

GUIDE TO SEGREGATED PORTFOLIO COMPANIES IN THE BRITISH VIRGIN ISLANDS

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PREFACE

This Guide is a summary of the law and procedures relating segregated portfolio companies in the British Virgin Islands (**BVI**).

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to the contact, using the [contact information](#) provided at the end of this Guide.

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1. INTRODUCTION

This Guide provides a summary of the concept and applications of segregated portfolio companies (**SPCs**) in the BVI.

Part VII of the BVI Business Companies Act 2004 (**Business Companies Act**) allows the incorporation, registration and operation of SPCs, provided that the Financial Services Commission (**FSC**) has given its written approval and provided that the company is, or upon its incorporation will be:

- (a) licensed as an insurer under the Insurance Act 2008 (**Insurance Act**); or
- (b) recognised as a professional or private fund or registered as a public fund under the Securities and Investment Business Act 2010 (**Securities and Investment Business Act**).

A segregated portfolio (in some jurisdictions described as a “protected cell” or “segregated account”) is an internal account of an SPC to which may be attributed assets and liabilities that are legally separated from the assets and liabilities of the company’s ordinary account, called its “general assets”, and also from the assets and liabilities attributed to any other segregated portfolio of the SPC.

A segregated portfolio is not a legal person distinct from the SPC itself. An SPC may have numerous sub-funds or segregated portfolios and benefit from the statutory segregation of assets and liabilities between segregated portfolios established within the same company. SPCs can establish segregated portfolios to segregate the assets relating to those portfolios with different investment criteria, thus protecting shareholders from the potential of cross liability arising from any adverse performance of other segregated portfolios.

Where contractual dealings of an SPC are attributed to a particular segregated portfolio, a creditor’s recourse will be limited to recovery of assets attributed and credited to that portfolio. Accordingly, the creditor will not be legally entitled to seek recovery against assets attributed and credited to other segregated portfolios of the SPC or (save to the extent otherwise provided in any relevant contract) against the SPC’s general assets, being those assets which have not been attributed and credited to any segregated portfolio.

All references to statutory provisions below are to the Business Companies Act, unless otherwise stated.

2. APPLICATIONS

2.1 Range of Applications

Currently, only insurance companies and mutual fund companies may be registered in the BVI as SPCs. However, the FSC is empowered to include by regulation other types of companies under the SPC regime.

(a) Insurance

A company that is, or on its incorporation will be, licensed as an insurer under the Insurance Act may be incorporated as an SPC.

SPCs may be used for a variety of insurance purposes, including rent-a-captives, life and annuity companies, transformer vehicles, as well as financial guarantee, securitisation and derivatives structures and special purpose vehicles.

(i) **Rent-a-captives**

In the BVI, SPCs are often used as a variation of a “rent-a-captive”. A rent-a-captive is a risk financing solution in which the sponsor (such as a captive manager) establishes and licenses a captive insurance company and “rents” the core capital, licence and corporate capacity of the vehicle to programme participants, thus providing the many benefits of captive risk financing without the attendant administrative and capital costs associated with a pure captive.

In a rent-a-captive structure which does not offer legal segregation of accounts, participants agree among themselves to keep the gains and losses of each program separate from the others. These internal agreements would not generally be effective against third parties such as creditors of the rent-a-captive in the event of liquidation. However, by virtue of the protections afforded to SPCs under the Business Companies Act, in a segregated portfolio rent-a-captive, each participant’s programme is legally segregated and protected from the liquidation of the others. The segregated portfolio rent-a-captive offers “fire walls” between programme participants which should withstand the claims of third party creditors of another participant. Accordingly, participants need not be concerned that the underwriting losses of an imprudent participant may adversely impact the entire structure.

(ii) **Life and Annuity Companies**

Insurers underwriting long-term risks, such as life, disability, pension plan or annuity programs can take advantage of the legal segregation of reserves among different programs and products.

(iii) **Transformer Companies**

“Transformer companies” are those engaged in the transformation of insurance risk into capital markets products and *vice versa*. In cases where a single company enters into multiple arrangements of this kind, it will often be desirable to do so through segregated portfolios.

(b) **Mutual funds**

A mutual fund company formed under the Securities and Investment Business Act may be incorporated or (if it is an existing mutual fund) registered as an SPC.

Traditionally, in the field of investment funds, the need to have efficient structures whereby investors could access different trading strategies or other differential features through a single vehicle led to the development of “multi class” and “umbrella” funds. In the case of a corporate multi-class fund, typically a single entity offers various classes of shares designated, for example, according to the intended investment strategy with “pools” or portfolios of assets relating to that strategy expressed to be attributable to a particular share class.

In the event of the winding up of a multi-class fund, however, the segregation breaks down with distributions being made in the liquidation to creditors generally and there is also the possibility of a creditor attaching an asset without regard to its attribution to a particular class in the fund. Properly organised corporate umbrella funds involving a feeder fund with subsidiary trading entities address this problem of “cross-class liability” to achieve the desired segregation of assets.

The SPC legislation provides an attractive alternative for fund managers wishing to establish master-feeder fund structures, allowing for multiple classes of shares or any structures where the

statutory segregation of assets and liabilities is required without the additional costs and complications of a group structure involving a parent and various subsidiaries.

3. **REGISTRATION UNDER THE BUSINESS COMPANIES ACT**

3.1 **Application Procedure**

Prior to the incorporation or registration of an insurer or mutual fund as an SPC, an application in prescribed form accompanied by relevant supporting documents must be submitted to the FSC seeking its approval for the insurer or fund to be incorporated or registered as an SPC.

The test the FSC will apply in determining whether to give its approval will be satisfied if “the company has, or has available to it, the knowledge and expertise necessary for the proper management of segregated portfolios”.

3.2 **Registration**

Once the written approval of the FSC has been given for an insurer or mutual fund to be incorporated or registered as an SPC, the company may apply to the Registrar of Corporate Affairs (**Registrar**) to be incorporated or (if it is an existing insurer or mutual fund) registered as an SPC. The Registrar will not incorporate or register a company as an SPC until such written approval has been given by the FSC.

4. **MANAGEMENT AND ADMINISTRATION**

4.1 **Registered Agents and Functionaries**

Like ordinary BVI companies, an SPC must have a registered agent in the BVI and the directors of the company will manage its business and affairs.

The Insurance Act does not stipulate further requirements in respect of an insurance company by virtue of it being an SPC. However, a mutual fund that is an SPC must also appoint various functionaries including, *inter alia*, an administrator and a custodian (see section 9.1 of this Guide).

4.2 **Management Duties and Statutory Requirements**

The Business Companies Act and the Segregated Portfolio Companies Regulations 2005 (**2005 Regulations**) set out a number of duties applicable to SPCs, their directors and functionaries.

(a) **Directors and Functionaries**

In an SPC, the directors have a duty to establish and maintain (or cause to be established and maintained) procedures to segregate, and keep segregated, segregated portfolio assets separate and separately identifiable from general assets; 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; and, where relevant, to apportion or transfer assets and liabilities between segregated portfolios, or between segregated portfolios and general assets of the company. Please note, however, that directors of an SPC do not breach their duties by reason only that they cause or permit segregated portfolio assets, or general assets, to be collectively invested or collectively managed by an investment manager, provided that the assets remain separately identifiable.

Functionaries have duties towards the SPC to which they are appointed; these will be set out in the instrument of appointment (see section 9.2 of this Guide).

(b) Accounts, Records and Registers

An SPC is required to keep financial records, which are sufficient to show and explain the company's transactions and will, at any time, enable the financial position of the company to be determined with reasonable accuracy. The financial statements of an SPC must, however, take into account the segregated nature of the company and must include an explanation of:

- the nature of the company;
- how the segregation of the assets and liabilities of the company impacts upon members of the company and persons with whom the company transacts; and
- the effect that any existing deficit in the assets of one or more segregated portfolios of the company has on the general assets of the company.

The rules that apply to an SPC in relation to its records and registers are the same as those that apply to an ordinary BVI company. For more information, please refer to Appleby's "Guide to Companies in the British Virgin Islands", available from our website (www.applebyglobal.com).

(c) Offences under the Business Companies Act relating to SPCs

The Business Companies Act only creates one direct offence relating to SPCs: any failure by an SPC to obtain the requisite approval of the FSC prior to creating a segregated account will be liable to a fine on summary conviction of USD10,000. The 2005 Regulations currently make the obtaining of FSC approval a requirement for mutual fund companies only.

(d) Effect of Infringement on the Validity of Contracts

The SPC legislation does not provide that a contract with or interest in a segregated portfolio is void or voidable by reason only that the SPC or portfolio created thereunder fails to comply with, or is in breach of, any provision of the Business Companies Act. However, where either the SPC or the relevant segregated portfolio has not been properly created in accordance with the statutory requirements, we expect any segregation purporting to link the contract or interest to a specific portfolio of assets (and related liabilities) will fail. As a result of any such failure to create the relevant segregated portfolio, the assets (and related liabilities) intended to fall within the segregated portfolio will instead form part of the general assets and liabilities of the company. In addition, the company may be liable to a fine (as described above in section 4.2(c)).

4.3 Contracts (Shareholders)

An SPC may issue shares (including shares in one or more classes or series) attributable to a particular segregated portfolio (see section 6.1 of this Guide). Accordingly, the holders of such shares have an ownership right in the SPC and indirectly in the relevant segregated portfolio. This right is governed by the articles of association of the SPC or by a specific contract containing the terms of issue of such shares. The Business Companies Act and the 2005 Regulations do not set out any requirements in relation to the nature of the contract or what must be specified in such a contract with respect to shareholders' rights, interests or obligations.

4.4 Contracts (Counterparties)

The Business Companies Act provides that any act, matter, deed agreement, contract, instrument under seal or other instrument or arrangement which is to be binding on a segregated portfolio must be executed by the SPC for and on behalf of the segregated portfolio which must be identified in the contract. The contract must also indicate that the execution of the contract is in the name of, or by, or for the account of such segregated portfolio.

The Business Companies Act also provides that a number of terms will be implied into a contract regarding the creditor enforcement rights over portfolio assets (see section 5.5 of this Guide).

4.5 **Contracts (Internal Transactions)**

There are no explicit provisions in the Business Companies Act with respect to the ability of segregated portfolios to contract with each other or with the general portfolio. However, section 143(5) expressly allows a director, where relevant, to apportion or transfer assets and liabilities between segregated portfolios, or between segregated portfolios and general assets of the company.

5. **ASSETS AND LIABILITIES**

5.1 **Application of Assets and Liabilities**

The Business Companies Act provides that assets of an SPC must be either “segregated portfolio assets” or “general assets”, but not both. The segregated portfolio assets comprise assets representing the consideration paid or payable for the issue of segregated portfolio shares and reserves attributable to the segregated portfolio, as well as all other assets attributable to or held within the segregated portfolio. Accordingly, the general assets of the SPC comprise the assets of the company which are not segregated portfolio assets, e.g. income, receipts and other assets or rights acquired by the SPC that are not otherwise attributable to any segregated portfolio.

The directors of an SPC are under a statutory duty to establish and maintain (or cause to be established and maintained) procedures to keep segregated portfolio assets segregated and identifiable from both the general assets of the SPC and the assets of other segregated portfolios, and to prepare financial statements showing this to be the case (see section 4.2(b) of this Guide).

Pursuant to section 145, segregated portfolio assets will only be available and used to meet liabilities to the creditors of the SPC who are creditors in respect of that segregated portfolio and who will therefore be entitled to have recourse to the segregated portfolio assets attributable to that segregated portfolio for such purposes, i.e. a creditor will be afforded restricted recourse, and will be entitled to make recoveries, only as against assets attributed and credited to the specific segregated portfolio to which such creditor’s contract is also attributed.

Segregated portfolio assets are therefore not available to meet liabilities, and shall be absolutely protected from, the creditors of the SPC who are not creditors in respect of that segregated portfolio.

For these reasons, where a liability of an SPC to a person arises from a matter, or is otherwise imposed, in respect of a particular segregated portfolio, then such liability will only extend, and that person shall only have recourse, to the assets of the segregated portfolio in question. However, the Business Companies Act also provides that where the segregated portfolio’s assets attributable to such segregated portfolio are insufficient to satisfy the liability, and to the extent that the assets attributable to such SPC’s general assets exceed any minimum capital requirements, then the person may also have access to the SPC’s general assets. In no circumstances will a person be entitled to have recourse to the assets of any other segregated portfolio. Accordingly, where a liability of an SPC to a person arises or is imposed otherwise than in respect of a particular segregated portfolio, then that person shall only have recourse to the SPC’s general assets in respect of that liability.

The segregated portfolio assets attributable to a specific segregated portfolio of an SPC cannot be transferred to a third party except under the authority of, and in accordance with the terms and conditions of, an order of the BVI High Court of Justice. The court has wide powers, however, the court is not able to make such a “segregated portfolio transfer order” in relation to a segregated portfolio of an SPC unless it is

satisfied that the creditors of the company entitled to have recourse to the segregated portfolio assets attributable to the segregated portfolio consent to this transfer, or those creditors would not be unfairly prejudiced by the transfer.

5.2 **Apportionment of Assets and Liabilities**

Generally, the intention of Part VII of the Business Companies Act is to ensure that assets and liabilities of segregated portfolios will not be intermingled with the assets and liabilities of the company. However, in many cases it will be convenient for commercial purposes for an asset, such as a bank account, to be held to the credit of more than one account. The same will sometimes be true of liabilities. Accordingly, the Business Companies Act expressly enables the apportionment of assets and liabilities between segregated portfolios and the general assets of the company, and it is the duty of the directors to establish and maintain (or cause to be established and maintained) procedures to this end. The Business Companies Act provides, however, that in such instances the assets belonging to the segregated portfolio and the assets belonging to the company must remain separately identifiable.

Notwithstanding the above, the directors of the SPC may permit both segregated portfolio assets and general assets to be held by or through a nominee or a company.

5.3 **Transfers between Portfolios**

As stated above in section 5.2, the legislation expressly provides that the directors of an SPC are under a duty to establish and maintain (or cause to be established and maintained) procedures to apportion or transfer assets and liabilities between segregated portfolios, or between segregated portfolios and general assets of the company.

For example, assets of or pertaining to a segregated portfolio may from time to time be temporarily held within the general assets (e.g. reinsurance recoveries or other inbound payments) en route to the particular segregated portfolio for which they may be earmarked.

5.4 **Rights of a Shareholder**

As noted above, the rights of a shareholder whose shares relate to a specific segregated portfolio will be set out in the articles of association or terms of issue of such shares (including, where applicable, a prospectus or other offering document). The Business Companies Act and the 2005 Regulations do not stipulate any additional requirements in this respect by virtue of the company being registered as an SPC.

5.5 **Creditor Enforcement Rights over Portfolio Assets**

Special provisions are included in the Business Companies Act to reduce the likelihood that creditors in respect of a particular segregated portfolio will be in a position to enforce their claims against assets not attributable to that segregated portfolio. The Business Companies Act provides that in relation to every transaction entered into by an SPC it shall be implied that the relevant liability will not be paid out of assets other than assets of the segregated portfolio to which the transaction is attributed.

In addition, if any party succeeds in making liable any segregated portfolio assets that are not attributable to that segregated portfolio, then that party shall be liable to the company to pay a sum equal to the value of the benefit obtained by him. The Business Companies Act also provides that any recoveries in breach of the provision are held on trust by the recipient for the company.

The foregoing provisions may, however, be excluded in writing.

In the event of any segregated portfolio assets being taken in execution in respect of a liability not attributable to that segregated portfolio, and in so far as such assets or compensation in respect thereof cannot otherwise be restored to the segregated portfolio affected, the company must procure its auditor, acting as expert (and not as arbitrator) to certify the value of the assets lost and transfer or pay, from another segregated portfolio's assets or general assets to which the liability was attributable to the segregated portfolio affected, assets or sums sufficient to restore to the segregated portfolio affected the value of the assets lost. In such circumstances, and where a segregated portfolio's assets are insufficient to compensate the relevant segregated portfolio's deficit, the company must, as far as possible, make up the deficiency from its general assets. As stated above and to this end, the directors of the SPC are under a duty to establish and maintain (or cause to be established and maintained) procedures, where relevant, to apportion or transfer assets and liabilities between segregated portfolios, or between a segregated portfolio's assets and the general assets of the SPC.

These provisions will be particularly useful in cases where assets attributed to a segregated portfolio are located outside of the BVI. In fact, the Business Companies Act explicitly states that this section has extra-territorial application.

5.6 **A Cautionary Note**

An SPC may operate or have assets, or be subject to claims, in jurisdictions that may not recognise the segregation of assets and liabilities. In those jurisdictions, the assets of one segregated portfolio may potentially be exposed to the liabilities of another. This risk is higher in jurisdictions that do not have segregated portfolio type legislation. Currently there is very little, if any, case law in such jurisdictions in which the structure and standing of a BVI SPC have been tested. Accordingly, there is very little guidance to indicate the manner in which the courts will deal with this issue. The BVI legislation with respect to SPCs is substantive as opposed to procedural and this should mitigate the non-recognition risk on the basis that a foreign court, in applying the law of another jurisdiction, more usually respects substantive provisions even though they may apply their own procedure.

The risk is likely to be reduced if the SPC holds its assets in jurisdictions that have segregated accounts legislation, for example the Cayman Islands, Bermuda, the British Virgin Islands, Jersey and Mauritius, and if relevant contracts are governed by the law, and made subject to the jurisdiction of the courts, of a segregating jurisdiction, such as the BVI. Further protection is gained if contracts contain language that limits the recourse of any potential creditor of a particular segregated portfolio to the assets in that portfolio.

In considering these issues, it is likely that a court (even in a jurisdiction with equivalent legislation) considering a BVI SPC would also have close regard to whether the SPC has in fact been operated in accordance with the requirements of the BVI legislation. Consequently, it is important for this reason (among others) that these requirements be strictly adhered to.

6. **SECURITIES**

6.1 **Issue of Securities by a Segregated Portfolio**

The Business Companies Act expressly provides that an SPC may issue shares in respect of a segregated portfolio. They may be issued in classes and the proceeds of issue would, of course, be included in the segregated portfolio assets. An SPC is not, however, required to state in its memorandum of association the classes of segregated portfolio shares that it is authorised to issue.

The SPC may also issue shares the proceeds of which fall into the SPC's general assets.

6.2 Dividends, Distributions and Redemptions

An SPC may pay a dividend or other distribution in respect of segregated portfolio shares. Due to the inherent nature of a segregated portfolio, segregated portfolio dividends and distributions may only be paid by reference to the segregated portfolio assets and liabilities attributable to the segregated portfolio in respect of which the shares were issued.

Accordingly, in determining whether the segregated portfolio satisfies the solvency test, no account may be taken of the assets and liabilities of or attributable to any other segregated portfolio of the SPC or the company's general assets and liabilities.

No special rules in respect of redemptions apply to a company by virtue of the fact that it is an SPC. However, it follows from the segregation requirements (see section 5 of this Guide) that redemption proceeds should be paid from the applicable segregated portfolio. For more information on this topic with respect to companies in the BVI, please refer to Appleby's "Guide to Companies in the British Virgin Islands", available from our website (www.applebyglobal.com).

6.3 Reduction of Capital/Capital Transactions

No special rules in respect of reduction of capital or capital transactions apply to a company by virtue of the fact that it is an SPC. For more information on this topic with respect to companies in the BVI, please refer to Appleby's "Guide to Companies in the British Virgin Islands" mentioned in section 6.2 above.

7. LIQUIDATION, PORTFOLIO LIQUIDATION AND ADMINISTRATION

7.1 Portfolio Liquidation Orders

A portfolio liquidation order may be made in relation to a segregated portfolio that requires the liquidator to manage the orderly closing down of the business of or attributable to the segregated portfolio and the distribution of the segregated portfolio's assets attributable to the segregated portfolio to those entitled to have recourse thereto.

A portfolio liquidation order may be made in respect of any number of portfolios and will be made when the court is satisfied that:

- the segregated portfolio assets attributable to a particular segregated portfolio of the company (when an account is taken of the company's general assets, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the company's general assets) are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio; and
- the making of the order would achieve the orderly closing down of the business of or attributable to the segregated portfolio and the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto.

Such an order will not be made, however, if a liquidator is appointed in respect of the SPC and will cease to have effect upon the appointment of a liquidator in respect of the SPC, though in the case of the latter, leave of the court is required before a resolution may be passed to appoint a liquidator of the company, i.e., the shareholders of an SPC cannot pass a resolution to wind up voluntarily without the consent of the court, which ensures that such a dramatic step will not take place in relation to an SPC unless the court is aware.

The court may make a portfolio liquidation order subject to such terms and conditions as it considers appropriate.

At the same time as making the order, the court will appoint an Official Receiver or an “eligible insolvency practitioner” (as defined in the Insolvency Act 2003 (**Insolvency Act**)) to act as portfolio liquidator. The provisions relating to the appointment of an overseas insolvency practitioner apply to portfolio liquidation orders.

Creditors of a segregated portfolio that is subject to a portfolio liquidation order are regarded as preferential creditors just as they would be preferential creditors under the Insolvency Act if the segregated portfolio were a company and the portfolio liquidator were an Insolvency Act liquidator. Subject to this premise and any agreement between the SPC and any creditor of the company as to the subordination of the debts due to that creditor to the debts due to the company’s other creditors, the portfolio liquidator must, in the winding up of the segregated portfolio in question, apply the segregated portfolio assets in satisfaction of the company’s liabilities attributable to that segregated portfolio *pari passu*.

Subject to the company’s memorandum or articles of association, any surplus must be distributed among the holders of the segregated portfolio shares (or other persons entitled to the surplus), according to their respective rights and interests in or against the company. Where there are no segregated portfolio shares and no persons otherwise entitled to the surplus, the surplus goes to the general assets of the company.

The court will not discharge a portfolio liquidation order unless it appears to the court that the purpose for which the order was made has been achieved, substantially achieved or is incapable of achievement. On hearing such an application, the court may make such order as it considers appropriate.

Where the court discharges a portfolio liquidation order on the ground that the purpose for which the order was made has been achieved (or substantially achieved), the court may direct that any payment made by the portfolio liquidator to any creditor in respect of that portfolio shall be deemed full satisfaction of the liabilities of the company to that creditor in respect of that portfolio, thereby extinguishing that particular claim. This does not, however, affect any right or remedy a creditor may have against any other person, including any surety of the SPC.

7.2 **Application Procedure**

An application for a portfolio liquidation order in respect of an SPC may be made by the company itself, the directors, any creditor or shareholder in respect of the relevant segregated portfolio, or the FSC. Notice of such an application must be served upon the SPC, the FSC and such other persons (if any) as the court may direct, each of whom will have an opportunity to make representations to the court before any order is made.

The court, on hearing such an application for a portfolio liquidation order (or for leave to pass a resolution appointing a liquidator) may make a portfolio liquidation order, an interim order or adjourn the hearing conditionally or unconditionally.

7.3 **The Portfolio Liquidator**

Pursuant to the Business Companies Act, the portfolio liquidator has all the powers of the directors in respect of the business assets attributable to that portfolio for the purpose of achieving:

- the orderly closing down of the business of, or attributable to, the segregated portfolio; and
- the distribution of the portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto.

Accordingly, during the period of operation of a portfolio liquidation order, the powers, functions and duties of the directors of the SPC continue but are subject to any directions of the portfolio liquidator. The portfolio liquidator is therefore the agent of the SPC and the Business Companies Act provides that the portfolio liquidator does not incur personal liability except to the extent that he is fraudulent, negligent, reckless or acts in bad faith.

In addition, the Business Companies Act stipulates that during the period of operation of a portfolio liquidation order, no proceedings may be instituted or continued by or against the SPC and no steps may be taken to enforce any security in respect of the business or segregated portfolio assets in relation to the portfolio in respect of which the order was made.

The remuneration of a portfolio liquidator will be fixed by the court (in accordance with the principles set out in section 432 of the Insolvency Act) and are payable in priority to all other claims from the segregated portfolio assets in respect of which the portfolio liquidator was appointed and from the general assets (where the segregated portfolio assets are insufficient). Under no circumstances will the portfolio liquidator be remunerated from assets attributable to any other segregated portfolio.

7.4 **Stay of Proceedings**

The Business Companies Act provides that the court may make a portfolio liquidation order subject to such terms and conditions as it considers appropriate, which may include a stay of proceedings. Accordingly, in the event of the insolvency of a segregated portfolio, the court may order the stay of any legal actions relating to a SPC in respect of that segregated portfolio.

A stay of proceedings comes into force automatically when the SPC goes into a compulsory liquidation and the court may order a stay in a creditor's voluntary winding-up. In those circumstances, the stay of proceedings is meant to give the insolvent company and its liquidator a "breathing space" during which the company and the liquidator may consider their options. As the provisions relating to portfolio liquidation orders under the Business Companies Act may come into operation when a segregated portfolio becomes insolvent, despite the solvency of the SPC itself, a stay of proceedings might be just as appropriate in the event of the insolvency of a segregated portfolio as it is in the event of the insolvency and liquidation of the general assets.

7.5 **Winding Up of an SPC**

The general provisions of the Insolvency Act as to winding up of an ordinary BVI company apply equally to SPCs but, notwithstanding the provisions of Part XII of the Insolvency Act, or any other statutory provision or rule of law to the contrary, in the liquidation of an SPC the liquidator (as defined in the Business Companies Act) is under a duty, pursuant to the Business Companies Act, to deal with both the general assets and segregated portfolio assets in the same fashion that a director is under a duty to deal with the general assets and the segregated portfolio assets (and as described in section 5.1 of this Guide).

Accordingly, in the discharge of the claims of creditors of the SPC, the liquidator must apply the company's assets to those entitled to have recourse thereto in conformity with the provisions of Part VII of the Business Companies Act. In other words, the assets and liabilities that are attributed to each segregated portfolio may only be available and be used to meet liabilities to the creditors of the SPC who are creditors of that segregated portfolio and shall not be available or be used to meet liabilities to, and shall absolutely be protected from, the creditors of the SPC who are not creditors in respect of that segregated portfolio, and who accordingly shall not be entitled to have recourse to the segregated portfolio assets attributable to that segregated portfolio.

Subject to the above, an SPC is wound up, as far as possible, just like an ordinary BVI company, i.e. the winding up is governed by Part XII of the Insolvency Act. However, Part XII of the Insolvency Act will be subject to such modifications as are necessary to give effect to Part VII of the Business Companies Act and, in the event of any conflict, Part VII of the Business Companies Act will prevail.

8. REMOVAL FROM THE REGISTER

The Registrar does not maintain a separate register of SPCs. The general rules in the Business Companies Act with respect to removal of defunct companies from the Register apply equally to SPCs.

Should a court direct that a particular segregated portfolio be dissolved (on such date as the court may specify), following the discharge of a portfolio liquidation order in respect of a segregated portfolio, the company may not undertake business or incur liabilities in respect of that segregated portfolio. However, the fact of this matter may not necessarily be registered on the public registry.

9. MUTUAL FUNDS – THE SEGREGATED PORTFOLIO COMPANIES REGULATIONS 2005

The 2005 Regulations applies solely to SPCs that are mutual funds.

9.1 Application Procedure

In order to be constituted as an SPC, a company that is, or on its incorporation will be, a mutual fund must apply to the FSC for approval to be incorporated or registered as an SPC. The application must include *inter alia*, the following information:

- the name of the company;
- details of the person(s) who will be appointed as administrator(s) of the company;
- a list of the initial segregated portfolios that it is intended will be created, including the name, identification or designation of each segregated portfolio; and
- in respect of each of the initial segregated portfolios intended to be created, details of the functionaries who will be appointed by the company to act in respect of that portfolio.

The application will serve as the application for recognition or registration of the fund under the Securities and Investment Business Act and must be accompanied by certified true copies of the company's memorandum and articles of association and the offering documents for each of the segregated portfolios intended to be created.

A mutual fund SPC shall pay an annual fee on or before 31 March of each year commencing on the year following its incorporation or registration comprising the total of USD1,000 in respect of the company and USD100 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 the sum of USD10,000. A mutual fund that fails to pay its annual fee in full on or before 31 March in any year shall, in addition to the annual fee, pay a penalty of USD250 for each month, or part thereof, that the fee, or any part thereof, remains outstanding.

9.2 Functionaries and Auditors

A "functionary" with respect to a mutual fund is a manager, administrator, investment adviser or custodian. The 2005 Regulations provide that a mutual fund SPC must at all times have at least one administrator, manager and custodian, and may appoint one or more investment advisers.

A functionary must be appointed by instrument that specifies in respect of which portfolio(s) the functionary is appointed, and his responsibilities and duties in respect of each such portfolio.

A mutual fund SPC must also have an auditor and must maintain annual audited financial statements in respect of each financial year of operation. The audited financial statements must be filed with the FSC within six months after the end of its financial year.

9.3 **Creation of Additional Segregated Portfolios**

A mutual fund SPC will require written permission from the FSC before it can create or authorise an additional segregated portfolio. In the case of professional and private funds, however, the prior approval of the FSC is not required by an SPC for the creation of an additional segregated portfolio where the persons who will be appointed by the SPC to act as functionaries of the new segregated portfolio (i) are the same persons as the functionaries notified to the FSC on the application for approval to incorporate or register as an SPC or in any subsequent notification of change of functionary or (ii) have their principal place of business in a recognised jurisdiction for the purposes of the Securities and Investment Business Act.

Where the prior written approval of the FSC is not required for the creation of an additional segregated portfolio, the mutual fund SPC must nevertheless notify the FSC of the creation of the additional segregated portfolio within 14 days after the creation of a segregated portfolio. Such notification shall be made in the approved form containing:

- the name of the SPC;
- details of the segregated portfolio that has been created, including the name, identification or designation of the portfolio;
- details of the functionaries who have been appointed by the company to act in respect of the segregated portfolio; and
- the date of the creation of the segregated portfolio.

The form can be found on the FSC website (www.bvifsc.vg).

In addition, a mutual fund may not create a segregated portfolio unless it has previously issued an offering document with respect to the portfolio and a copy of the offering document must be submitted to the FSC with the notice.

9.4 **Change in Information**

In almost all circumstances, a mutual fund SPC is required to notify the FSC of any change in information that it is required to submit to the FSC under the 2005 Regulations.

10. **GENERAL**

The Business Companies Act contains a general and fairly standard provision enabling the BVI's Executive Council to make regulations in connection with the Business Companies Act. Regulations would deal with such things as fees payable under the Business Companies Act and the 2005 Regulations and the prescription of standard forms and documents to use for the purposes of the Business Companies Act.

11. **CONCLUSION**

The legislation pertaining to SPCs represents a major opportunity for many international businesses in the insurance and mutual fund industries, to name but a few. An SPC with segregated portfolios is a less

unwieldy and, from an administrative perspective, less expensive structure than the traditional structure for creating legal divisions between accounts, namely a parent with a number of subsidiaries.

Most importantly, Part VII of the Business Companies Act establishes substantive law governing the application of particular assets in favour of particular accounts and their respective liabilities. In this regard, we believe that the substantive provisions will significantly enhance the prospects for enforceability of transactions in jurisdictions where the assets of a particular segregated account might be situated, and furthermore, the extent to which procedural as well as substantive law provisions may bind third parties.

For more specific information or advice on segregated portfolio companies in the BVI, please contact:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).