

Briefing Series on the Draft UAE Commercial Companies Law

Issue No. 4 | July 2012

Issue No. 4 — Key Changes Relating to Mergers

This is the fourth briefing in Latham & Watkins' five-part *Briefing Series on the Draft UAE Commercial Companies Law* (the Draft CCL). The Draft CCL introduces some significant changes to Federal Law No.8 of 1984 Concerning Commercial Companies (the Existing CCL), which will be repealed in its entirety when the Draft CCL comes into force. The purpose of this *Briefing Series* is to highlight the key changes expected to be introduced by the Draft CCL.

The topics in our five-part briefing series are:

- Issue No. 1 — key changes applicable to most forms of companies
- Issue No. 2 — key changes for limited liability companies (LLCs)
- This Issue, No. 3 — key changes for joint stock companies (JSCs)
- **Issue No. 4 — key changes relating to mergers**
- Issue No. 5 — key changes relating to penalties

By way of background, the Existing CCL contains a regime which enables two companies incorporated under the Existing CCL to merge. In short, this regime provides for each company's shareholders to approve a merger by a 75 percent majority, following which (and subject to rights of creditors to object) at least one company is dissolved, its assets and liabilities transferred to the acquiring company and the shareholders in the dissolving company receive shares in the acquiring company as consideration for their shares in the dissolving company (the Existing Merger Regime). The Draft CCL amends the Existing Merger Regime in the following key respects:

- **No pre-emptive offer required to existing shareholders of the acquiring company.** One of the key issues with the Existing Merger Regime is the requirement for an acquiring company to make a pre-emptive offer to its existing shareholders when issuing shares to shareholders of the merging company. Under the Draft CCL, the acquiring company is expressly not required to make a pre-emptive offer to its existing

shareholders so long as the merger is approved by a 75 percent majority of the existing shareholders of both companies (Art. 288.1).

- **Merger contract.** Under the Existing Merger Regime, there is no requirement for a merger contract and no requirement for the contract to be approved by the general assembly. Under the Draft CCL, both companies are required to enter into a merger contract which determines directors of the acquiring company, details of the method of conversion of shares and details of the date that the consideration shares will be provided (Art. 289). In addition, a draft merger contract is required to be presented to the general assembly for approval by a 75 percent majority of the existing shareholders of both companies.
- **Notice of meeting to include summary of merger contract and details of rights to appeal the merger.** Under the Existing Merger Regime, there is no requirement for the notice of meeting to summarise a merger contract or set out details of shareholders' objection rights. Under the Draft CCL, the notice of meeting is required to include a summary of the merger contract and clearly state that any one more shareholders holding at least 20 percent of the share capital who object to the merger may appeal the merger before a court within 30 working days from the date of the approval of the general assembly (Art. 290). It is odd that one or more shareholders holding at least 20 percent are given this appeal right, as in practice, such persons are likely to be able to block the merger through exercising their votes at the general assembly.
- **Valuing the assets of the merging company.** Under the Existing Merger Regime, the net assets of the merging company are required to be valued by a government-appointed valuation committee, and the acquiring company is required to increase its share capital by the amount of the valuation. Under the Draft CCL, there is no express requirement for a valuation

of the net assets of the merging company. However, there will need to be a valuation of the shares of the merging company in accordance with the new “non-cash consideration” valuation procedures for LLCs or JSCs (as applicable) as discussed in [Issue No. 2](#) and [Issue No. 3](#) of this *Briefing Series*.

- **Cashing-out objecting shareholders.** The Draft CCL includes a new provision that allows shareholders who object to the merger resolution to notify the company within 15 days of the resolution that they wish to withdraw from the company and recover the value of their shares. The valuation of the shares is to be assessed by mutual agreement, failing which the valuation shall be referred to a committee formed by the Minister (Art. 292). As drafted, this appears to be a right of shareholders of the acquiring company as well as shareholders of the merging company.
- **Merger resolution from the Minister.** The Draft CCL provides that the Minister shall issue a resolution regulating the methods, conditions and procedures of mergers in respect of all companies except PJSCs, subject to the rules of the UAE Central bank in the case of mergers of banks and financial institutions (Art. 288). In addition, the Draft CCL provides that the chairman of the Securities & Commodities Authority (the SCA) shall issue a resolution concerning mergers of PJSCs (Art. 288). It is not clear to us whether such resolutions would be issued on a case by case basis or in general, or what the resolutions would say.

- **Future SCA takeover regulation for DFM/ADX listed PJSCs?** The Draft CCL provides that any person desiring to do any act that may lead to the takeover of securities in a PJSC that offered its shares for public subscription or are listed on the Dubai Financial Market (DFM) or the Abu Dhabi Stock Exchange (ADX) shall comply with the provisions and resolutions regulating the rules, conditions and procedures of takeovers issued by the SCA (Art. 297). In June 2012, the SCA published new disclosure and share dealing rules concerning DFM/ADX listed companies, which require persons intending to acquire 30 percent or more of the shares in a DFM/ADX listed company to notify DFM/ADX, and DFM/ADX may block the transaction, following consultation with ESCA, if it has reason to believe that the purchase may harm the interest of the DFM/ADX or the national economy.¹ Other than these amended disclosure and share dealing rules, there is no takeover code or other similar regulation issued by the SCA governing takeovers. Article 297 appears to hint that more meaningful takeover regulation could be under consideration, which would be good news for shareholders in DFM/ADX listed companies.

We note that the Draft CCL does not address the uncertainty under the Existing Merger Regime relating to whether the assets and liabilities of the merging company transfer as a matter of law and/or whether this would be effective for foreign assets and liabilities.

Endnotes

¹ See Latham & Watkins [Client Alert](#) of 4 July 2012 titled “New Share Disclosure Rules Relating to UAE Listed Companies”.

If you would like any further information on the matters covered in this Issue No. 3, please contact one of the attorneys below.

Chris Lester

+971.2.813.4825
chris.lester@lw.com
Abu Dhabi

Charles Fuller

+971.4.704.6328
charles.fuller@lw.com
Dubai

Jade Laktineh

+971.2.813.4822
jade.laktineh@lw.com
Abu Dhabi

Saad Khanani

+971.2.813.4821
saad.khanani@lw.com
Abu Dhabi

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