

UPDATE

# Changes to the BVI business companies regime introduced

In line with evolving international standards, the British Virgin Islands (**BVI**) Government has introduced changes to the BVI business companies regime to ensure the BVI maintains its reputation as a leading financial services centre.

## Introduction

The BVI Business Companies (Amendment) Act, 2024 (the **Amendment Act**) was published in the BVI Gazette on 26 September 2024 but has not yet come into force. The key changes that the Amendment Act will make to the BVI Business Companies Act, Revised Edition 2020, once in force, are set out below. We are expecting the Amendment Act to come into force imminently and will issue a further update at that time.

## Register of Members

Every company will be required to keep a register of members and, save for certain exceptions, file a copy with the BVI Registrar of Corporate Affairs (the **Registrar**). Although the copy register of members maintained by the Registrar will be available to domestic competent authorities and law enforcement agencies in the lawful discharge of their responsibilities (in addition to the company and its registered agent (**RA**)) it will not be generally available to the public.

A company may still opt for its register of members (including any notations as may be typically included on finance transactions where security has been granted over the company's shares) to be publicly accessible.

The register of members will be required to contain, as appropriate for the company:

- the names and addresses of the persons who hold registered shares in the company;
- the names and addresses of the persons who are guarantee members of the company;
- the names and addresses of the persons who are unlimited members of the company;
- the number of each class and series of registered shares held by each shareholder, including (unless already set out in the company's memorandum or articles) the nature of associated voting rights;
- the date on which the name of each member was entered in the register of members; and
- the date on which any person ceased to be a member.

If applicable, the company will (in addition to the register of members kept) also need to file with the Registrar the following information in relation to any 'nominee shareholder':

- the name and address of the nominator;
- the date on which the nominee shareholder ceased to be a member; and
- the date on which a person ceased to be a nominator.

A **nominee shareholder** is defined as a member of a company who holds shares in the company and exercises the associated voting rights according to the instructions of a nominator without any discretion or receives dividends on behalf of a nominator.

The register of members and, if applicable, the nominee shareholder information may be kept in such form as the directors approve provided the company is able to produce legible evidence of its contents.

Every company will be required to file a copy of its initial register of members (including the required nominee shareholder information, if applicable) with the Registrar within 30 days of incorporation (or continuation in the BVI, as the case may be). Any subsequent changes to the register of members must also be filed with the Registrar within 30 days of the changes occurring. However, this filing requirement will not apply to:

- listed companies;
- BVI private, professional, public or private investment funds; or
- BVI incubator or approved funds.

### **Beneficial ownership information**

Every company must collect, keep and maintain adequate and up to date beneficial ownership information which, save for certain exceptions, must be filed with the Registrar within 30 days of incorporation (or continuation in the BVI, as the case may be).

**Beneficial owner** is defined as:

- in the case of a legal person (other than a listed company), a natural person who:
  - ultimately owns or controls, directly or indirectly, 10% or more of the shares or voting rights in the legal person;
  - holds, directly or indirectly, the right to appoint or remove a majority of the board of directors of the legal person; or
  - otherwise exercises control over the management of the legal person;
- in the case of a limited partnership, a natural person who:
  - is ultimately entitled to or controls, directly or indirectly, 10% or more share of the capital or profits of the partnership or 10% or more voting rights in the partnership; or
  - otherwise exercises control over the management of the partnership;
- in the case of a trust:
  - the trustee; the settlor or other person by whom the trust is made; the protector (if any); the beneficiaries or class of beneficiaries with a vested interest in the trust at the time of or before distribution of any trust property or income; and any other natural person exercising ultimate effective control over the trust (including through a chain of control or ownership).

However, the filing requirement for beneficial ownership information will not apply to:

- listed companies;
- BVI private, professional, public or private investment funds; or
- BVI incubator or approved funds

provided, for BVI funds, that the company's beneficial ownership information is held by:

- a person who holds a Category 6 investment business licence pursuant to the Securities and Investment Business Act, Revised 2020; or
- its authorised representative or other person licensed by the BVI Financial Services Commission (**BVI FSC**) that has a physical presence in the BVI; and
- the beneficial ownership information can be provided by such person to the Registrar within 24 hours of request.

Where the beneficial ownership information of a company is held by a person as detailed above, the company must file the name and address of that person with the Registrar within 30 days of incorporation (or continuation in the BVI, as the case may be).

Before filing beneficial ownership information, the RA must take reasonable measures to verify the information, including the identity of the beneficial owners and to ensure that the particulars provided are adequate, accurate and up to date. The Registrar (or the BVI FSC) may adopt measures to further verify the beneficial ownership information filed by a company and ensure that such information is kept up to date.

Any changes to the beneficial ownership information must be filed with the Registrar within 30 days of the company becoming aware of the relevant changes.

Regulations may be made to permit beneficial ownership information to be publicly accessible by persons who can demonstrate legitimate interest (as may be defined in the relevant Regulations) in acquiring the information. However, access to such beneficial ownership information in such cases will be restricted to beneficial ownership of 25% or more of the shares or voting rights in a legal person.

### **Directors and register of directors**

The period within which a company's RA is required to appoint the company's first director(s) will be reduced from 6 months to 15 days. The initial copy of the register of directors will also be required to be filed with the Registrar within 15 days of appointment of the first director(s) (or continuation in the BVI, as the case may be).

The Registrar, which is already required to maintain a copy of the register of directors filed by a company, will only make such copy available to the company, its RA, domestic competent authorities and law enforcement agencies in the lawful discharge of their responsibilities. As is the case currently, the Registrar may make available, upon request (and upon the payment of a fee), a list of directors contained in a filed copy of the company's register of directors. A company's full register of directors will not be generally available to the public.

Where a person who is licensed by the BVI FSC to provide director services to companies (**licensed director service provider**) acts as a director of a company, the company will be required to indicate the capacity in which such licensed director service provider is acting (whether in corporate capacity or individual capacity representing the licensed director service provider) and file this information with the Registrar at the time of filing a copy of the company's register of directors. The company will also need to record and file with the Registrar the name of the relevant licensed director service provider and, where applicable, the name and address of the individual on whose behalf the licensed director service provider acts.

### **Rectification of register of directors**

Members or directors of a company, or any person who is aggrieved by an omission or inaccuracy in a company's register of directors (or unreasonable delay in rectifying an error) will be able to apply to the High Court for an order to rectify the register of directors.

### **Continuation of a BVI company under foreign law**

In addition to current requirements, a BVI company which intends to continue as a company incorporated under foreign law will need to include the following additional declarations in the notice of intention to be filed with the Registrar:

- the company does not have any pending request from a competent authority to produce documents or provide information which has not been satisfied;
- a receiver has not been appointed over the company or in relation to any assets of the company; and
- the company is not aware of any legal proceedings pending against the company, or any member, director, officer or agent of the company as it directly pertains to the affairs of the company.

The above requirements and any necessary due diligence should be factored into a company's timetable at the planning stage where a company is intending to continue to another jurisdiction.

### **Registration of foreign companies**

An application to register a foreign company in the BVI will need to contain additional information such as the registered office address in its country of incorporation and a list of members as at the date of application. The Registrar will only make the list of members of a foreign company available to such foreign company, its RA, a competent authority or a law enforcement agency.

A registered foreign company will also be required to file a notice within 30 days after any change in:

- its RA;
- its corporate name;
- the jurisdiction of its domiciliation;

- the instrument constituting or defining its constitution;
- its directors, or in the information filed in respect of a director;
- its members, or in the information filed in respect of a member; or
- the address of its registered office in its country of incorporation.

The current requirements for a foreign company to keep a register of members and to keep certain documents at the office of its RA have been repealed.

### **Resignation of registered agent of a foreign company**

The period of written notice which a foreign company's RA needs to give before resigning from that role has been increased from 30 days to 60 days. New provisions for a RA of a foreign company wishing to rescind a notice of intention to resign have also been included.

### **Restoration of struck companies**

The conditions for restoration of struck off and dissolved companies have been streamlined to make it easier for creditors and other persons to apply to restore such companies to the Register of Companies (the **Register**). The current or former RA will be specifically excluded from the list of persons who may apply to the Court to have a company restored.

Currently, one of the conditions for restoring a struck off company is that the RA needs to make a declaration that the company's records have been updated. There will be an alternative option to satisfy this condition in the form of an undertaking from the proposed RA that the company's records will be updated as required or procured and maintained within 14 days of the company's restoration. Notably, a failure to keep such undertaking will result in the company's name being struck off the Register.

The company to be restored must also file a copy of its register of members and a copy of its register of directors with the Registrar within 14 days of the company's restoration (unless the company had filed its register of members and register of directors at the date when it was struck off and dissolved).

Where a company is struck off the Register, it will be dissolved on the same date (as specified in the notice sent to the company by the Registrar of its intention to strike off the company). Currently, a struck off company is dissolved on the date the Registrar publishes a notice of the striking off in the *Gazette* which has caused uncertainties in practice.

The period of 30 days for filing the sealed Court order to restore a company with the Registrar has been extended to 60 days. Failure to meet this filing timeline will result in a penalty instead of invalidating the order.

### **Certificate of good standing**

In addition to current requirements, before issuing a certificate of good standing, the Registrar will need to be satisfied that:

- the company has filed a copy of its register of members;
- the company has filed a copy of its register of directors;
- the company has filed the requisite beneficial ownership information; and
- the Registrar has not received any notification that the company has failed to file its annual return, in each case, save where the company is exempt from the relevant requirement under the Act.

Further, the validity of a certificate of good standing issued by the Registrar will be restricted to a specified period (which is to be provided for in Regulations that have yet to be published).

### **Duty to cooperate**

Companies will be required to cooperate (including disclosing information within the company's knowledge and producing documents in the company's possession or under its control) with the Registrar, a person conducting an inspection under the Act, a competent authority and law enforcement agency in discharging their functions. However, there will be an exemption from the duty to cooperate where there is a claim of legal professional privilege.

## Registers

A legal framework has been created to enable the Registrar to establish such other registers as may be considered appropriate, including new or existing registers or information which may be included in the electronic VIRRGIN platform administered by the Registrar. This will allow for beneficial ownership information to be exported into VIRRGIN, which is anticipated to take place in the coming months.

## Returns

Provisions have been included to give the BVI FSC the power to require companies to prepare and submit returns on matters relating to their business or affairs. However, the changes introduced do not currently impose additional returns on companies.

## Penalties

The penalties for late payment of fees or late filings will be increased and the framework for penalties will be streamlined generally in Regulations (which have yet to be published).

## Transitional provisions

### Existing companies

Existing companies will be required to comply with the requirement to file their register of members, nominee shareholder information (if applicable), beneficial ownership information and, if applicable, information on any appointed licensed director service provider within 6 months of the Amendment Act coming into force (the **Effective Date**). However, an existing company which has already opted to file its register of members prior to the Effective Date will not be required to file a copy of another register of members, unless the register of members already filed does not contain all of the required information.

Failure to comply will result in a penalty of US\$600 for the first 3 months and US\$800 for the following 3 months, after which point the company will be struck off from the Register. Any subsequent application for restoration by a director, former member or former liquidator of the company will be liable to a penalty of US\$2,500 (in addition to any other restoration fees or outstanding penalties that may be payable).

Given the limited period for the transitional arrangements, clients with BVI companies should make sure that they keep their registers and beneficial ownership information up to date to ensure that they can comply with the new filing requirements.

### Existing struck off and dissolved companies

An existing struck off and dissolved company that seeks to be restored to the Register will not be restored until it has filed its register of members, nominee shareholder information (if applicable), register of directors (including information on any appointed licensed director service provider) and beneficial ownership information or has undertaken to do so within 14 days after the company's restoration. Failure to file within the 14 day time period will result in the company being struck off again from the Register and deemed never to have been restored to the Register. The company is liable to a penalty of US\$5,000 upon any reapplication by the same person for restoration.

## Next steps

For more information, please reach out to your usual Mourant contact or one of the key contacts listed in this update.

## Contacts

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