

Amendments to KSA's Companies Regulations

Wednesday, 11th of April 2018

Amending Resolution

The Council of Ministers issued resolution no. 403 and dated 24/07/1439H (corresponding to 09/04/2018G) (the Resolution) approving certain amendments to the Saudi Arabian Companies Regulations issued pursuant to Royal Decree no. M/3 dated 28/01/1437H (corresponding to 08/11/2015G) (the Companies Regulations).

We provide a summary of the key amendments made by the Resolution below.

Summary of Amendments

1. Article 12 – Requirement for constitutional documents to be in writing:

- a. There continues to be a requirement for the articles of association of a company, other than a general partnership, and any amendment thereto to be made in writing, otherwise any such articles or amendment will be void.
- b. The Resolution removes the explicit notarization requirement for articles and amendments thereto, but makes a reference to procedures to be set by the Ministry of Commerce and Investment (MOCI). These procedures have not been published yet.
- c. The Resolution deletes Article 12(2) of the current Companies Regulations, which states that shareholders and board members who do not comply with the requirement of having the articles and all amendments thereto be notarized and made in writing will be jointly liable to for damages caused to the company, the shareholders, or third parties as a result of such non-compliance.

2. Article 71 – Transactions with an interested board member:

- a. The Resolution removes the need for “prior” approval from the general assembly of a joint-stock company (a JSC) in relation to transactions with an interested board member. This is a welcome change that would allow more flexibility in entering into related party agreements that can be ratified at a later stage in a general assembly.
- b. The Resolution also removed the need for such approval to be renewed annually. Again, this is a welcome change given that many agreements are usually multi-year relationships. This change would give more certainty to companies.
- c. Rules relating to the general assembly approval of interested transaction to be set by the relevant authority (MOCI or Capital Market Authority (the CMA)).
- d. The Resolution provides that board members (including the interested board member) are liable for any damages resulting from an interested transaction which:
 - i. does not comply with the general assembly approval requirement;

- ii. is “not fair” (such term has not been defined); or
- iii. conflicts with, and damages, the interests of the shareholders.

These changes create a robust mechanism that would allow the relevant stakeholders to bring action against board members for entering into transactions that may not be in the best interest of the company.

- e. Non-voting/objecting board members of a JSC remain liable for any such interested transaction unless they record their explicit objections in the minutes of the relevant board meeting.
- f. The Resolution provides that absence from a meeting does not absolve a board member from liability unless he/she shows that he/she was not aware of the resolution or could not object to the resolution after he/she becomes aware of it.

3. Article 72 – Non-compete duty on board members of a JSC:

- a. The Resolution removes the need for “prior” approval from the general assembly of a JSC in relation to transactions which involve a board member competing with the company he/she serves on.
- b. The Resolution also removed the need for such approval to be renewed annually.

4. New Article 80 – Derivative lawsuits: The Resolution included conditions for how a JSC can be made liable for costs of derivative lawsuits. This is an important development, especially in light of the CMA’s Class Action Suits Rules which became effective in November 2017.

5. Article 91 – Annual general assembly of a JSC: General assembly notice is now 21 days, as opposed to 10 days.

6. Articles 104 and 126 – financial statements and auditor report of a JSC: The internal auditor report, and the signed financial statements, have to be prepared and deposited at the head office of the company 21 days before a general assembly, as opposed to 10 days.

7. Article 157 – Upfront payment of a limited liability company (an LLC)’s capital:

- a. Removed the requirement that an LLC’s capital be fully paid at the time of registering the LLC with the commercial register.
- b. We note that this aligns the Companies Regulations with the current MOCI practice in relation LLCs with 100% Saudi Arabian capital, pursuant to which shareholders can incorporate an LLC and undertake to pay up the registered capital of the LLC within 90 days from the date of its registration in the commercial register (instead of paying up the capital in full at the time of the LLC’s incorporation).
- c. It is not clear what the status of the LLC is if the capital is not fully paid within 90 days.

8. Article 161 – Pre-emptive rights of shareholders of an LLC:

- a. The Resolution clarifies that the shareholders of an LLC enjoy a statutory right of first refusal, as opposed to a right of first offer.
- b. The purchase price and conditions in a right of first refusal situation in an LLC is the price offered by the third-party buyer, or the valuation mechanism in the articles.

9. Article 167 – annual general assembly of an LLC: Any shareholder(s) owning 10% or more of shares in an LLC may now call a general assembly, as opposed to the 50% minimum prescribed under the current Companies Regulations.

Effective Date

The Resolution does not specify the effective date of the amendments made by it, nor does it state whether existing companies will have a grace period to comply with such amendments. We expect this to be clarified in an official announcement once a Royal Decree is passed to ratify the Resolution.

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