

## Significant changes to the BVI Business Companies Act effective 1 January 2023

### Overview

The BVI Business Companies (Amendment) Act, 2022 (the **Amendment Act**) comes into force on 1 January 2023 (the **effective date**). The Amendment Act makes significant changes to the existing BVI Business Companies Act (the **current BCA**) which are intended to ensure compliance with international standards and best practices. These changes include abolition of the bearer share regime, creation of a new requirement to file annual returns, and changes to the regime for striking off and restoration of companies.

### Bearer shares

The current BCA permits the issue and transfer of bearer shares but these bearer shares could only be held by custodians authorised or recognised by the Financial Services Commission (the **Commission**). A bearer share which is not held by a custodian is “disabled” under the current BCA so that the holder of it is not entitled to vote, receive dividends or share in the assets of the company on its winding up or dissolution.

The Amendment Act will effectively abolish the concept of bearer shares in the BVI. As of the effective date, a company shall not issue a bearer share, convert a registered share to a bearer share or exchange a registered share for a bearer share. The memorandum of a company which, prior to the effective date did not prohibit these actions (**bearer share company**), will be deemed to be amended from the effective date to state that the company is not authorised to issue bearer shares, convert registered shares to bearer shares or exchange registered shares for bearer shares.

Every bearer share which existed prior to the effective date will, as of the effective date, be deemed to be converted to a registered share and be treated as if it had been issued on or after the effective date as a registered share. Following the effective date, custodians will cease to be authorised or recognised by the Commission to hold bearer shares.

If the owner of the bearer share is unknown, it shall be deemed transferred to the company which shall hold the share in trust for the owner of it. In these circumstances, the bearer share company may redeem the share notwithstanding the provisions of the BVI Business Companies Act, the company’s memorandum and articles of association and any shareholders’ agreement or other agreement. Prior to redeeming the share, the company must meet the requirements of the Amendment Act including publishing a notice in the Gazette announcing its intention to redeem the share, stating the redemption price of the share and indicating the manner in which the redemption is to be effected.

## Requirement to file annual return

The Amendment Act introduces the requirement for companies to file a financial return (referred to as an annual return) with their registered agent. The annual return shall be filed nine (9) months after the company's financial year ends. For example, the first annual return for a company with financial year ending 31 December would be due in September 2024 and the first financial return for a company with financial year ending 31 March would be due in December 2024. This requirement does not apply to a listed company, a company that is regulated under financial services legislation and provides financial statements to the Commission in accordance with that legislation, and a company that files an annual tax return to the Inland Revenue Department accompanied by the company's financial statements.

Where a company fails to file its annual return within the required timeframe, the registered agent shall notify the Registrar of Companies (the Registrar) in writing of that fact not later than 30 days after the annual return was due.

A company which fails to file an annual return within the required timeframe shall be liable to a financial penalty for each month or part of a month that the filing is delayed, up to a maximum penalty of US\$5,000.00. Where a company is liable to pay the maximum penalty and has not filed its annual return, the Registrar may strike the name of the company off the Register of Companies (the Register).

The Amendment Act does not outline what should be included in the annual return. However, it does state that the annual return should contain such information as the Commission may by Order prescribe. It is expected that these requirements will be published by the Commission prior to September 2024, which is the earliest date by which companies would be required to file annual returns under the Amendment Act. We will provide updates when these requirements are available.

## Additional requirements for company registers

A company's register of members has always been required to show the number of each class and series of registered shares held by each shareholder, but from the effective date must now also include the nature of the voting rights associated with those shares, unless the nature of the voting rights is outlined in the memorandum and articles of association.

From the effective date, the register of directors shall include the names of persons appointed as alternate directors, however this requirement shall not apply where the alternate director is, at the time of appointment, already a director of the company.

The Amendment Act establishes a framework for the Registrar to maintain a register of persons with significant control as shall be defined and kept in accordance with the BVI Business Companies Regulations. As at the date of this publication, the Regulations regarding the register of persons with significant control have not yet been published. Details are not yet available about what this register should contain however we will publish updates when the regulations become available.

## Continuation

The current BCA allows a BVI business company to continue as a company incorporated under the laws of a jurisdiction outside the Virgin Islands in the manner provided under the laws of that jurisdiction. The Amendment Act places additional requirements on a company which intends to continue outside the Virgin Islands after the effective date. The company will be required to file a notice of intention to continue under the laws of a jurisdiction outside the Virgin Islands with the Registrar in the approved form. At least 14 days before filing the notice, the company must advertise a notice of intention in the Gazette and on its website (if any) and specify the jurisdiction to which it intends to continue. The company shall also notify its members and creditors in writing of such intention. These additional requirements provide a means by which shareholders, creditors and other stakeholders of the company will be given notice of the continuation before the process is completed. However, the Amendment Act does not empower them to make representations to the Registrar or otherwise take steps which will prevent the issuance of a certificate of discontinuance.

## List of directors

The Amendment Act empowers the Registrar to make available a list of directors contained in a company's register of directors on request made by registered users of the Registry's online information system (VIRRGIN) or members of the public who visit the Registry. It is important to appreciate that it is only a list of names of the directors which will be publicly available and not the register of directors, which includes the date of appointment and date of cessation as director and personal data of individual directors such as residential address, date and place of birth and nationality.

## Striking off and dissolution of companies

The current BCA provides a mechanism for the Registrar to remove companies from the Register which are not compliant with its provisions. This is the process of striking the company off the Register. When a company is struck off the Register, that company cannot carry on business, commence or defend legal proceedings or otherwise act in any way with respect to the affairs of the company.

The current BCA provides for a seven-year period between the point at which the Registrar strikes a company off the Register and the date the company is dissolved. The Amendment Act changes this position. As of the effective date, where a company is struck off the Register, the company shall be dissolved on the date the Registrar publishes a notice of striking off in the Gazette. The Amendment Act provides for transitional arrangements for companies which are struck off the Register but not yet dissolved as at the effective date. However, it is important that companies which have been struck off the Register consider whether they wish to be restored and take action accordingly without delay.

Under the current BCA, applications to be restored to the Register can only be made to the Registrar in respect of companies that are struck off but not dissolved; companies which are dissolved are required to apply to the court to be restored. The Amendment Act will allow dissolved companies to make an application to the Registrar in prescribed circumstances, introducing a simpler process of restoring dissolved companies to the Register. In some circumstances, applications for restoration will still need to be made to the court including where the company was not carrying on business or in operation on the

date of dissolution or where the purpose of the restoration is to initiate, continue or discontinue legal proceedings in the name of or against the company. However, dissolved companies will only have a period of five years (moving from the current seven years) to file an application for restoration to the Registrar or the court. It would therefore be prudent for persons to check the status of their companies and check that they are up to date with the annual fees and all other requirements notified to them by their registered agent.

### **Residency requirements for voluntary liquidators**

The Amendment Act introduces the requirement for voluntary liquidators appointed after the effective date to be resident in the British Virgin Islands. If joint voluntary liquidators are appointed, only one needs to be resident in the British Virgin Islands. This requirement does not apply to voluntary liquidators who are appointed prior to the effective date.

### **Restrictions in relation to charitable or non-commercial businesses**

Persons who wish to incorporate a company to pursue charitable or non-commercial purposes, whether wholly or partially, are required to apply to the Registrar in the approved form. The application must meet the requirements in the Amendment Act; this includes indicating (i) whether the purpose of incorporating the company is to undertake charitable or non-commercial activities, wholly or partially; (ii) how the company intends to segregate the activities of the charitable or non-commercial business from other activities of the company if carrying out these activities partially, and (iii) the geographical region or regions in which such charitable or non-commercial activities are to be carried out. The Registrar will only approve the incorporation of the company if satisfied the requirements under the Amendment Act are met. This new requirement applies to all BVI business companies regardless of where in the world it performs charitable or non-commercial activities.

### **Conclusion**

The above is not intended to be a complete account of the changes to the business company regime. It is important for companies to familiarize themselves with the various amendments and make adjustments accordingly in order to comply with their new obligations under the Amended Act. As indicated above, further developments are expected as new concepts introduced by the Amendment Act will be further refined. We will continue to monitor changes and provide updates when available.

Feel free to contact us with any queries on the impact of the Amendment Act on your company or the steps you may need to take to ensure compliance with its provisions.

## Contact Us

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