

BVI Business Companies Act Amendments

October 2022

Significant changes have been made to the BVI Business Companies Act, 2004 (the "Act") with the recent passing of amendments that will enter into force on 1 January 2023. This memo identifies the key changes that will affect clients and outlines how best to ensure compliance.

At a Glance

- The struck-off regime has changed considerably, and existing struck-off companies will have six (6) months from 1 January 2023 to regularize their status before they are dissolved.
- Companies will be required to file annual financial returns. The first financial period will be for the 2023 financial/calendar year.
- A list of the names of directors connected to a company will be available on request from the Registrar on payment of a search fee.
- The timeline for registered agent resignations has been reduced to 60 days.
- Voluntary liquidators must now be properly qualified and meet a BVI residency test.
- The bearer share regime will be fully phased out by July 2023.
- The Registrar will be required to keep a publicly accessible Register of Persons with Significant

Control. Details of the information this register will contain and how it will be collected are yet to be published but should come into force before the end of 2023.

Struck-Off Entities

Currently, a company can remain in a state of limbo for a period of seven (7) years after it is struck off the BVI Register of Companies. A company can be struck off due to not having a registered agent, failure to pay licence fees or because of action taken by the Registrar in the exercise of their powers under the Act. Under the new requirements, and with effect from 1 January 2023, once a company is struck off for any reason, the Registrar of Corporate Affairs will issue a notice to the company giving it up to 90 days to bring itself back to good standing. At the end of the notice period, if the company takes no action to regularise its status, it will be automatically dissolved.

A dissolved company can, in the five-year period post dissolution, apply to the Registrar to be restored to the register if it meets certain criteria:

- The company was carrying on business or was in operation at the date of its striking off and dissolution

- A registered agent has agreed to act as such for the company
- The registered agent has made a declaration that the company's corporate and due diligence records have been updated
- The company has paid the requisite fees and penalties
- If any property has vested in the Crown *bona vacantia* after the company was struck off and dissolved, the company must request the Financial Secretary's consent to the restoration

An application may be made to the High Court where the above conditions are not met and if:

- The company was dissolved after liquidation or struck off while in liquidation
- On the date of dissolution the company was not carrying on business or in operation
- The purpose of the restoration is to continue, discontinue or initiate legal proceedings for or against the company
- The company's property is vested in the Crown as a result of being dissolved
- The court considers it to be just and fair to restore the company

An application to the court for restoration may be made only by certain persons, including the Attorney General, creditors, former directors, former members, former liquidators, a person with a legal claim against the company and any person who can establish an interest in having the company restored.

There are some transitional provisions in the amendments which apply to companies that are struck off prior to 1 January 2023 ("existing struck-off companies"). An existing struck-off company will have six (6) months to bring itself back to good standing. If it fails to do so, then it will be dissolved automatically as a matter of law and its registered agent will be deemed to have resigned on the date of dissolution. In addition, if an existing company is restored by court order, a penalty of US\$5,000 will be payable in addition to all other applicable restoration fees and outstanding penalties.

Recommendation

Clients should carefully consider the risks of leaving companies to be struck off, given the shortened timeframe for struck-off entities to be dissolved. They should also ensure that they keep asset-holding companies in good standing, to avoid these assets being vested in the Crown in the event that the company is struck off.

Annual Returns

Currently, a company is required to maintain records and documentation relating to its financial transactions. With the new requirements, companies will need to file an annual return with their registered agent every year. If a company fails to file its annual return, its registered agent will have to notify the Registrar and the company will be liable to pay a penalty of US\$300 for the first month of non-compliance and US\$200 for each month that the company remains in breach of the filing obligation, up to a maximum of US\$5,000. The Registrar may also strike a defaulting company off the register and non-compliance will be reflected on a company's Certificate of Good Standing.

The detailed financial information that companies will have to provide is still under consideration, but it is expected that it will take the form of a basic balance sheet and profit and loss statement.

Recommendation

Clients should ensure that they retain receipts, invoices and relevant financial records for their companies to facilitate the preparation of their annual returns. Once we have clear guidance on the requirements, we will be happy to assist with practical solutions for compliance.

Access to Director Names

From 1 January 2023, it will be possible to obtain a list of the directors contained in a company's register of directors on request to the Registrar. This will likely be carried out using the search function in the registry's online system (VIRRGIN) or through a direct request for a search made to the registry. The list will only reflect the names of the directors who appear on the company's filed register of directors and who are directors as of the date of the search. All other information on the directors will remain confidential to the general public.

A company's register of directors will now include the names of persons appointed as alternate directors. This will not apply if the alternate is already appointed as a director of the company.

Recommendation

Where alternate directors have been appointed but not reflected on the company's filed register of directors, updates to reflect these changes should be made as soon as possible.

Resignation of Registered Agent

The 90-day resignation notice period that registered agents are required to give to companies has been reduced to 60 days. In addition, registered agents will no longer have to issue a notice of intent to resign and thereafter file a notice of resignation once the notice period has elapsed. Resignation is automatic at the end of the 60-day notice period, unless the notice is rescinded.

Another key development in relation to the resignation provisions, is that the legislation now makes it mandatory for registered agents to resign when the business relationship with an entity has been terminated due to non-compliance by the entity with anti-money laundering regulations.

Recommendation

If you receive a notice of intent to resign, work quickly either to resolve the issue of non-compliance and request your registered agent to rescind the notice or to appoint a new registered agent before the two-month deadline elapses. Otherwise, the company will be struck off for not having a registered agent (as outlined in the *Struck-Off Entities* section above).

Liquidations

The new amendments include professional and residency requirements for persons acting as liquidators of solvent companies. Previously, a liquidator of a solvent company (voluntary liquidator) did not require any special qualifications, other than that they needed to satisfy eligibility criteria such as, *inter alia*, being over 18 years old, not being a bankrupt or any person who, in the previous two (2) years, was in a senior management position in the company being liquidated or any of its affiliates.

With effect from 1 January 2023, a voluntary liquidator will need to have lived in the BVI for at least 180 days (six months) prior to his/her appointment. In addition, the individual must either be qualified as an insolvency practitioner, or in a field such as law or accountancy and have experience in advising companies in the financial services sector. Under the new regime, voluntary liquidators will also be required to collect company records and to provide copies of those records to the company's former registered agent.

Where joint liquidators are appointed, at least one must meet the residency requirement.

Recommendation

Carefully vet your intended voluntary liquidator to make sure that they are properly qualified to act as such. You will also need to provide the liquidator with all of the corporate records that the company is required to maintain under the Act.

Bearer Share Regime

BVI companies have been prohibited from issuing bearer shares since 2009 and companies with bearer shares issued prior to this date have been required to have them held by an authorised custodian who is responsible for maintaining details of the beneficial ownership of the shares. Bearer shares not held by a custodian were disabled and any rights attached to them could not be exercised by the bearer.

The remainder of the BVI bearer share regime will be fully abolished by 1 July 2023, with a transition period between 1 January and 30 June 2023. During the transition period current holders of bearer shares must either redeem their bearer shares or convert them to registered shares.

After 1 July 2023, any bearer shares that are still in existence will be automatically converted to registered shares and the memorandum of bearer share companies will be deemed to be amended to state that the company is not authorised to issue or convert registered shares to bearer shares. If the owner of the bearer share is unknown, the bearer share will be deemed to have been transferred to the company, which will hold the share in trust for

the owner. The bearer share company can also redeem an existing bearer share after publishing a notice of its intention to do so in the Gazette.

Recommendation

In the event that you have a bearer share in your custody, you should immediately contact your registered agent or the company to have it converted to a registered share and to avoid the risk of the share being redeemed by the company. In any event, as previously stated, all bearer shares will be automatically converted to registered shares by 1 July 2023.

Register of Persons with Significant Control

The amendments to the Act set out a basic framework for the creation of a Register of Persons with Significant Control. While the details will be outlined in regulations that are yet to be published, they may require companies to record and provide information to the Registrar on persons who have significant control over them. The register may include information that is publicly accessible, although there is a possibility of exemption from the requirement to comply, as well as restrictions on access if it is in the public interest, necessary for compliance with data protection laws or for other grounds. What is not clear is how soon the regulations will be published or the extent to which all of the possible requirements listed in the amendments will be reflected in them. The BVI Financial Services Commission has advised that the regulations must be published by the end of 2023.

Recommendation

Given the uncertainty surrounding this amendment to the law, it is recommended that clients wait for a formal notification that the regulations have set out the requirements and specifications for this register.

Please contact your usual Trident representative if you require any clarifications about the contents of this memo and the impending changes it describes.

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