

FINANCIAL SERVICES COMMISSION

Public Consultation on Reforms to the BVI Business Companies Act, Revised Edition 2020

EXPLANATORY MEMORANDUM

Introduction

The Financial Services Commission (“the Commission”) has published the draft *BVI Business Companies (Amendment) Act, 2024* (“the Bill”) for public consultation. The Bill comprises proposed reforms to the BVI Business Companies Act, 2004 (“the Act”) and contains 68 clauses. This Explanatory Memorandum (EM) provides explanation of the reasons and rationale for the reforms contained in the clauses of the Bill and is designed essentially to give appropriate context to the proposed reforms.

The provisions that deal with or relate to similar subject matters are grouped together in this EM and appropriate commentary and guidance provided as considered necessary. It should be noted that this EM is not designed to be exhaustive and, therefore, it is important that readers review the actual provisions contained in the Bill for completeness. This also requires readers to familiarize themselves with all the amendments previously effected to the Act in order to better understand and appreciate some of the amendments contained in the Bill.

Readers/reviewers are particularly encouraged to focus on the substance of the Bill with the aim of ensuring completeness, including identifying issues where it is considered that practical implementation of identified provisions may pose a challenge. All suggested/proposed changes to the Bill must be properly and clearly explained/justified to enable a proper review thereof and thus ensure that all views are appropriately considered and, where considered necessary, factored into the final draft of the Bill.

Background Information

Section 4 (1) of the Financial Services Commission Act (“FSCA”) outlines the functions of the Commission to include the administration of the registry legislation (subsection (1) (cb)) and “*to make recommendations to the Cabinet on such amendments or revisions to the financial services legislation or such new legislation as the Commission considers necessary or appropriate in developing the financial services industry in the Territory*” (subsection (1) (f)). The registry legislation comprise those enactments that are listed in Part 2 of Schedule 2 of the FSCA and include the BVI Business Companies Act (“the Act”).

In carrying out these functions, the Commission is assisted by the Company Law Review Advisory Committee (CLRAC) established under section 228A (1) of the Act. The functions of the CLRAC (as outlined in section 228A (3)) are:

“(a) to keep this Act, and such other enactments relevant to company law as may be specified by the Commission, under review;

- (b) *to make such recommendations as it considers appropriate to the Commission for changes to this Act and to any other enactments specified by the Commission under paragraph (a); and*
- (c) *to make such recommendations as it considers appropriate to the Commission for the development and reform of company law in the Virgin Islands.”*

The Commission, on a continual basis, reviews the financial services legislation to ensure they remain relevant and up-to-date and, whenever necessary, seek the views of the CLRAC on possible legislative reforms for the CLRAC to advise the Commission appropriately. In this context, the policy that guided the drafting of the Bill was reviewed and approved by the CLRAC after careful consideration. The factors taken into account include practical implementation issues (in the context of VIRRGIN) with respect to existing provisions of the Act, revisions carried out by the FATF in relation to Recommendation 24 affecting companies, obligations arising from reports of the Peer Review Group, recommendations arising from the recent BVI Mutual Evaluation Report (MER), issues raised during the Meet The Regulator forum (MTR) held in October 2023, written representations received by the Commission, issues arising from the Commission’s interaction with industry partners in Hong Kong and London in 2023, and issues identified by the Registrar and the Commission as needing reform. Consideration has also been given to the revamping of VIRRGIN to (amongst other things) centralise the collection and recording of information relative to persons required to provide certain information under various enactments affecting BVI business companies.

A number of the key reforms proposed in the Bill relate to recommendations contained in the MER, some of which are reflective of the revisions carried out in relation to FATF Recommendation 24 (legal persons). These primarily concern nominee shareholders and nominee directors and those who appoint them (“the nominators”), the uniform filing of registers of members with the Registrar (considered as the most viable long term option in the context of Recommendation 24), the collection, keeping and maintaining of certain key information, reduction in the period for appointment of first directors of incorporated companies, obligation of companies to cooperate with competent authorities in the performance of their statutory duties, and ensuring that penalties provided are sufficiently dissuasive and proportionate. Consequential amendments have also been effected.

In relation to penalties, the specific offences and penalties provisions in the Act have been repealed and a more streamlined contraventions regime established to replace the existing Part II of Schedule 1. The proposed Part II creates penalties in the form of fixed penalties, administrative penalties, and offences triable and punishable criminally; provision is also made for late penalty payments in certain cases. In relation to the imposition of administrative penalties, appropriate due process provisions have been created to allow for representations to be made to the Registrar before any penalty is imposed.

Provision has also been made to enable the Commission to require the filing of returns by companies. The nature and types of return will be identified and published in an Order to be made by the Commission; this will be required in instances where the Commission and/or the Registrar require the information for their own statistical purposes and also in compliance with any

obligation under an established international standard. The return may also be required by the Commission and/or the Registrar for their own purposes and in relation to the effective discharge of their functions/duties.

The Bill concludes with transitional provisions as they relate to existing (current) companies and companies that have been struck off and dissolved.

Specific Provisions of the Bill

Clause 1: This is the standard short title of the Bill, coupled with the framework for bringing the Bill into force after it has been enacted.

Clause 2: This relates to the interpretation section of the Act. The Bill requires companies to collect, keep and maintain beneficial ownership information, hence the new definitions of “beneficial owner” and “information” to provide better clarity on persons to whom the subject matter relates and the types of information required.

Clauses 3 – 8, 12, 13 (c), 14 (a), 15, 16 (f), 18-21, 28-32, 34 (c), 37 (g), 39 (c), 40, 42 (b), 43-47, 48 (b), 49 & 50: These clauses repeal the offences and penalties currently identified in the sections to which the clauses relate. These offences and penalties have now been streamlined under Part II of Schedule 1 (clause 67) and, together with other contraventions under the Act, classified as fixed penalties, administrative penalties, and offences triable and punishable criminally.

Clauses 9 & 35: Clause 9 (which repeals and substitutes section 41 of the Act) reintroduces the requirement for every company to keep a register of members, but with the addition of new information that must be provided in the register namely, the names and addresses of nominee shareholders and their nominators, the date of cessation of a person as a nominator and the date on which a nominee shareholder ceased to be a member. These comply with the requirements of FATF Recommendation 24.

Corresponding provisions are created in relation to foreign companies, which must now keep a register of members, a copy of which must be filed with the Registrar containing specified information (see clause 35 repealing and substituting section 187A of the Act).

Clauses 10, 26 & 36: The current regime (section 43A) whereby a company opts to file its register of members for registration by the Registrar is being phased out to ensure compliance with the requirements of Recommendation 24. The proposal, therefore, is for every company to file a copy of its register of members with the Registrar (thus necessitating the repeal and substitution of section 43A of the Act). The filing is to be made either at the time of incorporation of a company or within 14 days from the incorporation date; the same rule would apply in relation to a company that is continued in the Territory, but with the restriction that the continued company must file its register of members at the time of continuation.

Where a company is incorporated, it is prohibited from commencing business unless it first complies with the requirement to file its initial copy of register of members. This prohibition (against commencement of business) will not apply to a company that is continued in the Virgin

Islands, considering that such company typically would have already commenced business before continuing into the Virgin Islands; hence the requirement for it to file its register of members at the time of continuation (without the option of the 14-day period to do so after continuation).

In addition, where a change occurs in relation to a company's register of members, the company has an obligation to file a copy of the register containing the change. The clause also makes provision as regards the Registrar's duty to maintain copies of registers of members filed and to make such copies available to the persons specified in clause 10 (in relation to the revised section 43A) and clause 36 of the Bill (introducing a new section 187B with regard to foreign companies). Clause 36 essentially introduces provisions that correspond to those contained in the revised section 43A, with the requirement for a foreign company to file its register of members at the time of registration.

Corresponding provisions in relation to a register of directors are contained in clause 26 amending section 118B (which is being redesignated as section 118C).

Clauses 11 & 36: Clause 11 introduces 2 new provisions (sections 89A and 89B) on the nomination of nominee shareholders and the rights and duties of such nominee shareholders in relation to incorporated companies. These are designed to formalise the relationship between a nominee shareholder and his or her nominator and align with the obligations identified in clause 9 above.

Corresponding provisions in relation to foreign companies are provided in clause 36 which introduces new sections 187C and 187D.

Clause 13: This clause seeks to effect a correction whereby the current reference in section 93 (6) of the Act to "(the rescission notice)" in the opening paragraph reads as "(the resignation notice)", which is the correct reference.

Clause 14: The amendment of section 94 (6) is a consequential amendment considering the repeal of subsection (5) of the section relating to an offence. The qualified defence contained in subsection (6) is retained in relation to a person eligible to act as a registered agent or continuing to so act after ceasing to be eligible to act as a registered agent.

Clause 16: The amendments contained in this clause are consequential to the new provisions contained in the Bill with respect to the requirements to collect, keep and maintain beneficial ownership information. The essence of the repealed subsections is now provided in the new provisions contained in clauses 17 and 38, respectively introducing new sections 96A and 187F.

Clauses 17 & 38: Clause 17 introduces a new section 96A requiring a company to collect, maintain and keep up to date beneficial ownership information, which should be filed with the Registrar either at the time of incorporation of the company or within 14 days thereof; a similar requirement applies in relation to a company that is continued in the Virgin Islands or a foreign company, except that the permissible 14-day period does not apply (meaning that the continued company or foreign company must file its beneficial ownership information at the time of continuation or registration, as the case may be). The requirement for filing is designed to enable

the Registrar to ensure appropriate verification across the board to confirm that the information is kept up to date. This aspect of the Registrar's new duty may be performed by the Commission as part of its regular inspection process in relation to licensees acting as agents of companies.

These requirements are replicated in clause 38 introducing a new section 187F with respect to foreign companies, however requiring the beneficial ownership information to be filed upon registration.

The rationale for these provisions is to ensure full compliance with the obligations under FATF Recommendation 24 and reflects recommendations contained in the MER.

Clause 22: This clause amends section 113 (1) by reducing the period within which a registered agent must appoint the first director or directors of a company from 6 months to 14 days, if this is not carried out upon incorporation of the company. This complies with a recommendation of the MER which considered the current 6-month period too long and unjustifiable.

Clause 23: This clause amends section 118 (3) and has been necessitated by the requirement for the register of directors to include the names of persons who are appointed as nominee directors and their nominators. This is akin to the similar requirement for the register of members (see clause 9 above).

Clause 24: The amendments in this clause in relation to section 118A are consequential in relation to the requirements (under FATF Recommendation 24) for the recording of the names of nominee directors and their nominators.

Clause 25: This clause introduces a new section 118B that would enable a director of a company or any aggrieved person to make an application to the High Court for an order for the Registrar to rectify a register of directors. This will arise in circumstances where required information is omitted from the register of directors or where there is unreasonable delay in making a relevant entry in the register. A similar provision already exists in section 43 of the Act in relation to the register of members.

Clause 27: This clause merely redesignates section 118C as section 118D purposefully to better streamline the provisions relative to directors, which come before the subject matter of the redesignated section (annual return for unlimited company not authorised to issue shares).

Clause 33: Section 184 of the Act is being amended to provide 2 additional conditions for the continuation of a company outside the Virgin Islands. A company that files a notice of intent to continue outside the Virgin Islands must also include in that notice a declaration that the company does not have any request from a competent authority (defined in section 2 (1) of the Act) to produce documents or provide information which remains unsatisfied; it must also declare that it does not have any pending criminal or civil litigation proceeding against or in relation to it or any of its members, directors, officers or agents. The absence of these conditions has been considered (by the MER) as presenting potential loopholes that a company may exploit to avoid cooperating with competent authorities or evading liability.

Clause 34: This clause amends section 186 of the Act to include amongst the required information a foreign company is to provide (accompanying its application for registration) the address of the foreign company's registered office in the country where it is incorporated. This is a recommendation contained in the MER and is designed essentially for any necessary follow-up action that may be needed in relation to the company in its country of incorporation.

Clause 37: The amendments contained in this clause are generally consequential to the amendments contained in clause 35 (repealing and substituting section 187A with regard to the register of members concerning foreign companies).

Clause 39: This clause amends section 188 (3) of the Act (in relation to foreign companies) to align it more with section 21 in circumstances where a notice of change relates to the corporate name of a foreign company. Thus, where a notice of change in the corporate name of the foreign company is filed with the Registrar, it must be accompanied by a resolution of the directors of the company confirming the name change. The Registrar will then register the name change and issue a certificate of name change.

Clause 41: This clause amends section 189A of the Act (resignation as registered agent of a foreign company) to align it more with section 93 relating to the resignation of a person as registered agent of an incorporated company. Consequently, a person wishing to resign as registered agent of a foreign company must give not less than 60 days' written notice (up from the current 30 days). The requirements of section 93 (6), (7) and (8) have been modified and transposed into section 189A as subsections (5), (6) and (7).

Clause 42: The amendment in this clause to section 189B (7) has been necessitated by the repeal of subsection (6).

Clause 48: The current period of 5 days for serving and filing a copy of a sealed order of the Court terminating a liquidation has been considered to be too ambitious. The 5-days' period is reckoned from the date of making of the order. It is important to take account of when the order is made and when it may be perfected and issued to enable it to be properly served and filed on time. It is therefore proposed to enlarge the period to 30 days.

Clause 51: This clause amends section 211A of the Act to avoid an application for the restoration of a struck off and dissolved company (that on the date of dissolution was insolvent) being muddled with the requirement for a separate application under the Insolvency Act to appoint an eligible insolvency practitioner as liquidator (see sections 159, 162 and 163 of the Insolvency Act).

Clauses 52 - 56: Clauses 52 to 56 respectively amend the Act in sections 213 (striking company's name off the register), 216 (dissolution of company that is struck off the register), 217 (restoration of a company by the Registrar), 218 (restoration of a company by the Court) and 218A (Court's power in hearing for an application for restoration). The amendments to sections 217 and 218A require (amongst other things) a registered agent to make a declaration that a company to be restored has updated its records pursuant to section 213 (3B). This requirement is considered to present a practical difficulty in circumstances where a new registered agent is retained and does

not have access to the company's records. An alternative is created in the form of an undertaking being made by the registered agent to update the company's records within 14 days of the company's restoration to the register. A failure to keep the undertaking within the stipulated period will result in the Registrar striking the name of the company off the register, hence the further amendment to section 213 (1) to provide for this.

Furthermore, 2 new conditions for restoration have been proposed: these are that the company to be restored must file a copy of its register of members and a copy of its register of directors (flowing from the MER). However, this obligation will not apply if it can be shown that as at the date of striking off and dissolution of the company, it had filed copies of those registers (clauses 54 (b) and 56 (b)).

Section 218 (2) lists the persons that can apply to restore a struck off and dissolved company. The amendments to section 218 make it clear (as was always the original intent and policy position) that the listed persons do not include current or former registered agents of the company or any other person who is or was an agent of, or in an agency relationship with, the company. To permit otherwise would create a loophole whereby defaulting companies may rely on their agents to avoid penalties or allow agents to rectify their own shortcomings in relation to the struck off and dissolved companies.

Currently, section 216 ties a company's date of dissolution to the date its striking off from the register is published in the *Gazette* under section 213. This has presented some challenges (in VIRRGIN) whereby the struck-off date may not align with the date of publication in the *Gazette*. In order to ensure certainty, section 216 (clause 53) has been amended to stipulate a company's dissolution date to be its date of striking off from the register. The strike-off date will be specified in the notice to be sent to the company under section 213 (3). In this respect, section 213 (6) is amended to specifically provide that the striking of the name of a company from the register takes effect from the date specified in the notice sent to the company. Section 213 is further amended to extend the grounds for striking the name of a company from the register to include a failure to pay a fixed penalty, administrative penalty or other penalty that may be applicable, when it is due. Consequential amendments are also made to the section.

Clause 57: This clause amends section 218B (1) to enlarge the period within which a sealed order of the Court to restore a company must be filed. There have been noted practical challenges experienced in filing a sealed order within the current stipulated 30-day period. Consequently, this clause proposes expanding the current period to 60 days. The clause also amends section 218B (1A) to allow a penalty to be assigned where a sealed order is not filed within the specified period, as opposed to invalidating the sealed order.

Clauses 58 & 59: Clause 58 introduces a new section 228A placing a duty on companies to cooperate with the Registrar, a competent authority and law enforcement agency in discharging their functions; this requirement also extends to an inspection that is being conducted under Part XIII of the Act. This reform is as a result of a recommendation contained in the MER. The introduction of this new section has resulted in redesignating the existing section 228A as section 228B (clause 59).

Clause 60: This clause amends section 230 of the Act principally for 2 reasons: the first, is to accommodate the Government’s policy change on the issue of beneficial ownership information and who may have access to such information; the second, is to facilitate filing within the Commission’s VIRRGIN electronic system of information required under other enactments other than the Act (such as information required under the BOSSs legislation).

With respect to the first aspect, clause 60 amends section 230 to delete the words “Register of Persons with Significant Control” and substitute the words “Register of Beneficial Ownership”. This is simply a choice of term and does not affect the substance of the requirements that may be contained in Regulations made pursuant to section 230, subsection (3A) in particular. There is now also a policy shift whereby information relative to beneficial ownership would be accessible only to persons that can demonstrate that they have a legitimate interest to such information. The amendments permit the elements of what constitute a legitimate interest to be defined in the Regulations.

The second aspect of the amendment contained in clause 60 essentially empowers the Registrar to maintain other registers for the purposes of, or incorporate into existing registers, information that may be required under other enactments. The Registrar may also establish and maintain any other Register considered feasible for purposes of facilitating the administration of the Act.

Clause 61: Section 235 of the Act empowers the Registrar to issue a certificate of good standing certifying that a company is in good standing. This is, however, premised on the company satisfying certain conditions (as outlined in the section). This clause, therefore, amends section 235 to include 2 new conditions that must be satisfied by a company to be issued a certificate of good standing. These are that the Registrar must be satisfied that the company seeking a certificate of good standing has filed a copy of its register of members as well as the requisite beneficial ownership information relative to the company. These new requirements are a consequence of the MER recommendations relating to the filing of copies of registers of directors and providing information on beneficial ownership.

Clause 62: This clause amends section 240 of the Act to make provisions similar to those contained in section 240A (4) and (5) (as amended in clause 63 of the Bill), considering that section 240 is a regulation-making provision. This amendment is necessary to provide a clear framework for contraventions under the Regulations which may be imposed and punishable.

Clause 63: This clause amends section 240A to essentially increase the monetary penalty currently provided under the section in relation to contraventions committed under the Regulations; the aim is to make any prescribed penalty dissuasive (MER recommendations on dissuasiveness and proportionality of penalties).

Clause 64: This clause introduces a new section 242A to enable the Commission, by way of an Order published in the *Gazette* and on the Commission’s website, to require companies to prepare and submit returns on matters relating to their business or affairs. The rationale and essence of the section are outlined in this EM in the penultimate paragraph of the heading “**Background Information**”. Any information provided in a return must be accurate and complete.

Clause 65: This clause repeals and substitutes section 243 of the Act relating to offences and penalties by primarily grouping all contraventions with their corresponding penalties under Part II of Schedule 1 of the Act. This makes for easier reference and enforcement. In addition, provision is made penalising (by the imposition of an administrative penalty) the filing of documents or provision of information which is false or misleading. The penalties applicable for contraventions are grouped into 3 categories – fixed, administrative, and criminal (as in offences and penalties) and are designed to be dissuasive and proportionate in compliance with the recommendation on the subject contained in the MER.

The fixed penalties essentially relate to breaches that are fact-based and non-contentious. It is a case of a person either complying with a requirement or failing to so comply which can be easily detected/discerned in VIRRGIN or otherwise established as factual.

The administrative penalties apply to contraventions which may have reasonable explanations to them (depending on the circumstances of individual contraventions) and for which the exercise of discretion may be considered reasonable and appropriate.

The offences punishable criminally relate to contraventions that require proof or which may be contentious and thus require investigation for a decision on prosecution.

This approach enables the creation of a contraventions regime that is both dissuasive and proportionate. The egregious nature of a contravention is taken into account as well as the risk that may be posed by a failure of compliance.

Clause 66: This clause introduces a new section 243A which sets out the procedure to be adopted in imposing administrative penalties.

Clause 67: This clause amends Part II of Schedule 1 of the Act by providing a table of contraventions and corresponding penalties that are to apply (see the explanatory note to clause 65 above for details).

Clause 68: This clause amends Part VIIA of Schedule 2 of the Act and introduces a new Part VIIB under that Schedule. It amends paragraph 60E of Part VIIA by removing the cross reference to paragraph 60C and substituting the cross reference of paragraph 60D. The cross reference to “paragraph 60C” within paragraph 60E is a typographical/drafting error which the Bill now seeks to rectify. A good reading of the cross reference will, in any case, establish that the actual cross reference intended was paragraph 60D.

Furthermore, clause 68 amends paragraph 60G (2) of Part VIIA of Schedule 2 to remove the reference to “creditor”; it is generally agreed that the creditor should not suffer the liability of the penalty outlined in paragraph 60G (2).

The new Part VIIB of Schedule 2 being introduced outlines transitional provisions in relation to the requirements for filing a register of members and beneficial ownership information. The transitional provisions apply to existing companies and existing struck off and dissolved companies (both terms defined in Part VIIB). The transitional period for an existing company to

file its register of members and beneficial ownership information is 6 months from the date the Bill (after enactment) is brought into force (the effective date). An existing struck off and dissolved company that seeks to be restored to the register shall not be so restored until it has filed its register of members and beneficial ownership information. In a situation where an existing company had opted to file its register of members prior to the effective date, it is not required to file a register of members under this Part of Schedule 2. However, if the register filed did not contain all the required information outlined in section 41 (2) of the Act, then the company is obligated to file a copy of its register of members containing all the required information.

If an existing struck off and dissolved company is restored to the register with the caveat for it to file its register of members and/or beneficial ownership and fails to do so within the prescribed period, it is liable to be struck off again, in which case it will be deemed never to have been restored to the register. If such a company subsequently applies to be restored to the register, it will be liable to a penalty of \$2,500.

All newly (as of the effective date) incorporated, registered or continued companies will comply with the obligations of filing their register of members and beneficial ownership information as provided in the amendments – that is, effecting the filing at the time of incorporation, registration or continuation or within a given period (14 days after incorporation).

---END---