



Trustee (Amendment) Act, 2015

On 30 March 2015, the Trustee Act, 1961 (the “**Trustee Act**”) of the British Virgin Islands (the “**BVI**”) was amended by virtue of the Trustee (Amendment) Act, 2015.

The amendment is not entirely new to the industry. The amendment reflects the same wording and duty imposed on BVI business companies under section 98 of the BVI Business Companies Act, 2004 (as amended) to maintain financial records that are sufficient to show and explain the company’s transactions and which will, at any, time enable the financial position of the company to be determining with reasonable accuracy.

IN A NUTSHELL

The amendment to the Trustee Act, similarly, places on every Trustee, the duty to maintain records and underlying documentation of the each trust for which it is a trustee whether within or outside of the BVI and to retain these records and underlying documentation for a period of at least 5 years. The records and underlying documentation of the trust must be sufficient to show and explain the trusts transactions and will, at any time, enable the financial position of the trust to be determined with reasonable accuracy.

The records and underlying documentation includes accounts and records, such as invoices, contracts or other similar documentation in relation to the following:

- (a) all sums of money received and expended by the trust and the matters in respect of which the receipt and expenditure takes places;
- (b) all sales and purchases of goods by the trust; and
- (c) the assets and liabilities of the trust.

BREACH AND LIABILITY

Each Trustee should take this responsibility seriously. Where a Trustee, without lawful or reasonable excuse, fails to comply with this legal requirement, the Trustee commits an offence and is liable on summary conviction to a fine not exceeding US\$100,000.00 or to imprisonment for a term not exceeding 5 years.

Under the common law, a Trustee already had the duty to keep clear trust accounts and trust accounts separate from his or her own personal accounts. A Trustee who failed to keep and be ready with such accounts could be held to be in breach of his trustee duties and be personally liable to pay damages and any costs to remedy the breach.

Therefore, Trustees must now be aware of both the statutory obligations and liabilities, as well as to those which apply under the common law.

IN PRACTICAL TERMS

The duty to maintain records and underlying documentation of the each trust should not be taken lightly as failure to comply carries with it the possibility of a fine or imprisonment.

If the Trustee acts for a trust which solely holds shares in a company, at the bare minimum, the Trustee should request and obtain the company's annual financial statements.

With respect to the time frame for keeping the records, we would interpret the time period to commence running from the date of termination of the trustee relationship, keeping in line with the general requirements of other legislation in the BVI which requires the maintenance of documents, such as due diligence documents, for a period of 5 years after the termination of the relationship. Perhaps in the future the Trustee Act may once more be amended to make this requirement clear.

The amendment would apply to any trust which falls under the Trustee Act, such as one which has a BVI Trustee or is governed by the laws of the BVI.

STANDARD OF CARE

The standard of care that is expected of a Trustee has not changed. However, the amendment makes is clear what is expected of a Trustee in carrying out his or her duties as a Trustee with respect to maintaining accountability of the trust's transactions and the trust's financial position.

For more information of advice on trusts please contact us at bvi@sinclairsoffshore.com .

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