

BVI Company Incorporation And Partnership Formation

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| Incorporating a BVI company

Companies are incorporated in the British Virgin Islands (**BVI**) under the BVI Business Companies Act, 2004 (the **Act**) by the filing of Memorandum and Articles of Association with the Registrar of Corporate Affairs. This filing is made by the first registered agent of the Company (the **Registered Agent**) which each BVI company must have and who must be located in the BVI.

The incorporation is effective from the date of filing the Memorandum and Articles of Association with the Registrar of Corporate Affairs. It generally then takes the Registrar of Corporate Affairs between three to five days to allocate a company number to the company, issue a Certificate of Incorporation and return stamped Memorandum and Articles of Association via its electronic filing system, VIRRGIN.

There is no BVI law concept of subscriber shares and as such, unlike the position under English law, at the time of incorporation of the company by the Registered Agent there will be no subscriber shares in issue. Similarly, unlike the position under the English law, a BVI company on incorporation does not have any first directors.

The Registered Agent will appoint the company's first director(s) and company secretary, if one is required, although there is no legal requirement for a BVI company to have a company secretary. A BVI company must have at least one director at all times following the appointment of its first director(s), and it can have either individual or corporate directors. There is also no residency requirement for directors.

Once directors have been appointed, they will be able issue shares to the shareholders.

There is no concept of authorised share capital as a matter of BVI law (the only similar limitation is that the memorandum of the company will provide that it is only authorised to issue

a certain number of shares, although this may be an unlimited number), and so there are no minimum share capital requirements. A company can be authorised to issue shares with or without par value. Shares issued with par value can be issued in any currency.

The consideration paid for the shares issued may be in any form, including money, a promissory note, or other written obligation to contribute money or property, real property or personal property, services rendered or a contract for future services. A relevant BVI law consideration for the issue of shares is that where a company is authorised to issue shares with par value, the consideration paid must be at least equal to the par value of the shares. Where a share is issued for consideration with a value less than its par value, the person to whom the share is issued is liable to pay the difference between the issue price and the par value to the company.

Choice of Appropriate Form of Entity

The Act provides that a BVI company can be incorporated as either a company limited by shares (as is most usual); a company limited by guarantee which is not authorised to issue shares; a company limited by guarantee which is authorised to issue shares; an unlimited company which is not authorised to issue shares; or an unlimited company which is authorised to issue shares.

Restricted Purposes Company

A BVI company could be incorporated as a "*restricted purposes company*". The Act requires that the Memorandum of Association of a restricted purposes company contain certain specific statements, including a statement that the company is a restricted purposes company and a statement of the purposes of the company i.e. the specific objects of the company and the activities that the company is to engage in. Significantly, any action by the directors outside of the scope of these objects and activities provided for in the company's Memorandum of Association will be *ultra vires*.

Having been incorporated, a restricted purposes company is not able to amend its Memorandum of Association to delete or modify the statement that it is a restricted purposes company and any resolution of the members or directors of a company purporting to do this is void and of no effect. However, a restricted purposes company may amend its Memorandum of Association to modify its purposes unless it is specifically prohibited from doing so in its Memorandum of Association.

Segregated Portfolio Companies

On prior application to the British Virgin Islands Financial Services Commission (the **FSC**), a company may be granted approval to be incorporated or registered (if already incorporated) as a segregated portfolio company (**SPC**). The SPC must be a company limited by shares.

Prior to October 2018, only open-ended investment funds and insurance companies could be incorporated or registered as SPCs. With the coming in to force of the BVI Business Companies (Amendment) Act, 2018, however, the classes of companies that may be SPCs has been extended to include all companies with the exception of certain those which are either:

- licensed to undertake investment business under the Securities and Investment Business Act, 2010 (i.e. broker dealers, investment managers, investment advisors etc.);
- licensed to act as an insurance manager or insurance intermediary under the Insurance Act 2008; or
- licensed to carry on any activity regulated under the Banks and Trust Companies Act, 1990, Company Management Act, 1990 or Financing and Money Services Act, 2009.

An SPC is a single legal entity: each segregated portfolio is a separate part of this legal entity, and does not have its own legal personality. Assets and liabilities of an SPC are either (a) segregated portfolio assets and liabilities (i.e. belonging to a specific segregated portfolio); or (b) general assets and liabilities of the company (i.e. not comprised in any of the segregated portfolios). Each segregated portfolio is created with the purpose of legally separating the assets and liabilities held by that portfolio from the other assets and liabilities of other portfolios of the SPC and from the general assets of the SPC. Directors of an SPC are under a duty to establish and maintain procedures for keeping the assets of a segregated portfolio separate from the general assets of the company and from the assets of the other segregated portfolios.

Other BVI vehicles commonly used

Limited Partnerships

A BVI entity can also be formed as a limited partnership pursuant to the Limited Partnership Act, 2017 (the **Limited Partnership Act**). While BVI limited partnerships existed prior to the Limited Partnership Act coming into force, being previously formed under the provisions of the Partnership Act 1996, the Limited Partnership Act thoroughly overhauled and modernised the law in relation to limited partnerships in the BVI. The Limited Partnership Act in particular sought to make BVI limited partnerships far more suited to being used as funds or other types of investment vehicle. As a consequence, while some aspects of current BVI partnership legislation and its concepts are similar to those in other common law jurisdictions, other aspects are more novel and likely to be of particular value to the investment funds industry.

A BVI limited partnership under the Limited Partnership Act may, at the option of its initial general partner, be formed either with or without a separate legal personality from that of its constituent partners. Each limited partnership is composed of at least one general partner (who has unlimited liability for the debts of the partnership) and at least one limited partner (whose

liability is limited to the capital he has contributed to the partnership). Limited partners cannot be involved in the management of the partnership or else they lose the benefit of limited liability. However, the Limited Partnership Act includes an extensive list of activities and positions that limited partners may undertake or hold in relation to a limited partnership and be deemed not to be participating in the business of the limited partnership.

A limited partnership is formed under the Limited Partnership Act by filing with the Registrar of Limited Partnerships an application for registration in the prescribed form which sets out the basic particulars of the limited partnership (name, registered office address, name of registered agent and the name and address of the initial general partner(s)).

A limited partnership formed under the Limited Partnership Act must have a limited partnership agreement which sets out, amongst other things, the provisions for the internal management of the partnership and its economic terms. However, if the relevant parties wish to form the limited partnership in advance of any written limited partnership agreement being finalised, the Limited Partnership Act provides that in the absence of a written limited partnership agreement a "default" statutory model agreement will be deemed adopted at formation. This model agreement can then be excluded and replaced by the actual limited partnership agreement once finalised and signed. While there must be a limited partnership agreement (whether separately written or by deemed adoption of the statutory model), written limited partnership agreements are not filed on the public record, but are held confidentially by the partnership's registered agent.

General Partnerships

BVI law also recognises traditional general partnerships, utilising the same basic concepts as English law in respect of general partnerships – most of which are repeated in the Partnership Act 1996. This means that the partnership does not have a separate legal personality from that of its constituent partners and all partners have unlimited liability for the debts of the partnership.

No formal steps or public filings are required to form a partnership under BVI law, but it would be usual for the parties to enter into a partnership agreement to regulate the conduct of the partnership. BVI law does not have a concept of limited liability partnerships with a corporate identity distinct from that of the partners.

Due diligence

The registered agent responsible for the incorporation of a BVI company (or registration of a limited partnership) is required by statute to obtain certain "know-your-client" information about the directors, shareholders or partners as appropriate. This obligation on registered agents to establish the identity of those persons wishing to form and manage the company or

other entity is required to ensure that BVI entities are not being used for money laundering or other criminal purposes.

When setting up a BVI entity, the participants should therefore be ready to provide certified copies of their photo ID and proof of address, together with professional reference letters. If they are corporate, nominee or trustee entities, then this information will be required of all participants up the chain to the ultimate individual beneficial owners.

This information is retained for compliance purposes and is not put on the public record. However, registered agents may be required to disclose information to authorities in connection with a specific investigation of wrongdoing in respect of a company.

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