

COMMENTS AND RESPONSES, 1ST DRAFT ABC BILL

Section	Comment/Recommendation	Response
General	There are a number of formatting and line spacing errors found throughout the document. Please review and correct as appropriate.	These formatting matters were noted and considered and referred to the drafter.
Objects and Reasons	“Transitional Provisions” refers to a transitional period. This is referred to in Section 275 and Schedule 2. However, no transitional period is mentioned in Schedule 2.	The ABC Bill -includes a combination of both the current IBC and Companies Acts. The procedures involved are similar and the Registry is currently engaged in an upgrade of its electronic system. This section will be reviewed further.
Objects and Reasons	In talking about the solvency test, this section simply states that the value of assets is to exceed the value of liabilities. From an accounting perspective, this is naïve as it appears not to contemplate assets which have provisions set against them, depreciation or amortization charged to them, or comment on the possible inflation of asset values by introducing intangible assets (such as goodwill, brand image, etc.) The FSC already has guidelines referring to solvency tests. Why not refer to them instead?	Agreed. This section will be reviewed.

COMMENTS AND RESPONSES, 1ST DRAFT ABC BILL

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Table of Contents	In 235, an Official Receiver is contemplated. What legal provision creates one and does such a person need to consent to act?	The concept of Official Receiver will be discussed further in light of the fact that Anguilla does not have an Insolvency Act. This section will be reviewed.
1	The definition of “dollar” is that of the US\$. This means that the fines and penalties need to be proportionate. There is no provision for use of the EC\$ and perhaps consideration should be given to this instead since this is our legal currency.	The issue here is that the EC\$ is the legal tender in Anguilla. The purpose of this provision is to ensure that the pricing is in US dollars regarding the Act. This does not prevent companies from using other currencies. The implications of the term lawful currency will be reconsidered by the drafter.
1	The definition of “shareholder”. There should be a definition of this term separate and apart from the definition of the term “member”. In Anguilla’s jurisprudence, shareholder is a well-defined and understood concept. It ought to remain so. The use of the term “member” will likely cause confusion.	“Member” is defined in section 1; “shareholder” is defined in section 67. There is a shift to using the language of “member” internationally. To adopt the shift signals harmonization/assimilation. An attorney or Registered Agent is under no handicap to elucidate this assimilation to clients. We can move away from the static approach. The concern is readily resolved with a definition in Section 2 of each type of company along the lines set out in the Objects and Reasons for the Anguilla Business Companies Act. The next task would then be to remove the free variation that occurs between the use of “member” and “shareholder”. This will be reviewed by the drafter.
5(1)(b)	It is noted that written approval is required from the FSC for an SPC to be incorporated. Will there be regulations to address this process?	Yes.
PvT	The drafting instruction included an Indian company concept called the private (limited) company. It does not appear to be in this draft ABC Act. Was this company type abandoned or did the Registry determine that the company type can be formed under another section of the legislation?	This was excluded but will be put back in the Bill.

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17(1)(d) and 17(2)	There ought to be no role for the Commission here. This ought to be the duty of the Registrar...	In 17(1)(d), the Commission will be replaced with the Registrar. A subsection (e) will be added which would require approval of the Commission for certain restricted words or phrases related to regulated businesses.
24(1)	Why not also allow for a 10-day reservation as is the case at present?	Names can be reserved for 10 days at no cost and can reserve a name for up to 90/120? days for a fee.
37(2)	What bearer shares would any company have to convert into registered shares? Based on the law as far as 2016 bearer shares were all supposed to have been converted into regular shares.	Section 37(2) of the Bill has been revised; bearer shares have been abolished.
41(5)	This states that on summary conviction there will be a fine of \$1,000. This would mean that the company can be taken to court and fined \$1,000 for not maintaining a register of members. – Please confirm if this is correct and intended.	Confirmed. This may be used as an add on to a further enforcement action.
49	The word ‘person’ can include a company – if this section is accepted, it could make that company insolvent.	This section will be reviewed.
52	Can the articles and by-laws stipulate a specific event that can cause the transfer of shares from one person to another, such as the death of a person or other specific event? There is an example of this provision in Samoa legislation I believe.	This practice has created a number of legal issues in other jurisdictions and therefore not recommended.
54(2)1	The transfer form ought to be signed by the transferee also. Otherwise, persons could be designated as shareholders without their consent.	The share transfer form only requires the signature of the transferor unless there is an increase in liability to the transferee as a result of accepting the shares.

COMMENTS AND RESPONSES, 1ST DRAFT ABC BILL

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	Specify also what happens if the transferee cannot sign for any reason (e.g. deceased or is held to be incompetent).	
54(4)	What happens if the directors of a publicly traded company resolve to refuse to do this?	Directors have a fiduciary duty and must comply with the regulatory requirements of stock exchanges. It is unlikely that such a scenario would occur.
57(2)	Are the directors jointly and severally liable? This is potentially a big requirement.	This matter relates to the fiduciary duties of directors. Per section 112, directors are required to act in good faith.
68(2)	This would imply that a company can have no director for the first 6 months after incorporation. Is this correct?	A company must have a director upon incorporation. This will be reviewed by the drafter.
71(2)	The 30 percent threshold here to requisition a shareholders' meeting is way too high in comparison to what currently exists which is 5 percent.	The intention is to have a larger threshold for members to be able to request a meeting from the directors. Theoretically, a 30% threshold would increase the likelihood that more than one member believes that the meeting is needed.
	Members representing 30% of the voting rights can ask the directors to call a meeting of members/shareholders. Is this normal?	Same as above.
	Why 30?	Same as above.
74	Note that a voting trustee must have a written agreement filed with the registered agent that is available for inspection.	Noted.
77	Allow for resolutions to be signed in counterparts.	The policy position is that members should all sign on the same document. In the current age of electronic signatures, this should not be difficult to accomplish.

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80(2)(b)	Is this stating that if a registered agent resigns as the registered agent for a company and that company does not designate a new registered agent, then the last registered agent on the records of the Registrar will automatically become the new registered agent of the company following the resignation?	The intention is for the company to be struck from the register if the company does not find a new registered agent. A company cannot be on the register without a registered agent as this is a requirement. This section will be reviewed and discussed with the drafter to ensure that it is clear.
83(2)(a)	Registered agent must give 90 days' notice of its intention to resign versus the current 30 days' notice under the Companies Act. Why not stick with the current requirement?	90 days is the appropriate time frame.
86(1)(d)	The clause stipulates that notices and other documents filed by the company must be kept at the registered office but it is unclear where the notices or documents had to be filed. Is this only referring to notices and other documents filed with the Registrar? Records are only required to be kept for 6 years. Why is this requirement for 10 years?	The minimum period required is five years and jurisdictions are free to have a greater period. For AML purposes, the 6 year period is adequate. The section will be amended.
86(3) and 88(1)	"records" needs to be defined.	This will be reviewed.
	"Accounts and returns" needs to be defined.	This will be approved and the language stated in 2018 amendments that were approved by OECD used.

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88(2)(a)	Why on a QUARTERLY basis?	<p>This is an OECD requirement for all jurisdictions. With international requests it would be important to have the most recent copy of the accounting records, thus the request for accounts on a quarterly basis. The directors are responsible for submitting the information to the registered agents.</p> <p>See references above re language in 2018 amendments</p>
92(2)	Consider amending “shall” to “may”.	Agreed. This section will be reviewed.
93	This whole section should be removed because this is covered in other legislation.	Agreed. This section will be reviewed.
102(1)	<p>Clause 102 lists among Persons disqualified for appointment as director an individual who is under eighteen years of age. With corporate founders wanting to have as fellow directors relatives below 18 years old, this may be reconsidered unless this is a requirement already in place for local companies under Anguilla law. Corporate law in Panama does not prohibit minors to serve as corporate directors yet local law allows independent minors between 16 and 18 to apply before courts for emancipation to carry out acts of commerce.</p>	<p>This matter is under review. Minors are prohibited from acting as directors in Anguilla. However, it might be possible to include a discretion that allows "emancipated minors" already appointed in other jurisdictions as directors to also be accepted as directors in Anguilla.</p>

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104(1)	6 months to appoint the first directors is way too long. There is no need for this.	A director must be appointed from the date of incorporation.
104(3) and 104(5)(b)	What if, as is often the case, there is no term limit?	This is a matter for the company to be addressed in the by-laws.
104(7)	What if the member is a company?	The Committee determined that this section is confusing and should be reviewed. It was agreed that the objective of this section be determined and consideration be given to expanding the scope.
105(5)	This subsection is unclear. Is this suggesting that a meeting under subsection 3 can be called to remove a member?	This section is dealing with the removal of a director if it is not first addressed in the articles or by-laws. It is stating that members can call a meeting to remove a director of a company. This section should remain.
109(1)(a)	The way this is written it appears there would be one register. Is the intention that there be two?	The intention is to have one register.
121	Consider the effect, and implementation of blockchain technology in this area.	Agreed.
131	The time period for paying fees should be the same as currently exists. Again, there is no need to import foreign concepts into local practices. Further, the penalty regime for late payment set out in section 131(3) is needlessly complicated. The current way of imposing penalties is well-understood and ought not to be replaced by foreign concepts.	The current calendar quarter regime for the payment of fees will remain.

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143(1)(b)	As written, this can be done without FSC approval. It also appears to contradict section 143(2) and 144(1).	This will be reviewed.
154(1)(a)(ii) and 154(2)	Core/general assets should never be available to satisfy the obligation of a segregated portfolio, unless the Court were to rule otherwise.	This is a matter for the company and the Courts.
157(2)	Segregated Portfolio assets should be available if there were a proven intent to defraud.	This is a matter for the Courts.
157(3)	Why would a Court order be needed? Why can't the 'owner' of one segregated portfolio enter into an agreement with another 'owner' of one? This could be unnecessarily costly.	This section will be reviewed.
160(4)	How is an "insolvency practitioner" defined and is a person so defined necessary?	This section will be reviewed further
	It is noted that this becomes, in effect, an involuntary liquidation.	This section will be reviewed further
167(1)(b)(v)	This is the first we are hearing about segregated portfolio accounts needing to be audited. Shouldn't this requirement be set out clearly elsewhere?	The Commission can approve the waiver of audited accounts for each segregated portfolio and only have a requirement for the audit of the segregated portfolio company. However, the section will be reviewed and likely addressed in regulations.
171(4)(b), 172(3)(b) and 173(3)(b)	Why would the Registrar be obliged to send a copy to the charge? Surely this should be left to the arrangements between the charge and the chargor?	This is best practice.
172(2)	This could be open to abuse. What if the action were contested?	This section will be reviewed.

COMMENTS AND RESPONSES, 1ST DRAFT ABC BILL

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178(4)	The word “constituent” is noted. What about “surviving”?	Agreed. This section will be reviewed.
187(6)	Why would this have to apply to all shares? Some shares carry different benefits and obligations to others and so it is possible that these differences could influence the person’s thinking. This subsection can be safely removed as it currently appears to be too restrictive.	This section will be reviewed.
187(7)	Surely the person has all rights as a shareholder until such time as he transfers the shares, not till the time that notice is given?	This section will be reviewed.
	Part XV only applies to voluntary liquidations. Under the Section 217 of the Companies Act, a creditor could apply to the Court for a liquidator to be appointed. The new ABC Act does not make such a provision. The reason for this may be the draft Insolvency Act but this would mean that the Insolvency Act would need to be enacted before the ABC Act is enacted or this would cause a gap in the legislation.	This concern is being reviewed by the appropriate authorities.
225	What are the implications or duties if the entity being liquidated were regulated?	This was deferred by the Committee to be addressed following the publication of the regulations.
229(1)(b)	How would the Registrar be satisfied as to these facts?	This section will be reviewed.
229(2)	The Registrar can ask the Commission to investigate a company – Why? Why not let it be struck off?	Agreed. This section will be reviewed.

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232	Why 5 years? Why not a longer period? It has happened that companies have been restored after more than a 5-year period.	This section will be reviewed.
239(5)	The issue of whether a litigant should be asked to give security should be left to the Court. This is important because while it should never be that one is driven from the seat of judgment because they can't pay, it must also not be that the company should be put through unnecessary costs and expense by someone bringing frivolous claims. As such, the Court, as against Parliament, is in a better position to deal with this issue because it has a whole body of rules to ensure that in each case, the appropriate balance is struck.	Agreed. This section will be reviewed.
245(1), 245(2), 258(1)	Standardize the font and spacing to be compatible with the rest of the document.	Refer to drafter.
245(3)	Why should the Commission have control of what goes to and from this Committee? Why not the Joint Legislative Committee or some body to which the private sector has access?	This is a policy decision. It has been submitted to the appropriate authorities for review.
248	In light of current trends, shouldn't all directors, members and shareholders be publicly filed?	This section will be reviewed.

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254, 265(7)	The concept of action being taken in the Magistrate’s Court, for ANY amount, may be construed as amounting to interference with the judiciary by the legislature. Consider the policy of requiring that the Registrar must get approval from the Magistrate’s Court before penalties can be collected.	This section will be reviewed.
257 and 258	This should be Governor in Council and regulations ought to be recommended by the Registrar. This appears to be a blatant attempt to transfer powers of the Registrar to the Commission and remove the right of Executive Council to advise on issues of company law. This ought not to be accepted.	Agreed. This section will be reviewed.
	Why the Commission?	Agreed. This section will be reviewed.
261(5)	Will the system of incorporating a company according to relevant quarters remain? Are only the exempt companies required to make an annual return and pay an annual fee in January of each year?	This section will be reviewed.
266(5)	Tax concerned member state only relates to the EU. What about the requirements for exchanging information according to the OECD FHTP? What about the UK after 31 December 2020?	This section will be reviewed.
266(5)	Contrast this with the AML/CFT Code requirements, as well as anything elsewhere in the legislation.	This section will be reviewed.

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	What if the company has been struck off?	This is addressed in Section 271(1).
271(1)	So involuntary liquidations remain "as is"?	This section will be reviewed.