

AS TABLED IN THE HOUSE OF ASSEMBLY

A BILL

entitled

COMPANIES AMENDMENT (NO. 2) ACT 2011

TABLE OF CONTENTS

| | |
|----|---------------------------------------|
| 1 | Citation |
| 2 | Amends section 2 |
| 3 | Amends section 12 |
| 4 | Amends section 13 |
| 5 | Amends section 14A |
| 6 | Repeals sections 39, 39A, 39B and 39C |
| 7 | Amends section 43 |
| 8 | Amends section 48 |
| 9 | Amends section 54 |
| 10 | Amends section 71 |
| 11 | Inserts section 71A |
| 12 | Amends section 84 |
| 13 | Amends section 87 |
| 14 | Amends section 88 |
| 15 | Amends section 89 |
| 16 | Amends section 91 |
| 17 | Amends section 96 |
| 18 | Replacement of heading to Part VII |
| 19 | Amends section 101 |
| 20 | Amends section 103 |
| 21 | Amends section 104A |
| 22 | Amends section 104B |
| 23 | Amends section 104C |
| 24 | Amends section 104D |
| 25 | Inserts section 104H |
| 26 | Repeals and replaces section 105 |
| 27 | Amends section 106 |
| 28 | Repeals and replaces section 107 |
| 29 | Amends section 108 |
| 30 | Amends section 109 |
| 31 | Amends section 117 |
| 32 | Amends section 132G |
| 33 | Amends section 236 |

COMPANIES AMENDMENT (NO. 2) ACT 2011

- 34 Repeals section 272A
35 Regulations

WHEREAS it is expedient to amend the Companies Act 1981;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act, which amends the Companies Act 1981 (the "principal Act"), may be cited as the Companies Amendment (No. 2) Act 2011.

Amends section 2

2 Section 2 of the principal Act is amended—

- (a) in subsection (1) by repealing the definition of "director" and substituting it with the following—

" "director" includes any person duly elected or appointed as a director of a company, an alternate director and any person occupying the position of director by whatever name called;" and

- (b) by repealing subsection (2) and substituting the following—

"(2) Wherever in this Act an obligation or duty is placed on a company or a company is authorised to do any act, then unless it is otherwise provided such obligation, duty or act may be carried out by the directors of the company, or by the director of the company, where the affairs of the company are managed by only one director.

(2A) Wherever in this Act an obligation or duty is placed on directors or directors are authorised to do any act, then unless it is otherwise provided such obligation, duty or act may be carried out by the director of the company, where the affairs of the company are managed by only one director."

Amends section 12

3 Section 12(9) of the principal Act is amended by deleting the words "at least 2 directors" and substituting the words "a director".

Amends section 13

4 Section 13 of the principal Act is amended—

- (a) in subsection (1)(b) by deleting the word "(b)";
(b) in subsection (2)—
(i) by deleting paragraph "(b)";

COMPANIES AMENDMENT (NO. 2) ACT 2011

- (ii) in paragraph (c) by deleting the words “the laying of financial statements before general meetings of the company” and substituting “making available the financial statements to the members”;
- (c) in subsection (3)—
 - (i) by deleting paragraph (xii);
 - (ii) in paragraph (xiv) by deleting the words “which in no case shall be a quorum of less than two individuals”.

Amends section 14A

5 Section 14A(6)(b) of the principal Act is amended by deleting the words “at least two directors” and substituting “a director”.

Repeals sections 39, 39A, 39B and 39C

6 The principal Act is amended by repealing sections 39, 39A, 39B and 39C.

Amends section 43

7 Section 43(c) of the principal Act is amended by deleting the words “at least two directors” and substituting “a director”.

Amends section 48

8 Section 48 of the principal Act is amended by inserting, after subsection (2), the following subsections—

“(3) Subsection (2) shall not apply to the shares in or debentures of a company whose shares, or debentures, as applicable, are listed or admitted to trading on an appointed stock exchange.

“(4) Nothing in this Act or any rule of law shall operate to prevent shares in or debentures of a company from being transferred in accordance with the rules or regulations of an appointed stock exchange on which the shares or debentures are listed or admitted to trading.”.

Amends section 54

9 Section 54 of the principal Act is amended, in subsection (1)(b), by deleting the words “the aggregate of its liabilities and its issued share capital and share premium accounts” and substituting the words “its liabilities”.

Amends section 71

10 Section 71(1) of the principal Act is amended by deleting the word “A” and substituting the words “Subject to section 71A, a”.

Inserts section 71A

11 The principal Act is amended by inserting after section 71 the following section—

COMPANIES AMENDMENT (NO. 2) ACT 2011

“Election to dispense with annual general meetings

71A (1) A company may, by resolution of the company in general meeting, elect to dispense with the holding of annual general meetings.

(2) An election made under subsection (1) may be made to have effect—

- (a) for the year in which it is made and any subsequent year or years;
- (b) for a specified number of years; or
- (c) indefinitely:

Provided that any liability already incurred by reason of the default in holding an annual general meeting will continue to have effect.

(3) Where a company makes an election as provided under subsection (1) the provisions of sections 72 and 73 shall not apply to that company for the period or periods in which such election is in effect.

(4) In any year in which an annual general meeting would be required to be held but for an election under subsection (1), and in which no general meeting has been held, any member or members of the company may, by notice to the company not later than three months before the end of the year, require the holding of an annual general meeting in that year.

(5) Where a notice, referred to in subsection (4), is given, sections 71(3), (4) and (5), 72 and 75 shall apply.

(6) If an election under subsection (1) ceases to have effect the company is not obliged to hold an annual general meeting in that year if, when the election ceases to have effect, less than three months of the year remains.”.

Amends section 84

12 Section 84 of the principal Act is amended—

- (a) in subsection (1) by deleting the words “subject to section 88” and substituting the words “, in accordance with section 87 and subject to section 88,”
- (b) in subsection (1A) by deleting “(iiiA)” and substituting “(iv)”;
- (c) in subsection (2) by deleting the words “two of the directors” and substituting the words “a director”.

Amends section 87

13 Section 87 of the principal Act is amended—

- (a) in subsection (1) by inserting after the words “Subject to” the words “subsection (3) and”;
- (b) by inserting after subsection (2) the following—

COMPANIES AMENDMENT (NO. 2) ACT 2011

“(3) Where a company does not convene an annual general meeting in any one financial year following an election under section 71A—

- (a) financial statements as described in section 84(1) in respect of that year shall be made available to every member of the company within 12 months of the end of the year in which an annual general meeting was not held, and the making available of such financial statements to members shall be deemed to be the laying of such statements before the company;
- (b) any member or members of the company may, where requirements under paragraph (a) have not been complied with, by notice to the company require the convening of a general meeting to be held within 6 months of the failure to make available financial statements for the purpose of the laying before the company of such financial statements and with respect to such financial statements, section 84(2), (3) and (4) shall apply.”.

Amends section 88

14 Section 88 of the principal Act is amended by repealing subsection (1) and substituting the following—

“(1) Notwithstanding sections 13(2)(c) and (d), 84, 87 and 89 if all members and directors of a company, either in writing or at a general meeting, agree that in respect of a particular interval no financial statements or auditor’s report thereon need be laid before a general meeting or that no auditor shall be appointed then there shall be no obligation to lay financial statements for such period or to appoint an auditor, as the case may be:

Provided that if a general meeting of the company does not take place within 18 months of the agreement reached, any member or members of the company may, by notice to the company, require the holding of a general meeting within 6 months of the notice for the purpose of terminating the agreement. ”.

Amends section 89

15 Section 89 of the principal Act is amended—

- (a) by repealing subsection (2) and substituting the following—

“(2) An auditor appointed under subsection (1), and subsequent auditors, shall hold office until a successor is appointed by the members of the company or, if the members fail to do so, until the directors appoint a successor.”;

- (b) in subsection (3) by deleting the words “an annual general meeting”, wherever they occur, and substituting “a general meeting”;
- (c) in subsection (7) by deleting the words “until the close of the next annual general meeting” and substituting “for such term as he sees fit”.

COMPANIES AMENDMENT (NO. 2) ACT 2011

Amends section 91

16 Section 91 of the principal Act is amended—

(a) by repealing subsection (1) and substituting the following—

“(1) The affairs of the company shall be managed by at least one director who shall be a person elected in the first place at the statutory meeting and thereafter elected or appointed by the members at each annual general meeting of the company or in such other manner and for such term as may be provided in the bye-laws.”;

(b) in subsection (2) by deleting the words “an individual or individuals” and substituting “a person or persons”;

(c) in subsection (2A) by deleting the word “individual”, wherever it occurs, and substituting “person”.

Amends section 96

17 Section 96 of the principal Act is amended by—

(a) repealing subsection (2)(b) and substituting the following—

“(b) on condition that, if the approval of the company is not given as aforesaid either—

(i) at or before the next following annual general meeting; or

(ii) in the case of a company that has made an election under section 71A, at or before the next following general meeting, which shall be convened within 12 months of the authorisation of the making of the loan, or the entering into of the guarantee, or the provision of the security,

the loan shall be repaid or the liability under the guarantee or security shall be discharged, as the case may be, within six months from the conclusion of that meeting.”;

(b) repealing subsection (4)(b) and substituting the following—

“(b) a company (other than a company which is a holding company or a subsidiary (wherever incorporated) of the company making the loan or, as the case may be, the company entering into guarantee or providing security in connection with a loan made to such person by any other person) which a director, his spouse or children own or control directly or indirectly more than twenty per cent of the capital or loan debt.”.

COMPANIES AMENDMENT (NO. 2) ACT 2011

Replacement of heading to Part VII

18 The principal Act is amended by deleting the heading to Part VII and substituting the heading “ARRANGEMENTS, RECONSTRUCTIONS, AMALGAMATIONS AND MERGERS”.

Amends section 101

19 Section 101 of the principal Act is amended in subsection (1)(f) by deleting the words “or amalgamation”.

Amends section 103

20 Section 103 of the principal Act is amended by inserting after subsection (6) the following subsections—

“(6A) Where the purchaser is entitled and bound to acquire shares pursuant to subsection (1) or has determined in accordance with subsection (3)(a) to proceed to acquire all the shares involved at the price fixed by the Court, on the expiration of one month from the date on which the notice was given, or, if an application to the Court to appraise the value of the shares to be purchased is then pending, from the date that application has been disposed of, the purchaser may—

- (a) transmit a copy of the notice to the subject company together with an instrument of transfer executed on behalf of the shareholder by any person appointed by the purchaser and on its own behalf by the purchaser; and
- (b) pay or transfer to the subject company the amount or other consideration representing the price payable by the purchaser for the shares which by virtue of this section the purchaser is entitled to acquire,

whereupon the subject company shall register the purchaser as the holder of those shares.

(6B) Any sums received by the subject company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the sums or other consideration were respectively received. ”.

Amends section 104A

21 Section 104A of the principal Act is amended—

- (a) in the section heading by inserting after the word “Amalgamation” the words “or merger”;
- (b) by repealing subsection (1) and substituting the following—

COMPANIES AMENDMENT (NO. 2) ACT 2011

“(1) One or more exempted companies and one or more bodies incorporated outside Bermuda (each such body hereinafter in this section and in sections 104B and 104D referred to as a “foreign corporation”) may—

- (a) amalgamate and continue as an exempted company registered in Bermuda; or
- (b) merge, and the surviving company continue as an exempted company registered in Bermuda,

to which the provisions of this Act and any other relevant laws of Bermuda shall apply.”;

(c) by inserting after subsection (2) the following—

“(2A) In respect of a merger, a foreign corporation shall obtain all necessary authorizations, if any, required under the laws of the jurisdiction in which it was incorporated or is presently registered in order to enable it to merge and for the surviving company to continue as an exempted company registered in Bermuda, and shall file with the Registrar documentary proof of such authorizations.”;

(d) by repealing subsection (4) and substituting the following—

“(4) The provisions of sections 105 to 109, mutatis mutandis, apply to—

- (a) an amalgamation under this section in the same way as they apply to an amalgamation under section 104; or
- (b) a merger under this section in the same way as they apply to a merger under section 104H.”.

Amends section 104B

22 Section 104B of the principal Act is amended—

- (a) in the section heading by inserting after the word “Amalgamation” the words “or merger”;
- (b) by repealing subsection (1) and substituting the following—

“(1) One or more exempted companies and one or more foreign corporations may—

- (a) amalgamate and continue as a foreign corporation (in this section and section 104C referred to as “the amalgamated corporation”); or
- (b) merge and the surviving company continue as a foreign corporation (in this section and section 104C referred to as “the surviving corporation”),

to which the laws of the jurisdiction in which it is proposed that the amalgamated corporation or surviving corporation will continue (in this section and section 104C referred to as “the foreign jurisdiction”) shall apply.”;

- (c) in subsection (2)—
 - (i) by inserting after the word “amalgamate” the words “or merge”;
 - (ii) paragraph (a)(i) by inserting after the word “corporation” the words “or surviving corporation”;
 - (iii) paragraph (a)(ii) by inserting after the words “amalgamated corporation’s assets” the words “or surviving corporation’s assets”;
 - (iv) paragraph (a)(iii)—
 - (A) in line 2, by inserting after the words “amalgamation or” the words “merger, or”;
 - (B) in line 4, by inserting after the word “amalgamation” the words “or merger”;
 - (v) paragraph (b)(i) by inserting after the word “amalgamation” the words “or merger”, wherever they occur;
 - (vi) paragraph (c)—
 - (A) by inserting after the word “amalgamating” the words “or merging”;
 - (B) by inserting after the word “amalgamate” the words “or merge”;
 - (vii) paragraph (d)—
 - (A) in subparagraph (ii) by inserting, after the semicolon, the word “or”;
 - (B) by inserting after subparagraph (ii) the following—
 - “(iii) in respect of a merger, approved by the Minister, upon application by the company for the purpose of the merger of the company with a foreign corporation and the continuance of the surviving corporation as a foreign corporation;”;
 - (viii) paragraph (e)—
 - (A) by inserting after the word “amalgamation” the words “or merger”;
 - (B) in subparagraph (i) by inserting after the word “amalgamating” the words “or merging”;
 - (C) in subparagraph (ii) by inserting after the word “amalgamating” the words “or merging”;
 - (D) by inserting after the words “foreign jurisdiction” the words “or merge and the surviving corporation to continue as a company in the foreign jurisdiction”.

COMPANIES AMENDMENT (NO. 2) ACT 2011

Amends section 104C

23 Section 104C of the principal Act is amended—

- (a) in the section heading by inserting after the word “amalgamation” the words “or merger”;
- (b) in subsection (1)—
 - (i) in line 1 by inserting after the word “amalgamate” the words “or merge”;
 - (ii) in line 2 by inserting after the word “amalgamation” the words “or merger”;
 - (iii) in line 3 by inserting after the word “amalgamation” the words “or merger”;
 - (iv) in paragraph (a) by inserting after the word “amalgamation” the words “or merger”;
 - (v) in paragraph (c) by inserting after the word “corporation” the words “or surviving corporation”;
 - (vi) in paragraph (d) by deleting the word “and”;
 - (vii) in paragraph (e) by deleting the period and substituting “; and”;
 - (viii) by inserting after paragraph (e) the following—
 - “(f) a statement as to whether the company intends to amalgamate or merge.”
- (c) by repealing subsection (2) and substituting the following—

“(2) Within thirty days after the date of the issue thereof, the amalgamated corporation or surviving corporation continuing as a result of an amalgamation or merger pursuant to section 104B shall file with the Registrar a copy of the certificate of amalgamation or merger issued by the appropriate authority of the foreign jurisdiction, or, if no such certificate of amalgamation or merger is issued, such other documentary evidence of the amalgamation or merger as shall be issued by such authority.”.

Amends section 104D

24 Section 104D of the principal Act is amended—

- (a) in the section heading by inserting after the word “amalgamation” the words “or merger”;
- (b) in subsection (1)—
 - (i) in line 2, by inserting after the word “amalgamation” the words “or merger”;

COMPANIES AMENDMENT (NO. 2) ACT 2011

- (ii) in line 3 after the word “104”, by deleting the comma and inserting the words “or a merger pursuant to section 104H,”;
- (iii) in line 4, by inserting after the word “amalgamating” the words “or merging”;
- (c) in subsection (2)—
 - (i) in line 1, by inserting after the word “amalgamation” the words “or merger”;
 - (ii) in line 2 after the word “104A”, by deleting the comma and inserting the words “or a merger pursuant to section 104H,”;
- (d) in subsection (3) by inserting after the word “amalgamation”, wherever it appears, the words “or merger”;
- (e) in subsection (4)(b)—
 - (i) by inserting after the word “amalgamate” the words “or merge”;
 - (ii) by inserting after the word “amalgamation” the words “or merger”.

Inserts section 104H

25 The principal Act is amended by inserting after section 104G the following—

“Merger of companies

104H Two or more companies which are registered in Bermuda may merge and their undertaking, property and liabilities shall vest in one of such companies as the surviving company (the “surviving company”):

Provided that if the surviving company is to be a local company it shall comply with the Third Schedule.”.

Repeals and replaces section 105

26 The principal Act is amended by repealing section 105 and substituting the following—

“Amalgamation agreement or merger agreement

105 (1) Each company proposing to amalgamate or merge shall enter into an agreement setting out the terms and means of effecting the amalgamation or merger and, in particular, setting out —

- (a) in respect of an amalgamation, the provisions that are required to be included in the memorandum of the amalgamated company;
- (b) in respect of a merger, any proposed amendments to the memorandum of the surviving company, or if none are proposed, a statement that the memorandum of the surviving company immediately prior to the merger shall be its memorandum after the merger;

- (c) the name and address of each proposed director of the amalgamated or surviving company;
- (d) the manner in which the shares of each amalgamating or merging company are to be converted into shares or other securities of the amalgamated or surviving company;
- (e) if any shares of an amalgamating or merging company are not to be converted into securities of the amalgamated or surviving company, the amount of money or securities that the holders of such shares are to receive in addition to or instead of securities of the amalgamated or surviving company;
- (f) the manner of payment of money instead of the issue of fractional shares of the amalgamated or surviving company or of any other securities which are to be received in the amalgamation or merger;
- (g) in respect of an amalgamation, whether the bye-laws of the amalgamated company are to be those of one of the amalgamating companies and, if not, a copy of the proposed bye-laws;
- (h) in respect of a merger, any proposed amendments to the bye-laws of the surviving company or, if none are proposed, a statement that the bye-laws of the surviving company immediately prior to the merger shall be its bye-laws after the merger; and
- (i) details of any arrangements necessary to perfect the amalgamation or merger and to provide for the subsequent management and operation of the amalgamated or surviving company.

(2) If shares of one of the amalgamating or merging companies are held by or on behalf of another of the amalgamating or merging companies, the amalgamation or merger agreement shall provide for the cancellation of such shares when the amalgamation or merger becomes effective without any repayment of capital in respect thereof, and no provision shall be made in the agreement for the conversion of such into shares of the amalgamated or surviving company.”.

Amends section 106

27 Section 106 of the principal Act is amended—

- (a) in subsection (1)—
 - (i) in line 1, by inserting after the word “amalgamating” the words “or merging”;
 - (ii) in line 2, by inserting after the word “agreement” the words “or merger agreement”;
 - (iii) in line 2, by inserting after the word “amalgamating” the words “or merging”;

- (b) in subsection (2)—
 - (i) in line 2, by inserting after the word “amalgamating” the words “or merging”;
 - (ii) in paragraph (a) by deleting the word “amalgamating” and substituting the words “amalgamation agreement or merger”;
 - (iii) in paragraph (b)(i) by inserting after the word “amalgamating” the words “or merging”;
- (c) in subsection (2A) by inserting after the word “amalgamation” the words “or merger”;
- (d) in subsection (3)—
 - (i) in line 1, by inserting after the word “amalgamating” the words “or merging”;
 - (ii) in line 2, by inserting after the word “amalgamation” the words “or merger”;
- (e) in subsection (4)—
 - (i) in line 1, by inserting after the word “amalgamating” the words “or merging”;
 - (ii) in line 2, by inserting after the first appearance of the word “amalgamation” the words “or merger”;
 - (iii) in line 3, by inserting after the word “agreement” the words “or merger agreement”;
- (f) in subsection (5), by inserting after the word “amalgamation” the words “or merger”;
- (g) in subsection (6), by inserting after the word “amalgamation” the words “or merger”;
- (h) in subsection (6A)(b), by inserting after the word “amalgamation” the words “or merger”;
- (i) in subsection (6B)—
 - (i) in line 2, by inserting after the word “amalgamation” the words “or merger”;
 - (ii) in line 4, by inserting after the word “amalgamated” the words “or surviving”;
- (j) in subsection (7)—
 - (i) in line 1, by inserting after the word “agreement” the words “or merger agreement”;

COMPANIES AMENDMENT (NO. 2) ACT 2011

- (ii) in line 2, by inserting after the word “amalgamation” the words “or merger”;
- (iii) in line 3, by inserting after the word “amalgamating” the words “or merging”;
- (iv) in line 4, by inserting after the word “amalgamating” the words “or merging”.

Repeals and replaces section 107

28 The principal Act is amended by repealing section 107 and substituting the following—

“Short form amalgamation or merger

107 (1) A holding company and one or more of its wholly-owned subsidiary companies may amalgamate and continue as one company or merge and the holding company continue as the surviving company without complying with sections 105 and 106 if—

- (a) the amalgamation or merger is approved by a resolution of the directors of each amalgamating or merging company; and
- (b) the resolutions provide that —
 - (i) the shares of each amalgamating or merging subsidiary company shall be cancelled without any repayment of capital in respect thereof;
 - (ii) the memorandum and bye-laws of the amalgamated or surviving company shall be the same as the memorandum and bye-laws of the amalgamating or merging holding company; and
 - (iii) no securities shall be issued by the amalgamated or surviving company in connection with the amalgamation or merger.

(2) Two or more wholly-owned subsidiary companies of the same holding company may amalgamate and continue as one company or merge and one of the wholly-owned subsidiary companies may continue as the surviving company without complying with sections 105 and 106 if —

- (a) the amalgamation or merger is approved by a resolution of the directors of each amalgamating or merging company; and
- (b) in respect of an amalgamation, the resolutions provide that —
 - (i) the shares of all but one of the amalgamating subsidiary companies shall be cancelled without any repayment of capital in respect of such shares;
 - (ii) the memorandum and bye-laws of the amalgamated company shall be the same as the memorandum and bye-laws of the

amalgamating subsidiary company whose shares are not cancelled; and

- (c) in respect of a merger, the resolutions provide that –
- (i) one of the merging wholly-owned subsidiary companies is the surviving company;
 - (ii) the shares of all but the surviving company shall be cancelled without any repayment of capital in respect of such shares; and
 - (iii) the memorandum and bye-laws shall be the same as the memorandum and bye-laws of the surviving company.

(3) The amalgamating or merging companies may elect to combine their respective authorised share capitals and in the resolutions approving the amalgamation or merger they shall state whether or not they so elect.

(4) In this section where it is intended that there be a continuation of a foreign corporation after the amalgamation or merger event, the term “surviving company” shall be deemed to include “surviving corporation”.

Amends section 108

29 Section 108 of the principal Act is amended—

- (a) in the section heading by inserting after the word “amalgamated” the words “or surviving”;
- (b) in subsection (1)—
 - (i) in line 1, by inserting after the word “amalgamation” the words “or merger”;
 - (ii) in line 2, by inserting after the word “amalgamated” the words “or surviving”;
 - (iii) in line 3, by inserting after the word “amalgamation” the words “or certificate of merger”;
- (c) in subsection (2)—
 - (i) in line 1, by inserting after the word “amalgamated” the words “or surviving”;
 - (ii) in paragraph (a), by inserting after the word “amalgamating” the words “or merging”;
 - (iii) in paragraph (b), by inserting after the word “amalgamated” the words “or surviving”;
 - (iv) in paragraph (c), by inserting after the word “amalgamated” the words “or surviving”;
 - (v) in paragraph (d) by deleting the period and substituting “; and”;

- (vi) by inserting after paragraph (d) the following—
 - “(e) a statement confirming that the company is to be registered as an amalgamated company pursuant to an amalgamation or to be registered as a surviving company pursuant to a merger. ”;
- (d) in subsection (3)—
 - (i) in line 1, by inserting after the word “amalgamated” the words “or surviving”;
 - (ii) in line 2, by inserting after the word “amalgamating” the words “or merging”;
 - (iii) in paragraph (a)—
 - (A) by inserting after the word “amalgamating” the words “or merging”;
 - (B) by inserting after the word “amalgamated” the words “or surviving”;
 - (iv) in paragraph (b), by inserting after the word “amalgamated” the words “or surviving”;
 - (v) in paragraph (c), by inserting after the word “amalgamation” the words “or merger”;
 - (vi) in paragraph (d)—
 - (A) by inserting after the word “amalgamating” the words “or merging”;
 - (B) by inserting after the word “amalgamation” the words “or merger”;
- (e) in subsection (4)(b)—
 - (i) by inserting after the word “amalgamate” the words “or merge”;
 - (ii) by inserting after the word “amalgamation” the words “or merger”.

Amends section 109

30 Section 109 of the principal Act is amended—

- (a) in the section heading by inserting after the word “amalgamated” the words “or surviving”;
- (b) by renumbering section 109 as subsection (1) of section 109;
- (c) by inserting after subsection (1) the following—
 - “(2) On the date shown in a certificate of merger –
 - (a) the merger of the merging companies and the vesting of their undertaking, property and liabilities in the surviving company shall become effective;

- (b) the surviving company shall continue to be liable for the obligations of each merging company;
- (c) an existing cause of action, claim or liability to prosecution shall be unaffected;
- (d) a civil, criminal or administrative action or proceeding pending by or against a merging company may be continued to be prosecuted by or against the surviving company;
- (e) a conviction against, or ruling, order or judgement in favour of or against, a merging company may be enforced by or against the surviving company;
- (f) the certificate of merger shall be deemed to be the certificate of incorporation of the surviving company; however, the date of incorporation of a company is its original date of incorporation and its merger with another company does not alter its original date of incorporation;
- (g) the Registrar shall strike off the register each Bermuda registered merging company that is not the surviving company; and
- (h) the cessation of a merging company that is not the surviving company in a merger shall not be a winding up within Part XIII.

Amends section 117

31 Section 117 of the principal Act is amended—

- (a) in subsections (1) and (2) by deleting the words “two directors” and substituting “a director”; and
- (b) in the proviso of subsection (2) by deleting “directors” and substituting “director”.

Amends section 132G

32 Section 132G of the principal Act is amended in subsection (2)(b) by deleting the words “the directors” and substituting “a director”.

Amends section 236

33 Section 236(1) of the principal Act is amended—

- (a) in paragraph (d) by inserting after the word “amalgamation” the words “or of merger”; and
- (b) in paragraph (e) by inserting after the word “amalgamation” the words “or of merger”.

Repeals section 272A

34 The principal Act is amended by repealing section 272A.

Regulations

35 (1) The Minister may, in Regulations, make such consequential amendments to the principal Act, or any other law, as may be necessary to be made as a consequence of the amendments set out in this Act.

(2) Regulations made by the Minister under subsection (1) shall be subject to the negative resolution procedure.

COMPANIES AMENDMENT (NO. 2) BILL 2011

EXPLANATORY MEMORANDUM

This Bill seeks to make wide-ranging amendments to the Companies Act 1981 (the “principal Act”) to remove proven inefficiencies and unnecessary formality. For this purpose the Bill amends the principal Act to require companies to have at least one director instead of the requirement for at least two directors; to enable a director of a company to be an individual or corporation; to remove the requirement for the holding of annual general meetings and the laying of financial statements and instead to provide companies with options with respect to the holding of annual general meetings and the laying of financial statements; to remove the prohibition against a company giving financial assistance for the acquisition of shares in the company; to remove the requirement for a proper instrument of transfer of shares or debentures for companies whose shares or debentures are listed on an appointed stock exchange; to cause the provisions in the principal Act that apply to amalgamations to also apply to mergers and to effect all other related amendments.

Clause 1 provides a citation for the Bill.

Clause 2 amends section 2 of the principal Act with respect to the term “director”, by providing that where in the principal Act an obligation or duty is placed on the company or on directors of a company, such obligation or duty may be carried out by a director where the affairs of the company are managed by only one director.

Clause 3 amends section 12 of the principal Act to enable a single director to swear an affidavit that is submitted together with the company’s altered memorandum, to the Registrar of Companies.

Clause 4 amends section 13 of the principal Act to remove the requirement for a company to provide in its bye-laws for a general meeting of the company to be held at least once in every year.

Clause 5 amends section 14A of the principal Act so as to require only one director to make a statutory declaration with respect to the re-registration of a limited liability company as an unlimited liability company.

Clause 6 amends the principal Act by repealing sections 39, 39A, 39B and 39C. The repeal of section 39, removes the general prohibition against a company providing financial assistance where a person is acquiring, or proposing to acquire, shares in the company. The qualifications applicable to the prohibition in section 39 contained in section 39A, (dealing with exclusion from prohibition on financial assistance), section 39B (dealing with circumstances where financial assistance is permitted) and section 39C (dealing with conditions applicable to giving of financial assistance under section 39B), have also been removed.

Clause 7 amends section 43 of the principal Act in paragraph (c) to enable a single director to swear an affidavit on the day a company is to convert preference shares into redeemable preference shares, declaring that the company is solvent or that its creditors concur with the conversion.

COMPANIES AMENDMENT (NO. 2) BILL 2011

Clause 8 amends section 48 of the principal Act by inserting two new subsections which remove the requirement for a proper instrument of transfer of shares or debentures to be delivered to the company in the case of a company whose shares or debentures are listed on an appointed stock exchange.

Clause 9 amends section 54 of the principal Act to clarify the point that a company must look at its liabilities “in the normal course of business” when calculating liabilities for the purpose of the Cash Flow Test in subsection (1)(a). The amendment to subsection (1)(b) will enable the Balance Sheet Test to reflect the global trend away from restrictive capital preservation provisions so that companies can pay dividends or distributions when they record a profit, notwithstanding that the company may carry a negative retained earnings balance.

Clause 10 amends section 71 of the principal Act to cause the provisions of the section, which deal with general meetings, to be subject to the new section 71A which gives companies the power to dispense with annual general meetings.

Clause 11 amends the principal Act by the insertion of a new section 71A, which gives the power to companies to elect to dispense with annual general meetings. The legal framework for the section is based on the current UK procedure applicable to private companies, which has been modified to suit the requirements of Bermuda law.

Clause 12 amends section 84 of the principal Act, in the first instance, by continuing to provide that financial statements shall be laid before a general meeting in the case of companies that will hold a general meeting in a particular year; and, in the second instance, in the case of companies that may elect not to hold a general meeting in a particular year, by requiring that their financial statements shall nonetheless be made available upon request by any member.

Clause 13 amends section 87 of the principal Act to make the point clear that the right of company members to receive copies of financial statements of the company will apply even to companies that do not have a general meeting in any year. Such companies must still make their financial statements available to members. If they fail to do so, any member can requisition a meeting at which the provisions of section 84 will apply.

Clause 14 amends section 88 of the principal Act to ensure that where the power given for a company to waive the laying of accounts and the appointment of auditors is exercised, any member of the company may, by notice to the company, require the convening of a general meeting within 6 months of the notice, at which general meeting the need for the laying of financial statements or auditor’s report shall be reconsidered by the company.

Clause 15 amends section 89 of the principal Act to provide for the continuation of an auditor in office until a successor is appointed. In this way, the process will work both for companies that may elect not to have an annual general meeting and those that do have an annual general meeting.

Clause 16 amends section 91 of the principal Act to provide that a company’s affairs shall be managed by at least one director (as opposed to not less than two directors, as previously required) and that the director or directors shall first be elected at the company’s statutory meeting after which subsequent elections or appointments of its director(s) may be made at an annual general meeting or by a resolution of the members or as the bye-laws

of the company may provide. The former requirement for directors to be “individuals” has been changed to permit a company, i.e. a ‘body corporate’ to be elected or appointed as a director.

Clause 17 amends section 96 of the principal Act to provide that where companies elect not to have annual general meetings they will be required to have in place a mechanism whereby permitted loans to directors are brought to the attention of the members in a timely manner. The amendment to section 96 requires that if a permitted loan to a director is made and the company does not have annual general meetings, a general meeting must be called in a timely manner to ratify the loan.

Clause 18 amends the principal Act by replacing the heading to Part VII so as to provide for a heading that includes reference to mergers.

Clause 19 seeks to amend section 101 of the principal Act so as to include mergers in the provisions applicable to amalgamations.

Clause 20 amends section 103 of the principal Act to provide for the purchaser of shares to be able to submit a proper instrument of transfer executed on behalf of the shareholder whose shares are being acquired by any person appointed by the purchaser.

Clause 21 amends section 104A of the principal Act to provide for the merging of companies in addition to the amalgamation of companies. Similar to the existing amalgamation procedure, the merger regime introduced by the amendment will permit Bermuda companies to merge with either one or more Bermuda companies or foreign corporations and the undertaking, assets and liabilities of each merging company to vest in the company or corporation that continues, as either a Bermuda company or foreign corporation. The amendment of the Act with respect to mergers provides, pursuant to the provisions of section 104A as read with the amended sections 105 through 109, inclusive, for the following: (i) that the Bermuda company which continues after the merger shall be designated as the “surviving company”; (ii) that any Bermuda company participating in the merger which is not the “surviving company” shall be struck off the Register of Companies and (iii) that cessation of a merging company that is not the surviving company shall not be a winding-up of that company within Part XIII of the principal Act.

Clause 22 amends section 104B of the principal Act so as to include mergers in the provisions for amalgamation of an exempted company and foreign corporation, where the result is to continue the amalgamated corporation or the surviving corporation as a foreign corporation under the laws of the foreign jurisdiction proposed.

Clause 23 amends section 104C of the principal Act so as to include mergers in the provisions for documents to be filed on amalgamation in the case where there is a continuation of the amalgamated corporation or the surviving corporation as a foreign corporation under the laws of the foreign jurisdiction proposed.

Clause 24 amends section 104D of the principal Act so as to include mergers in the provisions applicable to amalgamation where there is a continuation of the amalgamated corporation or the surviving corporation as a foreign corporation under the laws of the foreign jurisdiction proposed.

COMPANIES AMENDMENT (NO. 2) BILL 2011

Clause 25 amends the principal Act to insert a new section 104H, which provides substantively for the merging of companies.

Clause 26 amends section 105 of the principal Act so as to include merger agreements in the provisions for amalgamation agreements.

Clause 27 amends section 106 of the principal Act so as to include mergers in the provisions for shareholder approval for, among other things, amalgamation or merger agreements.

Clause 28 repeals and replaces section 107 of the principal Act so as to include short form mergers in the provisions for short form amalgamations.

Clause 29 amends section 108 of the principal Act so as to include provisions for registration of mergers in the provisions for registration of amalgamated companies.

Clause 30 amends section 109 of the principal Act so as to include provision for the effect of a certificate of merger in respect of merging companies, to the existing provisions for the effect of a certificate of amalgamation in respect of amalgamating companies.

Clause 31 amends section 117 of the principal Act in subsections (1) and (2) to provide that one director can sign the return of shareholdings to be forwarded to the Registrar of Companies.

Clause 32 amends section 132G in subsection (2)(a) to provide that a director of an exempt company (rather than directors) may sign a statutory declaration to state that the company is solvent for the purpose of discontinuing as a company under the principal Act.

Clause 33 amends section 236 of the principal Act so as to include mergers in the provisions applicable to amalgamations.

Clause 34 amends the principal Act by repealing section 272A. The repeal removes the requirement where shares to be traded must be listed on an appointed stock exchange.

Clause 35 empowers the Minister to make Regulations to provide for consequential amendments that are necessary to be made as a consequence of the amendments set out in this Act. The Regulations made in this respect would be subject to the negative resolution procedure.