

## Mergers in a BVI Regulatory Context

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When planning a restructuring that involves a merger where at least one of the merging entities is a BVI company, that is regulated by the BVI Financial Services Commission (BVI FSC), there are some specific and unwritten procedures that you should be aware of. This article highlights some of those procedures.

Many regulated service providers in the BVI are ultimately owned by one of the brand-named private equity houses or international groups. In the context of an acquisition of a BVI service provider, therefore, it is typical that the actual change in ownership would take place further upstream of the BVI and other regulated entities. Though a change in the indirect shareholder of the BVI regulated entity, it is nevertheless a change in control that requires the prior approval of the BVI FSC. Once regulatory approval has been obtained for the merger, some transactions spin off into a second phase which involves restructuring on a local level, including mergers of regulated entities to streamline the structure and avoid duplication and expense of regulated services.

Though local, the restructuring may be quite complex, for example where an acquiring group and the acquired group each have regulated entities in their respective structures, and there is then a

natural exercise to consolidate and streamline the overall structure. Recently, in the BVI, this local consolidation of BVI regulated service providers has been done in several instances using the same merger provisions under the BVI Business Companies Act that are used in a cross-border restructuring.

Although mergers are not expressly provided for in BVI regulatory legislation, a merger involving a BVI regulated entity is considered an act that requires the prior approval of the BVI FSC. The statutory provisions relating to a change in control are stretched to include a merger as a change in control by way of a 'reorganization'. The general logic here is not controversial but the process to be followed is not always straightforward. Walkers (BVI) was recently instructed separately in the first two local consolidations of regulated financial services business to seek prior BVI regulatory approval for such mergers.

The key attractions of merging regulated entities are no different from merging non-regulatory entities. Therefore, for example, by operation of law on the effective date of the merger:

(a) assets, including choses in action, and the business of the merging company(ies) immediately vests in the surviving company; and

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(b) the surviving company is liable for all claims, debts, liabilities and obligations of the merged company(ies).

For some, therefore, merging can present a 'cleaner' option for acquiring an ongoing business in that it should take fewer transactional steps to achieve the same results. This also means that it is quicker and more cost effective (barring, of course, any negative tax consequences that may arise in other jurisdictions or, indeed, in the BVI where the BVI entities may be operational as opposed to merely holding structures).

When it comes to the regulatory application with the BVIFSC, there are a few differences from the regular change in control application. For example, in a case of a merger involving a regulated entity, the BVIFSC will require an application to merge from the surviving company as well as from each of the merging companies. Bear in mind that for a regular change in control application, the law specifies that an application for a change in control is to be made by the relevant licensee.

Another bespoke issue is that, where the merging entity is also approved as a registered agent, the Plan of Merger and Articles of Merger to be filed with the Registrar of Corporate Affairs must

contain appropriate language in relation to the change in registered agent and registered office of the companies for which each of the merging companies providing registered agent services and registered office.

One point of note, is that the BVIFSC will request a legal opinion in relation to the surviving entity of the merger assuming all claims, debts, liabilities and obligations of each of the merging entities. Typically, an official would request a legal opinion on foreign law (if one of the companies to the merger is a foreign company) but not on its own law. Additionally the BVIFSC will require an undertaking from the surviving entity confirming its responsibilities for the liabilities of each of the merged entities.

Anyone that has experienced the process of a change in control application by a regulated entity which operates from the BVI will know that it is a thorough process and one to which a discussion of an abbreviated nature such as this cannot do justice. The key lesson that this discussion imparts is rather that mergers do add some very special twists to the more usual change in control applications and it would therefore be prudent to consult with a professional who has undergone the process.

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