14 January 2020

Takeovers Update

Update to definition of "code company" narrows application of Takeovers Code

The Regulatory Systems (Economic Development) Amendment Act (No 2) 2018 came into force on 13 January 2020. Broadly, the Act makes discrete amendments to economic development legislation for the purpose of improving regulatory systems to ensure they are effective, efficient and accord with best regulatory practice. Importantly, the Act seeks to reduce compliance costs to New Zealand businesses.

A key change introduced by this Act is the addition of a monetary threshold to the definition of "code company" meaning that the Takeovers Code will no longer apply to small unlisted companies. Previously, provided an unlisted company had 50 or more shareholders and 50 or more share parcels, it was considered a "code company" regardless of the company's total assets and revenue. Now, unlisted companies are only "code companies" if they:

a) have 50 or more shareholders (with voting rights) and 50 or more share parcels; and

b) are "at least medium sized", being a company (including any subsidiaries) having total assets of at least $30 million or total revenue of at least $15 million in the company's most recently completed accounting period.

The law change arises as a result of a Takeovers Panel recommendation to narrow the application of the Code, seeking to address concerns of market participants that compliance costs were disproportionate to the benefits that small unlisted companies received. While some relief was previously available to "small code companies" (being unlisted companies with $20 million or less in total assets) under the Takeovers Code (Small Code Companies) Exemption Notice 2016 (now revoked), there were still compliance requirements to enable reliance on that exemption (albeit less onerous than compliance with the Code itself).

Small unlisted companies will now benefit from being more agile provided they continue to fall below the asset and revenue threshold – new investors will be able to acquire more than 20% of voting rights, existing shareholders will be able to increase their shareholding above 20%, and companies will be able to accommodate more shareholders, without having to consider Takeovers Code implications. In short, companies can now move quickly to address merger, acquisition and takeover opportunities, or raise more capital, all of which are often important to small New Zealand companies.

The updated definition also means that small unlisted companies that do not qualify as "code companies":

a) do not need to consider shareholding structures for the specific purpose of avoiding application of the Code (for example, including non-voting or limited-voting share structures or nominee arrangements); and

b) may undertake long form amalgamations under the Companies Act 1993 (with "code companies" prohibited from using this process).

Notwithstanding the relief offered by this recent law change, where any offer of financial products is made (for example, the sale and purchase of existing shares or issue of new shares), the disclosure requirements under the Financial Markets Conduct Act 2013 and related regulations will still need to be considered, including as to whether an applicable exclusion to such disclosure requirements might apply.

We expect to see more activity by small unlisted companies previously captured by the Code, with those companies benefiting from reduced compliance costs when seeking to raise further capital or take advantage of merger, acquisition and takeover opportunities.

Want to know more?

Please contact one of our Corporate Law specialists.