

# Proposed enhancements to the BVI Business Companies Act, 2004 – Potential impact on secured financings

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To maintain the British Virgin Islands' position as a leading international finance centre, the British Virgin Islands Financial Services Commission (FSC) has undertaken a review of the BVI Business Companies Act, 2004 (the BCA) which has been in operation for more than six years. A draft of the BVI Business Companies (Amendment) Act 2011 and a draft BVI Companies Regulations 2011 were published for public consultation earlier this year. The proposals will not change the fundamental features of the Act. The intention is to update and enhance the BCA with the benefit of the FSC and the private sector's experience since its inception.

This article highlights some of the proposed changes that may be of interest to lenders in secured financing transactions involving BVI Business Companies.

### Enhanced registration of charge procedure

The current registration of charge regime poses two problems. Where chargees appoint non-professional service providers to effect registration of charges, there are often delays caused by inaccurate filings which would prejudice the chargees' priority. The second problem relates to service of documents by the Registrar of Corporate Affairs (the Registrar) to chargees outside of the BVI which are frequently returned undelivered, and hence to the detriment of the chargees who may not become aware that a charge has been incorrectly varied or released. The proposals will limit the persons who have standing to make filings and will require chargees outside of the BVI to designate a person in the BVI to receive copies of notices from the Registrar.

### Confirmation of constructive notice of registered charges

The BCA currently provides that generally a person is not deemed to have notice or knowledge of any documents relating to a BVI Business Company by reason only of the fact that it is available to the public from the Registrar or is available for inspec-

tion at the registered office of the company. However, this presumption against constructive notice is not applicable in relation to charges registered on the Register of Registered Charges maintained by the Registrar, although the BCA does not go as far as to deem that a person has constructive notice of these documents. The proposals will clarify this and affirmatively confirm that a person will be deemed to have notice of a registered charge.

### Immediate enforcement of BVI law governed share charges

The proposals will permit a BVI law governed charge or mortgage over shares in a BVI Business Company to disapply the minimum waiting period before the statutory remedies are exercisable. This change will give lenders greater flexibility on enforcement of share charges governed by BVI laws.

### 'Opt in' and 'opt out' of optional registration

Although BVI Business Companies are not required under the BCA to file copies of their register of members and register of directors with the Registrar, a well advised lender would request a copy of the register of members noting the existence of a share charge to be optionally filed. The BCA is currently unclear whether a company can 'opt in' and 'opt out' of optional registration, and in practice, the Registrar's mechanism for optional registration does not permit a company to 'opt in' again after it has opted out. This means the potential benefit of actual notice of the share charge may not be available to a lender in a refinancing. The proposals will clarify that a company can 'opt in' and 'opt out' of registration, subject to registering all changes made to its register during the period when it has opted out.

*This article is intended to deal with the proposed amendments in broad terms only. The proposals discussed above are still in draft form and are subject to change after the FSC's review of submissions from the public.*

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