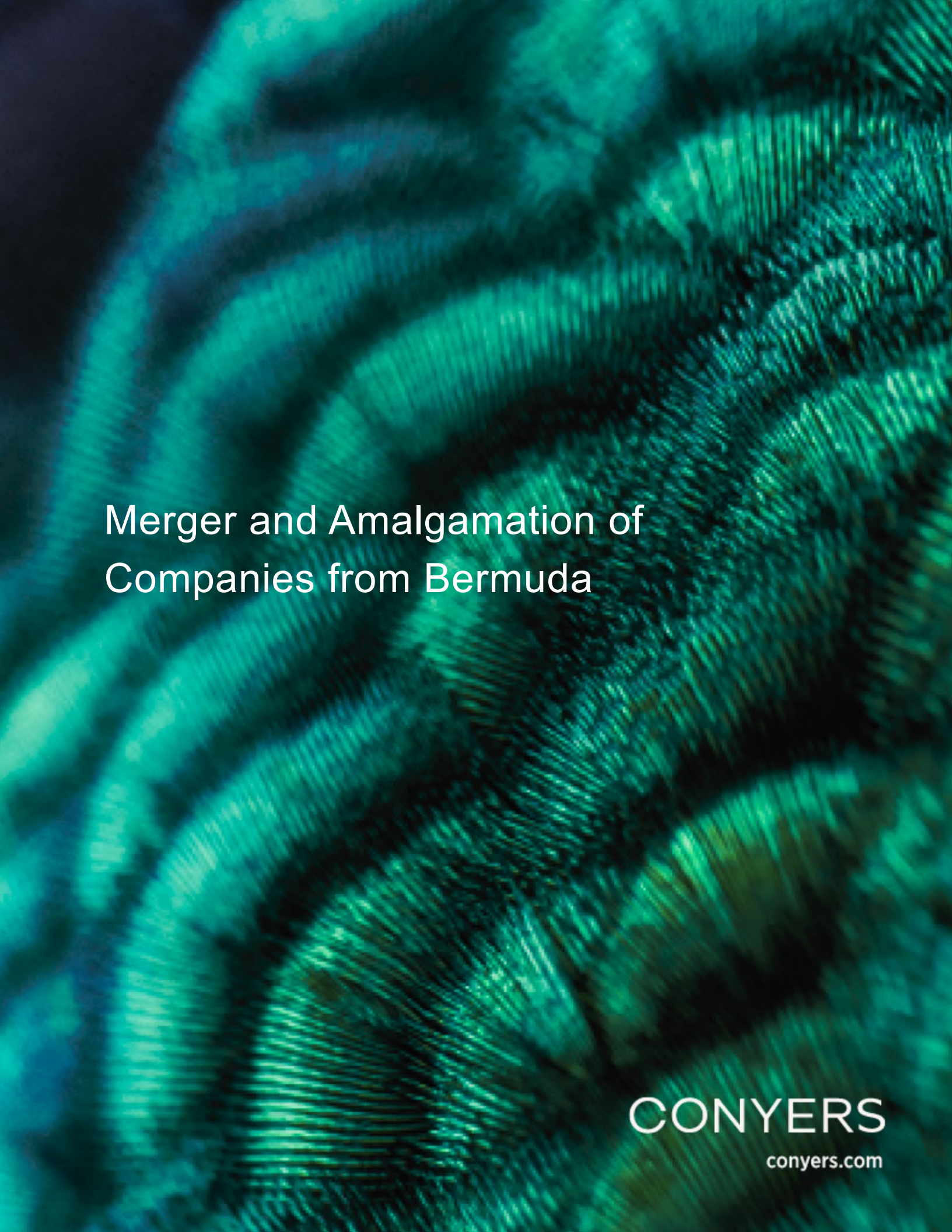

# Merger and Amalgamation of Companies from Bermuda

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# Preface

This publication has been prepared for the assistance of those who are considering the merger or amalgamation of a foreign corporation with a Bermuda exempted company where the surviving or amalgamated entity will be, or will become, a foreign corporation. It deals in broad terms with the requirements and procedures under Bermuda law for effecting such merger or amalgamation. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

Before proceeding with such a merger or amalgamation, persons are advised to consult their tax, legal and other professional advisers in their respective jurisdictions.

Copies of the Companies Act 1981 of Bermuda have been prepared and are available on request.

**Conyers Dill & Pearman**

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## 1. INTRODUCTION

This publication outlines the steps necessary under the Companies Act 1981 of Bermuda (the "Act") for a Bermuda exempted company to merge or amalgamate with a company incorporated outside of Bermuda (a "foreign corporation"), with the surviving or amalgamated corporation continuing as a foreign corporation.

In order to ensure that the merging or amalgamating companies are deemed to merge or amalgamate at the same time under their respective laws of incorporation, it is suggested that before any application is made, all the appropriate documentation first be completed both in Bermuda and in the jurisdiction in which the foreign corporation is registered.

The foreign jurisdiction to which a Bermuda company is to merge or amalgamate into must be a jurisdiction approved by the Bermuda Government as an "appointed jurisdiction". Please contact Conyers Dill & Pearman for a current listing of appointed jurisdictions. The government will consider approving further jurisdictions as appointed jurisdictions upon request, and will consider approving the merger or amalgamation of a Bermuda exempted company with a foreign corporation in a foreign jurisdiction which is not an appointed jurisdiction, on a case by case basis.

## 2. MERGER FROM BERMUDA

### 2.1. Procedure

**Merger Agreement**

The Act requires that each company proposing to merge enter into a merger agreement which sets out the terms and means of effecting the merger. In addition, the Act specifies certain matters which must be dealt with in any such merger agreement. This list is not exhaustive and there will likely be other matters which the parties will want to be included in the merger agreement.

**Shareholder Approval**

The directors of each Bermuda merging company must submit the merger agreement for approval to a general meeting of members of their respective merging company. All shareholders, whether or not their shares have voting rights, are entitled to vote on whether to approve the merger agreement. If the merger agreement contains provisions which would constitute a variation of the rights of any class of shares of a Bermuda merging company, the holders of shares of that class are entitled to vote separately as a class on the approval of the merger agreement. Unless the company's bye-laws otherwise provide, the resolution of the shareholders or class must be approved by a majority vote of 75 per cent of those voting at the meeting, the quorum for which is two persons, holding or representing by proxy more than one-third of the issued shares of the company or the class.

The notice to the shareholders of the general meeting must be accompanied by a copy or summary of the merger agreement and must state:

(a) the fair value of the shares as determined by each merging company; and

(b) that a dissenting shareholder is entitled to be paid fair value for their shares.

A shareholder that did not vote in favour of the merger and is not satisfied that he has been offered fair value for his shares, may apply to the court for an appraisal of the fair value of his shares within one month of the giving of the notice of meeting to shareholders.

**Statutory Declaration/Deed Poll**

A director or officer of each Bermuda company which is merging must sign a statutory declaration confirming that there are reasonable grounds for believing that:

(a) the relevant Bermuda company is, and the surviving company will be, able to pay its liabilities as they fall due;

(b) the realisable value of the assets of the surviving company will not be less than the aggregate of its liabilities and issued share capital and share premium account of all classes of shares; and

(c) either that no creditor of the Bermuda company will be prejudiced by the merger or that all known creditors of the relevant merging company have been given adequate notice of the merger and none have objected to the merger except on frivolous or vexatious grounds. For this purpose, adequate notice is given if a written notice is sent to each known creditor having a claim against the company in excess of $1,000 and a notice of the intended merger is published in a local newspaper informing creditors that they may object to the merger within 30 days from the date of the notice.

In addition, each Bermuda exempted company which is merging and its directors must execute an irrevocable deed poll regarding service of legal process on each of them after the merger of the company from Bermuda.

**Foreign Authorisations**

Each foreign corporation which is merging must obtain all necessary authorisations, if any, required under the laws of the jurisdiction in which it is presently registered to enable it to merge.

**Advertisement**

Not more than three months prior to the effective date of the merger, each merging Bermuda exempted company must advertise in a newspaper in Bermuda and each merging foreign corporation must advertise in a national newspaper in the jurisdiction in which it is presently registered, its intention to merge, with the surviving corporation continuing as a corporation in the foreign jurisdiction.

**Filing with Registrar of Companies**

On or before the effective date of the merger a notice of the merger must be filed with the Registrar of Companies (the “Registrar”) in order for the merger to become effective. The notice is filed on the Registrar’s online portal (the “RoC Portal”) which requires the following information / items:

(a) confirmation that the company intends to merge and the effective date of the merger;

(b) the name of the relevant foreign jurisdiction;

(c) the address of the registered office or the principal business address of the surviving corporation in the foreign jurisdiction;

(d) a copy of the statutory declaration referred to above;

(e) a copy of the irrevocable deeds poll referred to above; and

(f) the requisite filing fee.

The company must also file on the RoC Portal a copy of the Certificate of Merger (or such other documentary evidence of the merger) issued by the appropriate authority in the foreign jurisdiction within 30 days of the date of the issue thereof.

The effective date of the merger with the foreign corporation is the date that the merger is effective pursuant to the laws of the relevant foreign jurisdiction.

### 2.2. Intra-Group Mergers

An alternative "short form" method of merger is available where the merging companies are a holding company and one or more wholly-owned subsidiaries, or two or more wholly-owned subsidiaries of the same holding company. Companies merging by this method need not enter into a merger agreement and each Bermuda exempted company may approve the merger solely by a resolution of the directors of each company. In all other aspects, however, a merger by this method would be carried out and effected as described above.

Where the merging companies are a holding company and one or more of its wholly-owned subsidiaries, the directors' resolutions of the merging Bermuda exempted companies must provide that:

(a) the shares of each merging subsidiary company shall be cancelled without any repayment of capital in respect thereof;

(b) the articles of association or other charter document of the surviving company shall be the same as that of the merging holding company; and

(c) no securities shall be issued by the surviving company in connection with the merger.

Where the merging companies are two or more wholly-owned subsidiaries of the same holding company, the directors' resolutions of the merging Bermuda exempted companies must provide that:

(a) one of the merging wholly-owned subsidiary companies will be the surviving company;

(b) the shares of each merging subsidiary, other than those of the proposed surviving company, shall be cancelled without any repayment of capital in respect thereof; and

(c) the articles of incorporation or other charter document of the surviving company shall be the same as that of the merging subsidiary company proposed to be the surviving company.

In both scenarios of an intra-group merger, the resolutions approving the merger must also state whether or not the merging companies elect to combine their respective authorised share capitals.

## 3. AMALGAMATION FROM BERMUDA

### 3.1. Procedure

**Amalgamation Agreement**

The Act requires that each company proposing to amalgamate must enter into an amalgamation agreement which sets out the terms and means of effecting the amalgamation. In addition, the Act specifies certain matters which must be dealt with in any such amalgamation agreement. This list is not exhaustive and there will likely be other matters which the parties will want to be included in the amalgamation agreement.

**Shareholder Approval**

The directors of each Bermuda amalgamating company must submit the amalgamation agreement for approval to a general meeting of members of their respective amalgamating company. All shareholders, whether or not their shares have voting rights, are entitled to vote on whether to approve the amalgamation agreement. If the amalgamation agreement contains provisions which would constitute a variation of the rights of any class of shares of a Bermuda amalgamating company, the holders of shares of that class are entitled to vote separately as a class on the approval of the amalgamation agreement. Unless the relevant company's bye-laws otherwise provide, the resolution of the shareholders or class must be approved by a majority vote of 75 per cent of those voting at the meeting, the quorum for which is two persons, holding or representing by proxy more than one-third of the issued shares of the company or the class.

The notice to the shareholders of the general meeting must be accompanied by a copy or summary of the amalgamation agreement and must state:

(a) the fair value of the shares as determined by each amalgamating company; and

(b) that a dissenting shareholder is entitled to be paid fair value for their shares.

A shareholder that did not vote in favour of the amalgamation and is not satisfied that he has been offered fair value for his shares, may apply to the court for an appraisal of the fair value of his shares within one month of the giving of the notice of meeting to shareholders.

**Statutory Declaration/Deed Poll**

A director or officer of the Bermuda company which is amalgamating must sign a statutory declaration confirming that there are reasonable grounds for believing that:

(a) the relevant Bermuda company is, and the amalgamated company will be, able to pay its liabilities as they become due;

(b) the realisable value of the assets of the amalgamated company will not be less than the aggregate of its liabilities and issued share capital and share premium account of all classes of shares; and

(c) either that no creditor of the Bermuda company will be prejudiced by the amalgamation or that all known creditors of the relevant amalgamating company have been given adequate notice of the amalgamation and none have objected to the amalgamation except on frivolous or vexatious grounds. For this purpose, adequate notice is given if a written notice is sent to each known creditor having a claim against the company in excess of $1,000 and a notice of the intended amalgamation is published in a local newspaper informing creditors that they may object to the amalgamation within 30 days from the date of the notice.

In addition, each Bermuda exempted company which is amalgamating and its directors must execute an irrevocable deed poll regarding service of legal process on each of them after the amalgamation of the company from Bermuda.

**Foreign Authorisations**

Each foreign corporation which is amalgamating must obtain all necessary authorisations, if any, required under the laws of the jurisdiction in which it is presently registered to enable it to amalgamate.

**Advertisement**

Not more than three months prior to the effective date of the amalgamation, each amalgamating Bermuda exempted company must advertise in a newspaper in Bermuda and each amalgamating foreign corporation must advertise in a national newspaper in the jurisdiction in which it is presently registered, its intention to amalgamate, with the amalgamated entity continuing as a corporation in the foreign jurisdiction.

**Filing with Registrar of Companies**

On or before the effective date of the amalgamation, notice of the amalgamation must be filed with the Registrar in order for the amalgamation to become effective. The notice is filed on the RoC Portal which requires the following information / items:

(a) confirmation that the company intends to amalgamate and the effective date of the amalgamation;

(b) the name of the relevant foreign jurisdiction;

(c) the address of the registered office or the principal business address of the amalgamated corporation in the foreign jurisdiction;

(d) a copy of the statutory declarations referred to above;

(e) a copy of the irrevocable deeds poll referred to above; and

(f) the requisite filing fee.

The company must also file on the RoC Portal a copy of the certification of amalgamation (or other such documentary evidence of the amalgamation) issued by the appropriate authority in the foreign jurisdiction within thirty days of the date of the issue thereof.

The effective date of the amalgamation with the foreign corporation is the date that the amalgamation is effective pursuant to the laws of the relevant foreign jurisdiction.

### 3.2. Intra-Group Amalgamations

An alternative "short form" method of amalgamation is available where the amalgamating companies are a holding company and one or more wholly-owned subsidiary companies, or two or more wholly-owned subsidiaries of the same holding company. The amalgamating companies need not enter into an amalgamation agreement and each Bermuda exempted company may approve the amalgamation solely by a resolution of the directors of each company. In all other aspects, however, an amalgamation by this method would be carried out and effected as described above.

Where the amalgamating companies are a holding company and one or more of its wholly-owned subsidiaries, the directors' resolutions of the amalgamating Bermuda exempted companies must provide that:

(a) the shares of each amalgamating subsidiary company shall be cancelled without any repayment of capital in respect thereof;

(b) the articles of association or other charter document of the amalgamated company shall be the same as that of the amalgamating holding company; and

(c) no securities shall be issued by the amalgamated company in connection with the amalgamation.

Where the amalgamating companies are two or more wholly-owned subsidiaries of the same holding company, the directors' resolutions of the amalgamating Bermuda exempted companies must provide that:

(a) the shares of all but one of the amalgamating subsidiary companies shall be cancelled without any repayment of capital in respect thereof; and

(b) the articles of incorporation or other charter document of the amalgamated company shall be the same as those of the amalgamating subsidiary company whose shares are not cancelled.

In both scenarios of an intra-group amalgamation, the resolutions approving an intra-group amalgamation must also state whether or not the amalgamating companies elect to combine their respective authorised share capitals.

*This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.*

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