

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay containing text. The foreground shows a paved plaza with a pattern of light and dark tiles.

Continuing Requirements of the Business Companies Act of the British Virgin Islands

Preface

This publication has been prepared for the assistance of those who are considering the operation of companies in the British Virgin Islands (“BVI”). It deals in broad terms detailing certain continuing requirements of the BVI Business Companies Act and is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice in the BVI on their specific proposals before taking steps to implement them.

Before proceeding with the incorporation of a company in the BVI, persons are advised to consult their tax, legal and other professional advisers in their respective jurisdictions.

Persons considering establishing companies to carry on insurance or mutual fund business should request separate publications prepared by this Firm on these topics.

Conyers Dill & Pearman

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1. INTRODUCTION

The BVI Business Companies Act (the “Business Companies Act”) imposes continuing obligations on all business companies. A business company incorporated under the Business Companies Act may be (a) a company limited by shares; (b) a company limited by guarantee that is not authorised to issue shares; (c) a company limited by guarantee that is authorised to issue shares; (d) an unlimited company that is not authorised to issue shares; or (e) an unlimited company that is authorised to issue shares. Those companies which carry on business as trust companies, banks, company managers, insurance companies, insurance managers, mutual fund administrators and most mutual funds are subject to additional regulation governing those activities, details of which are available on request.

The main requirements of the Business Companies Act may be summarised as follows.

2. REGISTERED AGENT / REGISTERED OFFICE

A BVI business company must at all times maintain a registered office in the BVI, maintained by its own staff or the registered agent. The registered office must be a physical address in the BVI, not a post office box, and its details must be included in the first memorandum and articles of association.

A business company is also required to have a registered agent in the BVI. Registered Agents in the BVI must hold a licence under either the Company Management Act or the Banks and Trust Companies Act that authorizes them to provide registered agent services in the BVI. The list of registered agents can be found on the BVI Financial Services Commission website, under “regulated entities.” A company that does not have a registered agent in the BVI in accordance with the Business Companies Act commits an offence and is liable on summary conviction to a significant fine.

3. CORPORATE RECORDS

A BVI business company must maintain the following documents in the BVI, either at the office of its registered agent (items 1-5) or at its registered office (item 5 only):

- 3.1. the memorandum and articles of association;
- 3.2. the register of members or a copy of the register of members, including:
 - (a) the names and addresses of the persons who hold registered shares in the company;
 - (b) the number of each class and series of registered shares or, if relevant, bearer shares held by each shareholder;
 - (c) in case of bearer shares, the following must be disclosed in respect of each bearer share certificate:
 - (i) the identifying number of the certificate;
 - (ii) the number of each class or series of bearer shares specified in the certificate;
 - (iii) the date of issue of the certificate; and

- (iv) the name and address of the custodian of the certificate;
- (d) the names and addresses of the persons who are guarantee members of the company;
- (e) the names and addresses of the persons who are unlimited members;
- (f) the date on which each member was entered in the register of members; and
- (g) the date on which any person ceased to be a member;

3.3. the register of directors or a copy of the register of directors, containing:

- (a) in the case of an individual director, the individual's:
 - (i) full name;
 - (ii) 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 a director or nomination as a reserve director;
 - (iv) date of cessation as a 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 and place of birth; and
 - (viii) nationality.
- (b) in the case of a corporate director, the corporate director's:
 - (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 BVI, its corporate or registration number only;
 - (v) date of appointment as corporate director;
 - (vi) date of cessation as corporate director; and
 - (vii) place of incorporation or registration and date of such incorporation or registration;

- 3.4.** copies of all notices and other documents filed by the company in the previous ten (10) years; and
- 3.5.** a copy of the register of charges with the following information:
- (a) the date of the charge or, if it is a pre-existing charge over acquired property, the date on which the property was acquired by the company;
 - (b) a short description of the liability secured by the charge;
 - (c) a short description of the property charged;
 - (d) the name and address of the trustee for the security or, if there is no such trustee, the name and address of the chargee;
 - (e) unless the charge is a security to bearer, the name and address of the holder of the charge; and
 - (f) details of any prohibitions or restrictions, if any, contained in the instrument creating the charge on the power of the property to create any future charge ranking in priority to or equally with the charge.

Where a change occurs in the company's charges required to be recorded in a company's register of charges which is kept at the office of its registered agent, the company is required to notify the registered agent within 14 days of the change occurring.

In addition, the company must keep the minutes of all meetings and resolutions consented to by: directors, members, committee of directors, and committee of members, at the office of its registered agent or at such other place or places within or outside the BVI, as determined by the directors of the company. The registered agent must be provided with a written record of the physical address of the place or places where the records are kept, where they are kept at a place other than at the office of the registered agent, and must be notified within fourteen (14) days if the locations are changed.

A company that contravenes these requirements commits certain offences and is liable on summary conviction to significant fines.

4. FINANCIAL RECORDS

A BVI business company must keep at the office of its registered agent or at such other place or places, within or outside the BVI, as the directors may determine, the records and underlying documentation of the company. The records and underlying documentation of the company shall be 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. The company shall retain the records and underlying documentation for a period of at least five 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 provide its registered agent without delay any records and underlying documentation requested by the

registered agent of the company pursuant to a request by the Financial Services Commission or any other competent authority in the BVI.

Where the records and underlying documentation of a company are kept at a place or places other than at the office of the company's registered agent, the company shall provide the registered agent with a written record of the physical address of the place or places at which the records of the underlying documentation are kept; and a record of the name of the person who maintains and controls the company's records and underlying documentation. Where the place or places at which the records and underlying documentation of the company, or the name of the person who maintains and controls the records and underlying documentation change, the company is required to notify the registered agent within 14 days of the change.

Pursuant to the Mutual Legal Assistance (Tax Matters) Act, 2003 (as amended) every company is also required to keep its accounts, records and underlying documentation of the company at the office of its registered agent or at such other place the directors may determine. The records must be sufficient to show and explain the company's transactions and must enable the financial position of the company to be determined with reasonable accuracy. Such records must be kept for at least five years from the date of completion of the transaction in question or the date the company terminates the business relationship to which the records relate. If such records are kept at a place other than the office of the registered agent, the company is required to provide the registered agent with a written record of the physical address of the records.

5. ANNUAL REQUIREMENTS

A business company must pay its annual fee on or by 31 May or 30 November each year, depending on the date of incorporation.

A business company which is an unlimited company not authorised to issue shares and a foreign company registered under the Business Companies Act, are required to file an annual return made up to 31 December of the previous year, on or before 31 March of each year. The annual return must be in the approved form and be certified as correct by directors of the company or by its registered agent. A company that contravenes these requirements commits certain offences and is liable on summary conviction to significant fines.

6. NAME

A business company must ensure that its full name and, if it has one, its foreign character name, is clearly stated on every written communication sent by or on behalf of the company, and on every document issued or signed by or on behalf of the company, which creates or evidences a legal obligation of the company.

Subject to its memorandum and articles of association, a company may make application to the Registrar in the approved form to change its name or its foreign character name. The change of name takes effect from the date of the certificate of change of name issued by the Registrar.

7. SEAL

A business company is required to have a common seal and an imprint of it must be kept at the office of its registered agent.

8. ADMINISTRATION

Every business company is required to have a minimum of one shareholder and one director who can be either an individual or a company. The directors need not be residents of the BVI. There is no requirement for a business company to appoint officers under the Business Companies Act.

The Business Companies Act does not require that a business company hold an annual general meeting of its members.

9. SHARE TRANSACTIONS

The directors have the power to issue shares in a business company. The company's memorandum and articles of association must either set a maximum number of shares the company is authorised to issue or state that the company is authorised to issue an unlimited number of shares. A par value may, but need not be, set for the authorised shares. Unless limited by the memorandum and articles of association, shares may be issued for such amounts as the directors may determine from time to time, provided that in the case of par value shares, the amount must not be less than the par value.

Registered shares in a business company may be generally transferred by a standard instrument of transfer signed by the transferor, which must contain the name and address of the transferee. In the absence of a written instrument of transfer, the directors may accept such evidence of a transfer of shares as they consider appropriate.

Where shares are listed on a recognised exchange, the shares may be transferred without the need for a written instrument of transfer if the transfer is carried out in accordance with the laws, rules, procedures and other requirements applicable to the shares registered on a recognised exchange and subject to the company's memorandum and articles of association and the Listed Companies and Funds Regulations.

A share issued to bearer is transferable by delivery of the share certificate to an authorized or recognized custodian (see below).

10. BEARER SHARES

Under the Business Companies Act the general rule is that where a business company issues bearer shares, transfers treasury shares that are bearer shares or issues a bearer share converted from a registered share, it must not deliver the certificate for the bearer shares to any person other than a custodian who has agreed to hold the shares.

A custodian is a person who has the requisite approval from the Financial Services Commission to act as a custodian of bearer shares. There are two categories of custodians: authorised custodians and recognised custodians. An authorised custodian must be a licensed person in the BVI or a foreign entity that is approved by the Financial Services Commission to act as a custodian. A recognised

custodian is an investment exchange or a clearing organisation operating a securities clearance or settlement system in a Financial Action Task Force on Money Laundering country.

Where bearer shares are deposited with an authorised custodian, the person depositing the bearer shares must provide the custodian with an accompanying notice in the approved form stating the full name of the beneficial owner of the shares, and the full name of any other person with any interest in the shares, whether by a charge or otherwise, and any other information as may be required by the approved form. If no other person has an interest in the bearer shares then the notice must contain a statement to that effect. Without such an accompanying notice, the authorised custodian must not accept the shares.

If a bearer share is not deposited with or delivered to a custodian, then it is disabled during the period when it is held by a person other than a custodian. With some exceptions, disablement means that the share does not carry any of the entitlements that it would otherwise carry and, in particular, the purported transfer of the share or any interest in it is void and of no effect. In addition, the entitlement to vote, to a distribution and to a share in the assets of the company on liquidation are disabled during this period.

From 1 July 2023 (the “effective date”), BVI companies are no longer permitted to issue bearer shares, convert registered shares to bearer shares or exchange registered shares for bearer shares. In addition, all existing bearer shares will be deemed to be converted to registered shares or, if the owner of the bearer share is unknown to the company, the company shall redeem such share. Existing custodians of bearer shares will be required to surrender the existing bearer shares to the company and give notice of such surrender to the registered agent of the company, the owner of the bearer shares and any other person who has an interest in the bearer shares. Bearer shares in the possession of registered agents or a bearer share company will, if not redeemed or converted to, or exchanged for, a registered share before the effective date, be deemed to be converted to a registered share on such date to be held on trust for the owner of the share. Finally, custodians of bearer shares cease to be authorised or recognised as a custodian as of the day following the effective date. The register maintained by a registered agent containing the bearer shares of a company must be maintained by the registered agent for at least 5 years from the effective date.

11. FILING REQUIREMENTS

On incorporation, a business company must file the following documents with the Registry of Corporate Affairs:

- (a) a memorandum and articles of association signed by a proposed registered agent as incorporator; and
- (b) the proposed registered agent’s consent to act as registered agent.

The following records of a business company are available for public inspection at the offices of the Registrar of Corporate Affairs:

- (a) the memorandum and articles of association (which includes a record of the company’s registered agent and office); and

(b) the certificate of incorporation.

Where a business company wishes to change its registered office or registered agent, it must file a notice with the Registrar through the registered agent of the company or a legal practitioner in the BVI. A change of registered office or registered agent takes effect on the registration of the filed notice by the Registrar.

Amendments to the memorandum or articles of association must be filed with the Registrar and take effect on the date of the filing of the notice of amendment. A restated memorandum or articles of association takes effect on the date it is registered with the Registrar.

It should be noted that a change in the number of shares that a company is authorised to issue can only be done by amending the memorandum of association.

A business company is required to file a copy of its register of directors with the Registrar. The copy of the register of directors will not, unless the company elects otherwise, be open to the public except on order of the court or on request by a competent authority in the usual course. The initial copy of the company's register of directors shall be filed for registration with the Registrar within 21 days of the appointment of the first director. Changes to the register of directors are required to be filed with the Registrar within 30 days of any changes occurring. Penalties are payable in the event that the company fails to file a copy of its register of directors within the specified time period. In addition, a certificate of good standing cannot be obtained in respect of a company which has not filed a copy of its register of directors and such a company may be struck off the register of companies by the Registrar. Companies continued in have 21 days to comply with the filing obligation; the 21 day period runs from the date of continuation in.

Despite the filing requirement, the Registrar may issue a certificate of good standing (a) during the first six months and 21 days of a company's existence, where it has not yet appointed directors (as permitted by the Business Companies Act) and (b) within 21 days of a company's continuation in to the British Virgin Islands.

A business company also may elect to submit the register of members and the register of charges to the Registrar for registration and thus make them available for public inspection.

Where the company has elected to file a copy of its register of members it is required to file any changes with the Registrar. The company may subsequently decide to elect to cease registration of the changes in its register of members by notification to the Registrar.

In order to change its name or its foreign character name, a business company must submit an application to the Registrar. Where the name of a company is changed, its memorandum and articles of association are deemed to be amended to state the new name effective from the date of the change of name certificate.

Insurance companies and investment funds have additional filing requirements and specific advice should be sought for those types of companies.

12. ECONOMIC SUBSTANCE

The Economic Substance (Companies and Limited Partnerships) Act, 2018 (the “ES Act”) requires all **Legal Entities** carrying on a **Relevant Activity** during a **Financial Period** to establish economic substance in the BVI. For Legal Entities incorporated before 1 January 2019, the first Financial Period starts on 30 June 2019 and ends on 29 June 2020. A BVI company (which includes a company continued as a BVI business company) or a limited partnership is a Legal Entity unless (a) it is resident for tax purposes in a jurisdiction outside of the BVI and (b) that jurisdiction is not on Annex 1 to the EU list of non-cooperative jurisdictions for tax purposes, the “EU blacklist”. A Legal Entity carrying on only Holding Business (as defined in the ES Act) has less onerous economic substance requirements. A Legal Entity carrying on one or more of the other eight Relevant Activities will be required to ensure that the Relevant Activity is directed and managed in the BVI, has an adequate number of suitably qualified employees, appropriate premises and adequate expenditure in the BVI and Core Income Generating Activity (as defined in the ES Act) is carried on in the BVI. Irrespective of whether it is carrying on a Relevant Activity, all BVI companies and limited partnerships will need to submit a report within six months of the end of each Financial Period.

The bold faced capitalised terms in the previous paragraph are defined in the ES Act. Their definitions are not ‘standard’ definitions, but rather are precise definitions which determine the application of the ES Act. Reference is made to the ES Act and the Rules on Economic Substance (the “**Rules**”) for the definitions.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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