

BVI Business Companies (Amendment) Act, 2015



The BVI Business Companies (Amendment) Act, 2015 (the “Amending Act”), which amends the BVI Business Companies Act, 2004 (the “2004 Act”) was Gazetted on New Year’s Eve.

The Amending Act is part of the BVI Government’s continuing process of modernisation of the companies regime in the jurisdiction. The Amending Act is complemented by amendments to the BVI Business Companies Regulations, 2012.

The following are the key aspects of the Amending Act. It should be noted that the provisions relating to the register of directors will come into force on 1 April 2016. All other provisions are effective from 15 January 2016.

Register of directors and members

Registration of register of directors

Under the Amending Act every company must file for registration with the Registrar a copy of its register of directors.

A company that is incorporated after the Amending Act has become effective must file its initial copy of the register within 14 days of the appointment of first directors. The Registrar must be notified of any subsequent changes within 21 days by the filing of an updated copy of the register.

Companies in existence before the commencement of the Amending Act generally have until 31 March 2017 to make the filing. For these existing companies, the register to be filed need only include the directors as of the date of filing of the register.

A filed register of directors will only be accessible by obtaining a Court order or by a competent authority. While it can also be accessed by the company itself, its registered agent or any other person authorised by the company, importantly, it is not accessible by the public.

Particulars of directors to be registered

The company’s register of directors must contain certain particulars.

For individuals these are: (i) full name; (ii) each former name, if any, unless the former name was changed by deed poll or other legal means or disused for more than 10 years; (iii) date of appointment as director or nomination as reserve director; (iv) date of cessation as director or reserve director; (v) address for the service of documents; (vi) usual residential address, unless that address is the same as the individual’s address for the service of documents; (vii) date of birth; (viii) nationality and, if more than one nationality is held, all nationalities; and (ix) occupation.

For corporate directors the particulars are: (i) corporate name; (ii) corporate or registration number, if any; (iii) registered office or principal office; (iv) address, but if the corporate director is incorporated or registered in the Virgin Islands, its corporate or registration number only; and (v) place of incorporation or registration and date of such incorporation or registration.

Optional registration of register of members

The Amending Act provides for the option of filing the register of members with the Registrar. Where such an election is made, an updated copy of the register must be filed where there are changes, but the election can be stopped at any time by filing a notice with the Registrar.

Filing fees

It is worth noting that there are Government filing fees for filing the initial register of members and directors, and for filing changes, of US\$50 for each filing.

For existing companies the following fees for filing the register of directors currently apply:

- (a) for registration on or before 30 September 2016 – US\$0

(b) for registration on or before 31 March 2017 – US\$25

(c) for registration after 31 March 2017 – US\$50

Penalties for failure to file the register of directors within the specified timescales will also apply.

Financial records

The Amending Act replicates and expands upon provisions currently contained in the 2004 Act and the Mutual Legal Assistance (Tax Matters) Act, 2003. A company shall:

- (a) keep at the office of its registered agent or at such other places, within or outside the BVI, as determined by the directors, the records and underlying documentation of the company;
- (b) retain the records and underlying documentation for at least 5 years from the date: (i) of completion of the transaction to which the records and underlying documentation relate; or (ii) the company terminates the business relationship to which the records and underlying documentation relate; and
- (c) provide the registered agent without delay any records and underlying documentation in respect of the company that is requested by the registered agent in accordance with the Amending Act.

The records and underlying documentation shall be in such form as are sufficient to show and explain the company's transactions; and will, at any time, enable the financial position of the company to be determined with reasonable accuracy.

Where the records and underlying documentation are kept other than at the registered agent's address, the company shall provide the registered agent with a written record of the physical address of the place at which the records and underlying documentation are kept; and record the name of the person who maintains and controls the company's records and underlying documentation.

Where this information changes, the company shall, within 14 day of the change, provide its registered agent with the physical address of the new location of the records and underlying documentation; and the name of the new person who maintains and controls the company's records and underlying documentation.

Whenever required by the BVI FSC or other competent BVI authority duly empowered by law, the registered agent shall request from the company, records and underlying documentation in respect of the company.

For the purposes of these provisions "records and underlying documentation" includes accounts and records (such as invoices, contracts and similar documents) in relation to:

(i) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place; (ii) all sales and purchases of goods by the company; and (iii) the assets and liabilities of the company.

Arbitration

Complementing the introduction of the Arbitration Act, 2013, the Amending Act allows for the articles of association of a BVI company to provide for any dispute involving the company, or the company and its members, or the members themselves to be settled through arbitration in the BVI.

Registered agent acting on resolution of directors

The provision states that, subject to the memorandum and articles, a registered agent shall: (i) act on the instructions of the directors of the company if those instructions are contained in a resolution passed by the directors and a copy of the resolution is made available to the registered agent; and (ii) recognise and accept the appointment or removal of a director or directors by members of the company.

Issue of shares for non-cash consideration

Prior to the Amending Act, the 2004 Act required directors, before issuing shares for non-cash consideration, to pass a resolution stating: (i) the amount to be credited for the issue of shares; (ii) their determination of the reasonable present cash value of the non-cash consideration for the issue; and (iii) that, in their opinion, the present cash value of the non-cash consideration is not less than the amount to be credited for the issue of shares. The Amending Act removes requirement (ii).

Bonus shares

Under the Amending Act, a bonus share issued by the company is deemed to be fully paid.

Surrender of shares

The Amending Act introduces an express provision that a company may acquire its own fully paid shares for no consideration by way of surrender of the shares. Any such surrender must be in writing and signed by the shareholder.

Execution of deeds

The Amending Act states that a BVI law governed deed or document under seal will be considered validly executed by a foreign company if executed in the manner permitted where the foreign company is incorporated.

The Amending Act also provides clarification in relation to BVI law governed deeds and other documents by confirming that the document will still be validly executed if a pre-signed signature page is attached to the document at the completion of a transaction.

Register of charges

Currently the 2004 Act requires a register of charges to be kept at the registered office. The Amending Act states that where a change occurs in the relevant charges or in the details of charges, the company must notify the registered agent within 14 days.

Restorations

Where a company has been struck off but not dissolved, the period of time that the company can be restored by the company, creditor, member or liquidator is reduced from 10 years to 7.

Continuations outside of BVI

There are some new requirements in the Amending Act as regards the notification and consent of secured creditors of a BVI company that wishes to continue out of the jurisdiction.

Liquidations

The Amending Act adds some clarifications to the provisions of the 2004 Act enabling a company whose assets are subject to outstanding registered changes to be voluntarily liquidated subject to certain criteria.

Fine increases

Breaches of many provisions of the 2004 Act can lead to fines. The Amending Act has increased some of these fines. For example:

- The issuing, converting or exchanging of a bearer share where not authorised under the articles increases from US\$10,000 to US\$50,000.
- Breaches in relation to the keeping of a register of members increases from US\$1,000 to US\$30,000.
- Should a BVI company not keep its minutes and resolutions at its registered office or does not notify the registered agent of their location elsewhere, the fine increases from US\$10,000 to US\$50,000.
- There is a new offence of not delivering a bearer share to a custodian, which carries a fine of US\$50,000.

Listed companies and cross-border transactions

The Amending Act recognises that BVI companies are increasingly being listed on various stock exchanges by introducing some new provisions for such companies.

Bearer shares

There are some changes to the authorised custodian regime for those companies with bearer shares in issue.



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