ENACTMENT OF NEW COMPANIES LEGAL REGIME IN THE DIFC

Date: 15 November 2018

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INTRODUCTION

On 12 November 2018, the Dubai International Financial Centre (the "DIFC") enacted several new laws, which overhaul the legal framework applicable to companies incorporated or registered in the DIFC. These new laws also make certain changes to the legal regime of other types of DIFC entities including general partnerships, legal liability partnerships, limited partnerships, non-profit organizations, foundations and trusts. This article highlights some of the main changes in the DIFC companies regime.

NEW COMPANIES REGIME

The new DIFC companies regime is governed by the new DIFC Companies Law (Law No. 5 of 2018), the new DIFC Operating Law (Law No. 7 of 2018), the Companies Regulations, the Investment Companies Regulations, the Protected Cell Company Regulations, the Ultimate Beneficial Owner Regulations and the Operating Regulations. Copies of the new laws and regulations can be accessed on the DIFC online Legal Database at https://www.difc.ae/business/laws-regulations/legal-database/.

The enactment of the new laws and regulations referred to in this article forms part of a broader initiative to update the DIFC's regulatory framework to bring it in line with international best practice. While many of the new provisions have been modeled on UK and Jersey companies law, they also reflect the particularities of the DIFC and its evolution.

WHICH ENTITIES ARE AFFECTED?

All types of entities incorporated or registered in the DIFC are affected by the new legislation to a certain degree, and therefore it is important that each DIFC entity familiarizes itself with those changes that apply to it.

KEY CHANGES

Company classification: private and public companies; no more LLCs

Pursuant to the Companies Law, the types of companies permitted in the DIFC going forward are private companies, public companies and recognized companies (branches of foreign companies). Limited liability companies incorporated under the old companies law have been automatically converted into private companies whereas entities incorporated as companies limited by shares have automatically been converted into either private companies, or public companies. All companies should have received a notification of their new status following conversion (which can be contested within 30 days).

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Generally, private companies are subject to fewer regulatory requirements than public companies under the new regime.

Some of the main differences between private and public companies are set out in the following table:

Issue	Private Companies	Public Companies
Number of Shareholders	1 to 50 shareholders	1 to any number of shareholders (no maximum)
Minimum Share Capital Requirement	No minimum	US$100,000
Minimum Number of Directors	1	2
Company Secretary	Not required	Required
Annual General Meeting	Not required (unless otherwise provided in articles of association)	Required
Accounts	The board of directors must prepare a financial report each year and preserve a record of it for 6 years (unless exempt). "Small Private Companies"[1] are carved-out from the requirement to audit and file accounts	Subject to DIFC Regulatory Law 2004 and the Markets Law 2012, as amended
Issue of Shares for Non-cash Consideration	The board of directors may reasonably calculate the value of non-cash consideration	An independent valuation must be completed for non-cash consideration
Reduction of	By ordinary resolution of	By special resolution of

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Share Capital	the shareholders and subject to a newspaper publication and solvency certification process	the shareholders and subject to a DIFC Court Order confirmation process involving consultation with creditors
Restrictions on Payment of Dividends	Subject to solvency determination of directors	Subject to a Public Company's net assets being not less than the aggregate of the share capital of the company and provided that the payment of dividends does not reduce the amount of those net assets to less than the aggregate of the share capital[2]
Financial Assistance	Prohibited only if a subsidiary of a public company	Prohibited

Articles of association

New standard articles of association have been introduced. The companies' existing articles of association will stay in effect to the extent they do not conflict with the new legal regime. If they do conflict with the new regime, the standard articles will apply. Companies have twelve months to update their articles of association as appropriate.

In the event a company adopts either an amended form of the standard articles of association, or bespoke articles of association, one of the company's directors must certify compliance with all applicable DIFC laws. A legal opinion from the company's legal advisers is no longer required.

Directors' duties

The new regime significantly enhances directors' responsibilities, bringing them into closer alignment with those owed by company directors in the UK. Going forward, directors' duties will include, without limitation, the exercise of independent judgment, consideration of the long-term consequences of their decisions and corporate actions, the interests of the company's employees and its shareholders and its impact on the community and the environment.

Statutory pre-emption rights

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Any shareholder of a DIFC company now benefits from pre-emption rights in relation to any allotment of shares in the company (subject to certain exceptions). Private companies may dis-apply the application of such rights in their articles of association.

Company filings – confirmation statement

All DIFC companies are now required to file a confirmation statement with the DIFC Registrar of Companies at the time of license renewal, instead of filing an annual return. The confirmation statement will include a confirmation that all information (and any changes to such information) required to be notified to the DIFC Registrar of Companies has been so notified. In addition, public companies must provide a written copy of the confirmation statement to any person who may request it (subject to payment of a reasonable fee).

DIFC companies with foreign parents will have the option to maintain registers and records at a location other than the registered address of the DIFC company. The record of the decision to keep such documents at a location other than the registered address must be filed with the DIFC.

Treasury shares

The old companies law was silent on treasury shares despite references to treasury shares in the MKT Module of the DFSA Rulebook. The new Companies Law provides for the treatment of treasury shares, particularly in relation to redemptions of shares and a company's purchase of its own shares.

New mergers regime and scheme of arrangements

The new regime introduces new provisions in relation to corporate mergers involving shareholder approval, solvency statements, notice to creditors and recourse to the DIFC Court. Scheme of arrangement provisions, applicable to both private and public companies, have also been introduced.

New register of debentures

Public companies that have issued debentures must establish and maintain a register of debenture holders.

OTHER IMPORTANT CHANGES

Introduction of the new Operating Law and Regulations

The new Operating Law, and the Operating Regulations issued pursuant to it, govern the operation of DIFC entities under the supervision of the DIFC Registrar of Companies. The new provisions apply to all types of registered entities (companies, general partnerships, limited partnerships, limited liability partnerships, non-profit organizations, foundations, etc.). Among other things, the new provisions regulate the role and powers of the DIFC Registrar of Companies, including investigation, inspection and enforcement powers, licensing requirements, due process procedures, and confirmation statement requirement (see above).

Whistleblower protections

The Operating Law also introduces certain whistleblower provisions. A person who makes a disclosure of information to certain persons will be entitled to specific protections. These include, without limitation, avoiding being subjected to any legal or contractual liability for making the disclosure and being dismissed from his/her current employment.

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New Ultimate Beneficial Ownership Regulations

All DIFC entities (subject to certain exemptions) must now maintain a register of ultimate beneficial owners. This register must be put in place within 90 days of the date of enactment of the law. It is not a public register, but it must be provided to the DIFC Registrar of Companies, which also needs to be notified of any changes.

Changes to Investment Companies and Protected Cell Company Regulations

Generally, the changes that have been made regarding DIFC investment companies and protected cell companies under each of the respective regulations aim to provide more certainty in relation to the prevalence of DFSA administered legislation when there is a conflict with the new DIFC regime and better visibility as to the DFSA's relevant due process procedures. Specifically in relation to investment companies, the new Investment Companies Regulations provide that an investment company must make any distributions in accordance with the company's articles of association and the prospectus and subject always to the Collective Investment Law 2010 and the CIR Module of the DFSA Rulebook.

RECOMMENDATIONS

It is likely that all entities established in the DIFC will be affected by the new companies regime referred to in this article. Therefore, it is paramount that management of all DIFC entities familiarize themselves with the new regulatory framework and determine how it applies to them and take all actions as may be necessary to bring their articles of association, as well as internal procedures and policies, in line with all applicable new requirements. In addition, companies should consider the impact of the new regime on all transactions in progress, as some procedures have substantially changed. Finally, DIFC entities and their management should discuss, and raise awareness of, changes with the company's officers (directors and secretaries) and other relevant team members.

Our lawyers are available to advise on all legal aspects regarding the applicability and implementation of the new DIFC companies regime. Please feel free to get in touch with your usual K&L Gates contact or any of the persons whose details are set out below.

Footnote 1: A Small Private Company is a private company that has no more than 20 shareholders and annual turnover not exceeding US$5 million.
Footnote 2: Subject to exceptions in relation to DIFC funds using the investment company structure.

KEY CONTACTS



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