EXPLANATORY MEMORANDUM ON THE DRAFT:

(1) BVI BUSINESS COMPANIES (AMENDMENT) ACT, 2022

(2) BVI BUSINESS COMPANIES (AMENDMENT) REGULATIONS, 2022

(3) BVI BUSINESS COMPANIES (FINANCIAL RETURN) ORDER, 2022

Date: ***1st June, 2022***

Introduction

The above initial drafts constitute reforms to the BVIBC regime and are published for consultation. Interested persons are kindly requested to consider the draft provisions contained in the attached measures and provide opinions/comments on any aspects that they consider might need improvement. After reviewing the opinions/comments received, the next step will be the finalization of the legislation, taking into account all the opinions/comments received.

2. This Explanatory Memorandum assists in providing context to some of the provisions in order to enable readers of the attached measures to have a better appreciation of the reason for the approach taken in each case. With respect to the BVI Business Companies (Amendment) Act, 2022 ("the Bill"), the cross references to sections of the BVI Business Companies Act ("the BVIBCA"/ "the Act") (including clauses within the Bill) are highlighted merely to assist with any potential changes to the Bill which may affect the sections cross-referenced. When the Bill is ultimately finalised to move to the approval stages, the highlights will be removed.

3. In essence, the amendments to the BVIBCA seek to address the policy decisions of the Company Law Review Advisory Committee ("CLRAC"), following public consultation in 2021 on the broader policy issues. While every effort has been made to rationalise and, where considered appropriate, incorporate opinions and comments received from the earlier public consultation, the Bill concentrates on the core policy issues – such as the need to reform the struck off company regime, abolishing the bearer shares regime, and providing for the filing of financial returns. This has necessitated consequential amendments, including the creation of relevant transitional measures to deal with existing circumstances/statuses.

4. The CLRAC has also independently reviewed the BVIBCA to effect amendments it considered relevant in enhancing the Act and allowing some flexibility where needed while closing loopholes at the same time. Issues regarding voluntary liquidations, continuation of companies outside the Virgin Islands and register of directors were not previously consulted on but have been considered relevant in the context of current international standards and obligations. Appropriate amendments have accordingly been made to these regimes.

Details of Select Provisions

BVI Business Companies (Amendment) Act, 2022

Clauses 3 – 6

5. The CLRAC had considered the issue of a company with a name ending as provided in section 17 (1) of the BVIBCA engaging in charitable work instead of seeking to be incorporated under section 17A. Following extensive discussions, the CLRAC agreed to adopt an approach that would allow a company with a name ending as provided in section 17 (1) to engage in pure commercial activity, pure charitable activity or a hybrid of both. An entity wishing to engage in pure commercial activity need not have approval to use the name ending in section 17 (1). However, an entity using a name ending in section 17 (1) that wishes to engage in any charitable or non-commercial purpose must first secure the approval of the Registrar.

6. This has therefore necessitated amendments to section 17, while at the same time amending the current section 17A and redesignating it as section 17B. A new section 17A has now been inserted to address the approach advised by the CLRAC. All the provisions in sections 17A and 17B have been streamlined to ensure a good degree of consistency in approach.

Clauses 7 – 13

7. The Commission's Board had quite some time ago taken the decision that bearer shares as a regime should be abolished. This was also the consensus that emerged from the public consultation on the proposed reforms to the BVIBCA.

8. These clauses seek to do just that, with section 38 of the BVIBCA being repealed and replaced to provide the necessary prohibition against the issue of bearer shares, converting registered shares to bearer shares or exchanging registered shares for bearer shares. In this regard, a new Part VIIA to Schedule 2 of the BVIBCA has been created to provide necessary transitional provisions relative to "existing bearer shares" (defined). All other provisions in the BVIBCA that reference bearer shares have been appropriately amended (see clause 10, for example). Clause 13 amends section 89 of the Act (which, amongst other things, deals with the issue of service of notice to members holding bearer shares) to restrict the service of notice to ordinary members holding shares in a company.

9. With respect to "existing bearer shares", the aim is that the commencement date of the Bill (after enactment) should be different from the "effective date" to allow for time for bearer share holders to either redeem their bearer shares or convert them to registered shares. After the "effective date", all bearer shares existing then will be automatically converted to registered shares (by operation of law) to be held by the company (that issued them) on trust for the owner of the shares. The goal is to prevent a scenario that will allow for converted bearer shares to continue being treated as bearer shares rather than as registered shares and consequently permitting their redemption or transfer as bearer shares.

Clauses 14-16, 22-24 & 34-41 – struck off companies, registered office, registered agents & restoration

10. These clauses relate to amendments affecting registered offices, registered agents, struck off companies and restoration of struck off companies. They essentially comply with the recommendations made by the CLRAC following the earlier public consultation on the Policy Document – providing specifically for the reduction of the period of notice of intent to resign as registered agent from 90 days to 60 days and making it a requirement that a registered agent must resign if its business relationship with a client is terminated on AML/CFT grounds. In addition and for the purposes of the retention of records and underlying documentation (including AML/CFT purposes), provision is made that the registered office of a company shall continue to be that which the company had at the time of termination of any business relationship or completion of a one-off transaction.

11. Furthermore, where a notice of intent to resign is given and it is not rescinded, then the resignation automatically becomes effective. This effectively means that the Registry will be forgoing filing fees for the actual resignation. It is recognised that the major problem in this regard is that most registered agents seldom file for actual resignation, a design to avoid paying the requisite fee. Continuing that regime will not advance any purpose. So, other mechanisms have been employed to recoup the lost fees – Schedule 1 of the BVIBCA will be amended in due course (after the Bill is finalised) to introduce new fees and, in some cases, revise current fees).

12. Essentially, the following policies with respect to struck off companies have been adopted and accordingly crafted into the Bill:

(a) while the company struck off regime will continue to be in place, it has been modified such that the striking off of a company from the Register will be followed automatically by a dissolution of the company (see clause 38 repealing and substituting section 216 of the Act);

(b) consequently, the period a company may remain dissolved after striking off, for purposes of restoration to the Register, has been pegged at 5 years (this is a reduction from 7 years as currently applies with regard to the struck off period);

(c) a dissolved company may be restored to the Register by the Registrar if the company meets certain conditions (see clause 39 amending section 217 of the Act by repealing and substituting subsection (2) thereof);

(d) a dissolved company wishing to be restored to the Register that does not satisfy the requirements to be restored by the Registrar may apply to the Court for restoration if it meets certain conditions (see clause 40 repealing and substituting section 218 of the Act); the same period of 5 years for restoration applies;

(e) however, before a company is struck off from the Register and subsequently dissolved, the Registrar is required to send the company a notice indicating that, unless the company shows cause to the contrary within a period (to be specified in the notice) not exceeding 90 days, it is liable to be struck off from the Register.

12. Regarding existing companies (the legacy companies), provision is made to allow for the automatic resignation of a registered agent if a struck off company is not restored within 6 months after the coming into force of the Bill (after enactment). The company will then be automatically dissolved and can only be restored on a court application after satisfying the conditions stated in the Bill. For those legacy companies that fail to be restored within the 6-month period, a penalty will be applied. This approach will ultimately assist the process of phasing out the struck off company regime as currently exists and appropriately transition to the new regime (of strike off and automatic dissolution). The transitional provisions contained in the Bill should be examined as regards further required steps in relation to existing struck off and dissolved companies.

Clause 17 – Filing of Annual Financial Returns

13. A new section 98A has been inserted to cater for the CLRAC decision (following the earlier public consultation) that companies should be required to maintain annual financial statements (referred to as "annual returns") which must be filed with and retained by registered agents. In turn, registered agents are obligated to notify the Registrar of any failure by a company (for which they act as agent) to file its annual return by providing the name of the company concerned, the relevant year to which the annual return relates, and the last time the company filed its annual return. The annual return is required to be filed within a specified period (6 months is proposed) following the end of year to which the annual return relates.

14. The annual return is to contain such information and be in such form as the Commission prescribes through an Order to be published in the *Gazette*. A copy of the relevant draft Order is also circulated for public consultation. It should be noted that the Order has been drafted solely to address a recommendation of the Peer Review Group (PRG) with respect to its assessment of the Virgin Islands.

Clause 18 – Alternate directors

15. The issue has arisen as to whether the register of directors includes alternate directors, on the basis of the current language of section 118. The requirements in relation to the register cover every director, however named. An alternate director assumes all the powers of the director appointing him or her. In that context, therefore, the amendment to section 118 makes it clear that the register of directors includes persons acting in the capacity of alternate directors, irrespective of how transient the appointment may be.

Clause 19 – Register of directors

16. In dealing with this particular clause, the CLRAC considered 2 options. The first retains the existing policy where access to the register of directors is restricted, but provides that when a dissolved company is restored to the register in a liquidation status or with the appointment of a receiver, it is not required to file for registration a copy of its register of directors. The rationale is that the company is not being restored in an active status to engage in business.

17. The second option makes provision to ensure that the register of directors is publicly accessible (upon payment of a fee as will be outlined in Schedule 1 of the Act). This accords with

current established international standards (under the FAT Recommendations). The CLRAC formed the view that this subject has been debated time and time again and the reality is that the Virgin Islands can no longer hold on to the existing regime just to end up having the Territory adversely assessed in the forthcoming CFATF mutual evaluation. Clause 19 therefore amends section 118B of the Act accordingly.

Clause 21 – Continuation outside the Virgin Islands

18. This clause amends section 184. The aim is to ensure that while a company is free to continue outside the Virgin Islands, it should have an obligation to provide advance notice of such intention to its members and creditors. In addition, a notice of intention to continue outside the Virgin Islands should be published in the *Gazette* and on the company's website (if any). These requirements provide appropriate notice to persons who may, for any reason, object to the continuation and accordingly advise themselves of any step they may wish to pursue.

19. It is proposed that a company wishing to continue outside the Virgin Islands should make that intention known for a period of at least 14 days before the continuation and a notice of the intention must be filed with the Registrar; this is in addition to satisfying the Registrar that the requirements for publication and notifying members and creditors have been complied with. A notice of intention to continue outside the Virgin Islands may also be rescinded by filing a notice of recission.

Clauses 27 – 33 & 2 – Voluntary liquidators

20. The Commission considered that we might try to deal with the long running issue as to whether voluntary liquidators should be persons resident in the Territory. The issue is vexed but needs addressing. Section 150 of the Act is therefore repealed. Section 2 has been amended to define a "voluntary liquidator" (hitherto under section 150) to be a person who is either physically resident in the Territory for a defined period in any particular year or is licensed as an insolvency practitioner. This has accordingly necessitated amendments to other relevant sections of the Act as provided in clauses 27 to 33 of the Bill. The relevant qualifications a voluntary liquidator must have are prescribed in the BVI Business Companies (Amendment) Regulations, 2022. In a similar vein, the records required to be maintained by a voluntary liquidator are prescribed in the same amendment Regulations.

21. This revised approach has been taken on the basis of current experience whereby voluntary liquidators are often not resident in the Virgin Islands and do not maintain records in relation to liquidated companies. These issues come to the fore mostly when a request for mutual legal assistance is received and it has been identified as a loophole in the Territory's information exchange regime. By requiring all voluntary liquidators to be resident in the Virgin Islands, the Commission will have a better grip on records required to be maintained by such voluntary liquidators (as approval of appointments will be premised on certain conditions, including obtaining and securing records to file with relevant registered agents).

22. A further amendment to section 207A (clause 33) proposes that the Registrar be one of the persons to be served a copy of an application made to the Court to terminate a liquidation following

the appointment of a voluntary liquidator. It is considered appropriate that the Registrar should be aware of any Order of the Court terminating a voluntary liquidation.

23. Clause 33 also seeks to provide better clarity to section 207A (1) with regard to the period when the Court may make an order terminating a liquidation.

Clause 43

24. This clause repeals section 219, which cannot remain with the amendments proposed in the Bill.

Clause 44 – Framework for a publicly accessible register

25. The essence of this clause is to create an enabling framework for regulations to provide for a publicly accessible register whenever the decision is made for such regulations to be prepared.

Clause 45 – Certificate of good standing

26. This clause amends section 235 to add to the list of disqualifications for obtaining a certificate of good standing. The addition is that a failure to file an annual financial return will disentitle a company from receiving a certificate of good standing.

Clauses 46 & 47 – Schedules 1 and 2

27. These clauses respectively amend Schedule 1 and Schedule 2 of the BVIBCA.

BVIBC (Amendment) Regulations, 2022

28. The amendments to the BVIBCA have necessitated amendments to the Regulations. The Regulations streamline the references to 7 years by revising them to 5 years. In addition, the Regulations identify the requisite qualifications a person must have to be appointed as a voluntary liquidator (the disqualifications are already provided in the Regulations).

29. Furthermore, a new regulation 22A is introduced in clause 7 to identify the types of record a voluntary liquidator must collect and transmit to the registered agent of the company being liquidated. The registered agent is required to keep and maintain such records for a period of at least 5 years (the period is to be reckoned from the date of receipt of the records).

30. A new condition has been added to the list for a company to be able to secure a certificate of good standing. It is the requirement relative to the filing by a company of its annual financial return.

BVI Business Companies (Financial Return) Order, 2022

31. The need for this draft Order is evident in clause 17 of the Bill introducing a new section 98A. It is a necessary requirement in relation to the Territory's obligations under the Global Forum rules. It is equally relevant for full compliance with AML/CFT obligations.