

The Companies (Guernsey) Law, 2008 (amendment) Ordinance, 2015 – detailed summary of changes

Service area / [Corporate](#)

Location / [Guernsey](#)

Date / [August 2015](#)

Introduction

On 29 July 2015, the States of Guernsey approved amendments to the Companies (Guernsey) Law, 2008 (the 'Companies Law'). The changes are set out in the Companies (Guernsey) Law, 2008 Amendment Ordinance, 2015 (the 'Ordinance') published on the 19 June 2015. This briefing note considers the impact of the Ordinance for Guernsey companies. The Ordinance will commence on a date to be set in a separate regulation. Certain provisions of the Ordinance, such as those affecting the memorandum and articles of companies formed under the old Companies (Guernsey) 1994 Law (the '1994 Law'), will not come into effect until 31 December 2016 by which time the Companies (Transitional Provisions) Regulations, 2008 as recently amended (the 'Transitional Provisions') will have expired. Other Ordinance provisions refer to further implementing regulations the details of which have yet to be issued.

Main changes

Memorandum and articles

- A memorandum will no longer need to state the maximum number of guarantee members.
- Simpler, more permissive powers to issue shares will be available. Articles can be amended accordingly. The authority to issue shares no longer needs to distinguish between single and multi-class companies. The 5 year authority required for multi-class shares is abandoned. The authority to issue any shares (or to grant rights to subscribe for, or to convert any security into, shares) may be set out in the memorandum, the articles or by resolution of the company. Prohibitions or restrictions may be placed on the

power in relation to employee share schemes. Section 292 and 293 of the Companies Law are to be repealed and therefore any references to them, (as in the Registry standard articles) should be deleted. The Transitional Provisions dis-apply sections 291-293 of the Companies Law to 1994 Law articles until 31 December 2016.

- Director's disclosures of interest are simplified and the monetary value of an interest no longer needs to be disclosed.
- Company secretaries and directors should decide in their articles what duties secretaries should fulfil by 31 December 2016.
- Notices and service of documents articles should be amended to reflect the new postal rules for notices particularly to non-members (or their proxies). Unless the contrary is shown, posted documents are now deemed to be received on the second (formerly the third) day after the day of posting for documents sent to an address in the UK, Channel Islands or the Isle of Man, and in the case of a document posted elsewhere, on the third (formerly the seventh) day after the day of posting (excluding any which is not a working day).
- Emailing documents has become simpler and articles can be amended to provide for deemed service of an emailed document 'immediately after' the email is sent, unless the contrary is shown.
- Quorum at meetings provisions now refer to total voting rights of the company (not share capital).
- A company may redeem a share whether or not it is fully paid.

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Board and member meetings and minutes

- Director's disclosures of interest are simplified (see above).
- Board certificates in relation to assessing share consideration are no longer required.
- A new waiver resolution will be introduced exempting certain directors from producing a directors' report on an indefinite basis or for a particular year.
- Generally, indemnities for directors of overseas subsidiaries are void.
- The definition of unanimous resolutions has been clarified and means one agreed to by every member entitled to vote on it.
- Quorum at meetings provisions now refer to total voting rights of the company (not share capital).
- The members who are entitled to vote on a written resolution can now be determined by reference to a time, on the day of circulation of the resolution, which is before the actual circulation of the resolution.
- Simpler procedures exist now for re-appointing an auditor.

Corporate actions

- Squeeze out rights can be exercised as soon as a takeover offer reaches 90% shareholder acceptance, and the bidder will no longer need to wait 4 months before squeezing out the dissenting shareholders. However, the bidder will have to disregard shares held by certain persons and by entities connected to the bidder when calculating the 90% threshold to trigger the squeeze out.
- Shorter timelines are now available for amalgamations and emigrations: the Registry's 28 day notice period will now be able to run concurrently with the applicant's own notice period to creditors and members.
- Cross border company amalgamations will be allowed on a short form basis.
- A cell of a protected cell company will be able to convert into, and incorporate as, a standalone non-cellular company. A protected cell company may prepare separate accounts for its core and its cells rather than consolidate them.
- An 'alternative name' can be adopted and reserved with the Registry.
- A new 2 year time limit on recovering distributions where the directors failed to certify solvency has been introduced. Companies may wish to consider revising timelines for any clawback action.
- A new whitewash is introduced for directors in relation to distributions where a solvency certificate was omitted.

Dissolution

- A company can be struck off prematurely if there are no directors, for example when winding up a company.
- The Guernsey Financial Services Commission (the 'GFSC') must be notified of any Court hearing to wind up certain supervised companies. Further, certain GFSC supervised companies being voluntarily wound up must give notice to the GFSC within 30 days after the day the resolution was passed.
- Liquidators in voluntary and compulsory winding up can be released by court from their office. An administrator's release will be revocable by the Court.

Regulations that may follow include ones that:

- allow more types of professionals to incorporate companies
- simplify annual validations for small companies
- exempt directors from for duty to prepare directors reports if the new waiver resolution is not considered; and
- allow the Registrar to prescribe fees for consent from HM Procureur and the Director of Income Tax in relation to migrations.

Section changes to The Companies Law

The changes mentioned below are only a selection and do not include all amendments made to the Companies Law made by the Ordinance.

Formation and names

Section 17(9) Of The Companies Law – Application For Incorporation. This section is amended by section 4 of the Ordinance and provides that 'Corporate Service Providers' will not be the only persons or entities able to incorporate companies. The Ordinance empowers the Commerce Department to prescribe by regulations different persons and entities to form companies. In their report to the States in November, 2012, the Commerce Department expected this to include advocates and accountants registered with the GFSC for Anti-Money Laundering and Combating the Financing of Terrorism (AML/ CFT) and anyone fully licensed under any of the following: the Protection of Investors (Bailiwick of Guernsey) Law, 1987; the Banking Supervision (Bailiwick of Guernsey) Law, 1994; the Regulation of Fiduciaries, Administration Businesses and Company Directors (Bailiwick of Guernsey) Law, 2000; the Insurance Business (Bailiwick of Guernsey) Law, 2002; or the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002. The aim is to increase flexibility, and reduce the cost of incorporating a company in some cases, whilst maintaining AML and CFT standards, which apply to all the above.

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Sections 21A And 27(1A) Of The Companies Law – Alternative Company Names In Non-Roman Script Or Characters. These sections are amended by sections 5 and 9 of the Ordinance and permit an alternative name in non Roman script or characters to be used by a company, including a power to reserve such a name with the Registry. Emerging markets with non-roman alphabets, such as the Middle and Far East looking to incorporate Guernsey companies may find this appealing.

Section 24(4)(B) Of The Companies Law – Prohibited Names. A company whose incorporation pre-dated the registration of a trademark with the same name will now be able to continue to use that name (section 6 of the Ordinance). This amendment clarifies an existing uncertainty in the Companies Law.

Section 27(1A) Of The Companies Law – Reservation Of Names. This section is amended by section 9 of the Ordinance to permit companies to reserve a name in circumstances where they intend to change their name within 3 months of the reservation. Presently name reservations are only possible where a person wishes to use that name to form a new company.

Memorandum and articles

Section 15(5) Of The Companies Law – Memorandum Of Incorporation. This section is to be repealed by section 3 of the Ordinance as it unnecessarily requires a memorandum to state the maximum number of guarantee members. Consequential amendments are made to sections 15(5)(b), 55(2)(d)(ii) and (iii) of the Companies Law.

Section 38 Of The Companies Law – Powers To Alter A Memorandum. This section is amended by section 14 of the Ordinance and adds in:

- references to the alterations in share capital in section 287 of the Companies Law;
- references to the new power to convert a cell of a protected cell company to a non-cellular company (see below); and
- an explanation that section 38 powers do not prejudice any Court or Registry changes to the memorandum.

Section 40 Of The Companies Law – Court May Annul Alteration Of Objects. This section provides that the Court may annul a change to a company's objects as set out in its memorandum of incorporation in certain circumstances. Concern arose that an annulment may affect transactions which the company has completed between the amendment of the objects and the Court order. For clarity, a new sub-section 40(7) of the Companies Law has been inserted by section 13 of the Ordinance to provide that any order annulling an amendment to the objects does not affect the right, title or interest of a third party which have arisen as a result of any transaction the company has effected.

References to 'memorandum and articles' have, where appropriate, been changed to 'memorandum or articles' as many matters can be recorded in either document.

Corporate transactions – conversions, emigrations, amalgamations, schemes

Conversions

Section 52A Of The Companies Law – Conversion Of A PCC Cell Into A Non-Cellular Company. This new section is added by section 14 of the Ordinance. A cell of protected cell company ('PCC') will be able to convert into, and be incorporated as a non-cellular company provided written consent is obtained from the GFSC and authorisation is given by both (1) the shareholders of the cell; and (2) the PCC's core shareholders. Generally, each shareholder authorisation must be passed by not be less than 75% of the relevant shareholders. Where no cell shares have been issued the authorisation is only required from the PCC's core shareholders (See Diagram 1. flowchart for cell conversion).

Conversion Regulations. In future, the Commerce Department will be able to make regulations to amend the conversion provisions of the Companies Law (section 16 of the Ordinance and section 59A of the Companies Law).

Migrations and amalgamations

Sections 69(3) And 70(5) Of The Companies Law – Amalgamations; And Sections 97(3) And 98 Of The Companies Law – Migrations Overseas. Currently, these Companies Law sections on amalgamations and on corporate emigrations require the Registrar's 28 day notice and waiting periods to run from the date an application is made to the Registrar. These sections will be amended by sections 22 (amalgamations) and 30 (migrations) of the Ordinance and allow the amalgamating or emigrating body corporate to notify the Registrar of its intention to amalgamate or emigrate which will trigger the Registrar's own notice period. Consequently, all notice periods will be able to run concurrently not consecutively and emigrations and amalgamations should be faster (See Diagrams 2 and 3: flowcharts for amalgamations and migrations overseas).

Sections 64(8), 76(C) And 84(6) Of The Companies Law – Registrar To Decide Equivalency Of A Special Resolution. These sections relate to an overseas company passing a resolution equivalent to a special resolution in Guernsey to either approve its amalgamation with a Guernsey company or to approve migration into Guernsey. Currently, the GFSC has the power to certify that a resolution of an overseas company is 'equivalent' to a special resolution under the Companies Law. These sections are amended by sections 19, 25 and 26 respectively of the Ordinance and the responsibility is to be transferred to the Registrar.

Other amalgamation points

Section 61 Of The Companies Law – Amalgamations Between Any Type Of Bodies Corporate Will Be Possible. The current restriction that requires that all bodies corporate wishing to amalgamate, to be of the same type, such as between two PCCs, is to be removed by section 17 of the Ordinance. The current restriction did not exist prior to the Companies Law.

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Section 65 Of The Companies Law – Short Form

Amalgamations. Overseas companies can now amalgamate with their Guernsey subsidiary or holding company on a short form basis. In section 65 of the Companies Law, section 20 of the Ordinance replaces the term ‘company’ (which only means a Guernsey company) with ‘body corporate’ which includes an overseas company. At least one of the bodies corporate must be a Guernsey company.

The Commerce Department will be empowered to issue regulations to permit short form amalgamations between bodies corporate other than those limited by shares (section 20 of the Ordinance).

Other migration points

Sections 94(2)(B) And 97(2)(B) Of The Companies Law – Fees.

These sections are amended by sections 28 and 29 of the Ordinance and permit the Registrar to prescribe regulations for the fees charged for the consent of HM Procureur and the Director of Income Tax in connection with a migration. Currently, HM Procureur charges a nominal fee for the granting of his consent and this has been on an ad hoc basis.

Section 98(A) Of The Companies Law – Effect Of Transfer.

This section provides that after a company has emigrated from Guernsey it must delete from its memorandum of incorporation the statement that its registered office is situated in Guernsey. Currently, it is not known if all companies are doing this or whether or not the deletion occurs automatically by operation of Law. Section 31 of the Ordinance amends section 98(a) of the Companies Law to clarify that the deletion occurs by operation of law regardless of whether the company takes any steps to effect the change.

Section 102 Of The Companies Law – Migration Documents In A Language Other Than English.

This section is amended by section 32 of the Ordinance and will give a discretion to the Registrar to prescribe the form and means of verification of any translation submitted to the Registry in relation to a company migration. Currently, translators do not need to be authorised.

Schemes – arrangements and reconstructions

Section 111(7) Of The Companies Law currently provides that the term ‘transferee company’ includes an overseas company for the purpose of section 111. This section will be amended by section 36 of the Ordinance to clarify that the term ‘transferor company’ also includes an overseas company, provided that at least one of the companies involved in the compromise or arrangement must be a Guernsey company.

Section 115(3) Of The Companies Law. This sub-section provides that any liability incurred by reason of the directors having exceeded their powers is not affected by sections 115(1) or 115(2) of the Companies Law. Section 37 of the Ordinance clarifies that sub-section 115(3) of the Companies Law applies to directors acting both individually and collectively, thereby removing any uncertainty.

Directors

Section 135 Of The Companies Law – Company must have at least one director or will be struck off. Section 38 of the Ordinance amends section 135 of the Companies Law and provides that failure to have at least one director is an explicit ground for striking the company off the Register.

Eligibility To Be A Director – Section 137(2)(c) of the Companies Law provides that a director who has been disqualified for reasons of misconduct or unfitness in a jurisdiction outside Guernsey is prohibited from being appointed in Guernsey. Controversially, a disqualification in some overseas jurisdiction may disqualify a person for spurious reasons such as political affiliations or racial background. Section 39 of the Ordinance inserts new sub-sections 137(2A) and section 137(2B) into the Companies Law which give the Court the discretion to ignore the disqualification where it is just to do so in accordance with various criteria including whether disqualification proceedings would be compliant with the requirements of the Human Rights (Bailiwick of Guernsey) Law, 2000, as amended.

Section 150(1) Of The Companies Law – Application To Court For Disclosure Of Usual Residential Address.

This section is amended by section 40 of the Ordinance so as to permit an application to the Court if the company does not comply with the request for disclosure within 5 working days instead of 2 weeks. This change ensures consistency of time periods for disclosure of information in a number of other sections (e.g. sections 128, 144 and 174 of the Companies Law).

Section 154(1) Of The Companies Law – Minutes Of Directors’ Meetings.

This section is amended by section 41 of the Ordinance so as to require the recording of just the ‘minutes of the proceedings’ and not ‘all’ the proceedings including inconsequential matters.

Section 157(2) Of The Companies Law – Exempting Directors From Liabilities.

This section provides that any provision by which a company directly or indirectly provides an indemnity for a director of the company, or an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty, or breach of trust is void, subject to two exceptions in sections 158 and 159. The definition in the Companies Law of ‘company’ and ‘associated company’ does not include an overseas subsidiary. This section is now amended by section 43 of the Ordinance and extends the prohibition on providing an indemnity to a director of an overseas company (‘body corporate’) that is also a subsidiary.

Section 162 Of The Companies Law – Disclosure Of Interests.

This section of the Companies Law provides that directors have an obligation to disclose any interest they may have in a transaction or proposed transaction of the company including its monetary value. Now, section 44 of the Ordinance simplifies section 162 of the Companies Law and only requires the director to disclose the nature and extent of his or her interest in the transaction.

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Secretaries

Section 170 Of The Companies Law – Eligibility To Be A Secretary. This section is expanded by section 49 of the Ordinance to provide that the acts of a person acting as a secretary are valid notwithstanding that it is afterwards discovered that there was a defect in his appointment, that he was not eligible to be a secretary, or that he had ceased to hold office. This reflects the provisions of section 141(1) of the Companies Law in respect of directors' appointments and provides commercial certainty to the actions of company secretaries.

Section 170(2)(C) Of The Companies Law – Disqualifications And Secretary. As with the amendments to the treatment of disqualified directors (see above section 137(2)(c)), so the Court is to be given a discretion to ignore certain overseas disqualifications which prevent a person being appointed as a secretary of a Guernsey company where it is just to do so in accordance with various criteria including whether disqualification proceedings would be compliant with the requirements of the Human Rights (Bailiwick of Guernsey) Law, 2000, as amended (sections 47 and 48 of the Ordinance).

Section 171 Of The Companies Law – Duties Of Secretaries. Currently, the Transitional Provisions suspend the application of section 171 of the Companies Law to any Guernsey company until 31 December 2016. The existing section 171 of the Companies Law prescribes mandatory and extensive duties to be imposed on secretaries, where one has been appointed. However, a company can choose whether to appoint a secretary or not. This section is to be amended by section 50 of the Ordinance and allows a company to have a secretary who will not necessarily be subject to these extensive duties. Instead, the extent of the duties of any appointed company secretary are a matter for the company's memorandum and articles. Consequential amendment to section 161 of the Companies Law has also been made by section 44 of the Ordinance to clarify that, where a company secretary is appointed but does not have all of the duties currently listed in section 171 of the Companies Law, the directors of a company are primarily responsible for carrying out any duties which are not the responsibility of the company secretary. Therefore, either a secretary or a director will be responsible for carrying out these duties, but companies will be able to choose how to allocate those duties between the directors and secretary.

Resolutions, meetings, quorums

Sections 178(6), 179(6)(A) And 180(3) Of The Companies Law – Void Resolutions. Currently, these sections render void a members' special, waiver or unanimous resolution where the notices of the meeting omit the text of the resolution and specify the intention to propose such a resolution as a special, waiver or unanimous resolution. These sections are amended now by section 52 of the Ordinance and allow the Commerce Department to prescribe regulations to dis-apply these requirements in limited circumstances. It is expected that any such regulations will be limited to resolutions of very small companies with less than, for example, 10 members. Consequential amendments to sections 178(3), 179(3) and 180(2) of the Companies Law are included in section 50 of the Ordinance.

Section 180 Of The Companies Law – Unanimous Resolutions. For clarity, this section is amended by section 53 of the Ordinance to specify that a unanimous resolution is one agreed to by every member entitled to vote on it. Consequential amendments are made by section 54 of the Ordinance to clarify a unanimous resolution by a show of hands and passed on a poll at a members' meeting. These changes harmonise the wording of section 180 of the Companies Law relating to unanimous resolutions with that of sections 176 (ordinary resolutions), 178 (special resolutions) and 179 (waiver resolutions) of the Companies Law.

Section 181 Of The Companies Law – Articles, Written Resolutions & Circulation Date. This section is amended by section 55 of the Ordinance to provide for the closure of the Register of Members for a limited period of time. Section 181(4) currently states that the members entitled to vote on a written resolution are those appearing on the register of members at the exact time of day when the resolution is first circulated. A new sub-section 181(6) of the Companies Law permits companies to set a time, on the date of circulation of the resolution, at which at which the register is deemed to be closed for the purposes of determining which members are entitled to vote on the resolution.

Section 213(2) Of The Companies Law – Quorum At Meeting. This subsection currently distinguishes between a company that only has shareholders (where two members holding 5% of the issued share capital constitute a quorum at a meeting) and one that has other types of members (where two members that hold 5% of the total voting rights of the company constitute a quorum). This section is amended by section 58 of the Ordinance which simply removes the distinction by deleting the reference to issued share capital and referring only to voting rights for all kinds of company. The rule is clear that only those eligible to vote at a meeting can count towards quorum requirements.

Section 228(1)(B) Of The Companies Law – Records Of Resolutions And Meetings, Etc. This section is amended by section 60 of the Ordinance and now only requires minutes of 'the proceedings' (instead of 'all proceedings') of general meetings to be kept.

Section 232 Of The Companies Law – Quorum For Class Meetings: Shareholders. Arguably, this section is potentially overly prescriptive as to the quorum requirements for a class meeting. This section is now clarified by section 61 of the Ordinance which expressly provides that companies should decide the relevant class quorum in their memorandum and articles absent which the statutory quorum will apply.

Annual validations

Section 233 Of The Companies Law – Small Companies Simpler Annual Validations. Section 63 of the Ordinance enables the Department to regulate a simple annual validations regime for 'small companies' (expected to be 10 or fewer members).

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Section 243 Of The Companies Law – Protected Cell Accounts.

This section is amended by section 65 of the Ordinance to provide that a protected cell company may prepare separate accounts for its core and its cells rather than consolidate them.

Section 248 Of The Companies Law – Exemptions And Waivers For Directors’ Report.

This section has been amended by section 69 of the Ordinance to allow a waiver resolution to be passed in respect of the requirement to produce a directors’ report. The waiver can be on an indefinite basis or for one or more particular financial years and generally must be passed in the financial year before the financial year(s) to be exempted. Certain GFSC regulated companies are not allowed to waive this duty. The waiver provisions mirror those for audit waivers under section 256 of the Companies Law. Alternatively, section 68 of the Ordinance also allows the Commerce Department to prescribe regulations to exempt directors of a particular type or class of company from this reporting duty. Such an exemption is expected to apply only to very small companies.

Section 256 Of The Companies Law – Cell Audit Exemptions.

At present it is not possible for individual cells of protected or incorporated cell companies to pass an audit waiver. Section 78 of the Ordinance empowers the Commerce Department to issue regulations to allow such cells to be audit exempt under section 256 of the Companies Law.

Section 257 Of The Companies Law – Simpler Auditor

Appointment. This section has been amended by section 80 of the Ordinance: the requirement to appoint an auditor within 28 days is repealed and the provisions relating to appointment have been simplified.

Section 258(2)(A) Of The Companies Law – Term Of Office Of Auditor.

Currently, this sub-section provides that an auditor cannot be deemed reappointed if he was appointed by the directors. This can make re-appointment an administrative burden. This sub-section is now repealed by section 83 of the Ordinance. The Commerce Department’s report in the States Billet of November 2012 explains that ‘re-appointment by the directors offers no additional protection to members of the company over and above deemed re-appointment, as section 258(2)(c) of the Companies Law provides that the auditor cannot be deemed re-appointed where the members have resolved that he should not be re-appointed; and the members may remove an auditor from office after his appointment, under section 268 of the Companies Law, at any time.’

Section 283 Of The Companies Law – Conversion Into Stock.

This section unnecessarily banned conversion of shares into stock. Now section 84 of the Ordinance amends and reverses the ban thereby allowing stock conversion. In relation to companies that existed under the old Companies Law 1994 (and that still exist), the Transitional Provisions have already suspended the application of section 283 of the Companies Law until 31 December 2016. Assuming the Ordinance comes into force before that date, the ban on conversion and its subsequent repeal should be of no consequence for those older companies as the 1994 law allowed stock conversion for fully paid shares. For companies formed under the current Companies Law 2008, the repeal will take effect upon commencement of the Ordinance.

Section 284 Of The Companies Law – Different Amounts May Be Paid On Shares.

This section provided that if so authorised by its memorandum or articles, a company may (1) make arrangements to distinguish between shareholders as to amounts and times of payment of calls on their shares; (2) accept from any shareholder the whole or any part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up; or (3) pay dividends in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others. At present, a company may only do these actions if authorised by its memorandum or articles. Now, section 284 of the Companies Law is amended by section 85 of the Ordinance and allows these actions to be carried out where the company is authorised not just by the memorandum and article but alternatively by the terms of issue of the shares in question.

Sections 291 – 293 Of The Companies Law – Exercise By Directors Of Powers To Issue Shares Etc.

These sections have been repealed and replaced by a new section 291 of the Companies law pursuant to section 87 of the Ordinance. The existing sections are overly prescriptive. Now, the replacement section 291 provides: (1) a general power for directors to issue shares, to the extent authorised by the company’s memorandum or articles or by resolution; and (2) a general power for directors to issue shares in pursuance of an employees’ share scheme (or grant a right to subscribe for, or to convert any security into shares so issued) to the extent that the directors are not prohibited or restricted from doing so by the company’s memorandum or articles or by resolution. This new authorisation procedure will provide greater flexibility but still allow shareholders to limit the power of directors if they so choose. Consequently, the Companies Law will no longer require articles to distinguish between a power to issue shares on a single and on a multi-class basis nor will there need to be a 5 year authorisation period or a statement of the maximum number of shares to be issued in respect of multi-class companies. Transitional Provisions currently dis-apply sections 291, 292 and 293 in the Companies Law 2008 to companies that existed under the 1994 Law (and that still exist) and the 1994 Law provisions will continue to apply to such companies until 31 December 2016.

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Section 294 Of The Companies Law – Consideration For Issue Of Shares. Corporate actions under the Companies Law should reflect the move to a ‘solvency’ model from the old ‘capital maintenance’ one under the 1994 Law. However, some of the old terminology remains in some sections of the Companies Law. This has led to a debate about the availability of share capital (the nominal value of a company’s shares and any share premium received as consideration for issue of shares) for distribution to shareholders as a dividend. Section 294 of the Companies Law has now been amended by section 88 of the Ordinance to provide, for the avoidance of doubt, that the Companies Law permits share capital to be paid out by a board of directors as a distribution, including as a dividend, in accordance with the solvency test.

Sections 295, 296, 298 Of The Companies Law – Directors’ Certificates And Consideration. These sections currently require the directors to resolve that the consideration for and terms of the issue of shares, or rights to subscribe for, or to convert any security into shares, is fair and reasonable to the company and ‘all existing members’. Sections 90, 94 and 96 of the Ordinance delete these italicised words as a director’s overriding fiduciary duty is to act in the best interests of the company and not in the best interests of every individual member.

Section 309 Of The Companies Law – Recovery Of Distributions. Currently, there is no time limit on the recovery from members of distributions made at a time when immediately after the distribution the company did not satisfy the solvency test. To avoid this uncertainty, section 99 of the Ordinance amends section 309 of the Companies Law and inserts a 2 year time limit for the recovery of distributions. Separately, section 100 of the Ordinance introduces a new ‘whitewash’ provision in respect of directors’ personal liability in section 309(4A) of the Companies Law. This provides that no recovery from a director can be made where the company (1) would have passed the solvency test at the time the distribution was made and (2) would pass it at the time recovery is contemplated. Consequently, directors and shareholders will benefit from increased certainty whilst creditors retain appropriate protection.

Section 311 Of The Companies Law – Redeemable Shares. This section is amended by section 102 of the Ordinance to provide that a company may redeem a share whether or not it is fully paid.

Takeovers

Sections 336 – 340 Of The Companies Law – Takeovers – 4 Month Wait. These provisions require a bidder ‘transferee’ in a takeover to wait four months from the date of making an offer before it is able to serve notice on dissenting shareholders effecting the compulsory acquisition of their shares. This is the case even where the bidder has already received the approval of 90% of the shareholders in value of the shares which triggers

the compulsory acquisition provisions. These sections are now amended by section 103 of the Ordinance to dispense with the full 4 month waiting period where the threshold of 90% has been reached. Notice may now be served on dissenting shareholders as soon as the 90% threshold is reached, provided that this threshold is reached within 4 months of the making of the offer. Notice cannot be served later than 2 months after the close of the offer period.

Section 337 Of The Companies Law – Takeovers – Overseas Jurisdictions. Some jurisdictions have securities laws that restrict the making of an offer to persons resident in those countries. Section 337 has been expanded by section 105 of the Ordinance to permit the making of an offer to shareholders in such jurisdictions, by publication in the Gazette Officielle. This change reflects existing market practice and will allow certainty that such offers can be made for the purposes of Guernsey law without infringing the requirements of foreign laws.

Section 337(2) Of The Companies Law – Right Of Transferee To Acquire Shares. This section provides that any shares of a dissenting shareholder which are compulsorily acquired must be acquired on the same terms on which the shares of the approving shareholders are acquired. This does not deal with the common situation of shareholders being given an individual choice of the form of consideration. Accordingly, this sub-section is amended by section 104 of the Ordinance to state explicitly that the dissenting shareholder has the same choice of which form of consideration to accept, and allowing the bidder to set a default option in case no choice is made.

Section 337 Of The Companies Law – Compulsory Acquisition Of All Shares And Disregarded Shares. This section is expanded by sections 106 and 107 of the Ordinance and add two shareholder protections common in squeeze-out provisions in other jurisdictions. First a compulsory acquisition of dissenting shareholders’ shares is only possible where the offer relates to all the shares in the company or in a particular class which the bidder does not already own or have a right to acquire. Second, shares already held by the bidding offeror (or a close associate of the offeror such as a spouse or child, a nominee, a holding company, subsidiary or fellow subsidiary or nominee thereof, a body corporate in which the offeror has a substantial interest, a person, or nominee of a person, who is party to a share acquisition agreement, etc) will be disregarded for the purposes of calculating the 90% threshold that triggers the right to compulsorily acquire the shares of dissenting shareholders. These changes will prevent a takeover by acquiring shares in lots and applying the squeeze out provisions in stages. These amendments should be taken into account in relation to the timing of any current or proposed takeovers as bidders may wish to expedite matters before the Ordinance is implemented. There are no Transitional Provisions to delay the application of these sections. Please see the separate Carey Olsen Takeover Update Briefing.

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Strike-off, administrators and liquidation

Section 355(1) Of The Companies Law – Striking Defaulting Company Off If No Directors. This section is expanded by section 109 of the Ordinance to include the failure by the company to have at least one director as a ground for striking off.

Section 359(A) And (B) Of The Companies Law – Circumstances In Which Applications For Voluntary Strike Off Not To Be Made: Proceedings With Solvency Not Concluded. These sub-sections are repealed by section 111 of the Ordinance for consistency with the amendments to section 89 of the Companies Law. The Loi ayant rapport aux Débiteurs et a la Rénonciation of 1929 to which these sub-sections refer does not apply to companies.

New notices to the GFSC

New Section 392A Of The Companies Law – Notice Of Resolution To Wind Up To The GFSC. This new section is inserted by section 114 of the Ordinance and requires a GFSC supervised company that resolves to voluntarily wind up, to give notice to the GFSC within 30 days after the day the resolution is passed.

New Section 425A Of The Companies Law – Notice Of Application To Wind Up To The GFSC. This new section is inserted by section 119 of the Ordinance and requires the GFSC to be notified of the date, time and place of any hearing for an application to wind up a ‘supervised’ (or financial services business) company. Such notice should be served on the GFSC not less than 7 days before the hearing of the application and the GFSC should have the right to be heard on the application. The Court may not hear the application if the GFSC are not notified accordingly.

Release of administrators and liquidators and Court revocation

Section 385 Of The Companies Law – Revocable Release Of Administrator. This section is amended by sections 112 and 113 of the Ordinance to give the Court the power to revoke an administrator’s release from office, and accordingly from his personal liability, on proof that the release was obtained for example, by fraud or misrepresentation.

New Section 400A Of The Companies Law – Members May Release Liquidator In Voluntary Winding Up. This new section is inserted by section 115 of the Ordinance and allow members by ordinary resolution in the final meeting prior to dissolution to release the liquidator in a voluntary winding up, from his office (and from his personal liability, subject to certain exceptions). The Court has power to revoke the release on proof that it was obtained for example, by fraud or misrepresentation.

New Section 426A Of The Companies Law – Court May Grant Release Of Liquidator. This new section is inserted by section 120 of the Ordinance and gives the Court a new power to grant the release and discharge of a liquidator from liability in respect of his acts or omissions in a winding up, save for acts of fraud, recklessness or gross negligence or except to the extent that he has acted in bad faith. The Court may grant the release in its discretion and may for example, impose terms, conditions or limitations. Professional insolvency practitioners will be more prepared to act as liquidators of Guernsey companies in light of this ability to apply for a release and discharge from liability at the end of a winding up. This is particularly relevant in compulsory windings ups as there is no ‘Official Receiver’ in Guernsey.

Wrongful trading

Section 434(3) And 435(3) Of The Companies Law – Civil Liability Of Directors For Wrongful Trading. These sub-sections are amended by sections 121 and 122 of the Ordinance to include an explicit reference to reasonableness in the test of a director’s liability. The Court shall not make a declaration of personal liability on the part of a director for wrongful trading where the director has taken every step to minimise the potential loss to the company’s creditors that he ought reasonably to have taken.

Protected cell companies

Section 437(1)(A) And (D) Of The Companies Law – Companies Which Can Be Protected Cell Companies. This section is amended by section 123 of the Ordinance and provides that registered (in addition to authorised) collective investment schemes are eligible to be protected cell companies.

Section 438(1)(C) Of The Companies Law – Gfsc Consent For Pcc Cell Conversion (See Above).

Registry

Section 498 Of The Companies Law – Registers May Be In Electronic Form. This section is amended by section 123 of the Ordinance and provides that the Registry is now permitted to destroy hard copy records after a period of 3 years where an electronic copy is retained. The Registrar is not under an obligation to retain the originals of documents delivered in electronic form where the information contained in the document has been recorded in the Register.

Continued

Other

Section 523 Of The Companies Law – Service Of Documents.

This section is amended by sections 129 to 133 of the Ordinance and:

- expressly permits service of documents by email where the intended recipient has agreed to accept service by email and has provided an email address for this purpose. A document served in this manner is now deemed to have been served immediately after sending unless the contrary is shown; and
- unless the contrary is shown, deems documents sent by post to be received on the second (formerly the third) day after the day of posting for documents sent to an address in the UK, Channel Islands or the Isle of Man, and in the case of a document posted elsewhere, on the third (formerly the seventh) day after the day of posting (excluding any which is not a working day). The articles may specify a different time period for posting documents but only in relation to posting to members and proxies (and from members and proxies to the company).

Section 532(1) Of The Companies Law – Definitions.

This section is amended by sections 137 to 138 of the Ordinance to provide simpler definitions of closed and open-ended investment companies which now refer to their meanings given to them in section 44(1) of the Protection of Investors (Bailiwick of Guernsey) Law 1987, as amended.

Sections 155(1) And 187 Of The Companies Law. References to the term “authenticated” in these sections are replaced by “signed” or just deleted by sections 42 and 56 of the Ordinance as the Companies Law provides no procedure for such authentication.

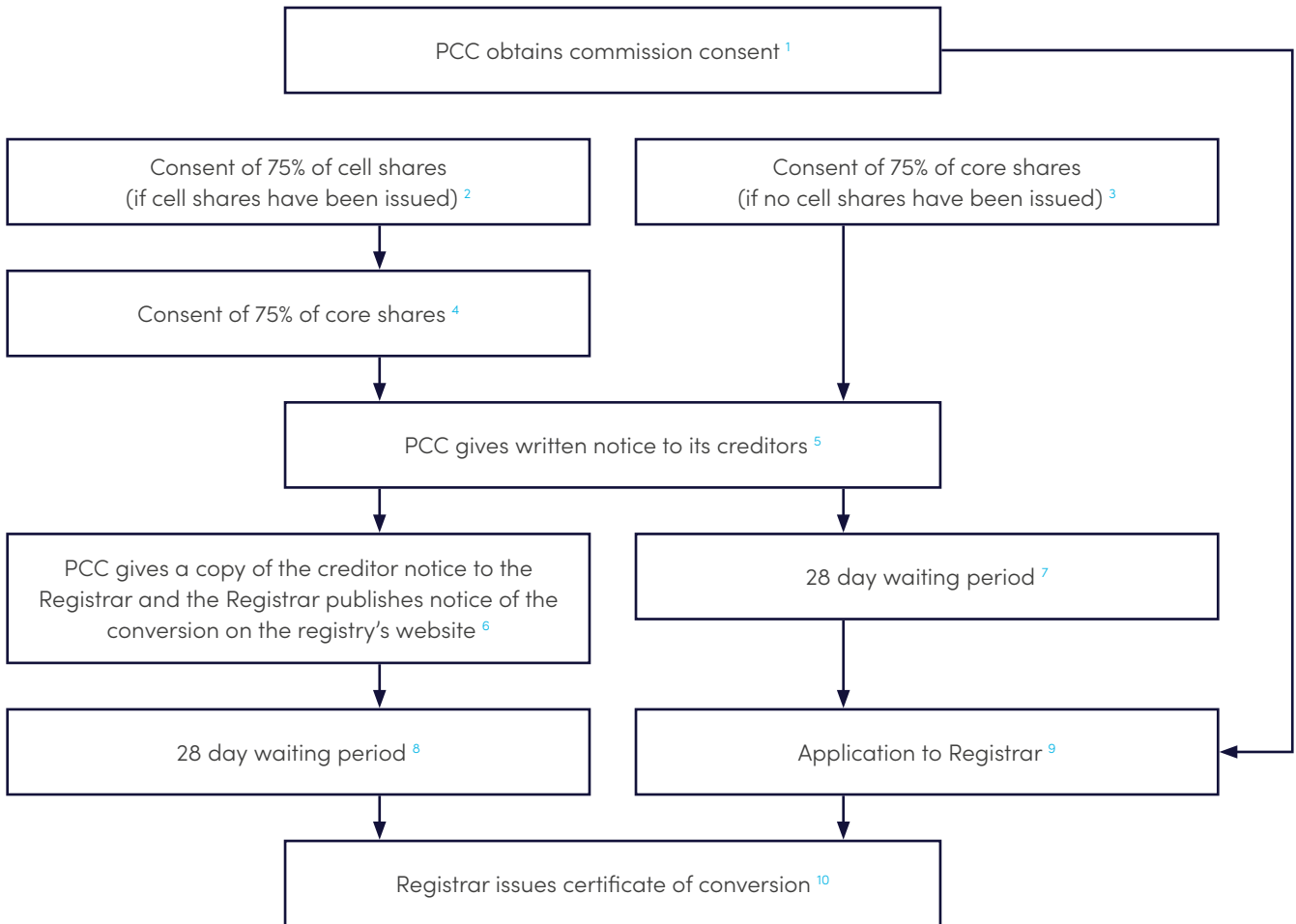
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Table of the main remaining transitional provisions (“TP”)

Topic	TP section no.	Companies Law 2008 section no.	Ordinance 2015 section no.	Transitional Provisions. The law officers do not intend to repeal the TPs. Consequently, those TPs with deadlines will expire and the remaining TPs will continue in force.
Memorandum	2	15	No ref.	1994 Law memoranda generally remain valid until 31.12.2016 but thereafter can only be amended by special resolution in relation to s. 15(2) and (7) Companies Law 2008 matters.
Articles	3	16	No ref.	1994 Law articles remain valid until 31.12.16. Registry standard articles will continue to be deemed to dis-apply after 31.12.16 and regardless of the Ordinance.
Shadow directors	6	132(3)	No ref.	In relation to ANY Guernsey company, the 2008 Companies Law definition of shadow directors continues not to apply nor does the statutory requirement for a shadow director to disclose their interests (regardless of the Ordinance) until 31.12.16.
Secretaries’ duties	12	171	44, 50	Transitional Provisions suspend the application of s.171 Companies Law 2008 to ANY Guernsey company in relation to the duties for which a secretary must be responsible. Further, the Ordinance has now relaxed s.171 so that from 31.12.2016, any articles must first assign the specific functions in s. 171 to the secretary in order for the secretary to become liable for fulfilling those duties.
Share to stock conversion	17	283	84	In relation to companies that existed under the old Companies Law 1994 (and still exist), the Transitional Provisions suspended the application of section 283 of the Companies Law 2008 until 31.12.2016. The Ordinance now permits stock conversion in an amended section 283 of the Companies Law 2008. Assuming the Ordinance comes into force before 31.12.2016, the ban on conversion and its subsequent repeal should be of no consequence for 1994 Law companies that were already allowed to convert stock under the 1994 Law. For companies formed under the Companies Law 2008, the change will take effect upon commencement of the Ordinance.
Directors’ power to issue shares	19	291, 292, 293	87	Transitional Provisions currently dis-apply sections 291, 292 and 293 in the Companies Law 2008 to companies that existed under the 1994 Law (and still exist) and the relevant 1994 Law provisions will continue to apply until 31.12.16. The Ordinance replaces sections 291, 292 and 293 in the Companies Law 2008 with a new section 291 which permits more relaxed powers to issue shares (no 5 year authority, no class distinctions). Assuming the Ordinance comes into force before 31.12.2016, the relaxation should be of no negative consequence for the articles of 1994 Law companies. For companies formed under the current Companies Law 2008, the amendments will take effect upon commencement of the Ordinance. For articles under the new Companies Law (including Registry Standard Articles), references to sections 292 and 293 of the Companies Law should be amended, but there are no requirements to change the powers to issue shares other than for the convenience of issuing shares on a simpler basis.

Continued

Flow diagram 1 – cell of PCC converting into a non-cellular company



1 Pursuant to section 52(A)(2) of the Companies Law, a cell of a protected cell company (the 'Cell') cannot be converted into a non-cellular company unless the protected cell company (the 'PCC') to which the Cell relates obtains the written consent of the GFSC pursuant to section 438(1)(d) of the Companies Law (the 'Commission Consent').

2 Pursuant to section 52(A)(3) of the Companies Law, if the Cell has issued shares ('Cell Shares') the holders of those Cell Shares must give the 'Requisite Consent' (as defined below) to:

- a. the conversion;
- b. the new non-cellular company's name;
- c. the non-cellular company type;
- d. upon conversion:
 - i the adoption of the new non-cellular company's memorandum and articles;
 - ii the registration of the Cell as a new non-cellular company;
 - iii the translation of the capacity, status and interest of the members of the PCC (including the holders of Cell Shares) in respect of or attributable to the Cell, from that of a member of the PCC into that of a member of the new non-cellular company; and

- iv the translation of the shares (including Cell Shares), guarantees, rights, interests, debts, obligations and liabilities of the members of the PCC in respect of or attributable to the Cell into shares, guarantees, rights, interests, debts, obligations and liabilities in or to the new non-cellular company;
- e. if the new non-cellular company is to have shares:
 - i the number of shares to be taken on conversion by each member;
 - ii the aggregate value of those shares (whether on account of the nominal value of the shares or by way of premium);
 - iii the amount to be paid up and the amount (if any) to be unpaid on those shares (whether on account of the nominal value of the shares or by way of premium); and
- f. if the new noncellular company is to be limited by guarantee, the inclusion in its memorandum of a statement of the guaranteed amount of each member.

Continued

- The holders of the Cell Shares are considered to have given the 'Requisite Consent' only if:
- a. the holders of not less than 75% in number of the Cell Shares give their written consent thereto; or
 - b. consent thereto is given at a meeting on a show of hands by not less than 75% of the holders of Cell Shares who vote in person on the matter; and the persons who vote on the matter as duly appointed proxies of the holders of the Cell Shares. The consent of the holders of Cell Shares under section 52(A)(3) of the Companies Law may also propose the date on which the conversion shall have effect.
- 3 Pursuant to section 52(A)(5) of the Companies Law, if Cell Shares have not been issued in respect of the Cell, the members of the PCC who are members by reason of holding shares in the PCC other than cell shares (i.e. shares in the core of the PCC) ('Core Shares') must authorise the matters set out in paragraphs (a) to (f) of footnote 2 above, by giving the Requisite Consent (as defined above, but substituting 'Core Shares' for 'Cell Shares').
 - 4 Pursuant to section 52(A)(6) of the Companies Law, if Cell Shares have been issued in respect of the Cell, and the holders of those Cell Shares have given the Requisite Consent to the conversion, the holders of the Core Shares must also authorise the conversion in the manner set out in footnote 3 above.
 - 5 Pursuant to section 52(A)(7) of the Companies Law, the Cell may not be converted unless, not less than 28 days before the PCC delivers its application for conversion to the Registrar (the 'Conversion Application'), the PCC gives written notice to all its creditors stating that it intends to apply to the Registrar for the conversion (the 'Creditor Notice').
 - 6 Pursuant to section 52(A)(8) of the Companies Law, the PCC shall deliver a copy of the Creditor Notice to the Registrar. Upon receipt of the copy of the Creditor Notice, the Registrar shall give notice of the conversion on the Registry's website for such period as the Registrar thinks fit (the 'Registrar's Notice').
 - 7 Pursuant to section 52(A)(9) of the Companies Law, the PCC cannot make the Conversion Application to the Registrar until 28 days after the giving of the Creditor Notice.
 - 8 Pursuant to section 52(A)(11) of the Companies Law, the timing of the Registrar's issuance of the certificate of conversion is driven by:
 - a. receipt and approval of the Conversion Application; and
 - b. the elapsing of 28 days from the giving of the Registrar's Notice. Assuming the copy Creditor Notice is delivered to the Registrar on the date it is delivered to the PCC's creditors, the 28 day waiting period before the application to the Registrar and the 28 day waiting period before the Registrar can issue the certificate of conversion should be able to be run concurrently.
 - 9 The Conversion Application to the Registrar comprises:
 - a. the Registry's conversion application form (which will be signed by the directors of the PCC);
 - b. the Commission Consent (referred to in footnote 1 above);
 - c. a copy or record of the Requisite Consent of the holders of the Cell Shares or the holders of the Core Shares (as appropriate);
 - d. a copy or record of the Requisite Consent of the holders of the Core Shares if required as described in footnote 4 above;
 - e. a copy of the memorandum and articles of the new non-cellular company;
 - f. a 'Declaration of Compliance (Conversion)' (as defined below);
 - g. a statement of the new non-cellular company's directors; and
 - h. a statement of the registered office address of the new non-cellular company.

A 'Declaration of Compliance (Conversion)' in this context is governed by sections 58(1) and 52(A)(10) of the Companies Law and is a declaration signed by a director of the PCC that:

 - a. all the requirements of the Companies Law in respect of the conversion have been fulfilled;
 - b. the Cell will satisfy the solvency test immediately after the conversion; and
 - c. there are no creditors of or attributable to the Cell or of the PCC whose interests will be unfairly prejudiced by the conversion.
 - 10 Pursuant to section 52(A)(11) of the Companies Law, upon receipt of the Conversion Application, and subject to the role of the Royal Court of Guernsey (the 'Court') described below, the Registrar shall, not less than 28 days after giving the Registrar's Notice:
 - a. issue a certificate of conversion stating the date on which the conversion is to have effect and which is conclusive evidence that the new non-cellular company is incorporated;
 - b. register the memorandum and articles of the new non-cellular company in the Register of Companies;
 - c. allocate a registration number to the new non-cellular company; and
 - d. publish on the Registry's website the fact that the Cell has been converted for such period as the Registrar thinks fit. The legal effect of the conversion is also discussed below.

Continued

The role of the Court

Pursuant to section 52(A)(14) of the Companies Law, if the Court is satisfied that the conversion would unfairly prejudice a member or creditor of or attributable to the Cell or of the PCC, it may, on the application of that person made at any time before the date on which the conversion has effect, or within such further time as the Court may in any particular case allow, make such order as it thinks fit in relation to the conversion, including, without prejudice to the generality of the foregoing, an order:

- directing that effect shall not be given to the conversion, or that effect shall only be given subject to such terms and conditions as the Court thinks fit;
- modifying the conversion in such manner as may be specified in the order;
- directing the PCC or its directors to reconsider the conversion or any part of it.

The legal effect of the conversion

Pursuant to section 52(A)(13) of the Companies Law, where the Cell is converted:

- all property and rights to which the PCC was entitled and which were attributable to the Cell immediately before the conversion become the property and rights of the new non-cellular company;
- the new non-cellular company becomes subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which the PCC was subject and which were attributable to the Cell immediately before its conversion;
- all actions and other legal proceedings which, immediately before the conversion, could have been instituted or continued by or against the PCC in respect of the Cell may be instituted or continued by or against the new non-cellular company (and not by or against the PCC) after the conversion;
- and a conviction, ruling, order or judgment in favour of or against the PCC in respect of the Cell may be enforced by or against the new non-cellular company (and not by or against the PCC) after the conversion.

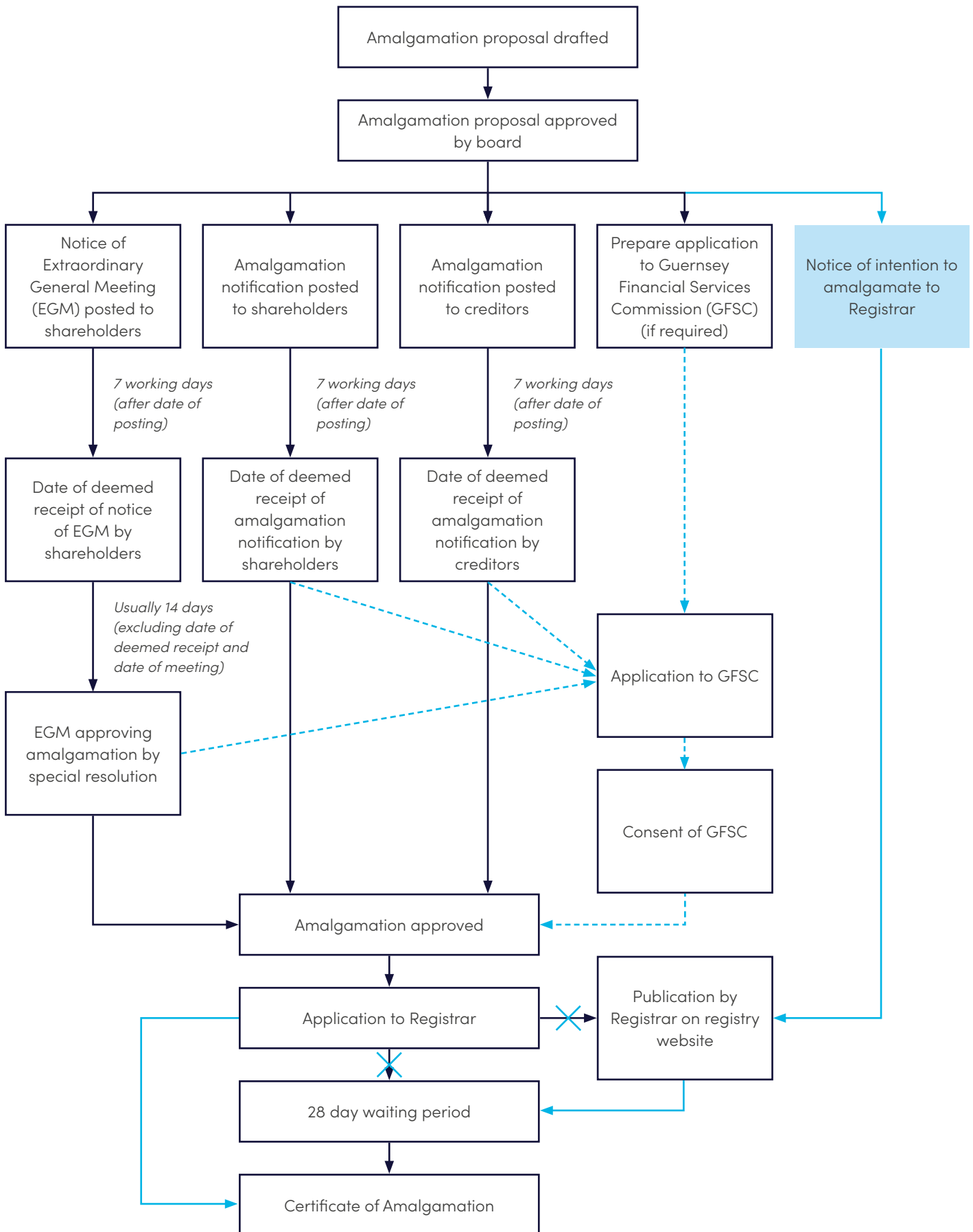
Pursuant to section 52(A)(16) of the Companies Law, a cell transfer order under section 457(3) of the Companies Law is not required by reason only of the conversion of the Cell into a new non-cellular company.

Pursuant to section 59 of the Companies Law, the conversion shall not be regarded:

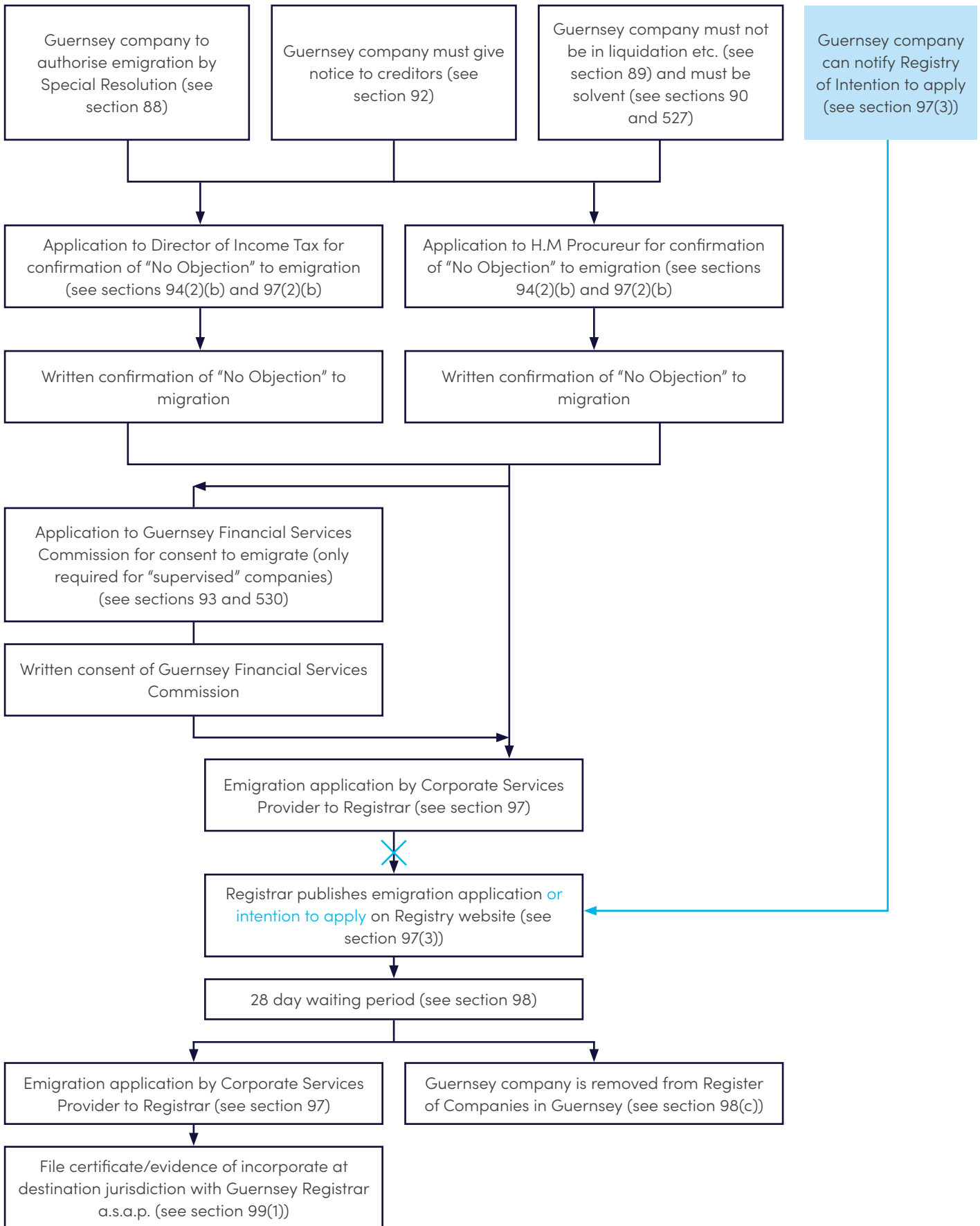
- as a breach of contract or confidence or otherwise as a civil wrong;
- as a breach of any contractual provision prohibiting, restricting or regulating the assignment or transfer of rights or liabilities; or
- as giving rise to any remedy, by a party to a contract or other instrument, as an event of default under any contract or other instrument or as causing or permitting the termination of any contract or other instrument or of any obligation or relationship.

Continued

Flow diagram 2 – amalgamations (Companies Law 2008 Ordinance 2015 amendments in light blue)



Flow diagram 3 – migrations out of Guernsey (Guernsey company law aspects only) Companies Law 2008 Ordinance 2015 amendments in light blue





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