



## More red carpet, less red tape

The Companies Amendment (No. 2) Act 2011 brings significant amendments to the Companies Act 1981, the principal statute governing the formation and operation of Bermuda companies. The changes ensure that Bermuda maintains its status as a top-tier financial services jurisdiction, having a sensible and balanced legislative regime for companies, while offering additional flexibility to those companies that want it.

### Directors and Residency Requirements

**Under the new provisions, Bermuda companies may have sole directors. Corporate directors of Bermuda companies are now permitted.**

Prior to the amendments, every exempted company was required to have a minimum of two directors. All directors had to be individuals. In addition, certain residency requirements had to be satisfied.

The new amendments greatly simplify the director and residency requirements. Now, every exempted company is only required to have at least one director and a secretary. An exempted company may have a resident representative. A director, secretary or resident representative may be an individual or a company. At least one of these roles must be filled by an individual or company ordinarily resident in Bermuda.

The new provisions offer flexibility, convenience and simplicity, while still ensuring that every Bermuda exempted company has a direct link to a person present in Bermuda. Note that some existing Bermuda exempted companies will have in their bye-laws a provision stating that there will be a minimum number of two directors. Companies are now at liberty to amend this requirement if desired.

## Waiver of Annual General Meetings

**Companies now have the option to waive annual general meetings.**

Previously, every Bermuda company was required to hold an annual general meeting in each calendar year. This was the case whether or not the company had any actual cause to hold such meeting.

Under the new provisions, a company may, by resolution of the members, elect to dispense with the holding of annual general meetings. This waiver can be made for a particular year, a particular period of time, or indefinitely. Where a company's members have elected to waive the holding of an annual general meeting, any one member may, by notice to the company prior to 3 months before of the end of the year, require that an annual general meeting be held in that year. If a member is out of time for a particular calendar year, he must wait until the following calendar year to trigger an annual general meeting.

It should be noted that the shareholder protections in the Act that are historically linked to the requirement to hold an annual general meeting continue to apply. For example, under the Act, financial statements must be laid before the members at each annual general meeting (unless the requirement has been waived by all members and all directors in accordance with the Act). Companies that have elected not to have annual general meetings are still required to prepare financial statements in the ordinary course and to make them available to every member within twelve months of the end of the relevant year. How a company makes those financial statements available to its members is a matter for the board of directors to determine. In many cases, delivery by electronic mail to a specified address will be the preferred, and most cost effective, route. Similarly, where a company makes a loan to a director and such loan would ordinarily have to receive the sanction of the members at the next annual general meeting, a meeting is automatically triggered for this purpose. In this way, the shareholders continue to receive the protections under the Act even if the company has elected to waive annual general meetings.

Given that any one member can trigger an annual general meeting for any reason (or for no reason at all), this new option will not be suitable for all companies. The option is best suited to single member, inactive companies.

## Financial Assistance

**The statutory prohibition on providing financial assistance is repealed.**

Section 39 of the Act, which provided that no company may give financial assistance for the purchase of, or subscription for, shares in itself, has been repealed. The prohibition created legal uncertainty as there was no comprehensive definition of 'financial assistance'. There was some debate as to whether or not certain indemnities, for example, fell within the meaning of the term. A decision as to whether a transaction constituted assistance required a determination of where the net balance of financial advantage lay, giving rise to complex commercial and accounting issues. The consequences for breach, however inadvertent, were severe, including the voiding of the transaction. In some circumstances, breach of the prohibition could give rise to criminal penalties and would expose the directors to personal liability for the transaction. Although the prohibition had been watered down over the years by other legislative provisions the uncertainty remained.

With the repeal of the prohibition (and its related exemptions and exceptions), this uncertainty is removed. It should be noted that many existing Bermuda companies will have provisions in their bye-laws that mirror the now-repealed sections of the Act. Depending on the formulation of the bye-laws, it may be advisable to amend them to remove the reference entirely.

## Paperless Share Transfers

**Paperless share transfers are facilitated for listed shares.**

Section 48 of the Act, which deals with how shares are to be transferred, has been amended to accommodate the paperless transfer of listed shares. For non-listed shares, an instrument of transfer must be delivered to the company for the transfer to be registered. Under the new provisions, listed shares are exempted from this requirement. The rules of the relevant appointed stock exchange pertaining to share transfers will instead apply. Given the number of Bermuda companies that are listed on appointed stock exchanges around the world, this modernisation will be well received.

## Mandatory Acquisition Provisions

**Purchasers making mandatory acquisitions in accordance with the Act are given the means to complete the transfer without the co-operation of the shareholder whose shares are being purchased.**

Section 103 of the Act empowers the holders of not less than ninety-five percent of the shares (or any class of shares) to acquire all of the shares of the remaining shareholders. It is sometimes the case that a shareholder who is being bought out simply fails to take positive steps to complete the acquisition, whether through indifference or intransigence. The Act now contains provisions enabling the purchaser to complete the transfer even without the cooperation of the shareholder whose shares are being acquired. The purchaser is permitted to notify the company of the acquisition and pay to the company the consideration for the purchase price, whereupon the company must register the purchaser as the holder of the shares. The money received by the company is held on trust for the persons whose interests have been bought out.

## The Solvency Test

**The solvency test is simplified.**

A Bermuda company is not permitted to pay out a dividend or make a distribution unless it meets the statutory solvency test set out in section 54 of the Act. The first branch of the solvency test is the cash flow test. The second branch is a balance sheet test. Previously, the balance sheet test was measured with reference to the difference between the realisable value of a company's assets and the aggregate of its liabilities and its issued share capital and share premium accounts. Now the appropriate measure is between the realisable value of the company's assets and its liabilities. There is no longer any reference to the company's issued share capital and share premium accounts. This amendment follows a global trend away from restrictive capital preservation provisions.

## Mergers

**A new statutory process for corporate mergers is created.**

The procedures for amalgamation and continuation in the Act have now been supplemented by new provisions permitting corporate mergers. In an amalgamation, two or more companies join their undertakings and continue along together, like two streams flowing into a river. In a merger, companies combine their

assets, liabilities and undertakings and a surviving company results. The new merger process closely resembles that seen in amalgamations and is simple and straightforward.

## Next Steps

**Existing Bermuda companies are not required to take any particular action as a result of these amendments. However, those companies wishing to take advantage of the increased flexibility offered by the new provisions should contact their Conyers' attorney or Codan contact to discuss their options.**

We expect that many Bermuda companies will want to take advantage of the opportunity to appoint corporate directors to their boards. Some may enjoy the efficiency of having a sole director. Many single member or closely held inactive companies will doubtlessly want to waive the requirement to hold annual general meetings. Some companies may wish to do all three. The existing bye-laws of such companies will need to be reviewed to ensure that they are consistent with the new language of the Act, and your Conyers' attorney or Codan contact would be pleased to assist.

Those companies already in the process of declaring a dividend or making a distribution will want to be particularly aware of the change in the solvency test. It may be advisable to undertake a review of the company's financial position in light of the new formulation of the balance sheet test and to ratify the declaration as appropriate.

Additional information on the new merger process has been prepared for those clients interested in this option. A publication outlining the procedure in full is available on request.

## Conclusion

Conyers takes the view that the amendments to the Companies Act are positive measures that will further enhance business efficiency. Not all of the new provisions will be suitable for all companies, however, so clients are invited to contact us for advice specific to their matters.



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This advisory is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information about the changes to the Bermuda legislation. These changes should be considered carefully with reference to individual circumstances. For detailed advice please contact a Conyers attorney or a Codan Services Limited manager.

### About Conyers Dill & Pearman

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