

# Cayman Islands mergers and consolidations

The Cayman Islands' statutory merger regime is set out in the Companies Act (the **Companies Act**) and the Limited Liability Companies Act (the **LLC Act**) which provide a process for 'merger' or 'consolidation' of companies. A 'merger' is where the assets, rights, obligations and liabilities of two or more companies are assumed by one of those entities and 'consolidation' is where the assets, rights, obligations and liabilities of two or more companies are assumed by a new company, in each case without requiring court approval.

In this guide 'Merger' includes merger and consolidation, a 'Constituent Company' is a company (including a limited liability company established under the LLC Act (an **LLC**)) participating in a Merger and a 'Successor Company' is the new or existing company (including an LLC) acquiring the businesses of the Constituent Companies.

## Parties to a Merger

The following entities can be party to a Merger:

- any Cayman Islands company limited by shares and incorporated under the Companies Act, other than a segregated portfolio company
- any Cayman Islands LLC
- any 'overseas company' (being a company, body corporate or corporate entity existing under the laws of a jurisdiction other than the Cayman Islands)
- any 'foreign entity' (being a company or a body corporate or corporation of any kind with legal personality, including certain trusts and any unincorporated business (including a partnership) existing under the laws of a jurisdiction other than the Cayman Islands) for a Merger with an LLC

## Material conditions to Merger

**Good standing and solvency** - each Constituent Company must be in good standing and solvent – Cayman Islands law applies a cashflow test of ability to pay debts as they fall due to determine solvency.

**Written plan** - the directors (or manager of an LLC) of each Constituent Company must prepare and approve a written Merger plan (**Merger Plan**).

**Member consent** - a member consent is generally required from the members of each Constituent Company (see below for details).

**Regulatory conditions** - any proposed Merger which involves a regulated entity such as a fund, bank or insurance company must obtain prior consent from the Cayman Islands Monetary Authority for the Merger.

**Foreign law conditions** - for any Merger of a company with an overseas company, or Merger of an LLC with a foreign entity, the overseas company/foreign entity must be permitted to merge by applicable foreign laws and its constitutional documents.

**Secured creditors** - the consent of secured creditors of the Constituent Companies is required unless a Cayman Islands court waives such requirements.

**Fee** - payable to the Cayman Islands registrar of companies (the **Registrar**) as prescribed by the Companies Act or LLC Act from time to time. The current filing fee for a Merger Plan is US\$731 and in addition, where the Successor Company is an

overseas entity/foreign entity, all Constituent Companies which are being struck off in the Cayman Islands need to pay a fee of three times the annual company maintenance fee that would have been payable in the January prior to the filing of the Merger Plan.

## Overseas Merger

For a Merger of a Cayman Islands company with an overseas company, or a Cayman Islands LLC with a foreign entity that has separate legal personality, the Registrar must be satisfied of the validity of the Merger and the good standing and solvency of the overseas/foreign Constituent Company. This can be satisfied by filing with the Registrar a director's declaration (or manager's declaration for an LLC) that having made due enquiry the required particulars have been met. In turn, this can be satisfied by obtaining an equivalent declaration from a director/manager of the overseas/foreign Constituent Company.

The Successor Company may be either a Cayman Islands or an overseas/foreign company. If the Successor Company is Cayman, the Registrar will issue a certificate of merger or consolidation in respect of the Successor Company and if the Successor Company is an overseas or foreign entity, the Registrar will issue a certificate of striking off of all Cayman Islands Constituent Companies.

Our lawyers also have experience of Mergers between Cayman Islands exempted companies and Delaware limited partnerships which have been approved by the Registrar on the basis that a Delaware limited partnership has separate legal personality. Although some practitioners disagree with this approach, merging a Cayman Islands exempted company with a foreign limited partnership which has separate legal personality does appear to be possible. The LLC Act also allows a Cayman Islands LLC to merge with a foreign partnership which has separate legal personality.

## Merger between companies and LLCs

The LLC Act confirms that an LLC may merge or consolidate with a Cayman Islands company as long as the LLC complies with the merger provisions of the LLC Act, the company complies with the merger provisions of the Companies Act and the company is not a segregated portfolio company.

## Shareholder/member consent

The following consents are generally required, except in the case of a Merger between a parent and its subsidiary:

- a special resolution of the shareholders of each Constituent Company (other than LLCs). A special resolution is passed by either (a) a unanimous written resolution signed by all shareholders who are entitled to vote (provided permitted by the articles of association); or (b) by two thirds of voting shareholders voting at a duly convened and quorate shareholder meeting, unless a higher threshold is set out in the articles of association either generally for all special resolutions or specifically in respect of statutory mergers
- for a Constituent Company which is an LLC, the approval of a two thirds majority (or such higher or lower threshold as may be set out in the LLC agreement) of the members of the LLC, and
- such other authorisation, if any, as may be specified in each Constituent Company's constitution.

## Parent/subsidiary Merger

The Companies Act provides that shareholder consent is not required for any Merger of a parent with its Cayman Islands subsidiary company, if a copy of the Merger Plan is given to every shareholder of the subsidiary, unless the shareholder agrees otherwise.

The LLC Act includes an equivalent provision for Mergers of a parent LLC with its Cayman Islands subsidiary LLC.

'Subsidiary' is defined as a company (or LLC) 90% or more of whose issued voting shares (or voting equity interests for LLCs) are held by the parent. The reference to voting shares only in the definition is not ideal as the voting and economic ownership of Cayman Islands companies is often split for tax, regulatory or ease of administration reasons. Cayman Islands hedge funds, for example, often have one class of voting management shares with no material economic rights and one or more classes of non-voting participating shares held by investors.

## Dissenting members

### Rights of dissenting members

The Companies Act provides that, subject to limited exceptions discussed below, a member of a Cayman Islands Constituent Company is entitled to be paid the fair value of its shares/LLC interests (**equity interests**) on dissenting to a Merger. The LLC Act contains equivalent provisions for dissenting LLC members and provides that a dissenting member is entitled to such payment as is provided in the LLC agreement and, if no such payment is included, then they are entitled to be paid the fair value of their LLC interest. A member who intends to exercise its entitlement to dissent must provide a written objection to the Constituent Company before the members vote on the transaction.

If member approval is obtained, the Constituent Company must provide all dissenting members with a notice of authorisation within 20 days of the approval. Within 20 days following the date of the authorisation notice, a dissenting member must provide the Constituent Company with a formal written statement of its decision to dissent, including its name and address, the number and classes of equity interests owned, and a demand for payment of the fair value of their equity interests.

A Constituent Company that has received any notice of dissent must make a written offer to each dissenting member to purchase its equity interests at a price that the company determines to be the fair value. If agreed by the member, monies must be paid to the dissenting member within 30 days of the offer being made. If no price is agreed, the Constituent Company must (and any dissenting member may) file a petition with the Cayman Islands court for a determination of the fair value of the equity interests of all dissenting members and any dissenting member is permitted to be involved in the proceedings.

### Limitation on dissenter rights

Dissenter rights are not available if a member receives any or all of the following, in exchange for its equity interests:

- equity interests of the Successor Company, or depository receipts in respect of such equity interests, and/or
- equity interests of any other entity, or depository receipts in respect of them, that are either listed or held of record by more than two thousand holders at the effective date of the Merger, and/or
- cash in lieu of fractional equity interests or fractional depository receipts received under the two bullet points above.

Only the registered shareholder of a company, ie the person who holds legal title to the shares, (including a single custodian or nominee holding for a number of beneficial owners) can exercise the right to dissent and that shareholder can only do so in respect of all and not some only of the shares legally held irrespective of underlying beneficial ownership. Only a registered LLC member can exercise the right to dissent to a Merger of an LLC, although they may do so in respect of all or any portion of the LLC interests that they hold in the constituent LLC.

### Timing

Timing will depend on a number of factors including any relevant foreign law requirements, any required regulatory consents and/or the requirements of any relevant listing authority listing the equity interests of a Constituent Company, the specific provisions of the constitutional documents of Constituent Companies and any requirements to obtain secured creditor consents. All things being equal, the time it takes to effect a Merger is typically less than that for a court sanctioned scheme of arrangement under the Companies Act.

## Practical considerations

Although shareholder class consents are not expressly required by the Companies Act, in preparing any Merger Plan the directors of each Constituent Company should take into account their overriding common law obligations in relation to the respective interests of all classes of shareholders. It is therefore recommended that shareholder class consents are always obtained approving the terms of any Merger Plan before adoption.

It is also recommended that LLC member class consents are obtained approving the terms of any Merger Plan involving an LLC. When acting for minority shareholders or LLC members, it is also recommended that an express right to approve or veto any proposed Merger Plan before the plan is executed or filed on behalf of the company by the directors is included in shareholder class rights in the articles of association of a Constituent Company or in LLC member interest provisions in the LLC agreement where a Constituent Company is an LLC.

It is also important to ensure that all the obligations of the entities under the International Tax Co-operation (Economic Substance) Act are discharged where applicable.



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