

Bringing your BVI company to an end: strike off vs liquidation

A BVI company has no limit on its duration (unless provided otherwise in its memorandum or articles). Indeed, this firm continues to act for many companies incorporated in the very early days of the International Business Companies Act - now approaching 40 years ago. The majority of companies do, however, at some point reach the end of their useful life and directors and shareholders need to be aware of the options available.

The introduction of reporting obligations under the economic substance regime which continue while a company is struck off the register mean that it is more important than ever to be well informed.

At the point in time at which a company has served its purpose the question that directors and shareholders must ask is this:

What needs to be done to bring the company's affairs to an orderly close?

The main choice is between liquidation and strike off. Voluntary liquidation is a straight forward and inexpensive process that brings formal closure and much greater certainty as well as mitigating risk for directors, shareholders and other stakeholders. It can be completed in as little as 4 to 6 weeks. Allowing or applying for the company to be struck off the register is, on paper, a simpler and quicker process. However, crucially the company remains struck off for 7 years before it is formally dissolved and during that period the company as well as its directors and shareholders are exposed to greater ongoing risk and uncertainty. The risk and uncertainty increased with the introduction of on-going reporting obligations under the economic substance regime which continue to apply during this 7 year period even if the struck off company is not carrying on any activity.

If the company is not able to pay its debts as they fall due or its liabilities exceed its assets then the company should adopt a procedure under the Insolvency Act. This is outside the scope of this guide. Please contact us for further details if required.

Voluntary liquidation

The steps involved in a voluntary liquidation are simple; the first is for the company to prepare a plan of liquidation. This requires the company to identify one or more liquidators. A voluntary liquidator cannot be another company or other body corporate - it must be an individual - but, save for regulated companies, does not have to hold any specific qualifications or be resident in the British Virgin Islands.

There are some restrictions on who may be appointed to act as a voluntary liquidator of a company.

In particular, an individual, or any person who is a close relative, who is or at any time in the two years prior to commencement of the liquidation has been a director or acted in a senior management position and whose functions have included financial management of the company or any affiliate is disqualified from acting as a liquidator (although there is no restriction on an external auditor acting as liquidator).

The company must then formally approve the liquidation plan and the directors must adopt a solvency declaration that the company can meet its debts as they fall due and that its assets exceed its liabilities.

Once appointed, the voluntary liquidator must advertise the commencement of the liquidation. Broadly this provides for advertising locally (in the BVI) and in the company's principal place of business (if that is outside of the BVI) or (if the company has no principal place of business) where the liquidator believes such advertising is most likely to come to the attention of the company's creditors.

The liquidator's duties are, broadly speaking, to take possession of and realise all of the company's assets, pay and discharge all of the company's obligations and liabilities and to distribute surplus assets to the members. The liquidator should prepare statements of account and, if required by the plan of liquidation, send it to all of the members.

Upon completion of the liquidation, the liquidator will make filings and publish a notice confirming that the liquidation is complete. The Registrar will then strike the company off the Register of Companies and issue a Certificate of Dissolution. The date of dissolution is significant since after this date, the company no longer exists and the company can no longer incur liabilities or sue or be sued.

Strike off from the Register

There are a number of circumstances in which the Registrar may strike a company off the Register under section 213 of the BVI Business Companies Act. The most frequently used is the automatic strike off for non-payment of the annual Registry fee. A company may also be struck off if the Registrar is satisfied that the company has ceased to carry on business. In practice, the Registrar will strike a company off on this ground upon application from the company. Strike off is sometimes used as an alternative to voluntary liquidation but this option does have significant risks which should be understood before taking such an approach.

All BVI companies must pay an annual fee to the Registry to keep in good standing. If the fee is not paid by the due date, a penalty will first apply. If the annual fee (and penalties) has not been paid by the expiration of five months after the due date, the Registrar will automatically strike the company off the Register of Companies.

A struck off company is restricted under statute from acting in any way with respect to its affairs. However, it still exists and can still incur liabilities and be sued. This distinction between a company which has been struck off the Register and a company which has been dissolved is important. Further, the directors of a struck off company still hold office and their duties as directors are in no way reduced as a result of the company being struck off. Directors can be held liable for the actions (or inactions) of a company which has been struck off in a way which is not possible if the company has been liquidated and dissolved.

Should a company remain continuously struck off the register for a period of seven years it will only then be automatically deemed dissolved.

Restoration

A company struck off for non-payment of fees can, at any time prior to it being dissolved, be restored to the Register by payment of outstanding fees as well as a restoration fee. The application to restore can be made by the company itself or any creditor, member or liquidator of the company. Once the company is restored to the Register, it is deemed never to have been struck off.

Where a company has been dissolved, an application can be made to the Court by the company, a creditor, former director, former member or former liquidator or any other person who can establish an interest in having the company restored to the Register. The circumstances in which an application would ordinarily be successful are limited.

Economic Substance obligations

The Economic Substance regime imposes ongoing annual reporting obligations to all companies - including struck off companies which have ceased to carry on all business. A company which has been voluntarily liquidated and dissolved has no such ongoing obligations whereas a struck off company is required to carry on making an annual filing under the economic substance regime for 7 years until the company is dissolved. This is another reason to consider voluntary liquidation over an automatic strike off.

A failure to make the filing without reasonable excuse is an offence which could extend to the directors of the company. Potential penalties are severe. Enforcement action would be taken through the Courts and a criminal burden of proof will apply.

We have put together two new packages here to ensure reporting obligations are met while the entity remains on the register:

Voluntary Strike Off - this can only be initiated when an entity is in good standing.

Clients who do not wish to go to the expense of a formal liquidation but wish to minimise their personal liability may wish to apply to the Registry for voluntary strike off and resign as directors. We will arrange the required nil-reporting for each year the company is struck off until it is dissolved.

ES reporting for struck off entities – we will facilitate nil-reporting for each year the company is struck off until it is dissolved.

Please contact us for pricing and procedures if you are interested in either of these options.

© Harneys, May 2020

Harneys is a leading international offshore law firm. From locations around the globe, Harneys advises the world's top law firms, financial institutions and corporations on the laws of British Virgin Islands, Cayman Islands, Cyprus, Luxembourg, Bermuda, and Anguilla. For more information about Harneys please visit [harneys.com](https://www.harneys.com) or contact us at marketing@harneys.com.

The foregoing is for general information only and not intended to be relied upon for legal advice in any specific or individual situation. Bermuda legal services are provided through an association with Zuill & Co which is an independently owned and controlled Bermudian law firm.