

THE CAYMAN ISLANDS COMPANY MANAGERS ASSOCIATION

(Registered as a Non-Profit Organisation under The Non-Profit Organisations Law)

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SUBMISSION

TO: MINISTRY OF FINANCIAL SERVICES AND HOME AFFAIRS
FROM: THE CAYMAN ISLANDS COMPANY MANAGERS ASSOCIATION
DATE: 21 OCTOBER 2020
SUBJECT: COMPANIES (AMENDMENT) (NO. 3) BILL, 2020
COMPANIES MANAGEMENT (AMENDMENT) (NO. 2) BILL, 2020

PART I. PURPOSES OF THIS SUBMISSION

1. The purposes of this Submission are:
 - (1) to discuss the amendments to the Companies (Amendment) (No. 3) Bill, 2020 (hereinafter the “Companies Bill”) and the Companies Management (Amendment) (No. 2) Bill, 2020 (hereinafter the “Companies Management Bill”) proposed by the consultation drafts received on 09 October 2020 (with a deadline for response by 22 October 2020); and
 - (2) comment on whether the proposed amendments, in our opinion, achieve their stated purpose.
2. Similar bills have been put forward with respect to limited liability companies, limited liability partnerships, exempted limited partnerships, partnerships and trusts; however, the focus of this Submission is on the Companies Bill and the Companies Management Bill.

PART II. WHY ARE THE AMENDMENTS BEING PROPOSED?

3. The Consultation Cover Note of 09 October 2020 refers to the Report (Global Forum on Transparency and Exchange of Information for Tax Purposes: Cayman Islands 2017) as the impetus for the proposed amendments.

4. The Consultation Cover Note states the following:

“The Report noted that in respect of recommendations under A.2 pertaining to the availability of accounting information, although there are sound legal requirements in place for all entities in the Cayman Islands to maintain accounting information, **the lack of oversight and non-enforcement of the accounting obligations led to issues in practice in providing accounting information, notably where the information was not held in the Cayman Islands.**” (Note: the words highlighted are not highlighted in the CCN)
5. The statement made in the highlighted words of the Consultation Cover Note is not borne out by the Report which states that accounting information was provided in all 59 instances to Cayman’s exchange of information partners where it was requested (paragraphs 192 & 238) and that there was only one case where accounting information was not provided; that was the case of an exempted company which held accounting information outside the Islands (paragraph 232) and refused to comply with subsection 59(2A) of the Companies Law which the proposed amendments do not seek to change. If our math is correct, that gives an effectiveness percentage of 100% for the current system in operation.
6. Regardless, the Report stated in paragraph 195 that:

“The Cayman Islands is recommended to implement an effective system of oversight to support the legal requirements which ensure the availability of accounting information in all cases.”

One would have thought that an effectiveness percentage of 100% would rank fairly high on the effectiveness scale.
7. Therefore, it appears that the purpose of the proposed changes is “to implement an effective system of oversight to support the legal requirements which ensure the availability of accounting information in all cases” in a situation where the existing system is already 100% effective.

PART III. AMENDMENTS PROPOSED BY THE COMPANIES BILL

8. **Attachment 1** to this Submission is a chart which shows the current provisions of sections 41, 59 and 168 of the Companies Law (2020 Revision) (the “Companies Law”) and the proposed amendments to those provisions.
 - (1) **Proposed Amendment # 1**
9. The Companies Bill proposes to add a new version of subsection 41(3) to the Companies Law which provides that every company, other than an exempted company, shall furnish to the registrar in January of each year, in addition to the list and summary, a return in the form of a declaration that - ,

- (a) the company is maintaining proper books of account;
- (b) states whether the company is required to file with the Authority information regarding its accounts under any regulatory law;
- (c) states the physical address at which the company keeps its books of account; and
- (d) where applicable, confirms the company has provided to its registered office, semi-annually, information regarding its books of account that will enable directors to ascertain the financial position of the company with reasonable accuracy.”

(Note: The words “where applicable” in the proposed paragraph (d) above refer to the proposed revision to section 59(2B) of the Companies Law; see paragraph 11 below.)

10. Our comments on Proposed Amendment # 1 are the following:

- (1) corporate services providers (includes company managers) will have to inform the directors of the companies for which they provide a registered office of yet another obligation imposed by the Cayman Islands Government, thus driving a wedge between the corporate services provider and its client;
- (2) the return, in the form of a declaration, is yet another form for the company to file, adding to the existing burden of filings under various laws; and
- (3) we question the wisdom of placing more obligations on corporate services providers and companies in a year which has already seen economic substance filings, trying to put beneficial ownership information online and attempting to deal with CIMA audits during the time of Covid-19.

(2) **Proposed Amendment # 2**

11. The Companies Bill proposes to amend subsection 59(2B) to make the reporting requirement to the registered office for a company which keeps its books of account outside the Islands semi-annual instead of the current annual reporting requirement. The new proposed subsection 59(2B) would state the following:

“59(2B) A company which keeps its books of account outside the Islands shall provide to its registered office semi-annually, information regarding its books of account that will enable directors to ascertain the financial position of the company with reasonable accuracy.”

Failure to comply with the new obligation, without reasonable excuse, would be an offence and could lead to fines against the company and its directors (proposed subsection 59(2BA)).

12. Our comments on proposed amendment # 2, **which applies to all companies including exempted companies which keep their books of account outside the Islands**, are the following:

- (1) corporate service providers will have to notify, without compensation, the companies to which they provide services of the new obligation;
- (2) corporate service providers will have to store this additional information;
- (3) where the directors of the company are in the Cayman Islands, the information would have to be passed by the corporate services provider to the directors;
- (4) it is unclear what the duty of a corporate services provider is in the event that the company does not comply with its obligation; and
- (4) In our opinion, Cayman will lose more companies as a result of this added obligation.

(3) **Proposed Amendment # 3**

13. The Companies Bill proposes to add new paragraphs (d) to (g) to section 168 of the Companies Law which requires every exempted company, except those who hold a licence to carry on business in the Islands, to add to the annual return in the form of a declaration, already provided for, the information in the proposed paragraphs (d) to (g) that:

- (d) the company is maintaining proper books of account;
- (e) states whether the company is required to file with the Authority information regarding its accounts under any regulatory law;
- (f) states the physical address at which the company keeps its books of account; and
- (g) where applicable, confirms the company has provided to its registered office, semi-annually, information regarding its books of account that will enable the directors to ascertain the financial position of the company with reasonable accuracy.”

14. Our comments on Proposed Amendment # 3 are the same as those made with respect to Proposed Amendment # 1; see paragraph 10 above.
15. The result of Proposed Amendments # 1 and # 3 is that all companies incorporated in the Islands (except overseas companies) will have to submit annually a declaration that –
 - (a) the company is maintaining proper books of account;
 - (b) states whether the company is required to file with the Authority information regarding its accounts under any regulatory law;
 - (c) states the physical address at which the company keeps its books of account; and
 - (d) where applicable, confirms the company has provided to its registered office, semi-annually, information regarding its books of account that will enable the directors to ascertain the financial position of the company with reasonable accuracy.”
- (4) **Proposed Amendment # 4**
16. The Companies Bill proposes to amend Schedule 7 of the Companies Law to provide administrative penalties for breach of the new obligations. We do not have any comments on the amendments.

PART IV. AMENDMENTS PROPOSED BY THE COMPANIES MANAGEMENT BILL

17. The Companies Management Bill proposes to add sections 15A to 15G to the Companies Management Law.
 - (1) **Proposed Amendment # 1**
18. The proposed subsection 15A(1) would impose a duty on a licensee who provides a registered office for a body corporate constituted under the laws of the Islands (excludes overseas companies) that:
 - (a) keeps its books of account outside the islands; **and**
 - (b) does not comply with a requirement under any regulatory Law to file information regarding its books of account to the Authority,

to furnish the Registrar of Companies in January of each year a return in the form of a declaration stating:

- (1) whether the body corporate for which the licensee provides a registered office is maintaining proper accounts; and
- (2) where applicable, whether information regarding the books of account has been provided to the registered office semi-annually (under various laws).

(Note: The words “where applicable” refer to companies which keep their books of account outside the Islands.)

19. Our comments in proposed amendment # 1 are as follows:

- (1) a licensee has no way of knowing whether the body corporate for which the licensee provides a registered office is maintaining proper accounts; the best that it can say is that “based on information received from the company, we are informed that the company is maintaining proper accounts”;
- (2) this is yet another obligation imposed on a licensee for which it will be difficult to obtain remuneration; and
- (3) this is a type of obligation which drives a wedge between corporate service providers and their clients as the corporate services provider is obligated to report something which may constitute an offence under the proposed subsection 59(2BA) of the Companies Bill.

(2) **Proposed Amendment # 2**

20. Subsection 15A(2) of the Companies Management Bill would impose penalties of varying amounts on the failure of a licensee to comply with its new obligation in the proposed subsection 15A(1); we do not have a comment on this Proposed Amendment # 2.

(3) **Proposed Amendment # 3**

21. Proposed sections 15B to 15H of the Companies Management Bill deal with administrative penalties which may be imposed by the Registrar, including the proposed section 15F which states the following:

“15F. If a breach set out in the Schedule is an offence, an administrative fine for the breach shall not preclude a prosecution for the breach or liability for any relevant fees.”

22. We do not see where a breach set out in the Schedule constitutes an offence.

PART V. CONCLUSIONS

23. There is a very old saying which, in our opinion, applies to what is being proposed:

If it ain't broke, don't fix it.

24. In our opinion, the price of trying to fix what ain't broke is too high for corporate services providers who are already reeling from the various impositions in this year of Covid-19.

25. With great respect for the Global Forum, the 2017 Report, in its recommendation that Cayman "implement an effective system of oversight to support the legal requirements which ensure the availability of accounting information in all cases" ignored its own evidence which showed that the existing system was already 100% effective.

26. In the event that it is decided to fix it, even though it ain't broke, there should be a delay until the end of 2021 before the proposed amendments come into force to allow corporate services providers to understand the implications of and to implement the changed system.

RESPECTFULLY,

THE CAYMAN ISLANDS COMPANY MANAGERS ASSOCIATION

To: The Honourable Tara Rivers
Dax Basdeo
DFS Legislation

ATTACHMENT 1

COMPARISON OF THE CURRENT AND PROPOSED SECTIONS 41, 59 AND 168 OF THE COMPANIES LAW

CURRENT

41(2) Every company, other than an exempted company, shall, in January of each year after the year of its registration, pay to the Registrar the annual fee specified in Part 2 of Schedule 5.

41(3) Each such annual fee shall be tendered with the list and summary required under subsection (1). A company which has failed to forward to the Registrar any copy to be forwarded in any January shall be deemed not to have made any default in complying with this section relating to the time within which such copy is required to be forwarded if the company forwards the copy either –

(a) within such further period, if any, as the Registrar, acting in that person's discretion may, by notice, addressed to the company specify; or

(b) within the period of twelve months next following such month of January,

Whichever is the shorter, together with the fee payable under subsection (2) and the penalty specified in section 42.

PROPOSED

41(2) Every company, other than an exempted company, shall, when it submits the list and summary required under subsection (1) and the return under subsection (3) in January of each year after the year of its registration, pay to the Registrar the annual fee specified in Part 2 of Schedule 5.

41(3) Every company, other than an exempted company, shall in January of each year after the year of its registration, furnish to the Registrar a return which shall be in the form of a declaration that –

(a) the company is maintaining proper books of account;

(b) states whether the company is required to file with the Authority information regarding its accounts under any regulatory law;

(c) states the physical address of the place at which the company keeps its book of account; and

(d) where applicable, confirms the company has provided to its registered office, semi-annually, information regarding its books of account that will enable directors to ascertain the financial position of the company with reasonable accuracy.

41(4) There is no subsection 41(4) in the current version.

59(1) Every company shall cause to be kept proper books of account including, where applicable, material underlying documentation including contracts and invoices with respect to –

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

(b) all sales and purchases of goods by the company; and

(c) the assets and liabilities of the company.

59(2) For the purposes of subsection (1), proper books of account shall not be deemed to be kept with respect to the matters aforesaid if there are not kept such books as are necessary to give a true and

41(4) A company which has failed to forward to the Registrar any copy to be forwarded in any January shall be deemed not to have made any default in complying with this section relating to the time within which such copy is required to be forwarded if the company forwards the copy either –

(a) within such further period, if any, as the Registrar, acting in that person's discretion may, by notice, addressed to the company specify; or

(b) within the period of twelve months next following such month of January,

Whichever is the shorter, together with the fee payable under subsection (2) and the penalty specified in section 42.

59(1) No change proposed

59(2) No change proposed

fair view of the state of the company's affairs and to explain its transactions.

59(2A) A company which keeps its books of account at any place other than its registered office or at any other place within the Islands shall, upon service of an order or notice by the Tax Information Authority pursuant to the *Tax Information Authority Law (2017 Revision)*, make available, in electronic form or any other medium, at its registered office its books of account, or any part or parts thereof, as are specified in such order or notice; and if the company fails to comply with the order or notice without reasonable excuse, the company shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which such non-compliance continues.

59(2B) A company which keeps its books of account outside of the Islands shall, in the form and manner prescribed, provide to its registered office, annually or with such other frequency and within such time as may be prescribed, information regarding its books of account; and, if a company fails to comply with this subsection without reasonable excuse, the company shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which such non-compliance continues.
(Note: Added 01 January 2019)

59(2BA) No such current provision

59(2A) No change proposed.

59(2B) A company which keeps its books of account outside of the Islands shall provide to its registered office, semi-annually, information regarding its books of account that will enable directors to ascertain the financial position of the company with reasonable accuracy.

59(2BA) A company which fails to comply with subsection (2B), without reasonable excuse, commits an offence and is liable on summary conviction to a fine of five thousand dollars and every director or other officer concerned in the management of the company who

59(2C) Subsection (2B) shall not apply to a company that complies with a requirement under any regulatory law to file information regarding its accounts to the Authority. (Added 01 Jan 2019)

59(3) A company shall cause all books of account required to be kept under subsection (1) to be retained for a minimum period of five years from the date on which they were prepared.

59(4) A company that knowingly and wilfully contravenes subsection (1) or (3) shall be subject to a penalty of five thousand dollars.

168. In January of each year after the year of its registration each exempted company that does not hold a licence to carry on business in the Islands to which section 174 refers shall furnish to the registrar a return which shall be in the form of a declaration that –

(a) since the previous return or since registration, as the case may be, there has been no alteration in the memorandum of association, other than an alteration in the name of the company effected in accordance with section 31 or an alteration already reported in accordance with section 10;

(b) the operations of the exempted company since the last return or since registration of the exempted company, as the case may be, have been mainly outside the Islands; and

knowingly and wilfully authorizes or permits the contravention shall incur the same penalty; and

59(2C) Subsections (2B) and (2BA) shall not apply to a company that complies with a requirement under any regulatory law to file information regarding its accounts to the Authority.

59(3) No change proposed

59(4) No change proposed

168. No change proposed to paragraphs (a), (b) and (c) except for the deletion of the word “and” at the end of paragraph (b) and the insertion of the word “and” at the end of paragraph (c).

Proposed addition of paragraphs (d) to (g) for which see the next page

(c) section 174 has been and is being complied with.

168 (Continued)

(d) the company is maintaining proper books of account;

(e) states whether the company is required to file with the Authority information regarding its accounts under any regulatory law;

(f) states the physical address of the place at which the company is keeping its book of account; and

(g) where applicable, confirms the company has provided the information regarding its books of account to its registered office semi-annually in accordance with section 59(2B).