

THE APPROVED COMPANY SECRETARIES



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ISSUE 4/2022

SUMMARY OF CASE LAW ON MEMBERS' WRITTEN RESOLUTION

**WHAT IS THE BENEFICIAL OWNERSHIP REPORTING
FRAMEWORK IN MALAYSIA?**

CRYPTOCURRENCIES – CAPITAL GAINS OR TRADING RECEIPTS

ISSN 1675-2376



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FROM THE EDITOR'S DESK

Dr. Adissayam Xavier Suseimanikam, FIACS



Warmest greetings to all and welcome to the fourth issue of IACS newsletter for 2022. I hope all our members are doing well and safe.

We wish to inform our members that in accordance with Clause 14 (a)(iii) of IACS' Constitution (amended as at 29th July 2022), Ordinary members comprised of persons who hold the Practising Certificate issued by the Registrar under Section 241 of the Companies Act 2016. Consequently, all our existing Associate members who hold the SSM Practising Certificate will be upgraded to Ordinary members automatically. As an Ordinary member, you are entitled to vote at IACS' general meetings besides enjoying all the other membership benefits.

To date, IACS had successfully conducted a total of thirty one (31) seminars/webinars (seven (7) physical seminars and twenty four (24) webinars) despite the challenges faced due to the pandemic and the economic meltdown. Sadly, we had to cancel or postpone some of the physical seminars due to low numbers of registration. We hope to receive better response next year as physical seminars are still the most effective platform for learning as they enable face-to-face interactions between the speaker and participants, as well as providing an avenue for networking between practitioners to exchange knowledge and ideas. This also provides an avenue for council members to meet up and interact with members and seminar participants. Additionally, IACS Tea Talks are in the pipeline for next year where members can discuss and resolve operational and technical issues that company secretaries face.

IACS is also looking into ways to assist and guide members and their secretarial staff who aspire to obtain a company secretary licence (LS) from SSM. Members can drop us an email to inform us of the problems faced in applying for the LS to enable us to understand the problems and to propose ways to resolve them.

Apart from the above, members need to be aware of the AML/CFT Data & Compliance Report (DCR) requirement, which is a yearly submission to Bank Negara Malaysia (BNM) by reporting institutions (RI). DCR includes questions on how RIs have met the anti-money laundering and counter-financing of terrorism (AML/CFT) requirements and exposure to money laundering and terrorism financing (ML/TF) risks that RIs might have. We have included a brief write-up in this newsletter to create awareness and provide a better understanding of the DCR requirement.

Lastly, as we have been informing you, members are invited to write to us on any technical or operational issues and enquiries with SSM or other agencies in relation to the company law and corporate secretarial matters so that we can provide a reply or address them at the appropriate forums/meetings. In addition, members are welcome to share with IACS any ideas or strategies to increase the membership of IACS or any topics of interest for seminars. Kindly email your issues, enquiries, ideas and seminar topics to us at iacsc19@yahoo.com.

In closing, I wish all our members who are celebrating the coming festivals a very **'Merry Christmas and Prosperous New Year 2023!'** It was a pleasure serving you in 2022 and my fellow Council Members and I would like to thank you for your continuous support. May the holiday season bring you joy, peace and love amongst both family and friends.

Thank you.

EVENT HIGHLIGHTS

<<<<<<<<< Continued from last page

IACS CPD Seminar in Kuantan on 18th July 2022

The seminar was held at AC Hotel Kuantan City Centre, Pahang. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Analysis and Case Studies on Beneficial Ownership of Legal Persons"*





INSTITUTE OF APPROVED COMPANY SECRETARIES (387525-X)

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Contributions of Article

The Council would like to invite members to contribute articles and news, which may be of interest to company secretaries for publication. However, the Council reserves the right to edit articles for clarity purposes or it shall at its absolute discretion not publish any or all articles or news received from contributors. A fee will be paid for contributions approved by the Board.

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SUMMARY OF CASE LAW ON MEMBERS' WRITTEN RESOLUTION

By

Dr. Cheah Foo Seong FCIS, FIPA (Aust), MBA, LLM, LLD

Introduction

The term “Members’ written resolution” was introduced in the Companies Act 2016, replacing the term “Members’ Circular Resolution” found in the repealed Companies Act 1965. Under section 297(1) of CA 2016 provides that a resolution shall be proposed as a written resolution by the board or any member of a private company. Further, section 298(1) provides that in relation to a member’s eligibility to receive a resolution proposed as a written resolution of a private company, the eligible members shall be the members who would have the been entitled to vote on the resolution on the circulation date of the resolution. And the way of passing a members’ written resolution is provided in section 306(4) stating that a written resolution shall be passed when the required majority of eligible members have signified their agreement to the written resolution.

Number of members or number of shareholdings to pass resolution?

The High Court in the case of *Mohamed Zahid Yon bin Mohamed Fuad v Jason Jonathan Lo & Ors* [2019] 3 AMR 824; [2019] Wong Chee Lin, Judicial Commissioner gave its judgment on March 6, 2019 clarifying the interpretation of the members’ written resolution provision of the Companies Act 2016 (“the Act”). The Court held that more than half the number of shareholding of the members is required to pass the members’ written resolution. It is not more than half the number of the shareholders. Further, the case also emphasised how the Act applies even to companies which still retain Table A of articles of association under the Companies Act 1965 (“CA 1965”), simply because under this provision there is no words to indicate subject to the Constitution of the company. Therefore, the law shall prevail over inconsistencies in the memorandum and article of association. The company in question is Fat Boys Records Sdn Bhd, where Mohamed Zahid (the plaintiff) and Wong (the second defendant) are the only shareholders and directors of the company. The shareholders were Mohamed Zahid, who held 40% of the total paid up capital, while Wong held the remaining 60% of the share capital. The members’ written resolution of the company was signed by Wong who was only carrying the 60% shareholding. Mohamed Zahid did not sign the members’ written resolution appointing Jason Lo as a director and challenged the validity of the appointment of Jason Lo as a director of the company by filing the originating summons and the notice of application to declare the appointment of Jason Lo as the director on 7 January 2019 as ineffective, void and invalid. Furthermore, it included an injunction to restrain Jason Lo from holding himself out as a director of the company.

The High Court dismissed the action, and examined the decision on the validity of the members’ resolution in writing. Although the Court agreed that the directors’ resolution was invalid to appoint the new director because the articles of association of the company required such a resolution to be signed by all the directors, the Court made the following judgment:

- (a) The Court considered the contention that the Act did not apply to the company as the memorandum and articles of association adopted the Fourth Schedule to the CA 1965. Mohamed Zahid’s argument was that the previous laws and provisions of the CA 1965 applied. This was because the rights and obligations of the parties arose under the CA 1965. Therefore, a members’ resolution in writing under s 152A of the CA 1965 that required all the members to sign the resolution should apply.
- (b) The Court, however, disagreed with this argument but held that the Act applied since the members’ resolution was passed under the coming into force of the Act. Mohamed Zahid could not be said to have

acquired any right, privilege, obligation or liability under s 152A of the CA 1965 which has been repealed after the coming into force of the Act. Further, s 619(3) of the Act also provides that memorandum and articles of association of an existing company incorporated under CA 1965 shall have effect as if made or adopted under the Act, unless otherwise resolved by the company.

- (c) The Court next examined whether the members' written resolution required more than half of the shareholding of the members or more than half of the number of members. This was made in reference with s 291(1) of the Act stating that an ordinary resolution of the members or a class of members of a company means a resolution passed by a simple majority of more than half of such members:
 - (i) who are entitled to vote and do vote in person, or where proxies are allowed, by proxy at a meeting of members; or
 - (ii) who are entitled to vote on a written resolution.

In addition, s 293(1) states that every member shall have one vote in respect of each share when voting on a written resolution, and unless otherwise provided in the Constitution on a vote on a written resolution, every member shall have one vote in respect of each share or stock held by him.

The High Court further held that the words "more than half of such members" must be read to mean more than half the number of shareholding of the members and not more than half the number of the shareholders. As with the resolution in writing, Mohamed Zahid, the 40% shareholder, could not stop Wong, the 60% shareholder, from passing the members' written resolution as the written resolution, although signed only by Wong, would be a valid ordinary resolution.

Conclusion

The High Court case seems to have confirmed a number of interpretations with regard to members' written resolution as follows:

- (a) where the Act does not provide options between the company's Constitution (memorandum and article of association) by specifying clearly the words "subject to the company's Constitution" or "as specified in the Constitution", then the provision shall prevail. Whatever set in the Constitution is considered invalid;
- (b) it is the number of shares held by shareholders that should be counted to obtain the majority;
- (c) even one shareholder who holds the majority shares can signify the members' written resolution and shall validly pass the members' resolution; and
- (d) that the number of votes is derived from the number of shares held i.e. one vote for one share held and the signature of the shareholder represents that vote given in totality.



WHAT IS THE BENEFICIAL OWNERSHIP REPORTING FRAMEWORK IN MALAYSIA?

By Benjamin Tham Tuck Chuen,
Practising Lawyer, M/S Benjamin Tham & Co.,

In the effort to combat money laundering, terrorism financing, corruption and serious financial crimes, Suruhanjaya Syarikat Malaysia / Companies Commission of Malaysia (SSM) has issued, pursuant to section 20C of the Companies Commission of Malaysia Act 2001 (CCM Act), a “Guideline for the Reporting Framework for Beneficial Ownership of Legal Persons” (the Guideline), which came into effect on 1 March 2020. You can get the Guideline from SSM’s website www.ssm.com.my.

The Guideline applies to all business entities (companies and limited liability partnerships (LLP)) registered or operating in or from Malaysia as one form of preventing business entities from being misused by individual perpetrators hiding behind such businesses to carry out illicit activities. (Note: sole proprietorship and partnerships registered under the Registration of Businesses Act 1956 are deemed to have satisfied the statutory lodgement of information relating to the ownership i.e., owners or partners are natural persons and thus need not be specifically addressed under the Guideline).

The purpose of the Guideline is to provide general guidance on beneficial ownership (BO) reporting framework for all business entities, adopting a self-regulated approach. To this end, a company or LLP is required to: -

- (a) take reasonable steps to identify, obtain and verify the BO information;
- (b) enter the BO information into the register of beneficial owners;
- (c) keep the BO information accurate and up-to-date and accessible in a timely manner;
- (d) update the BO information whenever there is a change to the particulars of the beneficial owners and then notify the Registrar;
- (e) maintain the BO information and supporting documents at the registered office or where the register of members/register of partners is being kept; and
- (f) give access to competent authorities and law enforcement agencies, whose name has been entered in the register of beneficial owners and any other person authorised by the beneficial owner.

On 29 July 2020 SSM issued a consultative document seeking feedback on the proposed Companies (Amendment) Bill 2020 (CA Bill 2020) in relation to, amongst others, improving transparency of shareholding in companies in Malaysia by enhancing the disclosure framework for BO. The CA Bill 2020 has yet to be passed by Parliament (and will likely take some time in view of the current political circumstances). You can get the consultative document from SSM’s website www.ssm.com.my. For SSM’s replies to FAQs on the BO reporting framework, click <https://www.ssm.com.my/Pages/FAQ/FAQ-Beneficial-Ownership.aspx>

Who Is “Beneficial Owner”?

Section 2 of the Companies Act 2016 (CA 2016) defines a beneficial owner as “the ultimate owner of the shares and does not include a nominee of any description”.

Section 56 of CA 2016 states a company may require any member or person to provide information to the company on the member’s or person’s ownership or interest in the shares of the company, whether as a beneficial owner or as a trustee, in which case he/she is required to disclose the identity and particulars of the beneficiary.

CA Bill 2020 will introduce new sections 56A, 56B, 56C, 56D and 56E into CA 2016, to provide:

- (i) the definition of a beneficial owner through ownership and control;
- (ii) the register of beneficial owner to be kept;
- (iii) the reporting framework relating to the BO information;
- (iv) the power of a company to require the disclosure of beneficial owner; and
- (v) the duty of a beneficial owner to provide information.

By introducing new Section 56B into CA 2016, CA Bill 2020 re-defines beneficial owner as “a natural person who ultimately owns or controls a company and includes an individual who exercises ultimate effective control over a company”.

Notwithstanding this definition, the Registrar of SSM will have the power to determine the ownership and control of a person and certainly will be guided by the Guideline in relation thereto.

Under the Guideline, the ultimate owner must be a natural person having interest or ownership in shares (directly or indirectly) and effective control over the company, falling into at least one of the following criteria:

Criteria A	Individual has interest, directly or indirectly, in not less than 20% of the shares of the company
Criteria B	Individual holds, directly or indirectly, not less than 20% of the voting shares of the company
Criteria C	Individual has the right to exercise ultimate effective control whether formal or informal over the company or the directors or the management of the company
Criteria D	Individual has the right or power to directly or indirectly appoint or remove a director(s) who holds a majority of the voting rights at the meeting of directors
Criteria E	Individual is a member of the company and, under an agreement with another member of the company, controls alone a majority of the voting rights in the company

Identifying criteria for beneficial owner of a company or LLP

(Note: If shares in a company is held by a society or co-operative society, the Guideline states that the beneficial owner of the company is the respective public officer or the designated senior management person)

Entities Exempted from the BO Reporting Framework

As per the proposed new Section 56A of CA 2016, the following will be exempted from the BO reporting framework:

- (a) Companies which are licensed by Bank Negara Malaysia under the Financial Services Act 2013 or the Islamic Financial Services Act 2013 or prescribed development financial institutions under the Development Financial Institutions Act 2002 or licensed money services business under the Money Services Business Act 2011;
- (b) Entities licensed or registered under the Capital Markets and Services Act 2007;
- (c) Companies whose shares are quoted in a stock exchange, either local or foreign exchange; and
- (d) Companies whose shares are deposited in the central depository pursuant to the Securities Industry (Central Depositories) Act 1991.

Company To Maintain a Register of Beneficial Owners

Under the proposed new Section 56C of CA 2016, every company must keep a register of beneficial owners and record in the register all the requisite information. The company must notify SSM of any change in the register of beneficial owners within 14 days from the date of the relevant change made. Thus, there is a statutory duty on the company and company secretary to lodge the BO information with SSM.

Do note that the BO information lodged, viz the register of beneficial owners, is only required to be made available to:

- (a) the beneficial owner whose name is recorded in the register of beneficial owners;
- (b) the persons authorised by the beneficial owner; and
- (c) the following bodies:
 - (i) Royal Malaysian Police;
 - (ii) Malaysian Anti-Corruption Commission;
 - (iii) Royal Malaysian Customs Department;
 - (iv) Bank Negara Malaysia; and
 - (v) Securities Commission.

Accordingly, only law enforcement agencies will have the right of access to the register of beneficial owners to carry out enforcement activities. For instance, auditors of the company/LLP do not need to have the right of access to the register of beneficial owners for the purposes of their audit.

Power of a Company to Require the Disclosure of Beneficial Owner

The proposed new Section 56D of CA 2016 will empower the company to issue a notice to obtain BO information from its members, as well as from any persons believed to be a beneficial owner or believed to have information of a beneficial owner, for the purposes of recording such information on the BO in the register of beneficial owners.

It is an offence if a person receiving such notice contravenes the notice or in purported compliance with such a notice, makes any statement which he knows to be false in a material particular or recklessly makes any statement which is false in a material particular UNLESS he can prove that (a) the information in question was already in the possession of the company; or (b) that the requirement to give it was for any other reason that is frivolous or vexatious.

Duty of a Beneficial Owner to Provide Information

The proposed new Section 56E of CA 2016 seeks to compel a person to submit BO information to the company, with or without notices set by the company through issuance of notices under the proposed new Section 56D, via a self-declaration by the beneficial owner within a reasonable time.

Requirement to Lodge Information of Beneficial Owner in Annual Return

Upon the effective date of the Guideline, i.e., 1 March 2020, it is compulsory for companies to issue the written notice under Section 56(1) of the CA 2016 at least once in a year, and companies are recommended to send out notices pursuant to section 56(1) to (3) of the CA 2016 (i.e. to any member or person or on any voting agreement or arrangement) frequently to update SSM on the BO of their shareholders.

The CA Bill 2020 also proposes to impose a duty on companies to lodge BO information as part of the information to be submitted together with the annual return (under the general catch-all item of “such other information as

SSM may require" under Section 68(j) of the CA 2016) to ensure that companies lodge the BO information with SSM on a yearly basis and that such information is updated annually.

Amendments will be made requiring foreign companies to lodge BO information during the registration stage, evidentially by inserting the obligation to submit BO information as part of the information to be submitted for registration under the proposed new Section 562(1)(fa) of CA 2016.

Applicable Timelines

The BO reporting framework is to be implemented in 2 stages i.e., transitional period and post-transitional period.

Transitional period

A transitional period as per the Guideline, commences from 1 March 2020 to 31 December 2020, during which companies and LLPs are to obtain, keep and update the BO information at the company/LLP's level.

SSM has informed that this transitional period has been extended from 1 January 2021 to a later date to be determined by SSM to coincide with the enforcement date of the proposed CA Bill 2020 and the Limited Liability Partnerships (Amendment) Bill 2020 (LLPA Bill 2020). You can get the FAQs on the extension of the transitional period at <https://www.ssm.com.my/Pages/FAQ/FAQ-Beneficial-Ownership.aspx>

Meanwhile, the extension of the transitional period will allow companies, LLPs, company secretaries and compliance officers to familiarise themselves with the BO reporting framework and to take necessary actions in accordance with the Guideline.

At the same time, the extended transitional period will facilitate the concurrent operations of provisions relating to BO proposed under the CA Bill 2020 and the LLPA Bill 2020.

Post-Transitional period

A post-transitional period, during which companies and LLPs must obtain, keep, update the BO information, and notify SSM.

Companies and LLPs will have to submit the BO information to SSM within 14 days after the end of the transitional period, or such extended time frame as decided by SSM.

After the end of the transitional period, companies and LLPs are required to provide the BO information as follows:

- (a) Obtain the BO information within 30 days after the appointment of the company secretary;
- (b) Enter the BO information into the register of beneficial owners within 60 days after the BO information has been obtained or received;
- (c) Notify SSM of the BO information and any subsequent changes, within 14 days from the date the BO information is entered into the register of beneficial owners;
- (d) Lodge the annual return, together with the BO information not later than 30 days from the anniversary of its incorporation date.

Penalties for Non-Compliance

(A) Those in charge of obtaining and verifying the BO information, recording, and keeping up to date the BO information in the register of beneficial owners, and lodging the annual return (for companies) or the annual declaration (for LLPs) e.g., directors, company secretaries, compliance officers, agents of companies or partners of LLPs, may be imposed a fine of up to RM20,000.

(B) Members of a company, any person from whom the company requests BO information or partners of LLPs, not providing the BO information as requested, may be imposed a fine of up to RM50,000 and imprisonment.

(C) Person lodging the information with SSM is required to declare that the facts and information in the document are true and to the best of his/her knowledge, and all due diligence and vetting processes have been performed on the BO. As such, if the person is found making any false or misleading statement, he/she may be liable, on conviction, to a heavier penalty of a maximum 10-year jail term or a maximum RM3 million fine or both.

(D) Under Section 20E of the CCM Act, any person who fails to comply with the Guideline commits a breach and actions can be taken by SSM against such person e.g., impose penalty, reprimand, apply for Court Order for compliance, etc.

In view of the severe consequences of non-compliance, companies and LLPs and their respective company secretaries and compliance officers should take advantage of the extension of the transitional period to familiarise themselves with the BO reporting framework and to take such actions necessary to prepare for the compliance with the Guideline and the anticipated enforcement of the CA Bill 2020

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CRYPTOCURRENCIES

– CAPITAL GAINS OR TRADING RECEIPTS

By Choong Hui Yan
B.Acc(Hons)(Malaya), ACCA(UK), Licensed Secretary

Introduction

Cryptocurrencies are with soaring popularity in recent years and more tycoons from worldwide recognizes and accepts cryptocurrencies as an exchange in commercial transactions. One of the notable examples happens back in early 2021, where Elon Musk announces that Tesla buys \$1.5 billion worth Bitcoin and accepts cryptocurrencies as payment for its vehicles.

Cryptocurrencies in essence are currencies in nature, but in digital forms. It is free from government regulation, free flow by market forces and working on a blockchain mechanism. The investors must have abilities to hold and wait to strike at respective comfort or intended prices or exchange.

Cryptocurrencies are now be accepted, purchased by all groups of people. The demand on cryptocurrencies though fluctuates, volatile but their sustainability and continuity would be here like other currencies.

The few examples of well-known cryptocurrencies are Bitcoin, Ethereum, Ripple and Litecoin.

Rule of thumb

Trading of cryptocurrencies requires periodically buying and selling, at different intervals to realize gains. One may carry out constant purchase of cryptocurrencies over a period of time as a way and mean to earn extra fortune. The mere purchase without disposal may cause total wipe off on the cost of investment as one may miss out the peak prices for selling. The peak prices are subjective, guided by chart analysis and technical interpretation which varies between individual judgement.

Income tax: Capital gains or trading receipts

The gains deriving from the disposal of cryptocurrencies and its taxability varies based on circumstances, the operator, and the place of investment.

In general, cryptocurrencies have the features of currencies, highly volatile, and akin to gambling, speculative in nature. The gains vary based on timing of disposal requires subjective judgement and involves intellectual thinking and decisions. An individual who does trade cryptocurrencies with less significant buy and sell frequency within a calendar year would be viewed as a habitual gambler. The gain would not be taxed and the loss will not be deductible.

The gain or loss on disposal of cryptocurrencies is computed at each interval when the transactions have been translated into Malaysia banking account. The subsequent withdrawal of fund to purchase will be viewed as a withdrawal. These individuals need to focus and pay attention on the legitimacy on the source of fund of the investment. No proof or inadequate explanation on source of fund would result the source of fund being taxed as undisclosed income.

The determination of the gain or loss of the cryptocurrencies require professionals or adepts that are familiar to cryptocurrencies activities and processes.

The Inland Revenue Board of Malaysia (IRB) may view the gains as trading gains yet individuals always explain them as capital gains due to speculative in nature. This is very much depending on circumstances, situations, the knowledge and skills of the individuals, documentation, the source of funds and frequency of the transactions, which requires assistance from the professionals or tax adepts that are familiar with cryptocurrency transactions. It is the explanation and documentation, discussion and negotiation with the IRB at the time of audit that crucial.

Forming a Sdn Bhd

The incorporation of a Sdn Bhd to register the purchase of cryptocurrencies in the legitimate platform would allow the transactions to be carried out as business activities. The gains with the deduction of legitimate various business expenses would be taxed but most importantly, any losses from the cryptocurrency transactions is allowed to be deducted for future gain over the period of 10 years.

The preparation of the financial statement with the audited financial statements by external auditor over a period of time may allow investors to issue ordinary shares or preference shares to accumulate capital into a wider range of investments and trading with more regular and active intervals to strike for higher gains or spread business risks.

The issuance of ordinary shares and preference shares, and the publication of preference shares with the availability of various options able to meet risk appetites of wider range investors. The computation of the cost of investment based on weighted average cost, the valuation of the cryptocurrencies at financial year end may reflects market value at lower of cost would further allows deduction without actual disposal of cryptocurrencies.

Conclusion

The purchasing of the cryptocurrencies and its usage would continue to gain popularity in the post COVID-19 pandemic regime. Nonetheless, the trading of cryptocurrencies can be taxed, or being viewed as speculative. The treatment varies, heavily depends on the operators (individual/ company) and the activities. It is good to operate using a Sdn Bhd to strike a balance between gain to be taxed and with appropriate tax deduction on lower market value and loss to be carried forward. Most importantly Sdn Bhd is with perpetuality, so long with sustainable capital sum, there is always the possibility on gains or utilize the losses.

DATA COMPLIANCE REPORT 2022 FOR COMPANY SECRETARIES: A SUMMARY FOR COMPLIANCE

By

Dr. Cheah Foo Seong FCIS, FIPA (Aust), MBA, LLM, LLD

Background

Bank Negara Malaysia (BNM) as the Competent Authority under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLA) has on 12 September 2022, issued a circular on “Data Compliance Report (DCR) 2022 for Registered Companies Secretaries”. The DCR is one of the supervisory tools adopted by BNM to gauge Reporting Institutions¹ compliance to regular reporting requirements beginning 2020, and allows RIs to self-assess and understand their compliance to the AML/CFT requirements as well as to utilise similar information to access their exposure to ML/TF risks (i.e. institutional ML/TF risk assessment).

Mandatory Submission

The submission of DCR 2022 is mandatory for company secretaries and is an enforceable requirement under section 8(3)(a), section 16(6), section 21(1)(b) and/or section 25(2) of the AMLA on all Reporting Institutions under AMLA, including registered company secretaries under Companies Act 2016, when they, whether in person or through a firm or company, prepare to carry out Gazetted activities² for their clients.

“In house” company secretaries who are employees of the company acting as company secretaries are NOT required to submit nor declare their status for DCR 2022.

Reporting Institutions (RIs), at firm level, are required to submit DCR 2022 through an online portal which is assessable until 30 November 2022. Upon submission of DCR 2022, a report card will be issued to RIs identifying gaps and the areas for improvement meant to assist RIs in complying with AML/CFT requirements. The online portal is assessable through dnfbportal.bnm.gov.my

Prior to answering the DCR 2022, RIs are also reminded to appoint a Compliance Officer and notify the BNM of the appointment, which can be done through the link: <http://amlcft.bnm.gov.my/co/>

RIs are highly encouraged to refer to the online portal for further information regarding DCR 2022, including DCR 2022 Information Kit to prepare for submission and schedule for DCR 2022 clinics, etc.

For any enquiry on DCR 2022 which could not be found within the materials or resources provided in the online portal, please contact BNM at 03- 2694 2876 or email to dcrc@bnm.gov.my. For more information on the AML/CFT requirements, please visit AML/CFT website at <http://amlcft.bnm.gov.my>.

For more details, please refer to the following documents: <http://amlcft.bnm.gov.my>

- (a) AML/CFT Data & Compliance Report Information Kit. – 2022
- (b) Full Set of DCR Questions for Company Secretaries
- (c) Info Graft for AML/CFT Data & Compliance Report (DCR) 2022 and Checklist.

¹ Section 3 of AMLA defines a “Reporting Institution” as any person, including branches and subsidiaries outside Malaysia of that person, who carries on any activity listed in the First Schedule.

² As gazette in the Money-Laundering (invocation of Part IV)(No. 2) Order 2004 (P.U.(A) 340/2004) and Anti-Money Laundering (Invocation of Part IV) Order 2006 (P.U.(A) 293/2006) and as provided under paragraph 3.3(i) of the AML/CFT and TFS for DNFBPs and NBFIs Policy Document.

RAISING FUNDS THROUGH PREFERENCE SHARES

By Benjamin Tham Tuck Chuen,
Practising Lawyer, M/S Benjamin Tham & Co.,

When a company needs to raise funds to sustain its business or to expand its growth, it may do so by way of equity (shares) or loan (debt). It may also employ a hybrid form, i.e., combining the characteristics of equity investment and debt, as in preference shares, to source for funds.

If the company is at its early stage and does not have a proven track record of its business model, it may be difficult for it to obtain a loan from a bank. On the other hand, if the company seeks to raise funds by way of equity, it may cause the founders or existing shareholders of the company to suffer a dilution of their shareholdings and consequently eroding their control of the company.

Hence, preference shares offer an attractive alternative, whereby the founders will have access to funds without having to give up control of the company and investors are assured of preference or priority in getting returns on investment via dividend payments and in the worst case, a priority in distributions upon liquidation. Section 2 of the Companies Act 2016 of Malaysia defines “preference share” as “a share, by whatever name called, which does not entitle the holder to the right to vote on a resolution or to any right to participate beyond a specific amount in any distribution whether by way of dividend, or on redemption, in a winding-up, or otherwise.”

Advantages for the company in issuing preference shares

There are advantages for the company to issue preference shares, such as:

- (1) **Retaining control:** The founders or existing shareholders will retain their control over the company as (i) their voting rights are not diluted by the issue of the preference shares; and (ii) the preference shareholders are not entitled to vote save and except under limited circumstances and in matters affecting them.
- (2) **No security needed to be offered:** In loan financing, a collateral or security will usually be required, such as a debenture, charge or mortgage over the assets of the company; or a corporate guarantee from the parent/holding company or individual

guarantees from directors of the company. In contrast, preference shares are issued without the requirement of such security arrangements. As such, a company may conveniently obtain funds without pledging or creating any security over its assets or its shareholders’ assets.

- (3) **No negative covenants or pledges:** Unlike a loan, there are no undertakings and negative pledges imposed on the company to adhere to. The company can conduct its business and manage its affairs without the restrictions commonly found in financing documents.
- (4) **No fixed liability:** Unlike a loan where interest is payable whether there is profit or otherwise, the company is not obliged to pay dividends and thus will not be liable when the company is making losses and no dividend is declared. In such cases, the company can maintain adequate reserves and sustain itself in a financially sound position. Where the company is having financial difficulties, dividends in relation to cumulative preference shares can be deferred, i.e., the entitlement of the preference shareholder to the dividend of one year can be carried forward to the next year.
- (5) **Lower debt-to-equity ratio:** Financing through equity will lower the company’s debt-to-equity ratio, providing a favourable impression of a well-managed company. A company with a high debt-to-equity ratio will indicate the precarious financial position of the company and thus be considered as risky. When the company is too highly leveraged, it will, in most cases, find difficulty in growing and expanding due to the high cost of servicing their debt obligations.

Disadvantages for the company in issuing preference shares

The disadvantages for the company to issue preference shares include:

- (1) **Higher rate:** In most cases, the dividend rate of preference shares is higher than the rate of interest on loans. Due to this, companies will certainly resort to

sourcing loans from lenders before considering getting funds from investors through preference shares. When the company issues preference shares, it will have to pay dividend at rates higher than the interest charged by banks.

(2) **Accumulation:** In the case of cumulative preference shares, arrears of dividend or deferred dividends are required to be paid and will be burdensome on the company.

(3) **Dividend payment not a productive purpose:** The company may be compelled to pay the dividend due to preference shareholders instead of utilizing the limited funds generated from profits for ongoing needs of the business.

(4) **Financial status affected:** The creditworthiness of the company may be affected by the existence of preference shares. Potential investors looking to buy the company may be steered away if the terms of the preference shares are unfavourable.

There are advantages and disadvantages of having preference shares from the investor's perspective. The significant advantage is that preference shareholders will receive dividend payments before ordinary shareholders. The obvious disadvantage is that preference shareholders do not have voting rights in the company.

Advantages for the investor to hold preference shares

The advantages for the investor to hold preference shares include:

- (1) **Priority in dividend payments:** Preference shareholders will be paid dividends first, before dividends can be paid to ordinary shareholders. As dividends are only allowed to be paid out of profits, cumulative preference shares allow for the deferment and accumulation of unpaid dividends when the company is in the red. When the company is in a profitable position, all unpaid dividends must be given to preference shareholders first before any dividends can be paid to ordinary shareholders.
- (2) **Attractive dividend:** Investors may find preference shares with a fixed and/or high dividend rate as good investment.
- (3) **Appealing features:** Preference shares which have redeemable, convertible (to ordinary shares) and participative features assure the investor of being able to participate in the growing business of the company and thus a lucrative option especially

when the value of the company increases.

- (4) **Dividend received not taxable:** Capital gains on shares are not subject to tax under the Income Tax Act 1967. But if the activity of trading in shares is frequent enough, the tax authority may treat the gain as a revenue gain which is taxable. Be that as it may, dividend yields are exempted from tax in the hands of the investors as the dividends distributed by the company is already taxed at the company's level as a final tax.
- (5) **Priority in liquidation:** In the event of winding-up and liquidation, preference shareholders have a higher priority claim on the assets of the company.

Disadvantages for the investor to hold preference shares

The disadvantages for the investor to hold preference shares include:

- (1) **No voting rights:** Preference shareholders have no voting rights, except in limited matters, e.g., where it relates to:
 - (a) winding-up;
 - (b) matters arising during winding-up;
 - (c) disposal of the whole of the property, business and undertaking of the company;
 - (d) dividends in arrears;
 - (e) reduction in share capital of the company; and
 - (f) any proposal affecting the rights attached to the preference shares.
- (2) **Dividend declaration not certain:** Dividend payment is not assured and could be irregular and thus, potential earnings and returns are uncertain.
- (3) **Risk of winding-up:** The risk of a company, which is struggling with inadequate funds to expand or sustain, being insolvent or wound-up and going into liquidation or ceasing business is high. If such company goes into liquidation, it is the secured creditor, e.g., the lending bank, that will have priority of being paid first.

Types of preference shares

The types of preference shares used (which can be in the form that combines 2 or more of the types) include the following:

Cumulative. Cumulative preference shares entitle the holder to payment of dividend arrears on those shares before dividends are paid to any ordinary shareholders or other class of shareholders. If dividend is not declared in a

particular year, preference shareholders with cumulative rights are entitled to a dividend for that year at some point in the future (in priority to the payment of dividends to ordinary shareholders). They usually carry a fixed rate of dividend.

Non-Cumulative. If dividend is not declared in a particular year, holders of preference shares with non-cumulative rights to dividends will not be entitled to any dividend for that year.

Redeemable. Redeemable preference shares may by their terms be redeemed, at the option of the company and/or the holder. These redemption rights are usually expressed to arise on a definite date or in specified circumstances or on the happening of a particular event. The redemption price will be specifically stated and may be at a nominal value, the issue price or at a premium. Redemption can be paid out of capital, profit or by issuance of new shares (Section 72(4) of the Companies Act 2016). Redeemable preference shares are attractive to investors as they provide the investor with an agreed exit strategy. Conversely, it provides a way for the company to buy out the preference shareholder.

Irredeemable. The company cannot redeem non-redeemable preference shares.

Convertible. Convertible preference shares may be converted into ordinary shares (or any other shares of the company, where applicable), at a pre-agreed formula, either by the holder electing to convert or after a specified period or on occurrence of a defined event or upon certain triggers that are set out in the terms of the preference shares. These triggers often include (a) an initial public offering by the company; (b) a failure by the company to meet specified financial performance targets; (c) if redemption does not take place on the agreed date; and (d) a certain percentage of the preference shareholders deciding to convert all preference shares in that class.

Non-Convertible. Non-convertible preference shares cannot be converted into ordinary shares (or any other shares of the company, where applicable).

Participating. Participating preference shares give the holder the right to a dividend (usually a dividend which participates in surplus profits in addition to any fixed dividend) which is usually expressed by reference to a percentage of the company's annual pre-tax profits. In the event of liquidation, the holders of participating preference shares are entitled to receive their liquidation preference, as well as to participate with ordinary shareholders in any surplus assets (on a pro-rata basis) once all liquidation preferences have been satisfied.

Non-Participating. The holders of non-participating preference shares are not entitled to participate with ordinary shareholders once they have received their liquidation preference.

Multiple classes. Start-up companies usually create a new class of preference shares for each new funding round, resulting in multiple classes of preference shares, each with different terms, to suit its various investors. When drafting the terms of the new class, one should bear in mind the terms of the existing classes, so as not to create ambiguities and inconsistencies between the different classes, especially in matters pertaining to redemption, priority, conversion and liquidation.

How to issue Preference Shares

Section 90(4) of the Companies Act 2016 states that "No company shall allot any preference shares or convert any issued shares into preference shares unless provided by the constitution and the constitution shall set out the rights of the shareholders with respect to repayment of capital, participation in surplus assets and profits, cumulative or non-cumulative dividends, voting and priority of payment of capital and dividend in relation to other shares or other classes of preference shares."

As such, a company may only issue preference shares if its constitution has provided for it.

Actions that need to be taken for the issuance of preference shares:

- negotiate and document the agreed terms/features of the preference shares, e.g., in a subscription agreement;
- take note of any pre-emptive rights, i.e., the offer of new shares to existing shareholders first, and the exercise of such rights (under Section 85 of the Companies Act 2016 or the constitution or the shareholders agreement, etc.);
- pass the resolution of shareholders in a general meeting to amend the constitution of the company to incorporate the features of the preference shares;
- pass the resolution of the board of directors to amend the constitution of the company to incorporate the features of the preference shares;
- pass the resolution of shareholders in a general meeting to authorise the board of directors to issue the preference shares;
- pass the resolution of the board of directors for the allotment and issue of the preference shares;
- where required, issue the certificates of the preference shares to each of the preference share subscribers.

The advantages and disadvantages of issuing preference shares for the company and the advantages and disadvantages of holding preference shares for the investor largely depend on the terms of the preference shares. The terms will determine return on investment and will have significant impact on the company, the founders, and existing shareholders. Mistakes in negotiations or improperly configured terms will lead to dire consequences for the company and the shareholders. As such, if preference shares are to be issued, all parties must fully understand their respective rights attaching to those preference shares.

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** Information is as at 4 August 2022*

IACS NEW MEMBERS

We would like to welcome the following new members to IACS :-

IACS No.	Ordinary Members	State
M 2630	Ms. Noor Azirah Binti Said Ibrahim	Penang
M 2631	Ms. Yong Lian Feng	Kuala Lumpur
M 2632	Mr. Lee Chong Leng	Melaka
M 2633	Mr. Eng Boon Han	Johor

MEMBERSHIP UPGRADE

We would like to congratulate the following members who had upgraded from Associate Members to Ordinary Members:-

IACS No.	Ordinary Members	State
M 2433	Mr. Mohd Radzi Bin Lasim	Negeri Sembilan
M 2451	Mr. Ng Chin Hou	Penang
M 2469	Dato' M. Ramanathan a/l S.M. Meyyappan	Selangor
M 2501	Ms. Wendy Mak Mei Ching	Johor
M 2588	Ms. Kwan Siu Mei	Sabah
M 2610	Mr. Wong Hon Kai	Perak
M 2615	Dr. Tan Hoi Piew	Selangor
M 2625	Mr. Tee Wei Leong	Selangor

In the meantime, we take this opportunity to thank you for the support given to the Institute. We look forward to your active participation in all activities of IACS for the development of the company secretarial profession.

GENTLE REMINDER

ANNUAL SUBSCRIPTION FOR YEAR 2023

We wish to remind our members to remit their annual membership subscription for year 2023 to enable us to meet our objectives and discharge various structured programmes for year 2023 and beyond. For your information, the respective annual subscription fee for the time being is as follows:

CATEGORY OF MEMBERSHIP	ANNUAL SUBSCRIPTION
FELLOW	RM 250.00
ORDINARY	RM 200.00
ASSOCIATE	RM 150.00
GRADUATE	RM 150.00
STUDENT	RM 50.00

Kindly ignore this reminder if payment has been made.

✂

REMITTANCE SLIP - ANNUAL SUBSCRIPTION YEAR 2023

To:

Institute of Approved Company Secretaries
Suite C19, 1st Floor, Plaza Pekeliling
No.2, Jalan Tun Razak
50400 Kuala Lumpur

Name: IACS No:

I enclose herewith a Cheque/Bank Draft No. being payment of the above in favour of
INSTITUTE OF APPROVED COMPANY SECRETARIES

Should you wish to directly deposit or transfer online to our account, please fax/email a copy of the transaction slip to 03-4051 1133 or iacsc19@yahoo.com and call to confirm the receipt of your payment.

Details of our bank account are as follows:

Bank Name: Malayan Banking Berhad

Account Number: 514075431102

(Please fill in your name and membership no. under the Tran Description and Reference No. columns of the bank-in slip respectively)

.....

Signature



INSTITUTE OF APPROVED COMPANY SECRETARIES

[199601015175 (387525-X)]

MEMBERS INFORMATION UPDATE FORM 2023

PERSONAL INFORMATION

1. Full Name (as per NRIC): _____
2. IACS No.: _____ 3. LS No.: _____ 4. Practicing Certificate No.: _____
5. Residential Address: _____
- _____
6. Correspondence Address: _____
- _____
7. Tel. No.: _____ 8. H/P No.: _____ 9. E-mail: _____

CURRENT EMPLOYMENT INFORMATION

1. Company's Name: _____
2. Nature of Business: _____ 3. Position Held: _____
4. Office Address: _____
- _____
5. Tel. No. (O): _____ 6. Fax No.: _____ 7. E-mail: _____

**Please ensure that a copy of your renewed Company Secretary License and Practicing Certificate are forwarded to us for updating our Membership Tracking System.*

Member's signature

Date:

Kindly reply by mail/ fax/ e-mail to:

Institute of Approved Company Secretaries

Suite C19, 1st Floor, Plaza Pekeliling,

No. 2, Jalan Tun Razak,

50400 Kuala Lumpur.

Fax: 03-4051 1133

E-mail: iacsc19@yahoo.com

EVENT HIGHLIGHTS

IACS CPD Seminar in Ipoh on 10th August 2022

The seminar was held at WEIL Hotel Ipoh, Perak. The speaker was Ms. Jessica Liew and the topics of the seminar were *"Mitigating Common Offences by the Directors/Secretaries & Statutory Records Updates"*.



IACS CPD Seminar in Kota Kinabalu on 5th September 2022

The seminar was held at Promenade Hotel Kota Kinabalu, Sabah. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Annual Compliance Matters, Accounts & Auditors Case Studies"*.



IACS CPD Seminar in Kuala Lumpur on 20th September 2022

The seminar was held at AC Hotel by Marriott Kuala Lumpur. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Case Studies on AMLA/CTF, Directors and Conflicts of Interests"*.



IACS CPD Seminar in Melaka on 7th October 2022

The seminar was held at Holiday Inn Melaka. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Analysis and Case Studies on Beneficial Ownership of Legal Persons"*.



How to become a member of Institute of Approved Company Secretaries?



1) IACS

INSTITUTE OF APPROVED COMPANY SECRETARIES (IACS) was incorporated on 16 May, 1996 with the Registry of Companies [now known as the Companies Commission of Malaysia] under the Companies Act, 1965. IACS is a company limited by guarantee and not having a share capital.

2) OBJECTIVES OF IACS

The objects for which IACS is established are:-

- To co-ordinate and co-operate with all the regulating authorities in enhancing the professionalism of company secretaries.
- To provide an avenue for company secretaries to get together to improve and advance their interest and professional status and to provide a vehicle for regulating the conduct and professional ethics of company secretaries.
- To conduct seminars, conferences and meetings for the presentation of papers and delivery of lectures, and for the acquisition and dissemination by other means of information connected with the profession of company secretaryship and other related corporate practice.
- To form a library for the use of members and to collect, collate and publish information of service and/or interest to members of the profession and to establish and maintain libraries and collection of documents, papers, research materials and other effects.
- To submit either independently or jointly with other representations, etc; to the relevant authorities pertaining to any legislation either enacted or otherwise for the purpose of promoting the position of members or the professional conduct of company secretaries.
- To afford opportunities for social contact amongst members.
- To print and publish newsletters, periodicals, books or otherwise that are desirable for the benefits of members and the public with the approval of the authority concerned.

3) MANAGEMENT OF IACS

The Management of IACS is vested in the Council (the Board of Directors). The powers of the Council are governed by the provisions of the Constitution of IACS and the Companies Act 2016.

4) CATEGORIES OF MEMBERSHIP AND THEIR DISTINGUISHING LETTERS

The composition of membership of the Institute shall be classified as follows:-

- Fellow Member – FIACS
- Ordinary Member – MIACS
- Honorary Member – HIACS
- Associate Member – AIACS
- Graduate Member – GIACS
- Student Member

5) GUIDELINES FOR MEMBERSHIP APPLICATION

- Membership of IACS is by application on the prescribed form.

- The subscribers to the Constitution and such other persons as shall be admitted to membership in accordance with the provisions hereinafter contained shall, subject as provided by these present, be Members of the Institute.

- All applications shall be accompanied by the following:-

- Certified copy of valid Company Secretary Licence issued by CCM under Section 20G of the Companies Commission of Malaysia Act 2001 or Practising Certificate issued by the Registrar under Section 241 of the Companies Act 2016 by any other Company Secretary or Auditors or Commissioner for Oaths (applicable to Ordinary members only)
- Copies of other certificates of qualifications or membership in relevant associations/ bodies (if available). For Associate, Graduate and Student members, the copies of certificates must be certified by any other Company Secretary or Auditors or Commissioner for Oaths
- Two driving licence-size photographs.
- Photocopy of National Registration Identity Card.
- The registration fee and annual subscription shall be such sums as the Council may from time to time prescribe.

- The respective registration fee and annual subscription for the time being are as follows:

CATEGORY OF MEMBERSHIP	REGISTRATION FEE	ANNUAL SUBSCRIPTION
FELLOW	RM 150.00	RM 250.00
ORDINARY	RM 150.00	RM 200.00
ASSOCIATE	RM 100.00	RM 150.00
GRADUATE	RM 100.00	RM 150.00
STUDENT	RM 50.00	RM 50.00

** Members applying for upgrading to Fellow/Ordinary Members are required to pay a sum of RM170.00 being registration fee (RM150.00) and nominal upgrading fee (RM20.00).*

6) PRIVILEGES AND RULES OF MEMBERSHIP

- A Member is entitled to use the distinguishing letters as indicated in para 4 after his/her name.

- Members shall be entitled to:-

- Receive notices and circulars of IACS pertaining to latest news relating to Secretarial Practices from CCM and other regulatory bodies.
- Attend IACS' general meetings.
- Vote at IACS' general meetings (applicable to Ordinary & Fellow Members)
- Receive a Certificate and I.D. of Membership.
- Participate in seminars, schemes and privileged to enjoy reduced fee and other benefits.

- All Members shall adhere to the provisions of the Constitution, the Code of Ethics and regulations in force and any amendments or changes thereof by the Institute.