New DIFC Prescribed Company Regulations

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Having revised the overall companies regime under DIFC Companies Law No. 5 of 2018 ('Companies Law'), and having considered the Special Purpose Companies ('SPCs') and Intermediate Special Purpose Vehicles ('ISPVs') that used to form part of the offering of the DIFC, on 31 October 2019, the DIFC Authority enacted new Prescribed Company Regulations ('New Regulations').

The initiative to introduce the New Regulations was driven by the objective to make sure the secondary legislation, i.e. regulations, under DIFC law, naturally complement the Companies Law and encourage a relaxed, cost efficient and flexible regime for lighter company structures within the DIFC.

The Prescribed Companies, in addition to the New Regulations, are subject to the Companies Law, Operating Law DIFC Law No 7 of 2019, Operating Regulations and the Ultimate Beneficial Ownership Regulations.

What is a Prescribed Company?

Under the New Regulations, a Prescribed Company is a private company limited by shares that falls under the regime of a Small Private Company, as per the Companies Law. The existing SPCs as well as the ISPVs shall automatically become Prescribed Companies whilst certain other entities can be formed as a Prescribed Company.

Eligibility

A Small Private Company will be considered a Prescribed Company if it has been established:

1. by a qualifying applicant; or
2. for a qualified purpose.

1. Qualifying Applicants are:

- Authorised Firm, being a firm regulated by: (i) the Dubai Financial Services Authority (‘DFSA’); or (ii) a recognised financial services regulator in Australia, Austria, Belgium, Canada, Denmark, European Member States, Finland, France, Germany, Greece, Guernsey, Hong Kong, Iceland, India, Ireland, Isle of Man, Italy, Japan, Jersey, Luxembourg, Malaysia, Netherlands, Norway, Portugal, Singapore, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States of America;
- Fund: a DFSA-regulated fund or a fund domiciled in Australia, Austria, Belgium, Canada, Denmark, European Member States, Finland, France, Germany, Greece, Guernsey, Hong Kong, Iceland, India, Ireland, Isle of Man, Italy, Japan, Jersey, Luxembourg, Malaysia, Netherlands, Norway, Portugal, Singapore, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States of America;
- Family Office formed in the DIFC under DIFC Family Office Regulations and physically present in the DIFC;
- FinTech Entity: an entity licensed to conduct financial technology activities in the DIFC;
- Foundation: a foundation formed in the DIFC;
- Government Entity: (a) the Federal Government, the government of Dubai or the government of any Emirates; (b) a person who has powers or is associated with any government entities in (a) above; or (c) a person who owns (directly or indirectly) a significant interest in a government entity stated in (a) above;
- Holding Company: a holding company formed in the DIFC;
- Private Trust Company: a private trust entity registered in the DIFC;
- Proprietary Investment Company: a proprietary investment company registered in the DIFC; and
- a DIFC Prescribed Company controlled by one or more of the above applicants, (‘Qualifying Applicant’).

2. Qualifying Purposes are:

- Aviation Structure: a structure involving one or more persons that have a sole purpose of facilitating the owning, financing, securing, leasing or operating of one or more aircraft;
- Crowdfunding Structure: a structure involving one or more persons established for the purpose of holding asset(s) invested into through a crowdfunding platform;
- Family Holding Structure: a structure involving one or more persons established for the sole purpose of consolidating the holdings of a specific family member, their spouse and/or, bloodline descendants in a

DIFC family office, holding company or a proprietary investment company; or
- Structure Financing: a structure involving one or more persons having the sole purpose of holding assets to leverage, and/or manage risk in one or more financial transactions, including: (a) complex lending or security arrangements; (b) derivative transactions; (c) hybrid securities; or (d) securitised and collateralised debt instruments, (whether done in an Islamic or conventional financing manner), (‘Qualifying Purpose’).

Former Regime and the New Regulations

Under the former SPC framework, a SPC could be formed to conduct a prescribed type of functions, e.g. activities involving acquisitions (by leasing, title transfer, risk transfer or otherwise), the disposal of any assets (tangible or intangible, including but not limited to receivables and shares) for the purpose of a transaction, obtaining any type of financing, granting any type of security interest over assets, providing any indemnity/support for the benefit of shareholders, entering into any type of hedging arrangements and acting as trustee or agent for any participant in a transaction. The SPC had to appoint a corporate service provider as a company secretary and the majority of directors of the SPC were required to be employees of the corporate service provider.

The ISPV regime, on the other hand, focused on Qualifying Applicants who already had operations within the DIFC and wished to extend theses operations to further entities such as, fund vehicles, collective investment schemes, holding entities, proprietary investment entities, or, single family offices. The ISPV regime can be seen to be more tailored towards structuring investments for existing DIFC businesses. However, the scope of eligible businesses that could establish ISPVs in the DIFC was restricted to company limited by shares carrying out the eligible activities from the DIFC.

It follows, the former regimes for establishing special purpose companies were catered towards structured financial related transactions.

However, the Prescribed Company framework is more flexible and as such, better suited for a wider group of businesses.

New Regulations – Benefits

In general, the key benefit of the New Regulations when compared to the former regime is that this new framework offers competitive licensing and registration fees whilst also providing business friendly legalisation that accommodates commercial initiatives that do not require heavy or onerous governance framework.

Corporate Service Provider

In particular, a Prescribed Company can engage and maintain a Corporate Service Provider which would then carry out certain functions (instead of those having to be conducted by the employees of the Prescribed Company). These functions include providing a registered address, carrying out all assessments and checks to ensure the Prescribed Company complies with the relevant requirements such as AML compliance, annual reporting requirements and Ultimate Beneficial Ownership registration requirements.

Flexibility

What is more, Prescribed Companies are not required to file accounts or have accounts audited, and there is no requirement for a Prescribed Company to maintain its own separate registered office. Under the New Regulations, a Prescribed Company can either share the registered address of their Qualifying Applicant, which is registered within the DIFC, or maintain the registered address of its corporate service provider (as explained above).

Cost

Finally, the fees for incorporating a Prescribed Company are much lower in comparison to a typical private company limited by shares in the DIFC, with the registration fee (one-off) being US$100 (as opposed to US$8,000) and the annual license fee reduced to US$1,000 instead of US$12,000.

Economic Substance

In April 2019, the Cabinet of Minister Resolution No 31 of 2019 introduced the Economic Substance Regulations, which enforced businesses in the UAE to have evidential economic presence in the UAE. The Economic Substance Regulations apply to all onshore and free zone companies carrying out "relevant activity". Therefore, the Prescribed Company should assess whether the Economic Substance Regulations apply to its operations. It shall not assume the Prescribed Company status automatically exempts it from the application of the economic substance regime.

Conclusion

In conclusion, the New Regulations have introduced a more flexible, less burdensome compliance-wise and certainly less costly alternative to Qualifying Applicants or those who intend to form a business for a Qualifying Purpose. The ability to conduct business without the need to appoint an auditor or rent its own office space in the DIFC are key examples of how the DIFC wish to accommodate businesses' needs and stay competitive as a free zone.

Also, with the much anticipated global event of Dubai Expo 2020, and Dubai being a strategic location for businesses to provide services in the MEASA region, we could witness an increase of companies operating in the DIFC and the utilisation of Prescribed Companies.

Whether the future will bring a number of Prescribed Companies' begin formed – only time will tell.

One thing is for sure: the DIFC has made a move in the right direction with the introduction of the New Regulations.

Al Tamimi & Company's Corporate Structuring team regularly advises clients on the impact of legislative changes. For further information, please contact Izabella Szadkowska (i.szadkowska@tamimi.com) or Noff Al Khafaji (n.alkafaji@tamimi.com).