LARGEST OVERHAUL OF TAIWAN'S COMPANY ACT IN ALMOST TWO DECADES A WELCOMING BID FOR FUNDRAISING

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By: Joseph P.Y. Tseng, Jacqueline Fu

On July 6, 2018, Taiwan's legislature enacted 148 amendments to the Company Act (the "2018 Amendments"), which became effective November 1, 2018. The 2018 Amendments constitute the largest overhaul of Taiwan's Company Act in almost two decades.

The 2018 Amendments come three years after Taiwan enacted a series of amendments (the "2015 Amendments") that established under law the legal entity of a closely- held company limited by shares ("closely held company"). The 2015 Amendments were crafted to provide start-up companies with more flexibility in structuring their operations and raising funds. This article will explain how some of the newly enacted 2018 Amendments build upon the 2015 Amendments and go farther to help start-ups succeed in fundraising.

Specifically, we will address the provisions that:

- introduce no-par stock;
- create more flexible preferred stock rights and preferences;
- abolish financial threshold for debt financing;
- allow private companies to issue convertible bonds;
- confirm the enforceability of voting trusts and voting agreements; and streamline corporate governance requirements.

INTRODUCE NO-PAR STOCK

The 2018 Amendments allow private companies to issue no-par value stock and/or convert all shares with par value into shares with no-par value. This expands the scope of the 2015 Amendments, which only permitted closely held companies to issue no-par stock. This new provision gives start-ups the flexibility to issue shares at a low purchase price, which will allow their founders to retain majority control of their companies while issuing stock options at a low exercise price. As par value has no relation to the market value of the stock, allowing no-par stock could allow the valuation of the company to be more truthfully reflected.

While change is anticipated, public companies are still required to issue par value stock.

CREATE MORE FLEXIBLE PREFERRED STOCK RIGHTS AND PREFERENCES

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The 2018 Amendments allow private companies to issue preferred stock that entitles its holders to a wider variety of rights and privileges. Previously, preferred stock only entitled its holders to special rights in dividends and distribution (preference, fixed amount, or fixed rate) and voting rights (concerning the order of exercising voting rights, restrictions on voting, or whether to have voting rights). The shareholders' right to determine the order of voting rights only extended to agreeing on the voting order of preferred stockholders and common stockholders on a particular matter. Preferred stockholders could not have multiple votes per share or veto right. Any transfer restriction on the capital stock stipulated in the articles of association was prohibited and unenforceable. Also, when converted, one share of preferred stock could only be converted into one share of common stock; the conversion ratio could not be adjusted due to a later recapitalization event. All of this made preferred stock a lot less attractive to outside investors.

Following the 2015 Amendments, which permitted closely held companies to issue preferred stock that has a variety of rights, privileges, and preferences, the 2018 Amendments now allow any company to issue preferred stock, which may be entitled or subject to the following features:

- carry multiple votes;
- possess veto rights on certain matters;
- restrict preferred stockholders from being elected as a director or supervisor by the shareholders;
- provide the right to elect a fixed number of directors among preferred stockholders (but not a fixed number of supervisors, as the Ministry of Economic Affairs ("MOEA") explained that allowing such a set-up could undermine the supervisor's core oversight function and impugn the legitimacy of internal corporate governance safeguards);
- convert to shares of common stock by a conversion formula (paving the way for anti-dilution adjustment); and
- provide for a transfer restriction.

It should be noted that the 2018 Amendments allow transfer restrictions on the preferred stock (but not common stock) to be stipulated in the articles of incorporation. However, in venture capital investments, investors normally wish to place transfer restrictions on common stock or the shares held by the founders (which are normally common stock). Under the 2018 Amendments, it is still unacceptable to place transfer restriction on common stock via stipulations included in the articles of incorporation.

ABOLISH FINANCIAL THRESHOLD FOR DEBT FINANCING

Previously, the Company Act prohibited private companies from issuing corporate bonds that exceeded the amount of its net assets (total assets less total liabilities and intangible assets). The 2015 Amendments removed this limitation for closely held companies. The 2018 Amendments go one step further, abolishing the limitation for all private companies. This should be beneficial to start-up companies, as many operate in the red as they get their operations up and running.

ALLOW PRIVATE COMPANIES TO ISSUE CONVERTIBLE BONDS

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The 2018 Amendments also abolish the prohibition on private companies issuing convertible bonds, a key fundraising tool for start-ups. Following the 2015 Amendments, which gave closely held companies the right to issue convertible bonds and bonds with warrants, the 2018 Amendments extend this right to companies limited by shares.

CONFIRM THE ENFORCEABILITY OF VOTING TRUSTS AND VOTING AGREEMENTS

The Taiwan courts have consistently ruled a voting trust or voting agreement unenforceable out of concern that they could damage the rights of minority shareholders. However, exceptions to this general prohibition have been permitted. For instance, the Business Mergers and Acquisitions Law allows shareholders to create voting trusts and voting agreements for mergers and acquisitions-related matters at a shareholders' meeting. Additionally, the 2015 Amendments stated that shareholders of a closely held company may set-up voting trusts or entering into voting agreements. The 2018 Amendments extend the 2015 Amendment to apply to all private companies. This should empower start-up companies and their shareholders to better control who has a say or can vote on certain business matters important to their operations, thereby removing a level of uncertainty.

STREAMLINES CORPORATE GOVERNANCE REQUIREMENTS

Given the relatively simple shareholding structure and operations of most small- to mid-sized companies, the 2018 Amendments abolish the requirement that a company's board be comprised of three directors and one supervisor, as was previously required. Rather, in instances where a company has a sole shareholder, the 2018 Amendments only require a company to appoint one director (and no supervisor). MOEA hopes this amendment will increase decision-making efficiencies and reduce management costs, especially for start-ups who often operate on shoe-string budgets.

The 2018 Amendments also abolish the requirement that a board meeting be held by physical meeting attended either in person, by proxy, or via video conference. Thus, the new law now allows companies to hold board meetings and make decisions through written resolutions, so long as this is provided for in the company's articles of incorporation and that all directors have given their consent to adopt written resolutions in lieu of a physical meeting. No specific form is required by law to record director consent.

CONCLUSION

Overall, the 2018 Amendments show that Taiwan is committed to modernizing its Company Act. The 2018 Amendments address many long-held criticisms of the previous corporate fundraising regime and provide start-up owners with a broader array of options to access capital and entice investors with varying preferences.

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KEY CONTACTS



JOSEPH P.Y. TSENG
PARTNER

TAIPEI
+886.2.2326.5177
JOSEPH.TSENG@KLGATES.COM



JACQUELINE FU
MANAGING PARTNER, TAIPEI OFFICE

TAIPEI
+886.2.2326.5125
JACQUELINE.FU@KLGATES.COM

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