



# BVI Financial Services Commission

## Registry of Corporate Affairs

### User Guides on the BVI Business Companies Act

#### User Guide No. 5

## Striking off and Liquidation of Companies Under the BVI Business Companies Act

This is one of a series of User Guides published by the Registry of Corporate Affairs that are intended to provide general information about different aspects of the BVI Business Companies Act ["the Act"].

The Guide is not intended to provide, and is not a substitute for, legal advice and is not intended to address the circumstances of any individual case. The Act has been summarised to make the Guide easier to read and the Guide should be read together with the Act. You should always consider carefully whether you might benefit from legal, accounting or other professional advice concerning your particular circumstances or the circumstances of your company.

### Introduction

A company's life starts on its incorporation and ends on its dissolution. Two different and separate paths can lead to the ultimate dissolution of a company:

- Liquidation; and
- The administrative striking of a company from the Register of Companies by the Registrar (administrative strike off).

However, there are significant differences between administrative strike off and liquidation and each has different consequences for the company and its members and directors.

The purpose of this Guide is to summarise the provisions of the Act concerning strike off and liquidation.

It is important to appreciate that companies may only be liquidated under the Act if they are solvent. A company that is insolvent must be liquidated under the Insolvency Act, 2003. This Guide does not cover the liquidation of an insolvent company under the Insolvency Act. Information on insolvent liquidations may be obtained from the Insolvency Division of the Financial Services Commission.

## Liquidation and Administrative Strike Off – Summary and Principal Differences

Liquidation under the Act is a voluntary process requiring a resolution of members or, in certain circumstances, a resolution of directors. A company cannot be forced to liquidate under the Act. When a company enters liquidation under the Act, an individual who must be independent of the company is appointed as the liquidator of the company. Because the appointment of a liquidator under the Act is something that the members or directors of a company choose to do, the liquidator is called a “voluntary liquidator”.

The voluntary liquidator's job is to collect and realise all of the company's property, pay the debts owed to any creditors of the company and distribute any moneys remaining, after deducting his costs and fees, to the members of the company in accordance with their rights. Once the liquidation has been completed, the company is struck off the Register of Companies and dissolved.

The Registrar may, in certain circumstances, strike a company off the Register of Companies even though it has not been through a liquidation process. This is known as an administrative strike off. There are number of grounds for administrative strike off including the failure of a company to appoint a registered agent, to file documents that are required to be filed or to pay annual fees. The Registrar may also strike a company off the Register where satisfied that the company has ceased to carry on business. A company is not dissolved until ten years after the date on which it was struck off the Register.

The principal differences between liquidation and strike off are as follows:

- Liquidation is a process that results in the orderly winding up of the company's business and affairs and the realisation of all of its property. A company may be administratively struck from the Register when it is still trading and even though it may still have assets and debts.
- A company that has been liquidated is dissolved immediately, whereas a company that has been administratively struck from the Register will not be dissolved for a further 10 years. This is important as strike off does not affect the liability of the members or directors of the company. This is explained later in this Guide.

Given their potential liabilities, it is important that directors and members of a company consider carefully whether a company that has ceased to carry on business or for which there is no longer any purpose should be liquidated under the Act or whether the company can be allowed to be struck off the Register administratively by the Registrar. Unless the directors are certain that the company has no property and no liabilities, they should consider obtaining professional advice on the appropriate course.

We will now consider liquidation, and then administrative strike off, in more detail.

## Liquidation Under the Act

### ***Conditions for liquidation of company under the Act***

A company may only be liquidated under the Act

- if it has no liabilities, or
- where it does have liabilities, if it is able to satisfy them in full as they become due for payment.

If a company does not satisfy both of the above conditions, it is regarded as insolvent and it cannot liquidate voluntarily under the Act.

Furthermore:

- a company that is regulated by the Financial Services Commission cannot appoint a voluntary liquidator under the Act without the consent of the Commission; and
- a voluntary liquidator cannot be appointed under the Act if the company is in administration or liquidation under the Insolvency Act, or if an application for the appointment of an administrator or Insolvency Act liquidator has been made to the Court, but not decided.

There can be serious consequences for a director who permits a company to trade whilst it is insolvent. He may become personally liable for some or all of the company's debts and the Court may make an order prohibiting him from being a director of, or taking part in the management of, any company for a substantial period of time. Therefore, if as the director of a company you conclude that your company is insolvent, you should seek professional advice as soon as possible. You should note that only an individual who is licensed by the Financial Services Commission as an insolvency practitioner may act or be appointed in an insolvency proceeding under the Insolvency Act. A list of licensed insolvency practitioners may be found on the Commission's website.

### ***Process for putting a company into liquidation under the Act***

#### Declaration of solvency and liquidation plan

Before a company can be put into liquidation under the Act, the directors must:

- make a declaration of solvency in the form approved by the Commission in which they must state their opinion that the company is solvent; and
- approve a plan for the liquidation setting out a number of matters, such as:
  - the reasons for the liquidation;
  - their estimate of the time that it will take to liquidate the company;
  - the name and address of the proposed voluntary liquidator.

The liquidation plan must be approved no more than 6 weeks before the date that the members or directors pass a resolution to appoint the voluntary liquidator.

The voluntary liquidator of a company does not need to be a licensed insolvency practitioner but he or she must be an individual (ie not a partnership or a company) and must be independent of the company (so, for example, a director cannot act as voluntary liquidator of a company).

As an insolvent company cannot be liquidated under the Act, the declaration of solvency is a very important document. It must be made no more than 4 weeks prior to the date that the members or directors resolve to appoint a voluntary liquidator and must have attached to it a statement of the company's assets and liabilities as at, or shortly before, the date of the solvency declaration<sup>1</sup>.

It is a criminal offence for a director to make a declaration of solvency without having reasonable grounds for believing it to be true.

Although this process may appear difficult and complicated, most professional service providers in BVI have experience in voluntary liquidations, and directors should carefully consider obtaining professional assistance.

#### Resolution to appoint voluntary liquidator

It will usually be for the members of a company to resolve whether to approve liquidation plan and appoint a voluntary liquidator. However, in certain circumstances, a voluntary liquidator can be appointed by the directors. For example, the directors have this power where:

- no shares in the company have ever been issued; or
- the members have approved the liquidation plan and the memorandum or articles permit the directors to appoint a voluntary liquidator.

#### ***Liquidation of company by voluntary liquidator***

Once appointed, the voluntary liquidator takes custody and control of the property of the company and, although the directors remain in office, their powers cease.

The main tasks of the voluntary liquidator are:

- to collect and realise the company's assets;
- to identify all the valid claims against the company;
- to pay all the debts of the company; and
- to distribute the surplus to the members, in accordance with their rights<sup>2</sup>.

The voluntary liquidator is given extensive powers with which to undertake those tasks.

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<sup>1</sup> However, the statement of assets and liabilities is not required to be filed at the Registry.

<sup>2</sup> It should be noted that the rights of the members to a share in the surplus assets of the company may be specified in the memorandum, but if not, the BCA provides that each issued share in a company has a right to an equal share in the distribution of the surplus assets of the company.

The Act imposes a number of obligations on the voluntary liquidator with respect to the filing of certain documents with the Registry and advertising a notice of his appointment. In most cases, the voluntary liquidator must also send a statement of account to all members.

### ***Termination of a voluntary liquidation***

There are only three ways in which a liquidation under the Act can be terminated:

- when the liquidator has completed his work and the Registrar dissolves the company;
- by an order of the Court terminating the liquidation; and
- if the voluntary liquidator forms the opinion that the company is insolvent.

### Completion of liquidation

When the liquidator has completed the liquidation, he files a statement with the Registrar who strikes the company off the Register of Companies and dissolves the company. The Registrar will issue a certificate of dissolution and the voluntary liquidator must advertise the dissolution in the Gazette.

From the point that the company is dissolved, it ceases to exist as a legal entity. However, it is possible for the Court to restore a dissolved company to the Register in certain circumstances. This is discussed in the section of this Guide dealing with the restoration of companies to the Register.

### Termination of liquidation by Court

The Court may terminate a liquidation under the Act prior to its completion. The Act does not specify the grounds upon which the Court may make such an order, but it is likely that the applicant would have to show good reasons.

### Voluntary liquidator forms an opinion that the company is insolvent

Where the voluntary liquidator of a company forms the opinion that the company is insolvent, he must send a notice to the Official Receiver and he commits an offence if he does not do so.

The voluntary liquidator must then call a meeting of the company's creditors who will appoint a licensed insolvency practitioner as the liquidator of the company.

From the point at which the voluntary liquidator first forms an opinion that the company is insolvent, the liquidation must proceed as a liquidation under the Insolvency Act.

Strictly speaking, therefore, the liquidation does not end when the voluntary liquidator forms an opinion that the company is insolvent, but the liquidation becomes an Insolvency Act liquidation, not a liquidation under the Act.

## **Administrative Strike Off**

### ***Grounds for administrative strike off***

As indicated earlier in this Guide, the Registrar may strike a company off the Register of Companies on any one of a number of different grounds, including:

- the failure of the company to appoint a registered agent;
- the failure of a company to file documents that it is required to file under the Act;
- the failure of the company to pay its annual fee or a late payment penalty; or
- where the Registrar is satisfied that the company has ceased to carry on business.

However, the Registrar would not usually strike a company off administratively if the Registry had reason to believe that a company is trading or has any property. In such circumstances the Registrar has the power to refer the company to the Financial Services Commission for further investigation.

### ***Procedure for administrative strike off***

Unless the company has failed to pay its annual fee or a late payment penalty, the Registrar must send it a notice warning the company that it will be struck from the Register on a specific date no less than 30 days after the date of the strike off notice and publish a notice of intended strike off in the Gazette.

Note that the Registrar is not required to send an intended strike off notice to a company that has failed to pay its annual fee and will not usually do so.

If the Registrar does not receive a response to the notice, the company will be normally be administratively struck off the Register of Companies.

### ***Effect of administrative strike off***

A company that is administratively struck off the Register is not immediately dissolved. The company therefore retains its legal status but is incapacitated. Whilst a company is struck off the Register, the company may not

- commence legal proceedings,
- carry on any business or deal with its assets, or
- defend any legal proceedings.

The directors and members may not act in any way with respect to the affairs of the company.

There are some limited exceptions:

- application may be made to restore the company to the Register;
- proceedings commenced against the company prior to strike off may be defended; and

- legal proceedings commenced by the company prior to strike off may be continued.

Furthermore, the fact that the company is struck from the Register does not prevent the company incurring liabilities or any creditor from making a claim in the Court against the company.

Finally, the administrative strike off of a company does not affect the liability of the members, directors, officers or agents of the company.

As indicated in an earlier section of this Guide, a company that has been administratively struck from the Register is dissolved 10 years after it was struck off, provided that it has not been restored to the Register in the meantime.

### ***Potential problems arising out of administrative strike off***

There are a number of significant implications that arise out of the effect of administrative strike off on a company.

#### Property of the company

A company that has been struck off cannot deal with its property. In the circumstances, once a company has been struck off, it will not be possible for moneys in its bank account to be accessed whether to pay the debts of the company or to make a distribution to members. The company will not legally be able to sell or pass title to its assets. Any property that a company has when it is dissolved is transferred into the ownership of the Crown (ie the BVI Government), although the property or its value should be returned to the company if it is restored.

If a company that has been struck off has assets, it will be necessary to have the company restored for the company to access them.

#### Continuing liability for fees and penalties

Strike off does not relieve a company from the payment of its annual fees or late payment penalties. If there is a need to restore the company at some point in the future because, for example, it is discovered that the company has assets, all back fees and penalties will have to be paid to the Registrar as well as the restoration fee.

#### Continuing liability of members and directors

As indicated above, any liabilities of the members and directors of a company continue, even though the company has been struck off.

#### Advantages of liquidation

Every member and director of a company who is considering allowing their company to be administratively struck off by, for example, not paying its annual fees should consider very carefully whether it might not be better for the company to be wound up through a liquidation under the Act.

Depending upon the circumstances of the company, liquidation under the Act may have some or more of the following advantages over administrative strike off, despite the additional costs that will be incurred:

- the voluntary liquidator will undertake an investigation aimed at identifying all the property and liabilities of the company so that they can be properly dealt with, which reduces the chance of property being overlooked
- the voluntary liquidator will be able to commence and defend legal proceedings in the company's name, realise and deal with its assets and make payments
- as soon as the liquidation has been completed, the company will be dissolved and from that point on, the liability for fees and penalties ceases
- Any liabilities of the directors or members to the company will cease on the company's dissolution (although its subsequent restoration may reactivate them)

## Restoration to Register

### *Company struck off but not dissolved*

A company that has been administratively struck off the Register, but not dissolved, may be restored to the Registrar by the Registrar on the application of one of the following:

- The company
- A creditor of the company
- A member of the company
- A liquidator of the company

As indicated in the section above, any fees and penalties and outstanding when the company was struck off, the fees and penalties accrued for the years that the company has been struck off and the restoration fee will all have to be paid.

A company that is restored to the Register by the Registrar is treated as if it had never been struck off the Register.

### *Company dissolved*

Once a company has been dissolved it can only be restored to the Register by the Court which must first declare the dissolution of the company to be void.

An application to Court must be made within a 10 year period following the dissolution of the company. After that, a dissolved company cannot be restored to the Register at all.

The Court may restore the company subject to such conditions as it considers just.

## Transitional provisions

There are special transitional provisions that relate to the liquidation and strike off of Companies Act companies (CapCos) that are re-registered under the Act. These are summarised in this section of the Guide. This Guide does not cover the transitional provisions as they relate to former international business companies.



- (a) A Companies Act company (that has not already been re-registered under the Act) that wishes to appoint a voluntary liquidator on after 30 November 2006, must do so in accordance with the provisions of the Act described in this Guide and the liquidation provisions of the Act apply to the liquidation, even though the company has not been re-registered under the Act.
- (b) A company that is struck off the Companies Act for non-payment of its annual licence fee, and is not restored, is dissolved with effect from
  - 1 January 2008, if it was struck off the Companies Register on or before 2 January 1998; or
  - a date 10 years after the date on which it was struck off, if it was struck off on or after 3 January 1998.
- (c) Where a company has been dissolved under the Companies Act, an application may be made to the Court declaring the dissolution void and restoring the company to the Register. Application must be made at any time on or after 30 November 2006, but must be made within 10 years of the date that the company was dissolved under the Companies Act.

Where the Court makes an order restoring the company to the register before 1 January 2008, the company is restored to the Companies Act. Where the order is made on or after 1 January 2008, the company is restored straight to the Act and treated as an automatically re-registered company<sup>3</sup>.

- (d) Application may be made to the Registrar to restore and re-register a CapCo that was struck off the Register of companies maintained under the Companies Act prior to 1 January 2008, provided that the company has not been dissolved.

A restored company is deemed never to have been struck off and, if restored prior to 1 January 2008, is restored under the Companies Act, whereas if it is restored on or after 1 January 2008, it is restored to the Act, and treated as an automatically re-registered company<sup>4</sup>.

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<sup>3</sup> See User Guide No. 6.

<sup>4</sup> See User Guide No. 6.