

British Virgin Islands - Updated February 2016

The BVI Business Companies Act 2004 (“BCA”) has been amended by the BVI Business Companies (Amendment) Act 2015 (the “Amendment Act”) with effect from 15 January 2016 and the BVI Business Companies (Amendment) Act 2016 passed on 29 January 2016 but retroactive from 15 January 2016. As well as keeping the British Virgin Islands (“BVI”) corporate regime at the forefront of compliance with international standards, the Amendment Act now provides greater flexibility and certainty for those operating or doing business with BVI companies.

The key changes include:

- (a) The introduction of a requirement for a private filing of the register of directors with the Registrar of Corporate Affairs in the BVI (the “Registrar”);
- (b) The ability of a BVI company listed on a recognised stock exchange to dispense with the need to keep a register of members containing the information previously required by the BCA, instead, allowing the company itself to determine the contents of such register and provisions which allow shares of a BVI company listed on a recognised stock exchange to be transferred without the need for a written instrument of transfer;
- (c) Clarification of the rules surrounding the issue of bonus shares, the issue of shares for non-cash consideration and the ability of shareholders to surrender shares;
- (d) A change to the requirements relating to the execution of deeds governed by BVI law to simplify and give certainty to the process; and
- (e) Requirement to provide the name and address of the person who maintains and controls the company including accounting record to its registered agent.

These changes, together with a number of other amendments to the BCA, are set out in more detail below.

Register of Directors to be filed

The new provisions requiring filing of the register of directors with the Registrar of Corporate Affairs in the BVI will come into force on 1 April 2016. All existing BVI companies will be required to file their register of directors with the Registrar by 31 March 2017 while new companies will need to file their register of directors within 21 days of the appointment of the first directors of the company. The filing of the company’s register of members with the Registrar is not required; however this continues to be optional.

Updated registers will need to be filed with the Registrar within 30 days of a change being made.

It should be noted that filed registers will not be publicly available and may be obtained only by the relevant BVI company, its registered agent, any other person authorised in writing by the company to have access to it, by court order or on the request of a competent authority acting in the exercise of its powers or dealing with a matter for which it has authority under an enactment. This last reference is included in order to deal with obligations that may be imposed by automatic exchange of tax information arrangements such as US FATCA or the OECD Common Reporting Standard, other mutual legal assistance legislation or its powers as a financial services regulator, tax authority or law enforcement agency.

The requirement to file the register of directors stems from the FATF 40 Recommendations which require

director information on companies to be maintained on a central register and ensures that the BVI remains at the forefront of compliance with international initiatives in relation to the automatic exchange of information and the fight against money laundering and terrorist financing.

All BVI companies existing as at 31 March 2016 will be permitted to file their register of directors with the Registrar without incurring a government filing fee if they file the register before 30 September 2016 and on payment of a filing fee of US\$25 between 1 October 2016 and the end of the transition period on 31 March 2017. Newly incorporated BVI companies will be required to pay a government fee of US\$50 to file their registers of directors. The government fee for registering any changes to a register of directors held by the Registrar will be US\$50.

The penalty of a BVI company for failing to register within the stipulated time is US\$100. This includes failing to file the register or file changes, in particular a register of directors that has already been filed. Additional penalties will be applied to the company as follows:

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|-------|--|------------|
| (i) | for the first month | US\$ 300 |
| (ii) | during the next 3 months after (i), add | US\$ 500 |
| (iii) | during the next 3 months after (ii), add | US\$ 750 |
| (iv) | thereafter, per month, add | US\$ 1,000 |



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Shares of Listed Companies

A BVI company listed on a recognised stock exchange will no longer have an obligation to keep a register of members containing the information required under section 41 of the BCA but instead, containing such information as may be provided by its memorandum and articles of association or by a resolution of members. The intention is to allow listed companies the flexibility to operate in accordance with the rules and practices of the relevant stock exchange. The list of recognised stock exchanges is also expanded under the Amendment Act.

The Amendment Act allows shares of a BVI company listed on a recognised stock exchange to be transferred without the need for a written instrument of transfer and such shares may instead be transferred in accordance with the relevant stock exchange rules and other applicable laws. In essence, this change will allow for the “paperless” transfer of listed shares in accordance with the procedures of the relevant stock exchange.

Shares Issued for Non-cash Consideration

Before being permitted to issue shares for consideration other than money, the directors of a BVI company are required to pass a resolution which was required to include, in relation to the non-cash consideration, a determination of the reasonable present cash value of the non-cash consideration. This has proved to be cumbersome and, in some cases, very difficult to comply with and was viewed as unnecessary to deal with the perceived concern of the legislators, who wished to ensure that shares were not issued at an under value.

The Amendment Act provides that information required to be contained in such a resolution now must simply state the amount to be credited for the issue of the shares and that, in the opinion of the directors, the present cash value of the non-money consideration and money consideration, if any, is not less than the amount to be credited for the issue of the shares. This language is intended to clarify that consideration for a particular share issuance can be a combination of cash and non-cash consideration and remove the need to make a determination as to the reasonable present cash value of the non-money consideration for the issue.

Bonus Issuance of Shares

The Amendment Act clarifies that bonus shares issued by a BVI company will be deemed upon issue to have been fully paid unless otherwise provided for in the company’s articles of association.

Surrender of Shares

The Amendment Act provides explicitly that such a surrender of fully paid shares to a BVI company is permitted where the shareholder agrees in writing to the surrender.

The BCA has been amended to clarify that the surrender of shares of the BVI Company in such a manner will not be considered to be a distribution for the purposes of the BCA.

Execution of Deeds

The Amendment Act amends Section 103 of the Act to permit pre-executed pages (whether under hand or under seal) to be attached to a deed or instrument governed by BVI law. Provided that the consent of the signatory is provided in respect of the attachment of its pre-executed signature page(s) to the deed or instrument, such instrument/deed will be considered to be validly executed. This effectively abrogates the uncertainty arising from the decision in the UK in the case of *R (on the application of Mercury Tax Group Ltd and another) v HMRC & Others* [2008] EWHC 2721.

The Amendment Act also clarifies that non-BVI entities executing deeds or instruments under seal governed by BVI law can rely on the requirements for execution of documents in the jurisdiction in which the entity is incorporated. Provided that such requirements have been satisfied, the deed or instrument will be considered to be validly executed by the non-BVI entity.

Registered Agents

The Amendment Act has confirmed the requirement for registered agents to act on the instructions of the directors of a BVI company where these instructions are set out in resolutions of the board of directors of the company and such resolutions are provided to the registered agent. This amendment clarifies that registered agents are not required to seek instructions from their client of record before acting on such instructions. This is a welcome clarification and should streamline corporate transactions.

In addition, the BCA has been amended to confirm that a registered agent must recognise and accept the appointment or removal of a director or directors of a BVI company by the shareholders of that company.

The Amendment Act further clarifies that where a law firm assists with the necessary filings to be made with the Registrar in respect of a change of registered office or registered agent of a BVI company, it may now submit the fees payable to the Registrar. This provision will be useful in circumstances where an outgoing registered agent is refusing to cooperate with the proposed change.



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Records and Underlying Documentation

BVI companies are required to keep the records and underlying documentation of the company at the office of the registered agent or at such other place inside or outside the BVI as determined by the directors of the company. The Amendment Act incorporates provisions from other legislation and has clarified the scope of the records and underlying documentation required to be maintained to include accounts and records such as invoices, contracts and similar documents in relation to all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place, all sales and purchases of goods by the company and the assets and liabilities of the company. Such documents must be retained for a period of at least five years from the date of either: (i) the completion of the transaction to which the documents relate; or (ii) the termination of the business relationship to which the documents relate.

Where this documentation is not kept by the registered agent, the company is required to provide the registered agent with a written record of the address where such documents are kept and the name of the person who maintains and controls these documents. Where the location of the records or the identity of the person maintaining and controlling the documents changes, the company must, within 14 days of the change, provide the registered agent with the updated information.

The penalty for contravening this section of the BCA has increased from a fine of US\$10,000 to US\$50,000.

Continuations

The provisions relating to the continuation of a foreign company into the BVI under the BCA have been amended. The Registrar may rely on a certificate issued by a director of the foreign company attesting to the

foreign company's compliance with the requirements under section 180 of the BCA provided the certificate is in the approved form, duly signed by the director and notarised and accompanied by an extract of the law under which the foreign company is permitted to continue to another jurisdiction.

Where a BVI company wishes to continue to another jurisdiction and there are charges registered over the property of the company, a written declaration must be provided to the Registrar that the company will either: (i) discharge the charge; (ii) obtain the consent of secured creditor; or (iii) certify to the Registrar that the chargee's interest will not be diminished or compromised by the continuation.

A BVI company seeking to continue to another jurisdiction must file a declaration confirming that the laws of the jurisdiction to which the company is to be continued permits continuation and that the company has complied with those laws.

In circumstances where the continuation under the laws of another jurisdiction requires the Registrar to provide a certificate of discontinuation, the Registrar may rely on a provisional certificate of continuation issued under the laws of that jurisdiction as the basis to issue a certificate of discontinuation.

Court-ordered Shareholder Meetings

The circumstances under which the High Court of the British Virgin Islands may order a meeting of shareholders of a BVI company to be called have been amended to include situations where shareholders of the company entitled to exercise at least 30% of the voting rights have requested that the directors of the company call a shareholder meeting and the directors fail to take steps to convene such a meeting.

Arbitration

The Amendment Act makes specific reference to BVI companies being permitted to include an arbitration clause in their articles of association; the reason for its specific inclusion is the enactment of arbitration legislation earlier this year.

Resolutions of Directors

The provisions of the BCA relating to resolutions of directors have been amended to clarify that subject to any provision to the contrary in the memorandum and articles of association of a BVI company, each director of the company will have one vote at a meeting of directors of the company.

Register of Charges

A requirement has been introduced to oblige each BVI company, where its register of charges is kept by the registered agent, to transmit the details of the change to its register of charges to the registered agent within 14 days of a change occurring.

Bearer Shares

The Amendment Act gives the Financial Services Commission of the British Virgin Islands ("FSC") the power to revoke the approval of an authorised or recognised custodian where the FSC is satisfied that the custodian has acted contrary to its obligation or to a prohibition under the BCA or in relation to an agreement entered into with the FSC.

Additionally, specific penalties have been introduced in relation to bearer shares. Where a BVI company delivers bearer shares to any person other than the custodian who has agreed to hold such shares including bearer shares converted from registered shares, the company commits an offence for which a fine of US\$50,000 is payable. In addition where a custodian or registered agent transfers bearer shares in contravention of section 73 of the BCA, an offence has been committed, the penalty for which is a fine of US\$40,000.



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Liquidation, Striking-off and Restoration

The Amendment Act provides that a BVI company may be liquidated where there is undischarged registered security over its assets and notes that the liquidator will be bound to give effect to the rights and priority of the claims of the company's secured creditors.

A new provision introduced by the Amendment Act allows the Registrar to strike off a BVI company which is licensed under financial services legislation where its licence has been revoked by the FSC. Where a BVI company is struck-off and then restored, the Registrar will issue a certificate of restoration to the company. In addition, the BCA has been amended to shorten the amount of time within which an application can be made to restore a BVI company which has not been dissolved to the register of companies from 10 years to seven years, after the publication of the strike-off in the Gazette.

Implementation Dates

Sections 27 and 28 of the Act will come into force on **1 April, 2016**. These sections include provisions on the Registration of Register of Directors and particulars of directors to be registered. The date on which the provisions take effect, relate to both new and existing BVI business companies.

All other sections of the Act will come into force on **15 January, 2016**.

Amendment to the Anti Money Laundering Code of Practice

As of 1 January, 2016 minimum beneficial ownership information of BVI companies, for which NEWHAVEN BVI acts as Registered Agent, will be required to be held at NEWHAVEN BVI immediately upon incorporation.

Eligible Introdurers shall supply the minimum Beneficial Ownership information for all existing companies they have formed on behalf of their clients before 31 December, 2016.

The minimum due diligence information (physical documents are not required at this stage) must be held at NEWHAVEN BVI for each company is:

- a) Full name
- b) Date of birth
- c) Passport number
- d) Nationality
- e) Residential address
- f) Intended activities of the company

Additional information and supportive due diligence documents shall be provided upon request within 48 hours (i.e. bank account details, source of funds, etc.)

Following this amendment, NEWHAVEN BVI can rely only on Eligible Introdurers that are:

- a) a regulated person;
- b) a foreign regulated person; or
- c) a member of a professional body (i) whose rules of conduct or practice embody legal requirements for the detection and prevention of money laundering consistent with the FATF recommendations generally; and (ii) who, in relation to customer due diligence and record keeping procedures specifically, is regulated, supervised or monitored by that body for compliance with those requirements; and

- d) located in a country or territory that is in the Financial Services Commission's List of Recognized Jurisdictions.

Eligible Introdurers that comply with the requirements in points a, b, c or d above, shall have in place a new written terms of business agreement in line with the requirements of the new legislation with NEWHAVEN BVI.

NEWHAVEN BVI shall not rely on an Eligible Introdurer that is relying itself on a third party or other third parties to conduct and maintain information on the customer due diligence (known as multi-level or tiered introduction). Due diligence information must be held at the Eligible Introdurer directly conducting business with NEWHAVEN BVI.

If your company does not comply with the requirements in points a, b, c or d above please let us know at the earliest opportunity so that we can liaise with you in developing alternative processes to meet the necessary BVI compliance.

Please note that in accordance with amended regulations, under certain circumstances, NEWHAVEN BVI will be obligated to report to the BVI authorities if we lose contact with any of our clients before completed due diligence information has been provided, or where due diligence is not provided and we are forced to terminate our business relationship. We also recommend for that reason, that Eligible Introdurers inform us of any companies for which the Eligible Introdurer has lost contact and complete due diligence has not been provided, or in any case where clients have informed you that they cannot comply with the new requirements in order to advise and assist accordingly.

Please contact your administrator or the Managing Director for any queries on the above.



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