

Companies Act 2016 : Proposed Amendments on the Appointment of Nominees

June 2024
One Asia Lawyers Group

Yuki Hashimoto Lawyer (Japan)
Clarence Chua Min Shieh Lawyer (Malaysia)

1. Introduction

In the past, foreign entities who would like to expand their businesses to Southeast Asian countries like Malaysia, have traditionally utilised a nomination system. This is where a foreign entity may nominate a citizen or company from that target country to be its shareholder or director, depending on the circumstances, in order to satisfy certain conditions or requirements set out in the regulations of that country. That nominee in turn, will then adhere to the directions of the foreign entity that nominated them, usually for a fee or some other remuneration. However, amendments to the local legal system are currently underway that may force a change in this practice.



The Financial Action Task Force (“FATF”) is an intergovernmental organization that develops policies to combat money laundering and terrorism financing. It develops policies for its member states to adhere to in order to ensure such goals are met and Malaysia is one of its member states. Recently, the FATF has published new international standards and guidance on transparency and beneficial ownership of legal persons¹.

A particular emphasis was made to the disclosure of nominee shareholders’ and nominee directors’ status. This is because although nominees may have legitimate reasonings behind their appointment, such nominations can be used as a means to evade beneficial ownership transparency rules. In order to address this and to also comply with current international standards, amendments have been proposed into the Companies Act 2016 (“CA 2016”). Please note that these amendments are different than the amendments that have taken into effect earlier on 1 April 2024.

2. The current system.

The current CA 2016 includes references like ‘nominee’² and ‘nominee director’³. However, there are no specific provisions under the current CA 2016 that require companies to obtain, record, keep and maintain both register of nominee shareholders and register of nominee directors. Currently, there are no definitions of such parties in the same. Other than such general references in stating that a nominee director shall act in the best interest of the company under Section 217, the CA 2016 does not make specific references to who nominees are and what they do.

¹ Part 1, Consultative Document on the Proposed Amendments to the Companies Act 2016 relating to Nominee Shareholders & Nominee Directors, 22 December 2023

² Section 4(3), Section 6 Companies Act 2016, among others

³ Section 217 Companies Act 2016

This has resulted in a situation where companies are not obliged to ensure the availability of information as per international standards. As such, amendments under the new draft Companies Amendment Bill in the form of Division AA have been proposed. Division AA was then published to the public by way of a Consultative Document dated 22 December 2023. The public are then allowed to provide feedback on the same by 31 January 2024. The proposals under Division AA can be categorized into 3 parts: definitions, responsibility of nominees, and registration system for nominees.

3. Definitions

Division AA has proposed for the following definitions⁴:

“nominee director” means an individual that routinely exercises the functions of the director in the company on behalf of and subject to the direct or indirect instructions of the nominator. A nominee director is never the beneficial owner of a legal person;

“nominee shareholder” means an individual that exercises the associated voting rights according to the instructions of the nominator and/or receives dividends on behalf of the nominator. A nominee shareholder is never the beneficial owner of a legal person based on the shares it holds as a nominee;

“nominator” means an individual (or group of individuals) or legal person that issues instructions (directly or indirectly) to a nominee to act on their behalf in the capacity of a director or shareholder, also sometimes referred to as “shadow director” or “silent partner.”

It is interesting to note that Division AA refer to “shadow director” and “silent partner”, phrases that are not in the CA 2016 but are commonly used in business lingo. Having said that, the wide but clear definition of a “nominator” means that a nominator can also mean a company, society, or any other form of legal entity. Overall, the definition provides good guidance for such individuals since such definitions are absent in the current version of the CA 2016.

4. Responsibility of Nominees

Currently, there are no specific provisions relating to nominee shareholders or nominee directors that compel them to disclose their nominee status. Under Division AA, nominees will soon be required to disclose information about their nomination and of their nominator to the company⁵. It is worth noting that the company would only be responsible for keeping the records of such nominations. They are technically dependent on the reporting of the nominees pertaining to the same, which is quite different compared to the reporting system that has been provided for the reporting of other matters, such as beneficial ownerships, among others.

The company will then need to keep and maintain the information of its nominee shareholders, nominee directors, and nominators in a register. Companies are also required to lodge such information with the Registrar within 14 days after the information has been entered into the register. The lodged information is not publicly available except for the status of a shareholder or director as a nominee.

As such, the information registered is not supposed to be disclosed to the public, except for the shareholder's or director's status as a nominee. However, companies who appoint nominees in order to adhere to certain restrictions or requirements for foreign trade or investments, should still be particularly careful.

⁴ Section A1, Division AA, Companies (Amendment) Bill, Consultation Document 22 December 2023

⁵ Section A4 and A5, Division AA, Companies (Amendment) Bill, Consultation Document 22 December 2023

For an easier understanding, we shall use a company which has to adhere to certain requirements of local shareholding with regard to foreign investments as an example. In order to obtain a license or renew such a license, they may choose to appoint local nominees as their shareholders. If such nominee shareholders were appointed, the existence of such nominees would be made known as their status will be made available to the public as stipulated under Division AA. The existence of such information may then trigger possible questioning from the relevant authorities. This is especially so when based on the Consultative Document, that the relevant authorities would have full access to the information of nominees that were initially submitted to the SSM. As such, companies would still need to be careful with regard to the appointment of such nominees.

In the event that the nominees do not adhere to these reporting requirements, they would be seen to have committed an offence under Subdivision 2 (specifically, Section 591 to 598) of the CA 2016⁶ which covers fraudulent and/or misleading reporting, and delinquency of officers of a company. As the penalties for false or misleading reporting can lead to hefty fines and possible jail sentences⁷, such nominees must be mindful on their role under this new regime.

5. Registration System

Division AA under Section A3 for Nominee Shareholders and A5 for Nominee Directors have provided potential guidance on how a company can create and store the information of such nominees. The information needed is relatively straight forward. Namely, the name and address of the nominee, the date of nomination and when the nomination is to expire, and the information of the nominator, among others.

It is also worth noting that under Section A3(8) and Section A5(8) in the proposed Division AA, that the register of nominee shareholders and nominee directors, respectively shall be *prima facie* evidence of any matters inserted in the register under this Act. In other words, it means that unless rebutted, the information provided under the registers will be seen as evidence that can be used in legal proceedings. As such, companies should ensure that the registers are as accurate as possible.

It should be noted that foreign companies are also required to adhere to Division AA⁸ if it is to be in effect.

6. Possible response

In the event of the above-mentioned changes are to take into effect, companies that have appointed nominees based on the current system or considering using similar schemes in the future will now need to reconsider their approach due to these possible changes.

In particular, such impacted companies would have to reconsider their approach in appointing the people in charge of their organizations and then ensure they do not fall under the statutory definition of “nominee”. However, such an approach needs to be considered on a case-by-case basis as the needs and circumstances of one company may differ from another.

7. Conclusion

Although the process in amending overall system for nominees is still underway, the current progress shows the commitment of the authorities in ensuring that the legal system in Malaysia will soon comply with international standards. Seeing that the regulators are keen in ensuring

⁶ Section A4(4) and A6(4), Division AA, Companies (Amendment) Bill, Consultation Document 22 December 2023

⁷ Section 591(2) and 593 CA2016 states that on conviction for false or misleading reporting, an individual be liable to imprisonment for a term not exceeding 10 years or to a fine not exceeding 3 million ringgit or to both. Section 592 also provides for the same punishments for officers of a corporation that willfully deceive the relevant authorities via the making or furnishing of any false or misleading statement or report.

⁸ Section A2, Division AA, Companies (Amendment) Bill, Consultation Document 22 December 2023

that the mechanisms adhere to international standards like the ones proposed by the FATF, it would be advisable for businesses to take note of these current developments and assess if their own business structure would be able to work with these possible changes.

It should be noted that it is possible that the proposed Division AA may be amended depending on input from the public via the aforementioned Consultative Document. As that the most recent amendments to the CA 2016 just took into effect on 1 April 2024⁹, it may be some time before another set of amendments to the same are finalized on the laws on nominees. However, this seems more of when and how the amendments will take effect, instead of just if those amendments will take place. We will keep an eye on the developments on the matter and will provide updates accordingly. In the event you have any questions on the new Division AA or of the existing system pertaining to the appointment of nominees, please do not hesitate in contacting us.

◆ One Asia Lawyers ◆

One Asia Lawyers Group is a network of independent law firms created to provide seamless and comprehensive legal advice for Japanese and international clients across Asia. With our member firms in Japan, Southeast Asia, Oceania and other ASEAN countries, One Asia Lawyers Group has a strong team of legal professionals who provide practical and coherent legal services throughout each of these jurisdictions.

For any enquiry regarding this article, please contact us by visiting our website: <https://oneasia.legal/> or email: info@oneasia.legal.

This newsletter is general information for reference purposes only and therefore does not constitute our group member firm's legal advice. Any opinion stated in this newsletter is a personal view of the author(s) and not our group member firm's official statement. Please do not rely on this newsletter but consult a legal adviser or our group firm member for any specific matter or legal issue. We would be delighted to answer your questions, if any.

< Author >



Yuki Hashimoto
One Asia Lawyers Malaysia
Lawyer (Japan)

He established his own firm in Japan and worked as a representative partner of a law firm with three offices in Japan. He has provided legal service as advisor to a wide range of organization in Japan, including companies in construction, real estate management, system development as well as local government and politic parties. He has been a member of One Asia Lawyers since September 2020, providing advice on general cross-border Asian legal matters (M&A, regulatory investigations, etc.) with a focus on Malaysia.

yuki.hashimoto@oneasia.legal



Clarence Chua Min Shieh
One Asia Lawyers Malaysia
Lawyer (Malaysia)

A Malaysian lawyer with work experience mainly in litigation, dispute resolution and contractual advisory in both private and in-house practice. Advised on contractual obligations and drafting, company law, tort, data protection and litigation risk management. Joined One Asia Lawyers in January 2022 and provide advice for legal affairs involving Malaysian laws and regulations.

chua.clarence@oneasia.legal

⁹ “Akta Syarikat (Pindaan) 2024 Wajibkan Pelaporan Pemunyaan Benefisial Bakal Dikuatkuasakan pada 1 April 2024” (Translation: The Companies (Amendment) Act 2024 will make the reporting of beneficial ownership compulsory from 1 April 2024), SSM Press Release , 27 March 2024