

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay containing text. The foreground shows a paved plaza with geometric patterns and a few stanchions.

British Virgin Islands Segregated Portfolio Companies

Preface

This publication has been prepared for the assistance of anyone who is considering establishing a segregated portfolio company in the British Virgin Islands (“BVI”). It deals in broad terms with the requirements of BVI law. It is not intended to be exhaustive but merely to provide general information to our clients and their professional advisers.

We recommend that our clients seek legal advice in the BVI on their specific proposals before taking any steps to implement them.

Conyers Dill & Pearman

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1. INTRODUCTION

A segregated portfolio company (“SPC”) is a company limited by shares which is permitted to create one or more ‘segregated portfolios’ in order to segregate the assets and liabilities held in or on behalf of a segregated portfolio from the assets and liabilities of the SPC:

- (a) held in or on behalf of any other segregated portfolio of the SPC; and
- (b) which are not held within or on behalf of any segregated portfolio of the SPC.

In the BVI, only mutual fund companies, insurance companies and companies that are not licensed as an investment business company, insurance manager or insurance intermediary or to carry on a regulated activity under the Banks and Trust Companies Act, 1990, the Company Management Act, 1990 and the Financing and Money Services Act, 2009 are permitted to be registered as SPCs. The Financial Services Commission of the BVI (the “Commission”) is empowered to add, by regulation, other types of companies to this list.

2. RATIONALE FOR ESTABLISHING A SEGREGATED PORTFOLIO COMPANY

An SPC is one discrete legal entity. A segregated portfolio is not a separate legal entity but a record or a collection of records detailing transactions relating or linked to each other. The SPC structure therefore enables a statutory segregation of accounts within a single company that could not otherwise be achieved.

Assets linked to a particular segregated portfolio are held by the company as a separate fund. Such assets are not available to meet the company’s general liabilities, and cannot (unless otherwise agreed) be made available to satisfy the liabilities linked to other accounts. Each segregated portfolio is able to grant security over its segregated portfolio assets, and this security can be made to rank ahead of the interests of the owner of the account.

Within the mutual funds industry the ability to use a SPC is particularly beneficial for fund managers wishing to establish master-feeder fund structures, structures providing for multiple classes of shares or any structure where the statutory segregation of assets is desired. SPCs are also useful in the insurance industry, being a sensible vehicle for ‘rent-a-captives’, being captive insurance companies established and licensed by a sponsor who then ‘rents’ the capital, the insurance licence and the company’s capacity to operate, to various participants. Insurance companies also find SPCs useful for legally separating reserves among different insurance products, particularly long-term business such as life and disability programs. A recent amendment to the British Virgin Islands Business Companies Act, 2004 (the “BC Act”) has enabled SPCs to be used in closed ended fund structures such as private equity, venture capital and real estate fund structures.

2.1. Segregation of Assets and Liabilities

Assets of an SPC are either segregated portfolio assets or general assets. Segregated portfolio assets are those assets of an SPC held within or on behalf of the segregated portfolios created by the SPC. An SPC’s general assets are those assets of the SPC which are not segregated portfolio assets. The segregated portfolio assets of any given segregated portfolio comprise:

- (a) assets representing the consideration paid or payable for the issue of segregated portfolio shares and reserves attributable to the segregated portfolio; and
- (b) all other assets attributable to or held within the segregated portfolio.

The BC Act imposes a duty on directors:

- (a) to segregate (and keep segregated) segregated portfolio assets separate (and separately identifiable) from general assets; and
- (b) to segregate (and keep segregated) segregated portfolio assets of each segregated portfolio separate (and separately identifiable) from segregated portfolio assets of any other segregated portfolio.

A procedure exists whereby the directors can correct any failure to properly attribute a contract to a particular segregated portfolio. A segregated portfolio company may enter into a contract or other agreement with another segregated portfolio in the same segregated portfolio company.

A segregated portfolio that contains no assets or liabilities can be terminated in accordance with the provisions of the BC Act and regulations made thereunder. A terminated portfolio can later be reinstated if required subject to notifying the BVI Financial Services Commission.

2.2. Government Fees

An application fee of \$1,500 is payable upon application for approval to incorporate or register a company as a mutual fund SPC. A further fee of \$350 is payable in respect of each segregated portfolio included in the application.

In addition, a mutual fund SPC is required to pay an initial fee of \$1,500, plus \$300 for each segregated portfolio within the company, if it is incorporated or registered on or before 30 June in any year. This is reduced to \$750 plus \$150 for each segregated portfolio if the company is incorporated or registered on or after 1 July in any year. The total initial fees payable by a mutual fund SPC in any year shall not exceed \$10,000.

A mutual fund SPC must also pay an annual fee on or before 31 March of each year starting in the year following its registration or incorporation. The annual fee is \$1,500 in respect of the company and \$350 in respect of each segregated portfolio in existence on 31 December of the previous year. The total annual fee payable by a mutual fund SPC in any year shall not exceed \$10,000.

Taking into account these modest fees, and bearing in mind the considerable savings in legal incorporations fees and annual secretarial fees (which are usually payable 'per company') the cost benefit of the SPC structure is considerable.

3. SETTING UP A SEGREGATED PORTFOLIO COMPANY

3.1. Incorporation of a Business Company

The principal statute governing the formation and operation of a BVI business company is the BC Act. A business company is incorporated by the filing of the company's memorandum and articles of

association with the Registrar of Corporate Affairs (the “Registrar”), together with a document in the approved form signed by the first registered agent signifying his consent to act in that capacity. There is no requirement to publicise an intention to incorporate, nor is there any pre-approval by any BVI regulatory body. The registered agent is required to perform a due diligence review on the promoters of the company.

Having been satisfied that all of the incorporation requirements of the BC Act have been met, the Registrar will register the memorandum and articles of association and issue a certificate of incorporation certifying that the company is incorporated on that date. If all appropriate information is provided to the registered agent, the filing of the memorandum and articles of association with the Registrar for the purpose of effecting incorporation can usually be accomplished within a business day. The issuance of a certificate of incorporation will usually follow within a couple of days.

Full particulars of the incorporation process, together with a description of the constitutional documents, local requirements and the ongoing regulation of a BVI business company can be found in our publication entitled “BVI Business Companies,” copies of which are available on our website or on request.

3.2. Incorporation or Registration of a Segregated Portfolio Company

An SPC can be tailor-made to best serve the interests of the individual portfolio owners and the company at large. In particular, SPC’s can be designed to streamline and simplify administration for investment funds, other funds and insurance companies.

A company limited by shares may, with the written approval of the Commission, be incorporated as a segregated portfolio company or, if it is already existing, be registered by the Registrar as a segregated portfolio company. In addition, any company seeking to operate segregated portfolios must be (or upon incorporation become) (i) licensed as an insurer under the Insurance Act, 2008, (ii) recognised as a professional or private fund, registered as a public fund or approved as an incubator or approved fund under the Securities and Investment Business Act, 2010 or (iii) a company that is not licensed as an investment business company, insurance manager or insurance intermediary or to carry on a regulated activity under the Banks and Trust Companies Act, 1990, the Company Management Act, 1990 and the Financing and Money Services Act, 2009.

Full particulars of the licensing process for insurance companies, together with a description of the ongoing requirements for BVI insurance companies, can be found in our publication entitled, “British Virgin Islands Insurance Companies”. Similarly, information on the approval, registration or recognition of a mutual fund is found in our publication, “British Virgin Islands Funds”. Both of these publications are available on our website or on request.

In order for a company to be incorporated or registered as an SPC, an application for approval must be made to the Commission in the approved form attaching various documents required by the Segregated Portfolio Companies (Mutual Funds) Regulations, 2018, the Segregated Portfolio Companies (BVI Business Company) Regulations, 2018 or the Segregated Portfolio Companies (Insurance) Regulations, 2018, depending on the type of company for which the SPC is to be used (mutual funds, closed ended fund structures or insurers).

The Commission is empowered to request such information as it considers necessary to determine the application. If the Commission is satisfied with the information provided, and is satisfied that the company has, or has available to it, the knowledge and expertise necessary for the proper management of segregated portfolios, the Commission may approve the incorporation or registration of the company as an SPC subject to such terms as it considers appropriate. Any such approval must be in writing.

3.3. Name of SPC

The name of the SPC shall include the designation “Segregated Portfolio Company” or “SPC” placed immediately before one of the endings permitted by the Act, namely Limited, Corporation, Incorporated, Society Anonyme or Sociedad Anonima, or the abbreviations thereof.

4. TIMESCALE FOR INCORPORATION AND REGISTRATION

The usual processing time for applications for contemporaneous incorporation or registration as an SPC and registration/ recognition as a fund or licensing, as the case may be, is between two and four weeks. In order for contemporaneous registration, all documentation must be completed in full and correct.

5. ONGOING REQUIREMENTS

5.1. Functionaries

In addition to the ongoing requirements imposed by the BC Act on all BVI business companies (as detailed in our publication entitled “Continuing Requirements of the Business Companies Act of the BVI”), an SPC which is a mutual fund is required to appoint certain functionaries, including administrators, managers, custodians and an auditor. In addition, it is typical for an SPC mutual fund to appoint one or more investment advisors.

A mutual fund SPC’s auditor is responsible for auditing the SPC’s financial statements. These audited financial statements are required, where the SPC is a mutual fund, to be filed with the Commission within 6 months of the end of its financial year.

5.2. Issue of Shares

Shares whose assets and liabilities are linked to a particular segregated portfolio must be recorded in the records of the company as being linked to that segregated portfolio.

5.3. Record Keeping

An SPC must comply with the requirements of the BC Act and the Mutual Legal Assistance (Tax Matters) Act, 2003 (as amended) as it pertains to the keeping of records and accounts. In addition, an SPC must keep proper records of each portfolio.

5.4. Financial Statements

The financial statements of an SPC shall take into account the segregated nature of the company and shall include an explanation of the nature of the company, how the segregation of assets and liabilities

of the company impacts upon members and persons with whom the company transacts, and the effect that any existing deficit in the assets of one or more segregated portfolios has on the general assets of the company. There are restrictions and limitations on the transfer of assets or liabilities from one portfolio to another.

5.5. Dividends

An SPC may pay a dividend or otherwise make a distribution in respect of segregated portfolio shares. Segregated portfolio assets may be paid, and distributions made, by reference only to the segregated portfolio assets and liabilities attributable to the segregated portfolio in respect of which the shares were issued. When determining solvency of the company for the purposes of a dividend or distribution in respect of segregated portfolio shares, no account shall be taken of the assets and liabilities of any other segregated portfolio or of the company's general assets and liabilities.

6. SEGREGATED PORTFOLIO COMPANIES AND OTHER JURISDICTIONS

The SPC is a popular and effective vehicle not just in the BVI but in other jurisdictions as well. However, these types of entities have not been considered yet by the courts of the BVI or, to our knowledge, any other jurisdiction. As such, it is possible that in some jurisdictions an SPC may be an unfamiliar structure and its dealings may be construed in a manner which is contrary to the intent of the legislation. More specifically, courts in other jurisdictions may not be prepared to accept that creditors in respect of a particular segregated portfolio are prevented from gaining recourse to the assets of other segregated portfolios, or that general creditors of the SPC as a whole do not have recourse to those assets specifically designated as segregated portfolio assets. Similarly, if a liability (for example a fine or tax) is imposed by an authority of another jurisdiction, it is not known how the courts of the BVI (or indeed other jurisdictions) might impose or distribute that liability among the general account of the SPC and the various segregated portfolios.

Variations on segregated cell legislation exist in an increasing number of jurisdictions, including in several US states. As the concept becomes more commonplace, so too should investor comfort with the effectiveness of such structures.

7. TAXATION

The BVI has no corporation tax, capital gains tax, wealth tax, stamp duty or any other tax applicable to a business company. Business companies are specifically exempted from income tax. The Income Tax Act also exempts a business company from the provisions of the Stamp Act and the Registration and Records Act in respect to all instruments or deeds relating to the business of the business company, including the transfer of all property to or by the business company and transactions in respect of its securities.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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