CAYMAN ISLANDS

Supplement No. 4 published with Gazette No. 7 dated 30 March, 2009.

A BILL FOR A LAW TO AMEND THE COMPANIES LAW (2007 REVISION) TO REGULATE THE MERGER AND CONSOLIDATION OF COMPANIES; AND FOR INCIDENTAL AND CONNECTED PURPOSES

THE COMPANIES (AMENDMENT) BILL, 2009

MEMORANDUM OF OBJECTS AND REASONS

This Bill would amend the Companies Law (2007 Revision) to regulate the merger and consolidation of companies limited by shares.

Clause 1 provides the short title.

Clause 2 introduces a new Part XVA which contains provisions in new sections 251A to 251H which would establish procedures and rules to govern mergers and consolidations.

Section 251A is an interpretation section.

Section 251B requires the directors of constituent companies intending to merge or consolidate to draw up a plan, and specifies what it should contain. It sets out the procedure for obtaining the consent of shareholders and for filing it with the Registrar. A merger or consolidation is effective from the date of registration of the plan. Penalties are prescribed for false declarations.

Section 251C enables the effective date to be deferred.

Section 251D provides a procedure where by the merger or consolidation can be aborted.

Section 251E makes provision establishing the effect of a merger or consolidation and for the cessation of the constituent companies that are consolidated or which do not survive a merger.

Section 251F provides for additional procedures and checks where a foreign company is involved in a merger or consolidation.

Sections 251G and H provide a procedure whereby dissenting shareholders are to be compensated on a merger or consolidation.

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A BILL FOR A LAW TO AMEND THE COMPANIES LAW (2007 REVISION) TO REGULATE THE MERGER AND CONSOLIDATION OF COMPANIES; AND FOR INCIDENTAL AND CONNECTED PURPOSES

ENACTED by the Legislature of the Cayman Islands.

Short title

1. This Law may be cited as the Companies (Amendment) Law, 2009.

Insertion of Part XVA in the Companies Law (2007 Revision) - merger and consolidation

2. The Companies Law (2007 Revision) is amended by inserting after Part XV the following Part -

"Part XVA - Merger and Consolidation

Definitions in this Part

251A. In this Part -

"consolidated company" means the new company that results from the consolidation of two or more constituent companies;

"consolidation" means the combination of two or more constituent companies into a consolidated company and the vesting of the undertaking, property and liabilities of such companies in the consolidated company;

"constituent company" means an existing company that

is participating in a merger or consolidation with one or more other existing companies;

"foreign company" means a corporate entity incorporated under the laws of a jurisdiction outside the Islands;

"merger" means the merging of two or more constituent companies and the vesting of their undertaking, property and liabilities in one of such companies as the surviving company;

"parent company" means a company that owns at least ninety per cent of the issued shares of each class in a subsidiary company that are entitled to vote;

"subsidiary company" means a company at least ninety per cent of the issued shares of which **(**of one or more classes) that are entitled to vote are owned by a parent company; and

"surviving company" means the sole remaining constituent company into which one or more other constituent companies are merged.

Merger and consolidation

251B.(1) Without prejudice to sections 86 and 87, two or more companies limited by shares and incorporated under this Law, not being segregated portfolio companies, may merge or consolidate in accordance with subsections (3) to (10).

(2) Nothing in this Part shall derogate from the Authority's powers in relation to any constituent company that is a licensee under the regulatory laws and that proposes to participate in a merger or consolidation, or from a constituent company's obligations under the regulatory laws.

(3) The directors of each constituent company that proposes to participate in a merger or consolidation shall on behalf of the constituent company of which they are directors approve a written plan of merger or consolidation.

(4) The plan referred to in subsection (3) shall give particulars of the following matters -

(a) the name of each constituent company and the name of the surviving or consolidated company;

(b) the registered office of each such company;

(c) in respect of each constituent company, the designation and number of each class of shares;

(d) the date on which it is intended that merger or consolidation is to take effect, if it is intended to take effect in accordance with section 251C, and not in accordance with subsection (13);

(e) the terms and conditions of the proposed merger or consolidation, including the manner and basis of converting shares in each constituent company into shares in the consolidated or surviving company or into other property as provided in subsection (5);

(f) the rights and restrictions attaching to the shares in the consolidated or surviving company;

(g) in respect of a merger, any proposed amendments to the memorandum of association and articles of association of the surviving company, or if none are proposed, a statement that the memorandum of association and articles of association of the surviving company immediately prior to merger shall be its memorandum of association and articles of association after the merger;

(h) in respect of a consolidation, the proposed new memorandum of association and articles of association of the consolidated company;

(i) any amount or benefit paid or payable to any director of a constituent company, a consolidated company or a surviving company consequent upon the merger or consolidation;

(j) the name and address of any secured creditor of a constituent company and of

the nature of the secured interest; and

(k) the names and addresses of the directors of the surviving or consolidated company.

(5) Some or all of the shares whether of different classes or of the same class in each constituent company may be converted into different types of property (consisting of shares, debt obligations or other securities in the surviving company or consolidated company, or money or other property, or a combination thereof) as provided in the plan of merger or consolidation.

(6) A plan of merger or consolidation shall be authorised by each constituent company by -

(a) a shareholder resolution by majority in number representing seventy-five per cent in value of the shareholders voting together as one class; and

(b) if the shares to be issued to each shareholder in the consolidated or surviving company are to have the same rights and economic value as the shares held in the constituent company, a special resolution of the shareholders voting together as one class,

and in either case a shareholder shall have the right to vote regardless of whether the shares that he holds otherwise give him voting rights

(7) Notwithstanding subsection (6), a shareholder resolution under that subsection is not required if a parent company incorporated under this Law is seeking to merge with one or more of its subsidiary companies incorporated under this Law, and in that case a copy of the plan of merger shall be given to every member of each subsidiary company to be merged unless waived by that member.

(8) The consent of each holder of a fixed or floating security interest of a constituent company in a proposed merger or consolidation shall be obtained but if such secured creditor does not grant his consent then the

Court may upon application of the constituent company that has issued the security waive the requirement for such consent upon such terms as to security to be issued by the consolidated or surviving company or otherwise as the Court considers reasonable.

(9) After obtaining any authorisations and consents under subsections (6) and (8), the plan of merger or consolidation shall be signed by a director on behalf of each constituent company and filed with the Registrar together with, in relation to each constituent company -

(a) a certificate of good standing;

(b) a director's declaration that the constituent company is, and the consolidated or surviving company will be, immediately after merger or consolidation, able to pay its debts as they fall due;

(c) a director's declaration that the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the constituent companies;

(d) a director's declaration that -

(i) no petition or other similar proceeding has been filed and remains outstanding, and that no order has been made or resolution adopted to wind up the company in any jurisdiction;

(ii) no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the constituent company, its affairs, its property or any part thereof; and

(iii) that no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the constituent company are, and continue to be, suspended or restricted;

(e) a director's declaration of the assets and liabilities of the constituent company made up to the latest practicable date before the making of the declaration;

(f) in the case of a constituent company that is not a surviving company, a director's declaration that the constituent company has retired from any fiduciary office held immediately prior to merger or consolidation;

(g) an undertaking that a copy of the certificate of merger or consolidation under subsection (11) will be given to the members and creditors of the constituent company and published in the Gazette; and

(h) a director's declaration, where relevant, that the constituent company has complied with any applicable requirements under the regulatory laws.

(10) A director's declaration under subsection (9) shall be in writing, signed by, and shall include the full name and address of, the director making the declaration.

(11) Upon payment of the applicable fees under this Law and upon the Registrar being satisfied that the requirements of subsection (9) in respect of the merger or consolidation have been complied with and that the name of the consolidated company complies with section 30, the Registrar shall register the plan of merger or consolidation including any new or amended memorandum and articles of association and issue a certificate of merger or consolidation under his hand and seal of office, and in the case of a consolidation section 27 shall apply in relation to the consolidated company.

(12) A certificate of merger or consolidation issued by the Registrar shall be prima facie evidence of compliance with all requirements of this Law in respect of the merger or consolidation.

(13) Subject to section 251C, a merger or

consolidation shall be effective on the date the plan of merger or consolidation is registered by the Registrar.

(14) Whoever, being a director, makes a false declaration under subsection (9) is guilty of an offence and liable on summary conviction to a fine of twenty thousand dollars or to imprisonment for five years, or both.

(15) In any proceedings for an offence under subsection (14) it shall be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

Delay of effective date

251C. A plan of merger or consolidation may provide that such merger or consolidation shall not become effective until a specified date or until the date of the occurrence of a specified event subsequent to the date on which the plan of merger or consolidation is registered by the Registrar, but such date shall not be a date later than the ninetieth day after the date of such registration.

Termination or amendment

251D.(1) A plan of merger or consolidation may contain a provision that at any time prior to the date that the plan becomes effective it may be -

(a) terminated by the directors of any constituent company; or
(b) amended by the directors of the constituent companies to -
    (i) change the name of the consolidated company;
    (ii) change the effective date of the merger or consolidation, provided that the new effective date complies with section 251C; and
    (iii) effect any other changes to the plan as the plan may expressly authorise the directors to effect in their discretion.

(2) If the plan of merger or consolidation is terminated or amended after it has been filed with the Registrar but before it has become effective, notice of termination or amendment of the plan shall be filed with the Registrar, and shall have effect on the date of registration by the Registrar after he has satisfied himself in accordance with section 251B(11).

(3) A copy of the notice under subsection (2) shall be sent to any person entitled to vote on, consent to or be notified of the plan of merger or consolidation in accordance with section 251B.

(4) The notice of termination or amendment filed in accordance with subsection (2) shall identify the plan of merger or consolidation that is to be terminated or amended and shall state that the plan has been terminated or state the amendments made and in the former case, the Registrar shall issue a certificate of termination.

Effect of merger or consolidation

251E.(1) As soon as a merger or consolidation becomes effective -

(a) in the case of a consolidation, the new memorandum of association and articles of association filed with the plan of consolidation shall immediately become the memorandum of association and articles of association of the consolidated company;

(b) the rights, the property of every description including choses in action, and the business, undertaking, goodwill, benefits, immunities and privileges of each of the constituent companies, shall immediately vest in the surviving or consolidated company; and

(c) subject to any specific arrangements entered into by the relevant parties, the surviving or consolidated company shall be liable for and subject, in the same manner as the constituent companies, to all mortgages, charges or security

interests, and all contracts, obligations, claims, debts, and liabilities of each of the constituent companies.

(2) Where a merger or consolidation occurs -

(a) an existing claim, cause or proceeding, whether civil (including arbitration) or criminal pending at the time of the merger or consolidation by or against a constituent company, shall not be abated or discontinued by the merger or consolidation but shall be continued by or against the surviving or consolidated company; and

(b) a conviction, judgment, ruling, order or claim, due or to become due, against a constituent company, shall not be released or impaired by the merger or consolidation, but shall apply to the surviving or consolidated company instead of to the constituent company.

(3) Upon a merger or consolidation becoming effective, the Registrar shall strike off the register -

(a) a constituent company that is not the surviving company in a merger; or

(b) a constituent company that participates in a consolidation,

and section 177 shall apply.

(4) The cessation of a constituent company that participates in a consolidation or that is not the surviving company in a merger shall not be a winding up within Part V.

Merger or consolidation with foreign company

251F.(1) Where the surviving or consolidated company is to be established under this Law, one or more companies incorporated under this Law may merge or consolidate with one or more foreign companies in accordance with subsections (2) to (6).

(2) In addition to compliance by each constituent company incorporated under this Law with section

251B(3) to (10) the Registrar is required to be satisfied in respect of any constituent foreign company -

(a) that the merger or consolidation is permitted or not prohibited by the constitutional documents of the foreign company and by the laws of the jurisdiction in which the foreign company is incorporated, and that those laws and any requirements of those constitutional documents have been or will be complied with;

(b) that no petition or other similar proceeding has been filed and remains outstanding or order made or resolution adopted to wind up or liquidate the foreign company in any jurisdiction;

(c) that no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the foreign company, its affairs or its property or any part thereof;

(d) that no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the foreign company are and continue to be suspended or restricted;

(e) that the foreign company is able to pay its debts as they fall due and that the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the foreign company;

(f) that in respect of the transfer of any security interest granted by the foreign company to the surviving or consolidated company -

(i) consent or approval to the transfer has been obtained, released or waived;

(ii) the transfer is permitted by and has been approved in accordance with the constitutional documents of the foreign company; and

(iii) the laws of the jurisdiction of the foreign company with respect to the transfer have been or will be complied with;

(g) that the foreign company will, upon the merger or consolidation becoming effective, cease to be incorporated, registered or exist under the laws of the relevant foreign jurisdiction; and

(h) that there is no other reason why it would be against the public interest to permit the merger or consolidation.

(3) Subsection (2)(a) to (g) shall be satisfied by filing with the Registrar a declaration of a director of the surviving or consolidated company to the effect that, having made due enquiry, he is of the opinion that the requirements of those paragraphs have been met; and the declaration shall comply with section 251B(10) and shall include a statement of the assets and liabilities of the foreign company made up to the latest practicable date before making the declaration.

(4) Whoever, being a director, makes a false declaration under subsection (3) is guilty of an offence and liable on summary conviction to a fine of twenty thousand dollars and to imprisonment for five years or both.

(5) In any proceedings for an offence under subsection (4), it shall be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

Rights of dissenters

251G.(1) A member of a constituent company incorporated under this Law shall be entitled to payment of the fair value of his shares upon dissenting from a merger or consolidation.

(2) A member who desires to exercise his entitlement under subsection (1) shall give to the constituent company, before the vote on the merger or

consolidation, written objection to the action.

(3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for his shares if the merger or consolidation is authorised by the vote.

(4) Within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, the constituent company shall give written notice of the authorisation to each member who made a written objection.

(5) A member who elects to dissent shall, within twenty days immediately following the date on which the notice referred to in subsection (4) is given, give to the constituent company a written notice of his decision to dissent, stating -

(a) his name and address;
(b) the number and classes of shares in respect of which he dissents; and
(c) a demand for payment of the fair value of his shares.

(6) A member who dissents shall do so in respect of all shares that he holds in the constituent company.

(7) Upon the giving of a notice of dissent under subsection (5), the member to whom the notice relates shall cease to have any of the rights of a member except the right to be paid the fair value of his shares and the rights referred to in subsections (12) and (16).

(8) Within seven days immediately following the date of the expiration of the period specified in subsection (5), or within seven days immediately following the date on which the plan of merger or consolidation is filed, whichever is later, the constituent company, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase his shares at a specified price that the company determines to be their fair value; and if,

within thirty days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for his shares, the company shall pay to the member the amount in money forthwith.

(9) If the company and a dissenting member fail, within the period specified in subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period expires -

(a) the company shall (and any dissenting member may) file a petition with the Court for a determination of the fair value of the shares of all dissenting members; and

(b) the petition by the company shall be accompanied by a verified list containing the names and addresses of all members who have filed a notice under subsection (5) and with whom agreements as to the fair value of their shares have not been reached by the company.

(10) A copy of any petition filed under subsection (9)(a) shall be served on the other party; and where a dissenting member has so filed, the company shall within ten days after such service file the verified list referred to in subsection (9)(b).

(11) At the hearing of a petition, the Court shall determine the fair value of the shares of such dissenting members as it finds are involved, together with a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value.

(12) Any member whose name appears on the list filed by the company pursuant to subsection (9)(b) or (10) and who the Court finds are involved may participate fully in all proceedings until the determination of fair value is reached.

(13) The order of the Court resulting from proceeding on the petition shall be enforceable in such manner as other orders of the Court are enforced, whether the company is incorporated under the laws of the Islands or not.

(14) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances; and upon application of a member, the Court may order all or a portion of the expenses incurred by any member in connection with the proceeding, including reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares which are the subject of the proceeding.

(15) Shares acquired by the company pursuant to this section shall be cancelled unless they are shares of a surviving company, in which case they shall be available for re-issue.

(16) The enforcement by a member of his entitlement under this section shall exclude the enforcement by the member of any right to which he might otherwise be entitled by virtue of his holding shares, except that this section shall not exclude the right of the member to institute proceedings to obtain relief on the ground that the merger or consolidation is void or unlawful.

Limitation on rights of dissenters

251H. (1) Subject to subsection (2), no rights under section 251G shall be available in respect of the shares of any class for which an open market exists on a recognised stock exchange or recognised interdealer quotation system at the expiry date of the period allowed for written notice of an election to dissent under section 251G(5).

(2) Rights under section 251G shall be available in respect of any class of shares of a constituent company if the holders thereof are required by the terms of a plan of merger or consolidation pursuant to section

251B or 251F to accept for such shares anything except -

(a) shares of a surviving or consolidated company, or depository receipts in respect thereof;

(b) shares of any other company, or depository receipts in respect thereof, which shares or depository receipts at the effective date of the merger or consolidation, are either listed on a national securities exchange or designated as a national market system security on a recognised interdealer quotation system or held of record by more than two thousand holders;

(c) cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a) and (b); or

(d) any combination of the shares, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a), (b) and (c).".

Passed by the Legislative Assembly the day of , 2009.

Speaker.

Clerk of the Legislative Assembly.