of members, shareholders agreement, constitution etc.);



- (b) analysing the interests in the company held by individuals, corporate entities and/or trusts;
- (c) obtaining BO Information by sending out notices pursuant to Section 56 of the MCA ("Section 56 Notice") at least once annually; and
- (d) maintaining a BO Register and to ensure that the information therein is up-to-date, accurate and accessible in a timely manner.

The BO Register must contain information such as the type of beneficial ownership, beneficial ownership percentages and, whenever the BO Information is received pursuant to a Section 56 Notice, the date of the Section 56 Notice / BO Information was received.

Where the company has reasonable cause to believe it has a BO(s) but is unable to identify that individual even after taking reasonable steps, the BO Register must reflect this.

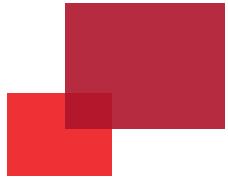
(3) BO Information must include information of the "ultimate owner of the shares"

In order for companies to discharge its obligation of identifying BOs, the Exposure Draft has provided further guidance to the definition. Under the MCA, a beneficial owner is "the ultimate owner of the shares and does not include a nominee of any description". The term "ultimate owner of the shares" is in turn, defined under the Exposure Draft to be an individual (natural person) who meets any of the following criteria:

- (a) the individual has interest (directly or indirectly) in at least 20% of the shares in the company;
- (b) the individual holds (directly or indirectly) at least 20% of the voting shares of the company;
- (c) the individual has the right to exercise significant influence or dominant control over the company, its directors or the management of the company;
- (d) the individual has the power to directly or indirectly appoint or remove a director(s) who holds a majority of the voting rights at meetings of the board of directors of a company; or
- (e) the individual is a shareholder and, under an agreement with another shareholder of the company, controls alone a majority of the voting right in the company.

(4) Government-linked companies

A company owned or controlled by the Government of Malaysia is, by that fact alone, not exempted. The government will be required to submit and declare beneficial ownership of companies. This is notwithstanding the fact that the relevant office may not necessarily be the "ultimate owner of the shares" of the company.



Conclusion

Once the Exposure Draft is finalised and is adopted as law, it will become a legal requirement. Companies that do not adhere to the requirements under the Exposure Draft may be liable to administrative sanctions, or penalties. Similarly, BOs who fail to respond to a Section 56 Notice or provide false information commit an offence under the MCA.

The new requirement will result in a greater discipline by both companies and their shareholders in making disclosures on the beneficial ownership of the companies. As the Exposure Draft also addresses disclosures in respect of trust arrangements, there may be a need for settlors to revisit their arrangements to understand and appreciate the level of disclosure.

The Exposure Draft is likely to be finalised and will come into force early next year; likely prior to the mutual evaluation of Malaysia by the Financial Action Task Force on anti-money laundering and combating of financial terrorism.

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