

# MYANMAR LEGAL MHM

## Newsletter

In this edition of our newsletter, we provide the following legal updates:

- **Notification on requirements for effective corporate governance:** The Securities and Exchange Commission of Myanmar ("SECM") issued Notification No. 2/2020 on Requirements for Effective Corporate Governance which took effect on 1 January 2021 (except for certain provisions which will take effect on 1 April 2021). The Notification sets out requirements for the corporate governance of listed companies and public companies with more than 100 shareholders.
- **Directorate of Investment and Company Administration ("DICA") issued a notification on resident director requirements:** The DICA issued Notification No. 92/2020 dated 20 October 2020 ("Notification No. 92") clarifying that the period during which entry into Myanmar has been restricted (i.e. from 29 March 2020) will not be counted when determining the period of residence in Myanmar for directors.
- **Standard operating procedures for unsolicited public-private partnership ("PPP") project proposals:** The PPP Center under the Ministry of Planning, Finance and Industry issued its first notification on standard operating procedures ("SOP") for unsolicited PPP project proposals on 2 October 2020. The SOP applies to unsolicited proposals for PPP projects, i.e. proposals made by the private sector directly to the Government.
- **Notification on registration of insolvency practitioners:** DICA issued Notification No. 95/2020 on 3 November 2020 ("Notification No. 95") setting out the procedures for registering insolvency practitioners under the Insolvency Law.

### LEGAL UPDATES

#### 1. NOTIFICATION ON REQUIREMENTS FOR EFFECTIVE CORPORATE GOVERNANCE

On 3 December 2020, the SECM issued Notification No. 2/2020 on Requirements for Effective Corporate Governance ("Notification"). The Notification sets out requirements for the corporate governance of listed companies and public companies with more than 100 shareholders ("Public Companies") in relation to (among other things) (i) the composition of the board of directors and their responsibilities; (ii) establishment of an audit committee; (iii) related-party transactions; (iv) directors' report and disclosure; and (v) shareholders' rights. The Notification took effect from 1 January 2021 (however, Public Companies have been provided a longer transition period to comply with certain provisions specified in section 1 of the Notification, which will only take effect from 1 April 2021).

Corporate governance has been a recent area of focus for the Myanmar government. In January 2019, the Ministry of Planning, Finance and Industry formed the Advisory Committee for Corporate Governance Reform ("Advisory Committee"), with a view to improving corporate governance in Myanmar. The Advisory Committee, which approved the Notification, previously endorsed a draft notification on corporate governance on 5 February 2020, covering key areas such as internal control systems, audit committees and independent directors.

A summary of key features of the Notification is as follows:

##### (1) Appointment of independent directors

Public Companies are required to have at least one independent director. Independent directors must meet the eligibility criteria prescribed in section 175 of the Myanmar Companies Law (Law No. 29/2017) ("MCL") and DICA Notification No. 90/2020 on Qualifications of Independent Directors dated 14 October 2020. For example, a director will not qualify as an independent director of a Public Company unless they (and their family members) have not been an employee of that Public Company or any of its related body corporates in the current or past three (3) financial years.

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(2) *Establishment of an audit committee*

Public Companies are required to form an audit committee chaired by an independent director. The audit committee is responsible for overseeing the entire financial reporting process of the Public Company, ensuring compliance with laws and regulations, and will report to the board of directors.

(3) *Regulations on transactions with related parties*

Public Companies are required to disclose all related-party transactions to the SECM in the prescribed form (in accordance with the SECM's Instruction No. 3/2020 on Material Related Party Transactions for Listed Companies and Public Companies with More than One Hundred Shareholders dated 3 December 2020). Moreover, any directors who have potential conflicts of interest in relation to a transaction are required to abstain from voting to approve it.

(4) *Regulations on directors' report and disclosure*

Section 13(a) of the Notification prescribes the matters which Public Companies must include in their directors' report, including among others, dividend policies, internal control systems and information on directors and audit committee members. The directors' report will be presented at the annual general meeting of shareholders together with the financial statements pursuant to section 146(b)(i) of the MCL. Public Companies are already subject to the continuous disclosure obligations set out in the SECM's Notification No. 1/2016 on Announcement of Continuous Disclosure dated 19 February 2016, and the Notification strengthens these disclosure requirements.

(5) *Shareholders' Rights*

Section 5 of the Notification provides that a Public Company should facilitate the exercise of voting rights of all shareholders, ensure that all shareholders access accurate and sufficient information in a timely manner to exercise those rights, and establish and disclose a policy on dividends.

The majority of companies in Myanmar are privately held, and as a result, the general understanding of corporate governance requirements is not high. However, there is a growing appreciation of the importance of corporate governance. In addition, although there are only six (6) listed companies in Myanmar as of 20 January 2021, the number of public companies with more than 100 shareholders is gradually increasing. This Notification will help to improve corporate governance practices in Myanmar.

## 2. DICA NOTIFICATION ON RESIDENT DIRECTOR REQUIREMENTS

DICA has issued Notification No. 92 relaxing the residency requirements for directors under the MCL to address the fact that many directors of companies in Myanmar have been unable to return to the country due to entry restrictions imposed by the Myanmar Government.

The MCL requires at least one director of a company be a "ordinarily resident" in Myanmar, which is defined as a person who is a permanent resident of Myanmar, or who resides in Myanmar for at least 183 days in a 12-month period. As some directors in companies in Myanmar who were expected to be the "resident director" in that company left the country and have been unable to return to Myanmar due to the imposition of the entry restrictions by the Myanmar Government on 29 March 2020, those companies risked being in breach of the requirement for at least one director to be ordinarily resident in Myanmar under the MCL. To tackle this problem, DICA issued Notification No. 92 to exclude the period from 29 March 2020 to the date the entry restrictions are lifted from the period for determining a director's residency status. We understand that Notification No. 92 is intended to provide relief for companies from having to satisfy the resident director requirement under the MCL until the restrictions on travel to Myanmar are lifted.

It should also be noted that Notification No. 92 is applicable only to company directors and is silent on the resident requirement for an authorised officer of an overseas corporation registered under the MCL. Although we expect that for consistency similar relief would also be granted to authorised officers of registered overseas corporations, this needs to be confirmed with DICA.

## 3. STANDARD OPERATING PROCEDURES FOR UNSOLICITED PPP PROJECT PROPOSALS

On 2 October 2020, the PPP Center issued the Standard Operating Procedures ("SOP") for unsolicited PPP project proposals (i.e. proposals for a PPP project made by private companies directly to a government entity). Under the SOP, a proposal for a PPP Project worth more than 2 billion kyats (approximately USD 1,480,000 as at the date of this newsletter) shall be in accordance with the procedures prescribed in the SOP.

Under the SOP, a proposal for a PPP project is subject to review by the Government as to the financial soundness and track record of the proposer, in addition to the review of the completeness of documents and information submitted and whether the project is in line with Myanmar's national strategic plan. If the proposed project is accepted, the Government will have several options to proceed with the proposal. The Government may undertake a standard tender or proceed with a Swiss Challenge (i.e. a method which requires the Government to publish a bid and invite third parties to provide counter-proposals to match with



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the original proposal). In addition, the SOP provides that the Government may opt for a direct negotiation with the proposer without going through the standard tender process or the Swiss Challenge, if the Government considers that the proposer has an exceptional reputation and international track record in implementing projects of the kind proposed by it.

The SOP can be understood as part of the Myanmar Government's efforts to make the review process for PPP projects transparent.

#### **4. NOTIFICATION ON REGISTRATION OF INSOLVENCY PRACTITIONERS**

On November 3, 2020, DICA issued Notification No. 95 setting out the procedures for registering insolvency practitioners under the Insolvency Law.

As described in our May 2020 newsletter, Myanmar enacted a new Insolvency Law on 14 February 2020, and this came into force on 25 March 2020 (except for Part X relating to cross border insolvency), and the Insolvency Rules 2020 were issued on 28 April 2020. The Insolvency Law provides for the establishment of a register of insolvency practitioners. However, the procedure for registering insolvency practitioners under the Insolvency Law are unclear, and none have been registered to date, meaning that the Insolvency Law has yet to be fully implemented.

Notification No. 95 is a significant step forward to implementing the Insolvency Law in Myanmar.

#### **FIRM UPDATE – PUBLICATION OF ARTICLE ON REAL ESTATE**

Myanmar Legal MHM contributed the Myanmar chapter of the 14<sup>th</sup> edition of the *Getting the Deal Through* volume on real estate, published in November 2020. This chapter provides our insights based on our on the ground experience advising on real estate transactions in Myanmar.

We trust this publication will be helpful to your business in Myanmar. You can access the publication at the link [HERE](#).