

BRITISH VIRGIN ISLANDS



HANDBOOK ON INTERNATIONAL CO-OPERATION AND INFORMATION EXCHANGE

A GUIDE FOR REGULATORS AND JUDICIAL AND LAW ENFORCEMENT OFFICIALS



Published by

THE BRITISH VIRGIN ISLANDS FINANCIAL SERVICES COMMISSION

April 2007

Revised: June 2013

If crime crosses all borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means. If the enemies of progress and human rights seek to exploit the openness and opportunities of globalization for their purposes, then we must exploit those very same factors to defend human rights, and defeat the forces of crime, corruption, and trafficking in human beings...

UN Secretary General, 2000

TABLE OF CONTENTS

1. BACKGROUND INFORMATION ON INTERNATIONAL COOPERATION AND INFORMATION EXCHANGE	5
2. KEY TREATIES AND INSTITUTIONAL INITIATIVES RELATIVE TO INTERNATIONAL COOPERATION	7
KEY TREATIES	
2.1 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988	7
2.2 UN Convention for the Suppression of the Financing of Terrorism, 1999	7
2.3 UN Convention Against Transnational Organised Crime, 2000	7
2.4 UN Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970	7
2.5 UN Convention Against Corruption, 2003	8
INSTITUTIONAL INITIATIVES	
2.6 The Financial Action Task Force (FATF) Recommendations	9
2.7 International Monetary Fund (IMF)	10
2.8 The Caribbean Financial Action Task Force (CFATF)	10
2.9 International Organisation of Securities Commissions (IOSCO)	10
2.10 Organisation for Economic Co-operation and Development (OECD)	11
2.11 International Association of Insurance Supervisors (IAIS)	11
2.12 Group of International Finance Centre Supervisors (GIFCS)	11
2.13 Organisations with which the BVI has a Working Relationship	12
3. THE BVI'S MUTUAL LEGAL ASSISTANCE REGIMES	13
3.1 The Legislative Regime	13
3.2 Synopsis of the Legislation	15
3.3 BVI Central Authorities	20
3.4 Range of Assistance	21
4. THE LAW ON PROVIDING LEGAL ASSISTANCE	22
4.1 Law Enforcement	22
5. LEGAL ASSISTANCE IN CIVIL OR COMMERCIAL PROCEEDINGS OVERSEAS	28
5.1 Scope of Assistance	28
5.2 Requirements for the Grant of Assistance	28
5.3 Limitation on Cooperation	29
6. COOPERATION WITH FOREIGN REGULATORY AUTHORITIES	30
6.1 FSC's Duty to Cooperate (Scope of Assistance)	30

6.2	What Constitutes a “Financial Crime”	30
6.3	FSC’s Power to Request Documents and Information	30
6.4	Power to Examine a Person Under Oath	31
6.5	Effecting Assistance	32
6.6	Considerations Precedent to Effecting Assistance	32
6.7	Point at Which a Request for Onward Disclosure can be Made	33
6.8	Privileged Information and Documents	33
6.9	Protection from Disclosure	34
6.10	Restrictions on Disclosure of Information (Protected Information)	34
6.11	Exceptions to the Restrictions on Disclosure of Information	34
6.12	Assisting the FSC to Protect the Public	35
7.	MUTUAL LEGAL ASSISTANCE IN TAX MATTERS	36
7.1	Aiming for a Level Playing Field	36
7.2	Scope of Assistance	36
7.3	Powers Exercisable by the Central Authority (CA)	36
7.4	Conditions Precedent to Providing Assistance	37
7.5	Declining a Request for Legal Assistance	38
7.6	Protection for Disclosure	38
7.7	Restrictions on Disclosure of Information	38
8.	MISCELLANEOUS MATTERS RELATIVE TO REQUESTS FOR LEGAL ASSISTANCE	39
8.1	Supplemental Requests	39
8.2	Costs of Providing Assistance	39
8.3	Representation in Court	39
8.4	Presence of Foreign Investigators	39
8.5	Requests Sent to the Wrong Central Authority	40
8.6	Requests for Legal Assistance that Lack Relevant Information	40
8.7	Resolving Disputes Between Central Authorities	40
9.	GENERAL PROCEDURES FOR THE TRANSMISSION AND EXECUTION OF REQUESTS FOR LEGAL ASSISTANCE	41

1. BACKGROUND INFORMATION ON INTERNATIONAL COOPERATION AND INFORMATION EXCHANGE

It is globally recognized that cross-border co-operation and co-ordination of efforts are the most viable tools in the international response to organized crime and, in particular, money laundering, terrorism and terrorist financing, and more recently the financing of proliferation of weapons of mass destruction. Those bent on perpetrating and perpetuating organized crime often use the legitimate institutions and facilities established and recognized under law to disguise their transactions and give them a semblance of legitimacy. In many instances the results of such transactions, where they are successful, are employed to further other criminal activities.

The nature of organized crime is such that it permeates national borders and assumes an international character. This makes it difficult for any country on its own to efficiently and effectively investigate and prosecute acts of criminality without the aid of other countries in which or through which the act of criminal conduct extends. Thus the efficient and effective combating of organized crime calls for a collaborative effort and co-operation between countries and at an international level. Such co-operation must be robust and multi-faceted in order to significantly thwart criminals from designing and executing their criminal intents.

This co-operative approach recognizes the mutuality of interest in maintaining law and order in society as well as ensuring the legitimate use of financial and other institutions to protect the security and financial stability of our communities. The world's economies are in many ways intertwined and the disruption of one often has negative consequences for others, albeit to varying degrees. It therefore becomes incumbent on every jurisdiction – large and small – to put in place domestic measures and mechanisms geared towards fighting organized crime and above all to create an effective regime of assistance and co-operation to aid law enforcement institutions or agencies of other countries in this fight. Such measures and mechanisms, coupled with an effective implementation process, act as a buffer in denying criminals a safe haven within which to engage in criminal activities.

Organised crime is far-reaching and extends to the market regulation and tax administration sectors; there are also individuals and business entities which exploit for ill-gain the legitimate business mechanisms designed to facilitate commerce and trade. The manipulation of the securities market, insider dealing, abuse of corporate vehicles, evading legitimate taxes - usually by employing unlawful means, and disguising the true nature of investment business to the detriment of investors are all forms of illegal activity which, if not checked, can bring about financial instability and disrupt otherwise orderly economies. These areas therefore warrant the application of the benefits associated with established regimes of international co-operation, both nationally and internationally.

Another significant area of international co-operation relates to extradition. Extradition serves as an effective medium of denying criminals a safe sanctuary; they may flee from the jurisdiction where they perpetrate their crimes, but they are not beyond the reach of law enforcement and prosecution. While generally the extradition of criminals is founded on bilateral agreements and arrangements, the increasing trend in multilateral treaties is that where national laws do not provide for a legislative mechanism for the extradition of criminals, the relevant treaty may be used as the basis for effecting extradition. The effectiveness of this treaty medium depends, however, on the legal system of a jurisdiction: for instance, in the British Virgin Islands legal system, the courts have ruled that a treaty to which the Territory is a party (usually through ratification, accession or

extension by the United Kingdom) does not have legal effect in respect of the Territory unless it is given legislative recognition. Yet in other jurisdictions a mere ratification gives a treaty the required legal effect for enforcement purposes. What is essential at the end of the day is that each jurisdiction recognizes the importance of extradition not only as an effective tool of law enforcement by which to bring fugitive criminals to justice, but also as one deserving of the maximum level of international co-operation to achieve that purpose.

The British Virgin Islands has for over twenty years been involved in international co-operation matters by providing mutual legal assistance upon request. The initial remit of the law was to provide assistance in specified criminal matters where a bilateral agreement existed. Then in 1992 a specific assistance regime was prescribed in relation to drug trafficking matters to give effect to the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. This scope was extended further in 1993 to enable assistance in all criminal matters where a request was received from a competent foreign authority so long as certain parameters were complied with. In 1997 a specific legislative regime was established to deal with money laundering offences and facilitating foreign requests for assistance in such matters. Subsequently the mutual legal assistance regime was extended in 2000 to enable assistance in the area of financial regulation by providing a regulator-to-regulator assistance scheme. In 2001 a comprehensive regime to combat terrorism and terrorist financing was introduced. With the establishment of the Financial Services Commission in 2002 (pursuant to the Financial Services Commission Act, 2001), this regime was enhanced further by providing the Commission with specific powers of enforcement, especially as they relate to requests for assistance by foreign regulatory authorities. Then in 2003 a new assistance regime was established to render assistance in tax-related matters on the basis of negotiated and concluded tax information exchange agreements. This new regime, in effect, represents the British Virgin Islands' recognition of the importance of playing its role in maintaining transparency and effective information exchange without compromising the viability of its services.

It is to be noted that the regimes outlined above have been continually reviewed and updated as necessary, taking into account domestic initiatives designed to strengthen the regimes and standards developed internationally. It remains the Government's aim, along with the Financial Services Commission in the discharge of its responsibilities, to ensure that the various co-operation regimes administered in the name and on behalf of the Territory are kept attuned with developments in the international arena in relation to effectively combating crime and regulatory breaches.

2. KEY TREATIES AND INSTITUTIONAL INITIATIVES RELATIVE TO INTERNATIONAL CO-OPERATION TREATIES

The threat posed by organized crime has been in the international spotlight for many years. International efforts, through the formulation and adoption of treaties, have been (and continue to be) marshalled in effectively combating organized crime. A brief survey of those treaties applied by the British Virgin Islands is outlined below.

2.1 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

This treaty essentially deals with issues concerning the drug trade and related law enforcement issues, including the need for the parties thereto to establish relevant regimes of international cooperation in the fight against drug trafficking. It also regulates specified precursor chemicals to drugs. The treaty also defines the activity of drug money laundering and calls on countries to criminalize money laundering where drug trafficking forms the predicate offence.

2.2 UN Convention for the Suppression of the Financing of Terrorism, 1999

The terrorist attacks on the USA on September 11, 2001 brought this treaty into greater prominence and countries were required to establish administrative, legislative and enforcement mechanisms to effectively combat the financing of terrorism in or from within their territories. In essence, the treaty criminalizes the provision or collection of funds designed to be applied for terrorist purposes or to cause death or injury of a civilian; it requires the adoption of appropriate measures to identify, detect and freeze or forfeit any such funds. The treaty also requires countries to afford each other maximum cooperation in relation to criminal investigations, extradition and the obtaining of evidence founded on a mutual legal assistance request. In that context, it encourages the sharing of information or evidence to establish criminal, civil or administrative liability.

2.3 UN Convention Against Transnational Organised Crime, 2000

This treaty, in essence, represents an expanded collaborative international effort in fighting international organized crime in all its facets, including the trafficking in humans. It calls on parties to the treaty to foster and promote international cooperation in effectively combating cross-border criminal activities; it also encourages cooperation and exchange of information between administrative, law enforcement, regulatory and other authorities, both at the domestic and international levels.

2.4 UN Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970

The essence of this treaty is to promote international judicial cooperation through the transmission and execution of request in relation to civil and commercial matters. It envisages a judicial authority of one country making a request of another to obtain evidence or perform some other specified judicial act.

2.5 UN Convention Against Corruption, 2003

This treaty complements the United Nations Convention against Transnational Organized Crime and introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight

corruption. It calls for preventive measures and the criminalization of the most prevalent forms of corruption in both public and private sectors and introduces a framework for stronger cooperation between States to prevent and detect corruption and to return the proceeds of related crimes.

In addition to these treaties, the British Virgin Islands also implements relevant UN Security Council Resolutions. The following Resolutions are given effect:

- **UN Security Council Resolution S/RES/1267 (1999)**

UNSCR 1267 places an obligation on States to freeze without delay the funds and other financial assets or economic resources derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban; prevent the entry into or transit through their territories by such designated individuals; and prevent the direct or indirect supply, sale and transfer from their territories, or by their nationals outside their territories, or via use of their flag on vessels or aircraft, of arms and related material of all types, including spare parts, technical advice, assistance, or training related to military activities, to such designated individuals and entities.

UNSCR 1267 is supported by various successor UNSCRs which are recognised and enforced by the Virgin Islands.

- **UN Security Council Resolution S/RES/1373 (2001)**

UNSCR 1373 calls for the prevention and suppression of the financing of terrorist acts and for the freezing without delay of funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities. States are also required to prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts; of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.

- **UN Security Council Resolution S/RES/1718 (2006)**

UNSCR 1718 imposes an arms embargo which also encompasses a ban on related financial transactions, technical training or services on the Democratic Peoples' Republic of Korea (DPRK); the ban extends to a nuclear, ballistic missiles and other weapons of mass destruction programs-related embargo; a ban on the export of luxury goods to the DPRK; and individual targeted sanctions – namely, a travel ban and/or an assets freeze on designated persons and entities associated with the DPRK.

- **UN Security Council Resolution S/RES/1737 (2006)**

UNSCR 1737 imposes a proliferation-sensitive nuclear and ballistic missile programmes-related embargo against the Islamic Republic of Iran (IRI) and calls on States to ban the export/procurement of any arms and related material from Iran and the supply of conventional weapons and related material to Iran. UNSCR 1737 further imposes a travel ban and an assets freeze on designated persons and entities within the IRI. The assets freeze also applies to any individuals or entities acting on behalf of, or at the direction of, the designated persons and entities, and to entities owned or controlled by them.

These UN Security Council Resolutions have been implemented within the Virgin Islands under the following legislation:

- The Terrorism (United Nations Measures) (Overseas Territories) Order, 2001 (U.K.S.I. 2001 No.3366)
- Anti-Terrorism (Financial and Other Measures) (Overseas Territories) Order, 2002 (U.K.S.I. 2002 No. 1822)
- The Al-Qaida and Taliban (United Nations Measures) (Overseas Territories) Order 2002 (U.K.S.I. 2002 No.112)
- The North Korea (United Nations Measures) (Overseas Territories) Order 2006 (U.K.S.I. 2006 No. 3337)
- The Iran (United Nations Measures) (Overseas Territories) Order 2007 (U.K.S.I. 2006 No. 282)

INSTITUTIONAL INITIATIVES

2.6 The Financial Action Task Force (FATF) Recommendations

The FATF is the standard setter in the area of developing and promoting national and international policies geared towards the effective combating of money laundering (ML), terrorist financing (TF) and the financing of proliferation (PF). It aims to foster legislative, regulatory and enforcement reforms amongst jurisdictions to stem the tide of money laundering, terrorist financing and the financing of proliferation. In 2012 the FATF revised the framework used to measure jurisdictions' compliance with these policies by adopting the new 40 Recommendations. Thus, the *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation – The FATF Recommendations* represent a comprehensive AML/CFT/CFP and are designed for universal application. The policies of the FATF are supported by the work of the FATF-Style Regional Bodies (FSRBs), such as the Caribbean Financial Action Task Force (CFATF) of which the BVI is an active founding member, and other international affiliates.

2.7 International Monetary Fund (IMF)

The BVI's relationship with the IMF comes as a result of assessments conducted by the IMF to ensure the ongoing stability of the BVI's financial sector. In 2004 the BVI was assessed by the IMF under its Offshore Financial Centre (OFC) program. Since that time the OFC program has been integrated into the IMF's Financial Stability Assessment Programme (FSAP) which has widened the scope of the assessment to include stability-related issues and stress tests of certain sectors. Ongoing developments in the BVI's financial sector and regulatory framework warranted an update of the assessment conducted under the OFC program and in 2010 the BVI underwent a further review, the focus of which was on the BVI's financial regulatory policies and financial stability, and covered both regulation and supervision, and matters relating to the soundness of the financial system and its ability to cope with stress.

The assessment included a review of the BVI's international cooperation regime, as the ability to share information and cooperate with other authorities is a crucial aspect of any jurisdiction's financial stability. The IMF concluded that there are no legal impediments to information sharing either domestically or internationally in the BVI and that through its active participation in regional and international cooperation the BVI has demonstrated both its willingness and ability to be a full partner in international information sharing and cooperation.

2.8 The Caribbean Financial Action Task Force (CFATF)

The CFATF is a Caribbean regional institution established to implement compliance standards and, where necessary, design appropriate implementation measures in relation to money laundering, the financing of terrorism, and since 2012 the financing of proliferation. It qualifies as an FSRB and is one of the most active FSRBs in the world. It promotes amongst its membership the adoption of sound and effective measures to combat ML activities and the financing of terrorism and proliferation, and puts in place appropriate mechanisms for monitoring compliance. It also requires its members to establish appropriate frameworks for promoting international cooperation. The BVI is a founding member of the organization and works actively in supporting and promoting the ideals and measures of the organization.

2.9 International Organisation of Securities Commissions (IOSCO)

IOSCO is the international standard setter for securities market regulation. Its broad mission is to promote high standards of regulation so that securities markets everywhere are fair, efficient and sound. IOSCO's membership comprises regulators with responsibility for around 90 percent of the world's securities markets. In recognition of its robust international standards, the British Virgin Islands Financial Services Commission was welcomed as an ordinary member at IOSCO's Annual Conference in Mumbai, India in April 2007.

2.10 Organisation for Economic Cooperation and Development (OECD) and the Global Forum

Although the BVI is not a member of this organization, it has a close working relationship with it through the BVI's membership in the OECD Global Forum. The initiative with which the BVI is involved with respect to the organization relates to the subject of promoting tax competition by ensuring transparency and effective exchange of information. The BVI subscribes to the principle of transparency and the effective exchange of information and has been assessed by the Peer Review Group (the assessment organ of the Global Forum) in this regard on tax related matters. The BVI considers assessments by international independent institutions as key in its international cooperation process as it positively aids the process of continual review and reform of relevant laws, administrative systems and law enforcement mechanisms. Accordingly, recommendations emanating from these assessments are reviewed and implemented to strengthen the BVI's international cooperation regime.

2.11 International Association of Insurance Supervisors (IAIS)

The IAIS is the international standard setting organisation established to promote cooperation amongst insurance supervisors and other financial sector supervisors. IAIS recognises the important contribution that strong supervisory regimes can make to financial stability and provides an effective forum for standard-setting and implementation activities by providing opportunities to both practitioners and policy makers to share their expertise, experience and understanding. Involvement of its diversified membership reflects the increasingly global nature of insurance markets and the need for consistent supervisory standards and practices. In addition, IAIS works closely with other financial sector standard setting bodies and international organizations to promote financial stability. The BVI Financial Services Commission has been a member of IAIS since 1997.

2.12 Group of International Finance Centre Supervisors (GIFCS)

Formally the Offshore Group of Banking Supervisors (OGBS), GIFCS is a long-established group of financial services supervisors with a core interest of promoting the adoption of international regulatory standards especially in the banking, fiduciary and AML/CFT arena. GIFCS contributes to the promotion of compliance among its membership with the Basel Core Principles and the FATF Recommendations and is recognised as a leading authority on the regulation of trust and company service providers. It was responsible for developing the OGBS Statement of Best Practice on Trust and Corporate Service Providers which has become a benchmark assessment tool adopted by the IMF in relation to its assessment of fiduciary business. Currently its present membership accounts for a market share of nearly 10% of global international banking assets. The BVI Financial Services Commission became a full member of GIFCS in 2007.

2.13 Organisations with which the BVI has a Working Relationship

Other organizations with which the BVI has a working relationship include:

- Association of Supervisors of Banks of the Americas (ASBA)
- Caribbean Group of Banking Supervisors (CGBS)
- Offshore Group of Collective Investment Schemes Supervisors (OGCISS)
- International Association of Insolvency Regulators (IAIR)
- International Association of Insurance Agencies (IAIA)
- Offshore Group of Insurance Supervisors (OGIS)
- Caribbean Association of Insurance Regulators (CAIR)
- Financial Stability Board - Regional Consultative Group of the Americas (FSB RCGA)

3. THE BVI's MUTUAL LEGAL ASSISTANCE REGIMES

The BVI boasts a comprehensive framework of international cooperation legislation to assist foreign judicial, law enforcement, prosecutorial, tax and regulatory authorities. The framework provides an efficient and effective mechanism for cross-border cooperation and exchange of information. The legislative regime and enforcement tools are continually reviewed and, where necessary, reformed, to keep attuned to emerging developments in the domestic and international arenas.

Under the current regime assistance is provided to relevant competent authorities and not to individual non-governmental persons or institutions. Individuals who desire assistance are advised to liaise with the relevant central authorities in the countries to seek advice on the way forward.

3.1 The Legislative Regime

The BVI's mutual legal assistance legislative regime comprises the following enactments:

- (a) Evidence (Proceedings in Foreign Jurisdictions) Act, 1988;
- (b) Mutual Legal Assistance (United States of America) Act, 1990;
- (c) Drug Trafficking Offences Act, 1992 (as amended);

Amendments:

- Drug Trafficking Offences (Amendment) Act, 1993
- Drug Trafficking Offences (Amendment) Act, 1996
- Drug Trafficking Offences (Amendment) Act, 2000
- Drug Trafficking Offences (Amendment) Act, 2006
- Drug Trafficking Offences (Amendment) Act, 2008

Subsidiary Legislation

- Drug Trafficking Offences (Designated Countries and Territories) Order, 1996

- (d) Criminal Justice (International Cooperation) Act, 1993 (as amended);

Amendments

- Criminal Justice (International Cooperation) (Amendment) Act, 1995
- Criminal Justice (International Cooperation) (Amendment) Act, 2000
- Criminal Justice (International Cooperation) (Amendment) Act, 2004

Subsidiary Legislation

- Criminal Justice (International Cooperation) (Enforcement of Overseas Forfeiture Orders) Order, 1996
- Criminal Justice (International Cooperation) (Amendment of Schedule 2) Order, 2010

- (e) Proceeds of Criminal Conduct Act, 1997 (as amended);

Amendments

- Proceeds of Criminal Conduct (Amendment) Act, 2001
- Proceeds of Criminal Conduct (Amendment) Act, 2003
- Proceeds of Criminal Conduct (Amendment) Act, 2006

- Proceeds of Criminal Conduct (Amendment) Act, 2008

Subsidiary Legislation

- Proceeds of Criminal Conduct (Designated Countries and Territories) Order, 1999
- Anti-money Laundering Regulations, 2008
- Anti-money Laundering (Amendment) Regulations, 2010
- Anti-money Laundering (Amendment) Regulations, 2012
- Anti-money Laundering and Terrorist Financing Code of Practice, 2008
- Anti-money Laundering and Terrorist Financing (Amendment) Code of Practice, 2009
- Anti-money Laundering and Terrorist Financing (Amendment) (No. 2) Code of Practice, 2009
- Anti-money Laundering and Terrorist Financing (Amendment) Code of Practice, 2010
- Anti-money Laundering and Terrorist Financing (Amendment) (No.2) Code of Practice, 2010
- Anti-money Laundering and Terrorist Financing (Amendment) Code of Practice, 2012
- Anti-money Laundering and Terrorist Financing (Amendment) (No. 2) Code of Practice, 2012
- Non-financial Businesses Designation Notice, 2008

(f) Financial Services Commission Act, 2001 (as amended);

Amendments

- Financial Services Commission (Amendment) Act, 2004
- Financial Services Commission (Amendment) Act, 2006
- Financial Services Commission (Amendment) Act, 2008
- Financial Services Commission (Amendment) Act, 2009
- Financial Services Commission (Amendment) Act, 2011

Subsidiary Legislation

Numerous subsidiary legislation have been enacted under the Financial Services Commission Act, however, these subsidiary legislation do not deal specifically with matters of international cooperation and information exchange and have therefore not been included in this Handbook.

(g) Financial Investigation Agency Act, 2003 (as amended);

Amendments

- Financial Investigation Agency (Amendment) Act, 2007
- Financial Investigation Agency (Amendment) Act, 2008

(h) Mutual Legal Assistance (Tax Matters) Act, 2003 (as amended);

Amendments

- Mutual Legal Assistance (Tax Matters) (Amendment) Act, 2005
- Mutual Legal Assistance (Tax Matters) (Amendment) Act, 2011
- Mutual Legal Assistance (Tax Matters) (Amendment) Act, 2012

- Mutual Legal Assistance (Tax Matters) (Amendment) Act, 2013

Subsidiary Legislation

- Mutual Legal Assistance (Tax Matters) Order, 2010
 - Mutual Legal Assistance (Tax Matters) (No. 2) Order, 2010
 - Mutual Legal Assistance (Tax Matters) (No. 3) Order, 2010
 - Mutual Legal Assistance (Tax Matters) (No. 4) Order, 2010
 - Mutual Legal Assistance (Tax Matters) (No. 5) Order, 2010
 - Mutual Legal Assistance (Tax Matters) Order, 2011
 - Mutual Legal Assistance (Tax Matters) (Automatic Exchange of Information) Order, 2011
 - Mutual Legal Assistance (Tax Matters)(Amendment of Schedule) Order, 2013
 - Mutual Legal Assistance (Tax Matters)(Amendment of Schedule) (No. 2) Order, 2013
- (i) Proliferation Financing (Prohibition) Act, 2009;
- (j) The Terrorism (United Nations Measures) (Overseas Territories) Order 2001;
- (k) The Al-Qaida and Taliban (United Nations Measures) (Overseas Territories) Order 2002 (as amended);
- (l) The Anti-terrorism (Financial and Other Measures) (Overseas Territories) Order 2002;
- (m) Extradition (Overseas Territories) Order 2002;
- (n) The North Korea (United Nations Measures) (Overseas Territories) Order 2006 (U.K.S.I. 2006 No. 3337) (as amended);
- (o) The Iran (United Nations Measures) (Overseas Territories) Order 2007 (U.K.S.I. 2006 No. 282) (as amended).

3.2 Synopsis of the Legislation

3.2.1 Evidence (Proceedings in Foreign Jurisdictions) Act, 1988

This Act essentially gives effect to the provisions of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970. The Act empowers the High Court to issue an order for the obtaining of evidence in the BVI for the purpose of giving effect to foreign requests for assistance. Such an order made by the Court may provide for the examination of witnesses (orally or in writing), production of documents, inspection, photographing, preservation, custody or detention of property, or medical examination of a person. The limitation, however, is that any steps to be taken in obtaining evidence must relate to steps that the High Court can take in proceedings of the same description as those to which an order relates. Furthermore, a person cannot be compelled to give evidence that, in civil proceedings before the Court or in the requesting jurisdiction, he cannot be compelled to give; that extends to situations where the giving of the evidence would endanger the security of the BVI.

3.2.2 Mutual Legal Assistance (United States of America) Act, 1990

This Act implements the bilateral Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands, 1986 which was extended to the BVI in 1989. The essence of the Treaty is to improve the effectiveness of the law enforcement authorities of both the BVI and USA in relation to the prosecution and suppression of crime through the process of cooperation and mutual legal assistance; hence the scope of the Treaty is limited to criminal matters, but excludes conduct or any matter which may relate directly or indirectly to the regulation, imposition, calculation or collection of taxes.

3.2.3 Drug Trafficking Offences Act, 1992

This Act gives effect to the provisions of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. It establishes the legal framework for the recovery of the proceeds of drug trafficking and, towards that end, it creates a regime of international cooperation on drug trafficking, including applications for confiscation, restraint and charging orders. The Act is complemented by the Drug Trafficking (Designated Countries and Territories) Order, 1996. This Order deals with the details of the assistance to be provided to appropriate authorities of designated countries and territories in relation to drug-trafficking and money laundering. Where no appropriate authority is specified in relation to a country or territory, the Governor is empowered to issue a certificate to the effect that the authority named therein is the appropriate authority. Thus the non-designation of a country or territory has never been a handicap to render assistance to a requesting authority as the provisions of the Act are considered broad enough to enable assistance to be rendered to any country or territory.

3.2.4 Criminal Justice (International Cooperation) Act, 1993

The objective of this Act, in essence is to create a flexible and comprehensive regime that enables the BVI to cooperate with other countries in matters pertaining to criminal investigations and proceedings; in addition, the Act regulates substances that are considered useful for the manufacture of controlled drugs and also creates a regime of hot-pursuit in apprehending vessels and persons concerned with drug offences. This latter regime, however, operates only on a bilateral arrangement, as currently exists between the BVI and the USA. The Act is complemented by the Criminal Justice (International Cooperation) (Enforcement of Overseas Forfeiture) Order, 1996. This Order outlines the process for obtaining assistance in matters concerning the enforcement of confiscation orders as well as applications for restraint and charging orders. Its scope is also sufficiently broad to enable assistance to be rendered to any country or territory.

3.2.5 Proceeds of Criminal Conduct Act, 1997

This Act represents an all-crimes anti-money laundering legislation. It provides for the recovery of the proceeds of crime; in addition, it also establishes a regime for the registration and enforcement of external confiscation orders. In that context it enables an application to be made to the High Court to obtain a restraint or charging order to protect any specified assets from being dissipated. The Act is complemented by the Proceeds of Criminal Conduct (Designated Countries and Territories) Order, 1999. This Order provides the process for enforcing a request to confiscate assets or apply for a restraint or charging order. The Anti-money Laundering Regulations, 2008 foster the [regulation] supervision of regulated and non-regulated entities by requiring the adoption of specified measures to

guard against the activities of money laundering and terrorist financing and ensure the availability of information when requested. The Anti-money Laundering and Terrorist Financing Code of Practice, 2008 supplements the Regulations and establishes a framework for compliance with AML/CFT matters including the verification and maintenance of relevant ownership information and other pertinent records, as well as exchange of information with relevant authorities¹.

3.2.6 Financial Services Commission Act, 2001

This Act establishes the Financial Services Commission as the BVI's autonomous regulatory institution with powers to license, regulate and develop the financial services industry. Apart from establishing a well-insulated regime for the regulation of the domestic market and the services provided to corporate vehicle, the Act also empowers the Commission to, among other things, receive and grant assistance on request from a foreign regulatory authority for the purpose of enabling the foreign authority to discharge its regulatory functions. Thus the Act empowers the Commission to make applications for a person to be examined under oath before a Magistrate; the Commission is similarly empowered to examine a person under oath by appointing an examiner to act on its behalf. Generally, the Commission is required to take appropriate steps to co-operate with foreign regulatory authorities or with persons who exercise functions in relation to the detection and prevention of financial crime. The enforcement regime (which incorporates compulsory powers) under the Act, coupled with the gateway provisions for the disclosure of information, is robust and comprehensive in so far as international cooperation on a regulator-to-regulator basis and in relation to law enforcement are concerned.

3.2.7 Financial Investigation Agency Act, 2003

This Act establishes the Financial Investigation Agency as an autonomous law enforcement institution specializing in the investigation of matters relative to international requests for assistance. It has the responsibility of receiving, obtaining, investigating, analyzing and disseminating information which relates to fiscal offences or the proceeds thereof as well as requests for legal assistance from a competent authority in a foreign jurisdiction. Its scope of operation covers law enforcement (fiscal offences) and regulatory breaches or offences that may be referred to it by the Governor, Attorney General or Financial Services Commission. Thus the primary function of this Agency is to serve as an investigative body in relation to matters that are the subject of foreign requests for assistance. It has the authority to order persons to refrain from completing transactions, freeze bank accounts and produce documents. In the discharge or performance of its functions, the Agency has the power to enter into arrangements (subject to the Governor's fiat) with foreign financial investigation agencies.

The policy-making body of the Agency is the Board; the Steering Committee, comprising the Attorney General, Managing Director of the Financial Services Commission and the Director of the Agency is the successor body to the Reporting Authority and has the responsibility of dealing with and issuing directives in relation to all suspicious activity reports. The Agency has a good complement of investigators with police powers and all members are sworn to maintaining confidentiality in the handling of information, and disclosure thereof is strictly

¹ The AML regime established under the Proceeds of Conduct Act, 1997 will be further refined as necessary on the basis of the revised FATF Recommendations which were adopted in February 2012.

restricted in the manner prescribed by the Act. This feature of the legislation is considered relevant if requests for legal assistance from foreign jurisdictions are not to be compromised.

3.2.8 Mutual Legal Assistance (Tax Matters) Act, 2003

This Act gives effect to the terms of the Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the British Virgin Islands, for the exchange of information relating to tax matters and it extends to any similar agreements the Government of the BVI may enter into. The Act recognizes the principle of transparency and the effective exchange of information in tax matters and applies only on the basis of bilateral arrangements through formally concluded agreements. In 2005, the Act was amended to accommodate the application of the European Union directive on the Taxation of Savings Income. Since 2005 subsequent amendments have been effected to, among other things, strengthen the regime by ensuring the Central Authority has a greater ability to source and obtain relevant information.

3.2.9 Proliferation Financing (Prohibition) Act, 2009

This Act confers power on the BVI Financial Investigation Agency (FIA) to take action against persons and activities that may be related to terrorist financing, money laundering or the development of weapons of mass destruction (proliferation financing). Such action comes primarily in the form of directions that may be issued by the FIA in relation to any and all persons or class of persons operating within the financial sector from a country where there is reasonable belief on the part of the FIA that activities carried out in the country or by the government or any other person resident or incorporated in the country pose a significant risk of terrorist financing, money laundering or the development or financing of weapons of mass destruction, and as such pose a risk to the interests of the Virgin Islands or the United Kingdom. Information gathered by the FIA in the exercise of its duties in carrying out the provisions of this Act may be the subject of information exchange providing such requests for information are made in accordance with relevant legislative provisions.

3.2.10 The Terrorism (United Nations Measures) (Overseas Territories) Order 2001

The essence of this Order-in-Council is to prohibit the raising of funds for purposes of terrorism; it places restrictions on making funds available and providing financial services to terrorists. It also creates a regime enabling the freezing of the accounts of persons suspected to be terrorists or linked to terrorism. The regime allows for the disclosure of information, on the authority of the Governor, to the United Nations and any government of a country for the purpose of detecting evasion of measures relative to terrorism.

3.2.11 The Anti-terrorism (Financial and Other Measures) (Overseas Territories) Order 2002

This Order-in-Council restricts transactions in terrorist property and creates extra-territorial jurisdiction in respect of offences relative to terrorism – that is to say, to be engaged in fundraising or money laundering, using or possessing property or arranging fundraising activities, for terrorist purposes. It also enables the registration and enforcement of foreign confiscation orders by an order of the Governor.

3.2.12 The Extradition (Overseas Territories) Order 2002

The BVI's extradition regime is governed by the Extradition Act (Cap. 121) and the above Order-in-Council; in addition, extradition treaties entered into between the United Kingdom on behalf of the BVI and other countries also have equal application. While the Extradition Act confers jurisdiction on the authorities (Governor and Magistrate) that deal with extradition matters, the Order-in-Council regulates extradition between the UK Overseas Territories (of which the BVI is a part) and Ireland and other designated Commonwealth countries, including the United Kingdom, by applying specific provisions of the UK Extradition Act, 1989. The legislation also creates a regime for the repatriation of prisoners.

3.2.13 The Al-Qaida and Taliban (United Nations Measures) (Overseas Territories) Order 2002

This Order-in-Council amends the Terrorism (United Nations Measures) (Overseas Territories) Order, 2001 and gives effect to UNSCR 1390. The Order requires States to prohibit the delivery or supply of arms and related material and the provision of related technical assistance and training to Usama Bin Laden, Al-Qaida, the Taliban and any of their associates. The Order further prohibits States from making funds available to any of these persons.

3.2.14 The North Korea (United Nations Measures) (Overseas Territories) Order 2006 (U.K.S.I. 2006 No. 3337)

The Order-in-Council gives effect to UNSCR 1718 and requires States to prohibit the supply of arms and sensitive goods and technologies related to the Democratic People's Republic of Korea's (DPRK) nuclear weapon, ballistic missile and other weapons of mass destruction programmes. It places a ban on the provision of assistance to DPRK and the procurement of goods from the DPRK; and prohibits States from making funds available to designated persons or entities associated with the DPRK.

3.2.15 The Iran (United Nations Measures) (Overseas Territories) Order 2007 (U.K.S.I. 2006 No. 282)

This essence of this Order-in-Council is similar to the North Korea Order as it prohibits States from supplying, selling or transferring materials, equipment, goods, technologies and other specified items related to Iran's nuclear enrichment related activities. It also places a ban on the provision of assistance to Iran and the procurement of restricted goods from Iran and prohibits States from making funds available to designated persons or entities associated with the Iran. This Order-in-Council gives effect to UNSCR 1737.

3.3 BVI Central Authorities

3.3.1 The range of mutual legal assistance requests made of the BVI necessitates a varied expertise in each specific area to ensure appropriate and effective processing. The relevant legislation outlined above (pages 13 – 20) are administered by different entities, but interact as necessary, with the Financial Investigation Agency remaining the focal point for conducting investigations unless, as in the case of the Financial Services Commission Act, 2001, the FSC is specifically imbued with certain compulsory powers. Generally, requests for legal assistance fall under three categories (this excludes assistance in judicial matters which is specifically dealt with in Part 5 of this Handbook):

- (a) Law enforcement – relates to the criminal law where investigations or proceedings have been instituted;
- (b) Regulatory breaches/offences – relate to violations or suspected violations of the financial and financial services regulatory regime or non-compliance therewith;
- (c) Tax offences – relate to violations or suspected violations of tax obligations or non-compliance therewith.

3.3.2 With respect to law enforcement, the BVI’s Central Authorities are:

- (a) the Governor and the Attorney General, in relation to requests that fall under the Criminal Justice (International Cooperation) Act, 1993, the Governor only in relation to the Terrorism (United Nations Measures) (Overseas Territories) Order 2001, the Anti-terrorism (Financial and Other Measures) (Overseas Territories) Order 2002 and the Extradition (Overseas Territories) Order 2002; and
- (b) the Attorney General, in relation to requests that fall under the Evidence (Proceedings in Foreign Jurisdiction) Act, 1988, Mutual Legal Assistance (United States of America) Act, 1990, Drug Trafficking Offences Act, 1992 and Proceeds of Criminal Conduct Act, 1997.

However, it is to be noted that the Governor’s Office and the Attorney General’s Chambers work very closely together in the processing of mutual legal assistance requests. Requests directed to the Governor are passed on to the Attorney General for advice and execution; similarly, requests falling to the Governor’s responsibility received directly by the Attorney General are acted upon, with the Governor’s sanction.

3.3.3 With respect to regulatory breaches/offences or investigations or inquiries, the BVI’s Central Authority is the Managing Director/Chief Executive Officer of the BVI Financial Services Commission.

3.3.4 With respect to tax matters (information exchange), the BVI’s Central Authority is the Financial Secretary. The execution of requests for assistance is delegated to the Director of the International Tax Authority.

3.3.5 Mutual legal assistance is provided only in respect of valid requests from established governmental or government-related authorities or agencies. No assistance is provided to individual non-governmental persons or institutions under the current legislative regimes. As noted above, persons who desire assistance are advised to liaise with the relevant central authorities in their countries to seek advice on a way forward.

3.4 Range of Assistance

The range of assistance that may be provided under the above enumerated BVI laws includes the following:

- (a) service of overseas process;
- (b) obtaining documentary evidence, statements and witness testimony;
- (c) issuing search warrants;
- (d) registration and enforcement of foreign forfeiture/confiscation orders;
- (e) grant of restraint (freezing) and charging orders;
- (f) regulator-to-regulator information assistance and investigations/enquiries in relation to regulatory breaches and offences or regulatory purposes; and
- (g) tax information exchange.

4. THE LAW OF PROVIDING LEGAL ASSISTANCE

Every request for legal assistance must be clear and precise as regards the nature thereof and the purpose for which the request is submitted. It must be written legibly in the English language or, where the original document is in a language other than the English language, a clear and certified translation of the original document must be provided. Failure to adhere to these requirements can result in delays in understanding and executing a request.

4.1 Law Enforcement

Save for requests emanating from the USA, almost all other foreign requests for legal assistance in criminal matters fall to be dealt with under the Criminal Justice (International Cooperation) Act, 1993 (all crimes); the Drug Trafficking Offences Act, 1992 (drug offences) and the Proceeds of Criminal Conduct Act, 1997 (money laundering). Requests from the USA are dealt with pursuant to the provisions of the Mutual Legal Assistance (United States of America) Act, 1990. However, the nature, scope and parameters of assistance in relation to all those legislation are practically the same – the information required to render assistance follows the same pattern.

4.1.1 Service of Foreign Process

- (a) A request for service of process in the BVI must be addressed to the Attorney General directly, or indirectly through the Governor;
- (b) The request must be made by a foreign government or other authority recognised and/or authorised by such government or by law;
- (c) The request must be accompanied by a summons or other process requiring the person to whom it relates to appear as a defendant or to attend as a witness in criminal proceedings in the requesting country, specifying the relevant date;
- (d) As an alternative to paragraph (c) above, the request must be accompanied by a document issued by a court exercising criminal jurisdiction in the requesting country and recording a decision of the court made in exercise of that jurisdiction;
- (e) The letter of request must identify a named person on whom the process is to be served and the address at which such person resides or is registered in the BVI.

(It should be noted that BVI law does not, where foreign process is served, compel a witness to attend and give evidence in a foreign country; it simply provides a notification procedure in relation to the witness);

- (f) Upon receiving and assessing the request for service of process, the Attorney General (or other person acting on his behalf) may cause the process or other documents to be served by post or, if personal service is requested, he shall cause the process or other documents to be served personally;
- (g) In effecting service in accordance with paragraph (f) above, the service is required to be accompanied by a notice information the person to whom it relates
 - (i) that he/she is not obliged under BVI law to comply with it;

- (ii) that he/she is entitled to obtain legal advice as to the possible consequences of failure to comply under the laws of the requesting country; and
 - (iii) that as a witness in a foreign country he/she may not be accorded the same rights and privileges as those that obtain under BVI law;
- (h) Once service is effected the requesting foreign authority is notified of that fact in writing by the Attorney General, accompanied by a certificate of service.

4.1.2 Obtaining Evidence

A request for assistance to obtain evidence can take one of two forms: testimonial evidence before the court, or administratively conducting investigations and obtaining statements and documents. Which formula is adopted is dependent on the nature of the specific request of the requesting country; a request may relate to either or both formula. Thus when a country makes a request for assistance it should be clear as to how it wishes the request to be handled.

4.1.3 Making a Request for Assistance

Requests for assistance can be made by:

- (a) a court or tribunal exercising criminal jurisdiction in a foreign country or territory;
- (b) a prosecuting authority in a foreign country or territory; or
- (c) any other authority in a foreign country or territory which appears to the Governor or the Attorney General to have the function of making such requests.

4.1.4 Basis for Granting Assistance

Assistance may be granted on the following basis:

- (a) that an offence under the laws of the requesting country or territory has been committed or there are reasonable grounds to suspect that an offence has been committed;
- (b) that criminal proceedings in respect of the offence have been instituted in the requesting country or territory or that a criminal investigation into the offence is being carried on in such country or territory; and
- (c) that either the conduct constituting the alleged offence would constitute an offence if it had occurred in the BVI or there is in force between the requesting country or territory and the BVI a treaty excluding such a requirement.

4.1.5 Testimonial Evidence

A request for testimonial evidence comprises the taking of evidence before a judge of the High Court. Once the Governor is satisfied, on the basis of paragraph 4.1.4 (a) and (b) above and after consulting the Attorney General, he nominates by notice in writing a High Court

judge to receive such of the evidence to which the request relates as may appear to the Court to be appropriate for giving effect to the request. Paragraph 4.1.4 (c) above in relation to the Governor's powers applies only in relation to fiscal offences, unless the requesting country or territory is a Commonwealth country or the request is made pursuant to a treaty that the United Kingdom is a party to and has been extended to the BVI.

4.1.6 Collection of Statements and Documents

This applies where the Attorney General receives a request (either directly or through the Governor) to assist in conducting investigations and obtaining statements and other relevant evidence in aid of criminal proceedings that have been commenced in a requesting country or territory or in respect of an ongoing investigation in such country or territory. The requirements of paragraph 4.1.4 (a) – (c) above apply. Once a request is considered to be in order, the Attorney General directs the Financial Investigation Agency to perform the following:

- (a) apply to a judge or magistrate for a warrant to enter and search premises and to seize any evidence found in such premises;
- (b) conduct necessary investigations;
- (c) interrogate and take statements from persons as may appear appropriate;
- (d) make copies of documents, take extracts or samples and receive such other evidence as may appear appropriate.

4.1.7 Limitations to the Powers of an Investigating Officer

An investigating officer cannot

- (a) compel a person to answer any question;
- (b) compel a person who is not under arrest to attend or remain in any specified place for the purposes of being interrogated;
- (c) compel a person to produce any document or other material; and
- (d) enter premises, save on the authority of a warrant, to conduct a search therein or to seize or take material therefrom without the consent of the owner or occupier of the premises.

4.1.8 Enforcement of Foreign Orders

BVI law permits the registration of foreign forfeiture/confiscation orders, as well as the prohibition of dealings in identified property and the issuing of charging orders. A request for assistance seeking the registration of a foreign forfeiture/confiscation order or the grant of a restraint order is made by the appropriate authority of the requesting jurisdiction. Where the request is found to be in order, an application is made to the High Court which may grant the order for registration; the Court grants a restraint order upon being satisfied that

- (a) proceedings have been instituted or are to be instituted against a defendant in the requesting jurisdiction;
- (b) the proceedings instituted against the defendant have not been concluded; and
- (c) an external forfeiture/confiscation order has been made in the proceedings or there are reasonable grounds for believing that an external forfeiture/confiscation order may be made.

The Court makes an order registering an external forfeiture/confiscation order where it is satisfied that

- (a) at the time of registration, the order is in force and not subject to appeal;
- (b) the person against whom the order is made had sufficient notice of the proceedings to enable him to defend the matter; and
- (c) enforcing the order in the BVI would not be contrary to the interest of justice.

4.1.9 Information Required to Provide Assistance

In order to determine compliance with the requirements of BVI law and thus facilitate the processing of a request for legal assistance, the following information must be supplied when submitting a request for legal assistance:

- (a) the request must be submitted in writing by a relevant central authority or a duly authorised competent authority, stating the purpose thereof;
- (b) the name of the authority responsible for the investigation or the proceedings, including contact details, must be supplied; this is important in the event that the BVI investigators or the Central Authority wish to seek clarifications or directions on any specific matter;
- (c) the offence and nature of the investigation to which the request relates and the information relied upon in support of the request;
- (d) the law pursuant to which investigations or criminal proceedings are being carried out including an extract of the relevant law relating to the offence; if the law is in a language other than the English language, a certified translation must be provided;
- (e) information relating to the persons who are the subject of the investigation or criminal proceedings, including (where available) their names, dates of birth and addresses; in respect of legal persons, the registered addresses and, where possible, the names and addresses of their agents;
- (f) the description of the evidence, information or other assistance sought, indicating as far as possible the time period to which the evidence or information relates;

- (g) the identity and any presumed location (if known) of any person from whom any information or evidence is sought;
- (h) where necessary, for the admissibility of evidence (depending on the laws of the requesting jurisdiction) an indication as to the preferred manner or procedure of collecting or gathering evidence and information, including the need or otherwise of any affidavit of either the investigating officer or other specified person;

As far as is necessary and possible, a request for legal assistance must also include the following:

- (i) the identity and address of the person to be served (in the case of service of process), how the persons is connected to the proceedings and in what manner service should be effected;
- (ii) information regarding the identity and location of the person to whom the request relates;
- (iii) a precise description of the person or place to be searched, including any specified article to be seized;
- (iv) an indication regarding the manner in which a person's testimony or statement should be recorded;
- (v) a list of any questions desired to be asked of any witness;
- (vi) where a witness is required to attend court in the requesting jurisdiction, an indication as to the allowance and expenses payable to the person by the requesting jurisdiction; this is generally essential to secure the cooperation and attendance of witnesses; and
- (vii) any other information that the requesting jurisdiction considers relevant to aid the processing of the request.

4.1.10 Restrictions on Further Disclosure of Information

Where legal assistance is provided to the requesting foreign law enforcement authority, BVI law requires that the information or documents provided therewith must not be further disclosed to another authority or used for a purpose distinct from the original purpose for which the request was made unless the permission of the relevant BVI Central Authority is first sought and obtained.

4.1.11 Protection for Disclosure

Where a person discloses information or produces documents pursuant to an order (in aid of a request for legal assistance), he or she is not held liable (civilly, criminally or disciplinarily) for acting in obedience of such order.

4.1.12 Restriction on Disclosure of Information

BVI law places restrictions on a person, who acquires information from being required to comply with an order to provide specified information or documents, from disclosing such information or documents to another person without lawful authorisation. Any action contravening such restriction constitutes an offence.

5. LEGAL ASSISTANCE IN CIVIL OR COMMERCIAL PROCEEDINGS OVERSEAS

The legislative regime governing assistance to a foreign judicial authority in respect of civil or commercial matters is the Evidence (Proceedings in Foreign Jurisdictions) Act, 1988.

5.1 Scope of Assistance

This Act empowers the BVI Central Authority – the Attorney General – to render assistance in the form of provision of evidence to a foreign court or tribunal for use in civil or commercial proceedings that have been instituted there. The scope of assistance extends to the following:

- (a) the examination of witnesses either orally or in writing;
- (b) the production of documents;
- (c) the inspection, photographing, preservation or detention of property; and
- (d) the medical examination of any person.

5.2 Requirements for the Grant of Assistance

A foreign court or tribunal may issue a Letter of Request addressed to the Attorney General of the BVI requesting assistance by providing the following information:

- (a) the name of the requesting court or tribunal;
- (b) the names and addresses of the parties to the proceedings and their representatives, if any;
- (c) the nature of the proceedings for which evidence is required, giving all necessary information with respect thereto;
- (d) the evidence to be obtained or other judicial act to be performed;
- (e) the names and addresses of the persons to be examined;
- (f) the questions to be put to the persons to be examined or a statement regarding the subject matter about which they are to be examined;
- (g) the documents or other property, real or personal, to be inspected; and
- (h) any requirements that the evidence is to be given on oath or affirmation, and any special form to be used.

5.3 Limitation on Cooperation

5.3.1 Ambit of a Foreign Judicial Order

A foreign judicial order shall not require the BVI Central Authority to take steps to obtain evidence in the High Court which are outside of the Court's normal jurisdiction; nor shall it require steps to be taken to require a person to declare custody or possession of, or to produce, documents other than those specified therein as likely to be in the person's possession, custody or power.

5.3.2 Privilege

Generally, a person cannot be compelled to give evidence which he or she cannot normally give in civil proceedings before the BVI High Court or in the territory in which the requesting court has jurisdiction.

5.3.3 State Security

A person may not be compelled to give any evidence which would endanger the security of the BVI.

6. CO-OPERATION WITH FOREIGN REGULATORY AUTHORITIES

The mutual legal assistance regime relating to regulated entities was initially dealt with under the Financial Services (International Co-operation) Act, 2000 and the Financial Services Commission Act, 2001. However, in 2006 that regime was amalgamated into a single statute through amendments to the Financial Services Commission Act, 2001 and the Financial Services (International Co-operation) Act, 2000 was repealed. Part IV of the Financial Services Commission Act (as amended) now deals with the Financial Services Commission's (the FSC) power to gather information and facilitate cooperation with foreign regulatory authorities and domestic law enforcement authorities as well as effectively enforce its own domestic regulatory requirements.

6.1 FSC's Duty to Cooperate (Scope of Assistance)

The FSC is required to take such steps as it considers appropriate to cooperate with foreign regulatory authorities; this cooperation extends to

- (a) such persons, whether within or without the BVI, who perform functions relative to the prevention or detection of financial crime;
- (b) the sharing of documents and information that the FSC is not prevented from disclosing by virtue of any enactment; and
- (c) making requests to foreign regulatory authorities for legal assistance.

6.2 What Constitutes a "Financial Crime"

A financial crime includes an offence which involves

- (a) money laundering;
- (b) the financing of terrorism;
- (c) the financing of proliferation (weapons of mass destruction); or
- (d) misconduct in, or misuse of information relating to, a financial market

6.3 FSC's Power to Request Documents and Information

The FSC is empowered, where it is reasonably required in the discharge of its functions or in ensuring compliance with any financial services legislation, to require a person to provide to the FSC specified information or any information of a specified description, or to produce specified documents or any documents of a specified description. The FSC exercises this power by giving written notice to the person concerned specifying the place where, the time within which, the form in which, the manner of verifying or authenticating, and the person to whom the information or document is to be provided or produced. It may take extracts of any document produced to it without affecting any lien that may relate to such document. In addition, the FSC may apply to a Magistrate for a search warrant to conduct a search of any premises and retrieve any documents or information to which the warrant relates or to take copies or make extracts thereof or to require any person on the premises to provide an explanation of any such documents or information.

6.4 Power to Examine a Person Under Oath

The examination of a person under oath may take one of two forms: before a Magistrate or before an FSC Commissioner or officer.

6.4.1 Examination Before a Magistrate

- (a) The FSC submits an application to a Magistrate for a specified persons to be examined under oath;
- (b) The Magistrate, upon granting the application, orders the examination of the person under oath on such terms and conditions as the Magistrate considers fit;
- (c) The person to be examined may be represented by a legal practitioner of his or her choice;
- (d) The proceedings of the examination are held in camera;
- (e) The Magistrate is required to process the application for examination within 7 days of the application and to transmit the results of the examination to the FSC within a reasonable period, not exceeding 14 days from the date of the examination.

6.4.2 Examination by the FSC

- (a) The FSC issues a written notice to a person, who it believes can provide information reasonably required for the purposes of discharging its functions or for purposes of compliance with any financial services legislation, to attend before a specified Commissioner or specified officer of the FSC to be examined under oath;
- (b) The person to be examined may be represented by a legal practitioner of his or her choice;
- (c) The examiner administers the oath to the person concerned;
- (d) The proceeding of the examination are held in camera;
- (e) The examiner, upon completion of the examination, is required to prepare a record of the examination and provide the person examined with a copy thereof, subject to such conditions as the examiner may impose;
- (f) The record is then finalised by the examiner and transmitted to the FSC.

6.5 Effecting Assistance

Where the FSC receives a request for assistance from a foreign regulatory authority and it forms the opinion that the request is needed for the foreign regulatory authority's regulatory functions, it may perform the following in rendering assistance:

- (a) exercise the powers outlined in paragraph 6.3 above;
- (b) appoint such a person or persons as it considers necessary as examiners to investigate any matter relative to the request;
- (c) perform any of the tasks outlined in paragraphs 6.4.1 and 6.4.2 above;
- (d) disclose information or provide relevant documents to the requesting authority.

6.6 Considerations Precedent to Effecting Assistance

The FSC, in deciding whether or not to provide assistance to a foreign regulatory authority, is entitled to take into account the following:

- (a) whether corresponding assistance would be provided to the FSC in the country or territory of the foreign regulatory authority concerned; in this respect the FSC may require the said authority to provide a written undertaking to provide corresponding assistance whenever requested – the essence of international cooperation;
- (b) whether the request relates to the breach or possible breach of a law or other requirement that does not have any close parallel in the BVI or involves the assertion of a jurisdiction that is not recognised in the BVI;
- (c) the seriousness of the case concerned and its importance to persons in the BVI;
- (d) the relevance of the information or documentation to the enquiries to which the request for legal assistance relates; and
- (e) whether it is otherwise appropriate in the public interest to provide the legal assistance sought.

The FSC may not exercise its compulsive powers to render assistance in relation to a request, unless

- (i) the foreign regulatory authority undertakes to render corresponding assistance to the FSC whenever requested;
- (ii) the foreign regulatory authority undertakes to make such contribution towards the costs associated with the FSC's exercise of its powers as the FSC considers appropriate;
- (iii) the FSC is satisfied that the foreign regulatory authority is subject to adequate legal restrictions relating to further disclosure of information and documents supplied to it and that it will not (subject to paragraph 6.7 below) further disclose

the information or document supplied save to its employees and officers or take any further action on such information or document;

- (iv) the FSC receives satisfactory assurance that the information or document provided to the foreign regulatory authority will not be used in any criminal proceedings against the person furnishing such information or document, save in proceedings for the offence of perjury or other equivalent offence.

6.7 Point at Which a Request for Onward Disclosure Can be Made

While none of the matters outlined in paragraph 6.6 above is necessarily an outright bar to rendering legal assistance to a foreign regulatory authority, the BVI's international cooperation regime is founded on the international law principle of reciprocity. The caveats contained in paragraph 6.6 serve as necessary checks to ensure the integrity of the mutual legal assistance regime. In that vein, information supplied is required to be used solely for the purpose for which it was requested. However, the Financial Services Commission Act, 2001 (as amended in 2006) permits onward disclosure of information and documents supplied only on the following basis:

- (a) that at the time of submitting a request for legal assistance, the foreign regulatory authority specifically requests permission to further disclose any information or documents supplied to another specified authority or authorities; this is an advance request for onward disclosure;
- (b) that after receipt of the information or documents requested, if the foreign regulatory authority forms the view that it should further disclose the information or documents to another authority, then it must first write to and obtain the express permission of the FSC to do so; this is a later request for onward disclosure;
- (c) that onward disclosure is permitted only to another authority within the jurisdiction of the same foreign regulatory authority that initially requested assistance, unless otherwise specified.

6.8 Privileged Information and Documents

A person may not be required to produce, disclose or permit the inspection of any information or document that he or she would be entitled to refuse to disclose or produce on the grounds of legal professional privilege. This relates to information or documents that come to a legal practitioner in privileged circumstances. However, no information or document is treated to fall within the ambit of such privileged circumstances if it is communicated or given with a view to furthering any criminal purpose. In addition, the restrictions on the disclosure of privileged information or documents do not prevent a legal practitioner from providing the name and address of his or her client.

6.9 Protection from Disclosure

As a means of exacting full cooperation in processing requests for legal assistance as well as ensuring effective enforcement of the law, a person who discloses information or produces documents pursuant to a request or directive of the FSC is held not to contravene any enactment, rule of law, agreement or any applicable professional code of conduct and he or she is not liable civilly, criminally or disciplinarily.

6.10 Restrictions on Disclosure of Information (Protected Information)

A key aspect of effective international cooperation is the ability to maintain, to the extent necessary, the confidentiality of requests for legal assistance and the information or documents supplied in that regard. The Financial Services Commission Act, 2001 classifies as “protected information” information that is acquired by specified persons in specific circumstances or pursuant to any financial services legislation, and includes any information that is obtained from a foreign regulatory or law enforcement authority. Thus, information received by the FSC, its Board members (including the Managing Director/CEO), its employees, its examiners and investigators and any other person acting under its authority as an agent is considered protected information and may only be disclosed in circumstances permitted by law. Information is considered not protected if

- (a) it is or has been available to the public from another source;
- (b) it is disclosed in a summary or in statistics that is expressed in a manner that does not enable the identity of any person to whom it relates to be determined.

6.11 Exceptions to the Restrictions on Disclosure of Information

While the law provides exceptions to the restrictions applied to the disclosure of information, these are selectively applied and only as exceptionally required for purposes of

- (a) judicial or quasi-judicial proceedings;
- (b) aiding the request of a foreign regulatory authority;
- (c) law enforcement (within or without the BVI), including the conduct of investigations; or
- (d) regulatory enforcement action, including proceedings for winding up or dissolution of business entities or appointment or duties of receivers of such entities.

Information received by the FSC from a foreign regulatory authority is held and treated in the strictest of confidence and persons required to provide information or produce documents in relation thereto are held to the same level of strict confidentiality. Where in the unusual circumstance when it becomes necessary to reveal certain confidential aspects of a request to aid the process of an investigation, the foreign regulatory authority is first notified and its permission sought before any action is taken in respect thereof.

6.12 Assisting the FSC to Protect the Public

One of the primary functions of the FSC in the discharge of its duties is to represent and protect the public interest by providing statements advising the public against any dealings with certain persons or businesses it considers undesirable. In particular, it may issue statements for the purposes of

- (a) protecting the public, within or without the BVI, against any financial loss that may arise from the dishonesty, incompetence, malpractice or insolvency of persons that are engaged in financial services business in the BVI;
- (b) protecting and enhancing the reputation of the BVI as a financial services centre; and
- (c) reducing crime and other unlawful activities relating to financial services business.

In order to aid the FSC in this process and in the context of international cooperation, the FSC welcomes any information that any foreign regulatory or law enforcement authority may provide in relation to BVI regulated entities to forestall any conduct that may be inimical to the interests of investors and the public in general. The source of any such information will be held in strict confidence.

7. MUTUAL LEGAL ASSISTANCE IN TAX MATTERS

The Mutual Legal Assistance (Tax Matters) Act, 2003 represents the BVI's international cooperation regime in tax matters. This Act initially gave effect to the terms of the Agreement between the Government of the USA and the Government of Great Britain and Northern Ireland, including the Government of the BVI, concluded in 2002 for the exchange of information in relation to tax matters. Since that time the Act has been amended to extend the scope of tax information exchange beyond this initial agreement to cover agreements entered into with other competent authorities in countries with which the BVI Government has signed Tax Information Exchange Agreements (TIEAs). The basis of the Act is founded on these bilateral agreements negotiated and concluded by the BVI Government on the principle of transparency and effective exchange of information on tax matters².

7.1 Aiming for a Level Playing Field

The BVI is one of many countries and territories that is a member of the OECD Global Forum which, apart from negotiating and agreeing on principles of transparency and effective exchange of information, also aims to agree on principles aimed at achieving a level playing field in the area of taxation. By enacting legislation on this subject, applicable on the basis of concluded bilateral agreements, the BVI continues to demonstrate its willingness in fostering and promoting international cooperation in all areas of legitimate business.

7.2 Scope of Assistance

The scope of assistance envisaged under the Mutual Legal Assistance (Tax Matters) Act, 2003 relates to the exchange of information in relation to the administration and enforcement of domestic laws concerning specified taxes and tax matters agreed pursuant to an agreement; that would include information that may be relevant in determining, assessing, verifying, enforcing or collecting tax claims, including the investigation or prosecution of criminal tax matters.

7.3 Powers Exercisable by the Central Authority (CA)

As noted in paragraph 3.3.4 above, the BVI's Central Authority in relation to tax matters, including information exchange, is the Financial Secretary. Authority for the execution of requests for assistance has been reposed in the Director of the International Tax Authority.

Where it is determined that a request for legal assistance complies with the terms of the Act and the applicable agreement, the CA may exercise any of the following powers in giving effect to the request:

- (a) Issue a written notice to a specified person requiring such person to provide the information or documents therein specified;
- (b) Require the information or documents to be provided within such time as may be specified in the notice;

² At time of publication the Government of the Virgin Islands was in active discussion with the US and other countries in an effort to conclude arrangements in relation to the US FATCA. It is envisaged that similar arrangements may be entered into with some other countries. This paragraph will be amended at the appropriate time if that is considered necessary.

- (c) Require the information or documents to be provided in such form as the CA may determine;
- (d) Require that the information or documents to be provided be verified or authenticated in such manner as the CA may consider reasonable;
- (e) Take copies or extracts of any information or document provided;
- (f) In such cases as it considers appropriate, apply to a Magistrate for a search warrant
 - (i) to enter and search specified premises;
 - (ii) to take possession of any information or document that relates to the warrant;
 - (iii) to take copies or extracts relative to any information or document that may be the subject of the warrant; and
 - (iv) to require any person on the premises to provide an explanation in respect of any information or document relative to the warrant.

Where the information in the possession of the CA is not sufficient to enable it to comply with the request for information, the CA may employ all relevant information gathering measures to provide the requesting authority with the information requested, notwithstanding that the CA may not need such information for its own tax purposes.

7.4 Conditions Precedent to Providing Assistance

In order to demonstrate the relevance of any information sought pursuant to a request for assistance, the following information must be provided:

- (a) the name of the requesting authority;
- (b) the identity of the person to whom the request relates;
- (c) the nature and type of the information requested;
- (d) a description of the specific evidence, information or other assistance sought;
- (e) the purposes for which the information is sought;
- (f) the period of time with respect to which the information sought is requested;
- (g) reasonable grounds for believing that the information sought is in the BVI or in the possession or control of a person subject to the BVI's jurisdiction and may be relevant to the purpose of the request;
- (h) the name and address (to the extent possible) of the person in possession or control of the information sought; and

- (i) a declaration that the request conforms to the law and administrative practice of the requesting country or territory and would be obtainable under its own laws in similar circumstances.

7.5 Declining a Request for Legal Assistance

A request for legal assistance may be declined if

- (a) the conditions precedent outlined in paragraph 7.4 above are not complied with;
- (b) the request fails to conform with the terms of any agreement pursuant to which assistance is sought;
- (c) the requesting country or territory has failed to pursue all the means available in its own jurisdiction (unless where recourse to such means would give rise to disproportionate difficulty); or
- (d) the disclosure of the information that is the subject of the request would be contrary to the BVI's public policy.

7.6 Protection for Disclosure

A person who discloses information in obedience to an order to disclose such information suffers no liability (civilly, criminally or disciplinarily).

7.7 Restrictions on Disclosure of Information

All information received pursuant to a request for legal assistance is treated and held in the strictest of confidence; any person who is notified of the information – whether to take action or supply information in respect thereof – is prohibited from disclosing such information or any particular thereof to another person save as may be permitted by law or the agreement governing the relationship between the BVI and the requesting country or territory.

8. MISCELLANEOUS MATTERS RELATIVE TO REQUESTS FOR LEGAL ASSISTANCE

8.1 Supplemental Requests

A requesting authority, having previously submitted a request for legal assistance, is entitled to submit a supplemental request in relation to the earlier request. This may be done either

- (a) during the execution by the relevant BVI central authority of the initial request and before the completion thereof; or
- (b) after receipt of the assistance requested; the information supplied may generate further avenue that the requesting authority may wish to be further explored.

In either case, the supplemental request is treated in the same manner as the initial request. Therefore, all the requisite procedures must be followed, but only information relevant to the further execution of the supplemental request need be provided. The supplemental request must make reference to the earlier request and be quite explicit as to the additional line of enquiry it wishes to be carried out. Failure to follow the established laws and rules any result in assistance either being delayed or not provided at all.

8.2 Costs of Providing Assistance

Although BVI law provides for the recovery of the costs associated with any enquiry or investigation concerning a request for legal assistance, as a matter of general practice the central authorities do not pass on such costs to requesting authorities. However, in exceptional cases where the costs are considered prohibitive, the requesting authority may be asked to make a contribution to such costs or undertake to effect full payment of the costs. In such a situation, the processing of a request for assistance will depend on the positive response of the requesting authority. It should be noted that the BVI's general practice of not passing on costs takes into account the reciprocal principle that in a similar situation where the BVI makes a request of the requesting authority the costs associated therewith will not be passed on, save where such costs are prohibitive.

8.3 Representation in Court

Where a request requires attendance of counsel in court to assist the court in taking evidence, this task is performed by counsel appointed by the Attorney General or, in the cause of the FSC, counsel appointed by the Managing Director/CEO of the FSC. Foreign counsel would ordinarily not have a right of audience before the court in such matters; however, where a requesting authority wishes, its foreign counsel may be allowed to be present in court but not address the court.

8.4 Presence of Foreign Investigators

While BVI law does not require the presence of foreign investigators in the BVI in relation to a request for legal assistance, it does not prohibit it either. However, where a requesting authority feels the need to have its investigators present, they must specifically request this at the time of submitting the request for legal assistance. The Governor's authorisation is required (for law enforcement-related requests) and, where granted, the foreign investigators are allowed to visit the BVI. During the visit the foreign investigators' role is limited only to assisting the BVI's investigators and they cannot take any direct part in the

investigations. Such requests as they relate to regulatory matters or tax matters must be addressed to the FSC and the Financial Secretary respectively.

8.5 Requests Sent to the Wrong Central Authority

In the rare cases where a request for legal assistance is addressed to and received by the wrong BVI central authority, the request is forwarded to the proper central authority. The requesting authority is then notified of that fact and asked to follow up the request with the proper central authority. Similarly, it may well be that a request (though very rare) would deal with a subject that permeates more than one central authority. In such a case, a mechanism exists for the request to be processed by the appropriate central authorities, with the original requested authority providing the necessary coordination. The requesting authority would be accordingly notified; this does not affect the required assistance being rendered.

8.6 Requests for Legal Assistance that Lack Relevant Information

In the rare circumstance where a request for legal assistance fails to provide the requisite information to enable assistance to be rendered, the requesting authority is notified to supply the missing information. No action is taken until the missing information is provided. The reason for this is simple: the exercise by the BVI central authorities of the compulsory powers given to them under the relevant enactments are subject to judicial challenge – normally in the form of applications for judicial review – where a deviation occurs in keeping to the requirements of the law. It is therefore imperative that all that is necessary is done to ensure full compliance with the law and thus obviate such a challenge or minimise any costs that may be associated therewith and maintain the integrity of any ongoing enquiries or investigations.

8.7 Resolving Disputes between Central Authorities

In the event that a dispute or disagreement arises between central authorities during the processing of a request for legal assistance, the requesting and requested authorities are encouraged to engage in dialogue to see how best the matter can be resolved within the terms of the relevant agreement. The BVI encourages dialogue between central authorities as a way of maintaining transparency and effective information exchange without compromising the viability of its services.

9. GENERAL PROCEDURES FOR THE TRANSMISSION AND EXECUTION OF REQUESTS FOR LEGAL ASSISTANCE

Addressing Requests for Legal Assistance

A request for legal assistance must be properly dated and signed and must emanate from a relevant authority of a country or territory. It is for the requesting authority to satisfy itself that all of the requirements specific to a desired request set out herein have been complied with before submitting a request for legal assistance. When all the requisite information has been compiled, then the request may be addressed to

(a) in the case of a law enforcement matter

His Excellency the Governor
Governor's Office
P.O. Box 702
Road Town, Tortola VG1110
British Virgin Islands

Tel: +284 494 2345
+284 468 3516
Fax: +284 494 5790
Email: bvigorner@gov.vg

(b) in the case of a law enforcement matter emanating from the USA

The Hon. Attorney General
Attorney General's Chambers
4th Floor, TTT Building
P. O. Box 242
Road Town, Tortola VG1110
British Virgin Islands

Tel: +284 468 2960
Fax: +284 468 2983
Email: agc@gov.vg

(c) in the case of a tax matter

The Financial Secretary
Ministry of Finance
Government of the Virgin Islands
Central Administration Complex
Road Town, Tortola VG1110
British Virgin Islands

Tel: +284 468 2144
+284 468 2095
Fax: +284 494 6180
+284 468 3141
Email: bviita@gov.vg

(d) in the case of a request for assistance by a foreign regulatory authority

The Managing Director/CEO
BVI Financial Services Commission
Haycraft Building, Pasea Estate
P.O. Box 418
Road Town, Tortola VG1110
British Virgin Islands

Tel: +284 494 1324
+284 494 4190
Fax: +284 494 9399
+284 494 5016
Email: commissioner@bvifsc.vg

(e) in the case of a request for assistance to the Financial Investigation Agency

The Director
BVI Financial Investigation Agency
2nd Floor, LM Business Centre
P.O. Box 4090
Road Town, Tortola VG1110
British Virgin Islands

Tel: +284 494 1335
Fax: +284 494 1435
Email: director@bvifia.org

(f) in the case of a request for judicial assistance, the request may be sent to either the Attorney General or to the Registrar of the High Court as follows:

The Registrar
High Court Registry
Main Street
P. O. Box 418
Road Town, Tortola VG1110
British Virgin Islands

Tel: +284 494 3492
Fax: +284 494 6664
Email: supremecourt@gov.vg

Re-issued by the Financial Services Commission this 25th day of June, 2013.

(Sgd:) Robert Mathavious
Managing Director/CEO
BVI Financial Services Commission