

BRITISH VIRGIN ISLANDS FINANCIAL SERVICES COMMISSION



CONSULTATION DOCUMENT ON PROPOSALS FOR REFORMS TO THE BVI BUSINESS COMPANIES ACT, 2004

I. INTRODUCTION

1. As an international financial centre, it is imperative that the Virgin Islands remains committed to complying with international standards established by standard-setting bodies such as the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) and the Financial Action Task Force (FATF). In addition, it is vital that the Virgin Islands fulfils its obligations in facilitating international co-operation as part of the global effort to combat organised crime. These objectives are achieved through a continual review and reform of the jurisdiction's legislative framework.

2. The Commission, working with the Government, International Tax Authority and the Company Law Review Advisory Committee (CLRAC), has been discussing the need for further reforms to ensure full compliance with recommendations made by the Global Forum in relation to the Territory's legislative regime affecting issues of taxation and cooperation in effectively exchanging information. This is in addition to ensuring full compliance with the FATF 40 Recommendations. Accordingly, it is proposed to strengthen the Territory's companies' regime, through amendments to the BVI Business Companies Act ("the Act") in relation to: (i) struck off-companies; (ii) maintenance of records and underlying documentation; and (iii) issuing of bearer shares.¹

3. The intent of this Consultation Document is to review (as has been the norm over time) the Virgin Islands' legislative regime in relation to its business companies, propose reforms to strengthen the companies' regime and map out the potential impacts of implementing the proposals that have been identified. The Commission is requesting views on the perceived efficacy of the proposals contained in this Consultation Document and how it might assist with strengthening the BVI business companies regime, ensure continued compliance with international standards, the practicality of implementing the proposals considering the potential impacts and any solutions that may mitigate negative consequences of implementing the proposals.

¹ Similar reforms will need to be effected to the Partnership Act and Limited Partnership Act.

II. STRUCK OFF COMPANIES

4. The struck-off companies regime has been the subject of regular review with a view to effecting reforms considered necessary to strengthen the relationship between registered agents and incorporated or registered companies vis-à-vis their obligations to the Commission and other competent authorities. These reforms are also carried out taking into account current and emerging requirements under established international standards to which the Virgin Islands has a nexus. It is in that context that reforms had in the past been carried out on matters relating to ownership and identity information pertaining to legal and beneficial owners of legal entities. This is viewed as a continuing process to ensure that the Virgin Islands continues to discharge its domestic and international obligations in creating and maintaining a competitive business companies regime on the one hand and, on the other hand, balancing that against compliance with established standards of compliance.

5. Current Analysis

5.1 Through the Territory's AML/CFT regime, registered agents are required to hold ownership and identity information of legal and beneficial owners of companies incorporated and registered under the BVIBCA. This information is to be made available to competent authorities upon request. However, in a few instances, issues arise after registered agents' relationships with companies are terminated and registered agents' AML/CFT obligations have been fulfilled. During the struck off period, although some legal restrictions are imposed, the struck-off companies retain legal personalities as BVI business companies, without being subject to any ongoing CDD and/or monitoring measures. This can lead to the provision of information to competent authorities that may no longer be accurate or current.

5.2 The register of members (or a copy thereof) of a company is required (under section 96 of the BVIBCA) to be maintained by the company's registered agent and, consequently, any change in that register must also be notified within 15 days of the change occurring. In order to ensure completeness of the register when a change occurs in the company's shareholding, it is essential that a company's record regarding its members and any related shareholding is properly updated and recorded notwithstanding that the company has been struck off the register. In a similar vein, any changes to a company's register of directors (maintained by the Registrar) which had not been notified prior to the company being struck off the register must also be notified notwithstanding that the company has been struck off the register. These proposals are considered fundamental to ensuring an accurate register, both before and after striking off, for accountability purposes and ensuring a much more effective exchange of information regime. Accordingly, it is proposed to amend section 215 of the BVIBCA to reflect these elements.

6. Strike-Off and its Effects

6.1 Pursuant to section 213 (1) of the BVIBCA, the Registrar of Corporate Affairs ("the Registrar") may strike the name of a company from the register of companies ("the register"), under specified conditions, including where a company does not have a registered agent, fails to file a return, notice or document to be filed under the BVIBCA, or fails to pay its annual fee or any late payment penalty by the due date. The effect of being struck off the register is that the company is deemed to be disabled and cannot engage in or transact any matter in relation to its

affairs, pursuant to section 215 (1) of the BVIBCA. A company that remains continuously struck off for a period of 7 years, is dissolved as of the last day of the 7 year period in accordance with section 216 of the BVIBCA.

6.2 In addition, upon satisfying specified conditions, a company that has been struck off the register, but not dissolved, may be restored to the register by the Registrar, in accordance with section 217 of the BVIBCA. Where a company is restored to the register pursuant to section 217, it is deemed to have never been struck off the register.

7. *Obligations of Registered Agents*

Registered agents, pursuant to the requirements of the Anti-Money Laundering and Terrorist Financing Code of Practice (AMLTF COP), are required to undertake ongoing CDD and monitoring of companies to which they act as registered agent throughout the life of the business relationship. Where a registered agent terminates its business relationship with a company, the registered agent is required to update its CDD information as of the date of termination of the relationship and maintain records of that company for a period of 5 years. Registered agents do not have any further obligation with respect to the company but are required to maintain and provide CDD information to competent authorities in relation to a company up to 5 years after the relationship had ended.

8. *Potential Areas of Reform Relating to Struck Off Companies*

8.1 Although companies are deemed disabled when struck off the register, struck off companies retain their legal personality during this 7-year period. In addition, there may be instances where the struck off companies continue to conduct business, as they may not be aware that they have been struck off the register (primarily due to loss of contact between the company and the registered agent). The business being transacted by companies during this period is consequently being undertaken without appropriate or full “monitoring”, as registered agents have completed their AML/CFT obligations upon terminating the relationship. The absence of mechanisms to monitor whether struck off companies are engaged in business activities, whether there are any changes to these companies’ basic information and beneficial ownership and ensure knowledge of the business operations during the period the companies have been struck off, has the potential to expose the Virgin Islands to AML/CFT risks and create reputational risk for the jurisdiction.

8.2 This is further exacerbated by the fact that a company can be restored to the register within 7 years to a position where it would effectively be deemed to have never been struck off and where unknown and potentially illicit business activities which might have been undertaken during this time is not accounted for. This could potentially create unnecessary challenges to domestic and international cooperation (as between competent authorities and in relation to law enforcement investigations). In addition, given that a company is only required to maintain records for a period of 5 years after the termination of a business relationship, where a request for international cooperation has been made for a company that has been struck off for more than 5 years after the termination of the relationship, the registered agent would not be required to maintain such information and as such may not have any information to provide to competent authorities.

8.3 From both a domestic and international cooperation perspective, the jurisdiction should have adequate measures and mechanisms in place for obtaining and providing accurate and up-to-date information on all companies that maintain legal personality (including struck off companies). This has always been the objective of the Territory's domestic and international cooperation regime as demonstrated in numerous enactments (Criminal Justice (International Cooperation) Act, 1993, Proceeds of Criminal Conduct Act, 1997, Financial Services Commission Act, 2001, Financial Investigation Act, 2003, Mutual Legal Assistance (Tax Matters) Act, etc.).

9. *Proposals for Reform*

9.1 In order to prevent any negative implications and to better streamline the business companies regime, the Territory should seek to significantly reduce the number of struck off companies within its registry portfolio. This would be effected through an amendment to section 216 of the BVIBCA to reduce the period for which a company can continuously remain struck off, before it is dissolved, from 7 years to 12 months. Consequently, companies will only be allowed a period of up to 12 months after being struck off from the register, to apply to the Registrar to be restored in the normal way. Where a company has been dissolved pursuant to section 216 of the BVIBCA, that company may only be restored to the Register, upon application to the High Court under the following circumstances, after which the company will revert to dissolved status upon completion of the event occasioning the Court restoration:

- where restoration is purely for the purpose of commencing or continuing legal proceedings in relation to the company;
- where restoration is purely for the purpose of defending an action against the company; or
- where restoration is purely for the purpose of distributing outstanding assets or claiming assets that have vested in the Crown *bona vacantia*.

9.2 These measures, if adopted and implemented, will reduce considerably the risk of a company being used for activities inconsistent with the law after it has been struck off and not restored within the prescribed period for restoration.

10. *Resignation as Registered Agent of a Struck Off Company*

10.1 By virtue of the Territory's AML/CFT laws (section 21 of the AMLTFCOP), a person who has a business relationship with a customer which is subsequently terminated is legally required to update the CDD information and maintain such information as at the date of termination for a period of 5 years. The BVIBCA (under section 93) permits a registered agent to resign as agent of a BVI business company; a fee is applied to such resignation. Unfortunately, there is currently no legal requirement that a person who terminates a business relationship with a company must at the same time resign from acting as agent of the company. It is an anachronism that a registered agent may, for good reason, terminate a business relationship with a company on AML/CFT grounds, but continue the relationship in another capacity as agent of the same company.

10.2 It is proposed to streamline termination of a business relationship with resignation as a registered agent of a company by ensuring that when a registered agent terminates a business

relationship on AML/CFT grounds, it must at the same time resign from acting as registered agent of the company. Furthermore, where a struck off company is subsequently dissolved (after the 12 months period from publication in the Gazette of the striking off), the fact of dissolution should be a ground for terminating the business relationship with the company. Accordingly, when a notice is published in the Gazette in accordance with section 213 of the BVIBCA with respect to the striking of a company off the register, a registered agent will be required to update the requisite CDD information of the company and retain such record for a period of at least 5 years.

10.3 In the same vein and pursuant to the BVIBCA, each resignation as a registered agent of a company ordinarily would attract a fee. It is not unknown that some registered agents, instead of filing to resign as agents of companies they no longer represent and paying the filing fee, choose to not act. In particular, for registered agents with a large portfolio of struck off/dissolved companies who will be required to resign as agents of such companies, the proposed requirement to streamline the termination of business relationships and resignation under the BVIBCA will likely result in huge cost in resignation filing fees.

10.4 It is therefore proposed to amend the BVIBCA in a way that will allow for bulk filing of resignations in relation to companies that, prior to the coming into force of the Act enacting the proposed reforms, were struck off from the register or dissolved² and for which the registered agent of record had not resigned in accordance with the BVIBCA. This may be a single bulk filing or a series of bulk filings, within a transition period not exceeding 6 months after the coming into force of the Act enacting the proposed reforms. Consequently, filing fees will be computed and applied on a graduated scale in relation to bulk numbers, similar to what was done previously in relation to bulk filing of notices under sections 92A, 92B and 92C of the BVI Business Companies (Amendment of Schedule 1) Order. On the other hand, resignation from companies that are struck off from the register and subsequently dissolved after the enactment of the proposed reforms will follow the normal course of notification required under the BVIBCA and resign accordingly after payment of the relevant fee. This would enable a dissolved company, should it wish to do so, to make an application for restoration as contemplated under paragraph 9.1 above.

10.5 A company is required to have a registered agent at all times. However, in circumstances where a registered agent has ceased to function as a licensee without having previously resigned as agent of a struck off/dissolved company, it is expected that the registered agent would have updated the CDD information in respect of the struck off/dissolved companies under its portfolio prior to or shortly after³ ceasing business. Ordinarily, such CDD information should be transferred to and maintained by a new agent. The transferring of the CDD information should be at the behest of the registered agent prior to ceasing business or it may be effected on the initiative of the struck off company if the agent had given notice of ceasing business. There are yet possible circumstances that may result in the abrupt termination of the business of a registered agent and therefore ceasing to qualify as a registered agent. In such instances, the obligation still remains on the registered

² Ordinarily, the dissolution of a company may be considered to result in automatic resignation by operation of law. That is, if a company is dissolved, the registered agent of the dissolved company will be deemed to have resigned. It, however, has the potential effect of encouraging non-compliance with resignation as required under the BVIBCA at the time a company is struck off the register.

³ The timeframe will be reckoned to be no longer than 1 month, since the obligation is only to update CDD information as opposed to undertaking a new CDD exercise.

agent to ensure a proper transfer of all the records relating to the struck off/dissolved companies under its portfolio prior to or shortly after ceasing business. In essence, the resignation of a person as a registered agent of a struck off or dissolved company or the fact that a registered agent has ceased to carry on business, does not terminate the AML/CFT obligations of the registered agent. The registered agent is still obligated to update all the requisite CDD information in respect of the struck off/dissolved company either at the time of ceasing to do business or shortly thereafter.

10.6 There is another scenario: the registered agent ceasing to carry on business as such updates all CDD information as at the date of termination of business and transfers the collected information to a custodian other than another registered agent. The registered agent that picks up the business (companies) of the agent that ceased to carry on business will only be obligated to carry out its own separate and independent CDD measures in respect of the companies it has picked up and thereafter update such CDD information periodically as required under the AMLTFCOP. The question, however, is which third party may be considered appropriate to serve as custodian of the CDD information collected and updated by the registered agent that has ceased business. Those who consider this as a viable option may wish to make suggestions as to who could serve as an effective custodian and how the attendant costs thereof may be met. Whoever becomes the custodian of CDD information of companies of a registered agent that has ceased to carry on business will have an obligation to keep and maintain the CDD information for a minimum period of 5 years.

11. Dissuasive Measures to Compel Compliance

It is proposed to adopt section 89 of the Micro Business Companies Act whereby a company may be restored to the register and, in that context, be prosecuted notwithstanding its “struck off” status. This will be without prejudice to the ability of the Commission to issue a public statement, in accordance with section 37A of the Financial Services Commission Act, 2001), in respect of the company. In a similar vein, if a registered agent is struck off or dissolved without taking the necessary steps to update a company’s CDD information, the agent may be restored to the register for purposes of undertaking criminal proceedings against it. A similar public statement may also be issued against the registered agent.

12. Transitional Provisions

12.1 Any proposed amendments to the BVIBCA in relation to struck off companies and dissolved companies will necessarily deal with appropriate transitional provisions. It is proposed that, in respect of companies that have been struck off from the register prior to the legislative reforms becoming legally effective and for which the 7 year rule for restoration in the normal way would have applied, the 7 year rule will be reckoned as 12 months to commence from the effective date (i.e. the date the Act enacting the proposals becomes operational). However, if the 7th year for normal restoration by the Registrar terminates at any time during the course of the 12 months period, it is that termination date that will apply. For example, if **AXIS Company Ltd.** was struck off from the register on 2nd June, 2014, it has up to 1st June, 2021 to apply to be restored to the register by the Registrar. If the proposed reforms come into force (legislatively) on 1st March, 2021, then **AXIS Company Ltd.** has up to 1st June, 2021 to apply for restoration in the normal way by the Registrar and not beyond.

12.2 On the other hand, if a company that has been struck off from the register has a period to run beyond the 12 months period to net 7 years for application for restoration in the normal way by the Registrar, that company will have only 12 months instead within which to apply for such restoration, reckoned from the date of the coming into force of the proposed reforms.

12.3 Where, after the coming into force of the proposed reforms, a company is struck off from the register, that company's 12 months period for restoration in the normal way by the Registrar shall be reckoned to commence from the date of publication of a notice in the Gazette of its striking off (in accord with section 213 (6) of the BVIBCA).

13. *Matters for consideration*

13.1 The Commission is cognizant of a number of consequential effects that may arise with the proposed amendments that must be taken into consideration. The Commission specifically notes the following:

- (a) The change will significantly increase the costs of restoration in companies which are struck off following the inadvertent non-payment of annual fees, typically where there has been a breakdown in communication between a registered agent and the directors. Instead of simply paying the restoration fees and penalties to the Registrar under the present system, when a company has been struck off for 12 months and dissolved, the only mechanism for restoration will be through an application to the Court, which may entail significant legal fees and costs. In addition, restoration shall be only for the purpose of advancing one of the three conditions stipulated under paragraph 9.1 above.
- (b) The proposed change may likely bring about a significant increase in new cases for restoration in the High Court, which will also create resource implications on the Court. In addition, consideration will have to be made as to whether the Court has the capacity to progress such a significant number of restoration cases in a timely manner.
- (c) As alternative to the consideration under paragraph (b), given that a company may only be restored for limited purposes, there may be a significant number of companies that do not have any assets for distribution or do not have a case to defend. As such, these companies may not have a reason to seek restoration.
- (d) There are presently a considerable number of court restoration applications where the company was dissolved 7 or more years ago. This means that striking off occurred 14 or more years ago and has only recently come to the attention of the former directors or members. Typically, it has come to their notice when they have attempted to conduct a transaction involving company assets and have sought a Certificate of Good Standing or have otherwise engaged with the former registered agent and have been informed of the fact of the dissolution. At present, companies may be restored by the court up to 17 years after the date of striking off (7 years under section 216 plus 10 years from dissolution per section 218(2)). The period available in cases brought under paragraph 57 of Schedule 2 of the Act may be even longer as the striking off to dissolution period was 10 years before section 216 was amended. The new proposals will reduce the maximum period to

11 years following striking off. There will be many companies which become aware of the dissolution more than 11 years after striking off. These companies will typically own assets of considerable value which vest in the Crown at dissolution and the members will lose their rights to have the assets restored to the company if they fail to act within 11 years of the effective date of striking off. Their only recourse then would be to apply to the High Court to seek restoration.

13.2 As with any reform, there are generally consequences. One gives up something to gain something else either in the short or long term, while ensuring the continuity of business and the good reputation of the Territory as an international finance centre.

14. *Opinions Sought*

Opinions are sought as follows:

- (a) Do you agree with the proposed reforms articulated in sub-paragraph 5.2 above?
- (b) If not, which aspects of sub-paragraph 5.2 do you not agree with?
- (c) Do you agree with the proposals outlined in sub-paragraph 9.1 above?
- (d) If not, which aspects of sub-paragraph 9.1 do you not agree with and why?
- (e) If not, do you have alternative workable solutions that will enable the Virgin Islands to comply with the established standards set out in Element A.1 of the Global Forum standards? If you do, please share them.
- (f) In relation to sub-paragraph 10.4 above as it concerns bulk filing of resignations from struck off/dissolved companies:
 - (i) would you agree that a filing fee should be paid based on a tiered fee structure of a minimum and a maximum, depending on the number of companies to be bulk-filed?
OR
 - (ii) should the filing fee be waived and, if so, on what basis?
- (g) In relation to paragraph 10.6 above, do you subscribe to the idea of having a custodian of CDD information in respect of companies whose registered agents have ceased to carry on business? If so, who would you consider to be a viable custodian and why? In addition, how should the costs of the custodian be financed?
- (h) In relation to paragraph 11 above, do you agree that the proposed dissuasive measures are sufficient and appropriate? If not, please propose alternatives.
- (i) Do you agree with the proposed transitional measures outlined in paragraph 12 above? If not, what types of transitional measures would you recommend, bearing in mind the objective of the proposed reforms?

- (j) If you have any further comments with respect to any of the proposals outlined above, please indicate them in writing.

III. RECORDS AND UNDERLYING DOCUMENTATION

15. Element A.2 of the Global Forum on Transparency and Exchange of Information for Tax Purposes, assessment of Exchange of Information on Requests states:

“Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.”

Accounting records include underlying documentation such as invoices, contracts, etc.

16. Current Analysis against Element A.2

16.1 Section 98 of the BVIBCA provides the current mechanism for ensuring that accounting records of companies are kept. That section requires companies to maintain records and underlying documentation, and section 98 (2) specifies that records and underlying documentation must be in such form as *“(a) are sufficient to show and explain the company’s transactions; and (b) will, at any time, enable the financial position of the company to be determined with reasonable accuracy.”*

16.2 The records and underlying documentation may be kept at the office of a company’s registered agent or such other place as the company may determine (whether inside or outside the Virgin Islands). Where a company’s records and underlying documentation are kept at a location other than its registered agent’s office, the company is required to provide the registered agent with details of where the records and underlying documentation are held. In addition, where a competent authority requires records and underlying documentation from a company to exercise any of its powers, registered agents are required to request the records and underlying documentation from the company. From a legislative point of view, the jurisdiction has the requirements in place for the maintenance of accounting records. However, issues may arise on a practical level where competent authorities have limited recourse against a company that fails to provide copies of its records and underlying documentation to its registered agent, in response to a request for international cooperation.

17. Availability of accounting information

17.1 Notwithstanding the current requirements under the BVIBCA, there may be instances where a competent authority requests records and underlying documentation from the registered agent of a company and the registered agent in turn makes a request of the company, but the company does not provide (or provide fully) the requested records and underlying documentation. This problem may be compounded in circumstances where the company concerned has been struck off the register or dissolved (whether through liquidation or otherwise). Competent authorities have no recourse against the company, as the obligation under section 98 (7) is placed on the registered agent to request the records from the company. There is no onus placed on the company to provide the records, and no timeframe for the provision of such records. This has the potential

to impede the Territory's ability to fully respond to requests for information (and provide them in a timely manner). It is therefore important that the Territory strengthen its regime for ensuring the proper keeping and availability of accounting information.

17.2 There is also the issue of ensuring the availability of accounting records in relation to the liquidation of companies. Quite often companies are liquidated; such liquidations may take place outside the Virgin Islands. In particular, in the case of voluntary liquidations (which are more prevalent), all that is required of the liquidator is to provide a report to the Commission. There is no obligation for such report to include accounting records or for such records to be provided separately to the Commission or filed with the Registrar. In view of the fact that requests for assistance may relate to companies that have been liquidated, it is proposed, in relation to voluntary liquidations, that provision should be made that a such liquidation shall not be considered to be complete unless the liquidator provides the Commission with the accounting records of the liquidated company (in addition to the report it provides). This will ensure the availability of accounting records, in relation to the voluntary liquidation of companies, whenever such records are requested.

18. *Proposals for Reform*

18.1 Considering the Territory's obligations, both domestic and international, it is proposed that section 98 of the BVIBCA be amended on the following basis:

- (a) The current Global Forum standard requiring that records and underlying documentation be maintained either in the jurisdiction or outside the jurisdiction if the place of custody and the custodian of the records and underlying documentation are identified, should be maintained;
- (b) However, where records and underlying documentation are maintained outside the Territory, copies of such records and underlying documentation should, at least once a year, be filed by the company with its registered agent;
- (c) The copies of accounting records and underlying documentation to be filed with the registered agent must relate to a company's financial statements (audited or, if unaudited, the unaudited statements), balance sheet, profit and loss account with relevant schedules and annual reports;
- (d) Where a company is struck off from the register, the directors of the company must, as at the date of striking off, compile and file with the company's registered agent all the company's records and underlying documentation held and maintained outside the Territory; such records are to be maintained by the registered agent for a period of at least 5 years from the date of striking off or dissolution, as the case may be.

18.2 In addition, the BVIBCA would be amended to ensure the provision of accounting records by voluntary liquidators in cases of the voluntary liquidation of a company. Accordingly, a voluntary liquidation would be considered as incomplete if the requisite report and the accounting are not provided.

18.3 Paragraph 18.1 (b) – (d) will not apply in respect of a company that maintains its records and underlying documentation in the Territory with a registered agent, save that the requirement to maintain records and underlying documentation after striking off or dissolution (as noted in paragraph 18.1 (d) above) shall apply in the case of all companies.

19. *Dissuasive Measures to Compel Compliance*

19.1 It is proposed that a registered agent shall notify the Commission whenever a company, whether currently or after striking off or dissolution, fails to file all or copies of its records and underlying documentation. Consequently, a company that fails to file such records and underlying documentation commits an offence and is liable to prosecution. Without prejudice to such prosecution, the Commission may also apply to liquidate the company under the Insolvency Act, 2003 or simply disqualify the directors of the company from serving as such and the disqualification published.

19.2 In addition, where a company which maintains its records and underlying documentation outside the Territory fails to accede to a registered agent's request/directive to provide all or specified records and underlying documentation, the Commission may issue a public statement in relation to the directors of the company.

19.3 Where a struck off company fails to comply with a request to provide records and underlying documentation, the Registrar should, without prejudice to the actions that may be taken under sub-paragraphs 19.1 and 19.2, be able to apply for the liquidation of the company under the Insolvency Act, 2003.

20. *Matters for consideration*

Implications that may be considered in implementing the above proposals relate to the following:

- (a) Imposing a requirement on companies that do not maintain their records and underlying documentation in the Territory to file copies of such records and underlying documentation would ensure that the records and underlying documentation are readily available and easily accessible to competent authorities in response to international requests. In the event that original records and underlying documentation are required, the registered agent would be obligated to request these from the company concerned.
- (b) Registered agents may require additional resources in seeking to receive and maintain copies of records and underlying documentation of all the companies filed with them. It would be expected that registered agents will more likely receive and store such information by electronic means. As such, registered agents may have to source IT assistance or expand existing resources in ensuring that the volume of records can be maintained with the attendant security and privacy measures to prevent any data breaches;
- (c) Companies may have concerns as to whether copies of their records and underlying documentation will be protected and secured with their registered agents and the legal

recourse for any security breaches (particularly in the absence of data protection laws in the Territory) and opt to re-domicile their business to another jurisdiction;

- (d) There will need to be an appropriate mechanism in place to ensure that companies are maintaining the relevant records and underlying documentation and that these meet the requirements detailed in the BVIBCA.⁴ Consequently, avenues for the imposition of commensurate enforcement action on companies that fail to comply with the requirements must also be considered; this may include the power to strike a company off the register or apply to liquidate a company under the Insolvency Act, 2003.

21. *Opinions Sought*

Opinions are sought as follows:

- (a) Do you agree with the proposals outlined in paragraphs 18.1, 18.2 and 18.3?
- (b) If not, which aspects of paragraphs 18.1, 18.2 and 18.3 do you not agree with and why?
- (c) If not, do you have alternative workable solutions that will enable the Virgin Islands to ensure practical measures are in place to compel the availability of records and underlying documentation? If you do, please share them.
- (d) In relation to paragraph 19 above, do you agree that the proposed dissuasive measures are sufficient and appropriate? If not, please propose alternatives.
- (e) If you have any further comments with respect to any of the proposals outlined above in this Part, please indicate them in writing.

IV. *BEARER SHARES*

22. The anonymity of bearer shares poses significant risks for money laundering, terrorist financing, fraud and other nefarious activities. The Financial Action Task Force (FATF) accordingly addresses the issue of bearer shares under Recommendation 24 (Transparency and Beneficial Ownership of Legal Persons). Jurisdictions are provided with a range of options in reducing the risks for this type of ownership to be misused and/or exploited for money laundering and terrorist financing (ML/TF)⁵ purposes. The options include:

- (a) prohibiting bearer shares and share warrants;
- (b) converting bearer shares and share warrants into registered shares or share warrants;
- (c) immobilising bearer shares and share warrants by requiring them to be held with a regulated financial institution or professional intermediary;

⁴ Since all companies are required to have registered agents, the Commission may, as part of its inspection process, carry out a random assessment of non-regulated companies to establish their level of compliance with keeping relevant records and underlying documentation.

⁵ This includes proliferation financing.

- (d) requiring shareholders with a controlling interest to notify the company, and the company to record their identity.

23. Current Analysis against Recommendation 24 regarding bearer shares

23.1 With the enactment and implementation of the BVIBCA, companies incorporated under the International Business Companies Act (Cap. 291) (IBC Act) were automatically re-registered under the BVIBCA. Pursuant to section 9 (1) of the IBC Act, companies were permitted to issue bearer shares. However, given the level of anonymity and the consequential risks for money laundering, fraud and other illicit activities, the BVIBCA essentially immobilised bearer shares (i.e. required bearer shares to be held with a custodian). The current regime in the Virgin Islands implements option (c) above as outlined by the FATF.

23.2 However, a gap has been identified with respect to grandfathered bearer share companies under the BVIBCA. Pursuant to Part III of Schedule 1 of the Act, a grandfathered bearer share company is a company that meets the following conditions:

- (a) as at 31 December 2004, it was on the Register of International Business Companies maintained under the International Business Companies Act;
- (b) its memorandum, as at 31 December 2004, did not prohibit it from issuing bearer shares;
- (c) it is a company that was re-registered automatically under Part III of Schedule 2;
- (d) a notice to disapply Part IV of Schedule 2 has not been registered with respect to the company; and
- (e) its memorandum has not, at any time since 31 December 2004, been amended to prohibit it from issuing bearer shares, converting registered shares to bearer shares or exchanging registered shares for bearer shares.

Paragraph 36(1) of Part IV of Schedule 2 of the Act, states:

“Where an existing bearer share in a grandfathered bearer share company is not deposited with a custodian who has agreed to hold the share on or before the transition date, the company may, notwithstanding sections 59 to 62 or any provision in the memorandum or articles, in any shareholders’ agreement or in any other agreement, redeem the share.”

Paragraph 37 further states:

“Where, after the transition date, a company to which this Part applies has one or more existing bearer shares that have not been deposited with a custodian in accordance with this Division, the Commission may apply to the Court for the appointment of a liquidator of the company under the Insolvency Act.”

23.3 The provisions of paragraph 36 accordingly allow a company, in relation to a grandfathered bearer share that was not deposited with a custodian by the transition date, to redeem the bearer share (without any restriction as to specific time, which may be interpreted to mean at any

perpetual point in time). This may only be prevented, by virtue of paragraph 37, where the Commission has applied to the Court for the appointment of a liquidator of the company, pursuant to the Insolvency Act, for the company to be dissolved. The ability of a company, in respect of a grandfathered bearer share, to redeem such shares without any limitation of time (in the absence of a dissolution made by the Commission), potentially facilitates the risks associated with anonymity that the provisions to require bearer shares to be held with a custodian was intended to prevent. Consequently, although the legislation complies with the requirements under the FATF recommendation to immobilise bearer shares, the ML/TF risks continue to exist from a practical standpoint, in relation to grandfathered bearer shares.

24. Proposals for Reform

24.1 The Commission's approach in immobilising bearer shares complies with the FATF requirement and a number of custodians were either authorised or recognised in the Virgin Islands to provide such services. However, these custodians have yielded limited business activity in this area and they do not appear to have an appetite for continuing to hold bearer shares deposited by BVI business companies. Currently only 3 entities fall under the Commission's remit as authorised custodians. On this basis, and in an effort to further strengthen the jurisdiction's AML/CFT regime, it is proposed to implement a combination of options (a) and (b) from the FATF Recommendation 24. Specifically, it is proposed to amend the BVIBCA to prohibit the issuing or holding of bearer shares. Consequently, from the date that the amendment to the Act comes into force, no company will be allowed to issue bearer shares, and companies that have bearer shares deposited with custodians will be required to convert these bearer shares into registered shares, or redeem the bearer shares. Conversion or redemption of bearer shares will be required to occur within a specified period (transition period of say 12 months), after which the shares become disabled. The intended outcome is for bearer shares to be eliminated from BVI company structures.

24.2 To address the issue of existing bearer shares being redeemed by a grandfathered bearer share company at any time, it is proposed to amend paragraph 36 of Division 5 of Part IV of Schedule 2 of the BVIBCA to allow grandfathered bearer share companies to redeem existing bearer shares within a specified period. A transition period of 12 months is proposed in this regard. After the specified period has expired, existing bearer shares would no longer qualify for redemption and would be deemed to be automatically converted into registered shares to be held by the grandfathered bearer share company (then qualifying merely as a normal business company without the ability to issue or hold any bearer share). In essence, the proposed reforms will terminate the bearer shares regime as at the end of the transition period and a grandfathered bearer share company will no longer be able to legally redeem an existing bearer share (which would have been converted into a registered share held by the company). In this respect, an amendment to the BVIBCA will comprise a specific provision prohibiting the issuing or holding of bearer shares by or in a BVI business company (a restatement of section 38 (1) of the BVIBCA with appropriate modifications), taking into account the transition period for existing bearer shares.

24.3 Consequently, the custodianship regime will also need to be terminated at the end of the same proposed transition period of 12 months. This will effectively terminate any need for paragraph 37 of Division 5 of Part IV of Schedule 2 of the BVIBCA relating to the Commission's

power to apply to the High Court to appoint a liquidator for a company with bearer shares that have not been deposited with a custodian.

24.4 There will be a number of consequential amendments as a result of these proposed reforms to the bearer shares regime, either through repeals or simple amendments. This will affect both the principal provisions of the BVIBCA and the Schedules thereto detailing bearer shares issues.

25. *Matters for Consideration*

25.1 Considering the anonymous nature of bearer shares and in an attempt to alert every holder of a bearer share in a bearer share company, the Commission proposes to roll out a communication strategy by issuing public notices over a period of time (8 weeks) to advise the holders of bearer shares in bearer share companies (whether grandfathered or otherwise) to either redeem their bearer shares or covert them into registered shares within the transitional period of 12 months. This will also include a formal notification to the current custodians of the proposed arrangement so they can advise the holders of the bearer shares of which they are custodian and aim to terminate their contractual arrangements.

25.2 It is important to preserve the reputation of the Territory's financial services industry and overall that of the Territory. The proposed reforms are not designed to deprive any person of his or her right; rather, they are designed to maintain the reputation of the Territory as an international finance centre in which persons may engage in legitimate business. The Territory also has an obligation under international law to adhere to rules designed to effectively combat the activities of ML/TF across international borders.

26. *Opinions Sought*

Opinions are sought as follows:

- (a) Do you agree with the proposals outlined in sub-paragraphs 24.1 - 24.4?
- (b) If not, which aspects of sub-paragraphs 24.1 – 24.4 do you not agree with and why?
- (c) If not, do you have alternative workable solutions that will enable the Virgin Islands to effectively abolish the issuing of bearer shares? If you do, please share them.
- (d) Are you agreeable to the transition period of 12 months for the redemption of existing bearer shares, after which unredeemed bearer shares will be automatically converted into registered shares to be held by the company? If not, please explain your reasons and propose appropriate alternative arrangements.

V. *CONSULTATION PERIOD*

27. The public, particularly persons in the financial services industry, are being consulted to share their views on the proposals contained herein to amend the BVI Business Companies Act, 2004 (BVIBCA). The consultation period is for 14 days, commencing on Tuesday 9th March, 2021 and ending at 4:30 p.m. on Tuesday 23rd March, 2021.

28. Comments should be provided in the Consultation Comments Template provided and submitted to the Commission via email to the following email address: consultation@bvifsc.vg. Late submissions will **not** be considered during the review process.

29. Please note that at this stage the Commission has not taken any particular or firm decision on the actual reforms to be effected to the BVIBCA. Following the consultation process and a proper consideration of all written comments by the Commission and the CLRAC, a decision will be taken regarding the way forward. This will be followed by the relevant amendments to the BVIBCA which, upon completion, will be published for wider public input. In this regard, the Commission wishes to advise the general public to refrain from engaging in discussions that may have the effect of misleading on the actual outcome of the consultations or the final decision forward.