

Recent changes to BVI legislation - limited disclosure of control and ownership

22 MARCH 2016

CATEGORY:
ARTICLE

The BVI's response to the UK government's call to the Overseas Territories for greater transparency in beneficial ownership has been incorporated in recent changes to BVI legislation. These are designed to achieve compliance with the Financial Action Task Force's Recommendations (as revised)¹ and are intended to ensure that the identities of the ultimate beneficial owners and directors of BVI companies can be ascertained by the BVI regulator and other competent authorities in the BVI. Most of these changes came into force on 1 January 2016.

First, amendments to the BVI Business Companies Act, 2004 ('BCA') provide for the filing for registration of copies of a company's register of members and register of directors by the Registrar of Corporate Affairs ('Registrar'). Under the previous s.231 BCA (now repealed), filing of both the register of members and the register of directors was optional. Under the new s.43A BCA, only the filing of the register of members is optional. If it is filed, it is obtainable by way of a search, making it publically available².

Filing of the register of directors however, is mandatory under s.118B BCA, which comes into force on 1 April 2016. From then, a company is required to file for registration by the Registrar copies of its register of directors. If there are any changes to the register of directors, the company must file an amended register within 30 days of the change. The register of directors as filed is not a public document. It can only be made available pursuant to a Court order, or on the written request of a competent authority³ acting in the exercise of its powers as a regulator of financial services business, tax administrator or law enforcement agency, or pursuant to its obligations to a mutual legal assistance request received or made or to be made by it. The only other people who can access the filed register of directors are the company, its registered agent and/or any other person authorised in writing by the company.

In addition, the new s.98 BCA now imposes an explicit obligation on the registered agent of a company, upon request from the Financial Services Commission ('FSC') or other competent authority in the BVI, to request and obtain the records and underlying documentation from the company (including the registers of members and directors); failure to comply is an offence, which carries a fine of \$50,000.

There is a transition period until 31 March 2017 (which can be extended by the Registrar by 6 months upon request subject to certain conditions) for all existing companies to comply with the requirements of s.118B BCA. Failure to comply with the deadline or any extension granted results in a penalty being payable.

Second, there have been significant changes to the Anti-Money Laundering and Terrorist Financing Code of Practice, 2008 and the Anti-Money Laundering Regulations, 2008 (the 'AML legislation') one of which is the incorporation of a definition of a 'beneficial owner' as a natural person.

In addition, there have been changes relating to the beneficial ownership information a registered agent is required to obtain, verify and hold. Copies of all such identification data and documentation must be provided to the BVI Financial Investigation Agency, the FSC or other competent authority in the BVI without delay, upon request and in any event within 48 hours [4]. This is regardless of whether this information is held by the registered agent or by a third party (previously known as eligible introducers).

Although the general rule is that a BVI registered agent is responsible for obtaining and keeping the beneficial ownership information for BVI companies, under the eligible introducer regime, a BVI registered agent was able to rely on an eligible introducer to obtain, verify and keep records of the identity of a client. Now, following recent changes to the AML legislation, beneficial ownership information is to be held and kept up to date by registered agents, but third parties may continue to hold detailed customer due diligence materials under certain conditions.

If the registered agent is satisfied that the third party has a business relationship with the customer and has taken steps to comply with AML legislation or their equivalent in the third party's jurisdiction, the registered agent is exempt from the requirement to hold the beneficial ownership documentation. However, there must be a written agreement between the registered agent and the third party, containing an undertaking on the part of the third party to provide copies of all identification data and documentation whenever required by the BVI Financial Investigation Agency, the FSC or other competent authority in the BVI. In addition, the third party must have a system for monitoring any change in the level of risk of the customer and must periodically review and update customer due diligence [5]. The registered agent must also periodically test its business relationship with the third party by carrying out a review of the third party's customer due diligence.

Even though the BVI has made various changes to its companies' and AML legislation, the details of directors and shareholders (past, present and future) of BVI companies will not become publically available as a result of those changes (unless, in the case of a register of members a company elects to file it with the Registrar). In the light of the recent requirement for UK companies to keep a 'Register of People with Significant Control', the BVI remains a desirable jurisdiction for the incorporation of companies.

[1] The Financial Action Task Force ('FATF') Recommendations set out an international standard of comprehensive and consistent framework of measures which countries should implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction. – see www.fatf-gafi.org

[2] 'This has not changed from s43A BCA's previous incarnation as s231 BCA.

[3] 'competent authority' for the purposes of s118B of the BCA, means a competent authority or central authority so designated, recognised or appointed under an enactment – s118B(10)(b)(i) BCA.

[4] From 1 January 2018, such a request must be responded to within 24 hours.

[5] every 4 years for a low-risk customer and every year for a high-risk customer.

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