

SEGREGATED ACCOUNT COMPANIES

by Josephine Noddings

Date 26 January 2018

A company incorporated in Bermuda or to which the Companies Act 1981 otherwise applies, can apply to be registered under the Segregated Accounts Companies Act 2000 (Act).

A segregated accounts company (SAC) is able to hold certain assets and liabilities in a separate account firewalled from the assets and liabilities of the SAC itself (the SAC's own account is usually referred to as the "general account") and the assets belonging to its other segregated accounts.

In order for a company to achieve legal separation of its general account and its segregated account(s) it must be registered as an SAC with the Registrar of Companies (ROC) and comply with all relevant laws and regulations governing the operation of an SAC.

SACs are commonly used in the insurance sector, for special purpose vehicles, and in the areas of financial guarantees, and securitisation & derivatives structures.

The Act is the principal legislation governing SACs in Bermuda, however, an SAC must also comply with other legislation applicable to its structure, for example the Companies Act 1981 and/or the Insurance Act 1978.

Documentation and contracts entered into by an SAC are often governed by the laws of a jurisdiction other than Bermuda. In this situation, a bi-location governing law clause should be added that ensures any aspects of

the document dealing with the segregated account nature of the SAC are governed by Bermuda law and the Act.

To register as an SAC, a company must apply to the ROC. If the company is engaged in insurance business (as defined in the Insurance Act 1978) then the company may proceed direct to application to the ROC. If it carries on business other than insurance business, it must first obtain approval from the Minister of Finance (Minister).

If the company has conducted business prior to its application to become an SAC then, unless the Minister directs otherwise, the application must be accompanied by a statutory declaration of the company directors setting out, among other things, a true and accurate statement or description of the assets and liabilities of the company and any pending material transactions. Unless the Minister directs otherwise, the creditors of the company must be notified of the application and the directors' statutory declaration must either confirm that no creditor will be prejudiced or confirm that the creditors of the company have consented to or been given adequate notice of the registration of the company as an SAC.

The ROC may impose conditions on the registration of the company and can require that the company use the abbreviation (SAC) in its name after registration.

In addition to its annual reporting obligations and compliance requirements under the Companies Act 1981 and any other relevant legislation (e.g. Insurance Act 1978, Bribery Act 2016) the Act provides that an SAC must comply with other requirements, including:

- Appointing and maintaining in office a resident representative. The resident representative must be approved by the Minister and has reporting obligations under which he must make written reports to the ROC on the happening of certain events, e.g. insolvency, breach of the Act or involvement in criminal proceedings;
- Maintaining records of the assets and liabilities of each segregated account as well as the general account and preparing financial statements in respect of each segregated account;
- Maintaining a register of account owners, including particulars of their interest in the particular segregated account; and
- Ensuring that third parties that have dealings with it are aware that they are dealing with an SAC. This includes a requirement to inform third parties that they are dealing with an SAC and to include reference to the fact it is an SAC on its letterhead and contracts.

The ROC can remove a company from the register of SAC companies thus causing it to cease holding such status. If a company wishes to cease being an SAC it must submit a written request to the ROC.

An SAC provides companies with an alternative to the cumbersome group structure that is traditionally used to protect assets from risks associated with other aspects of the business. The SAC structure is more flexible and can be less expensive to set up and maintain.

However, there are risks associated with utilising an SAC. Not all jurisdictions have legislation in force that corresponds to the Act, and so there is a risk that the Act may not be upheld or recognised in jurisdictions other than Bermuda.

A slight variant on the SAC, the incorporated segregated accounts company (ISAC) would be an entirely new type of entity adopting aspects of the traditional limited company and SACs. Not in existence in Bermuda, it is envisaged that an ISAC structure would afford each segregated account separate legal personality, a key change from the current model.

During his Speech from the Throne on September 8, 2017, Governor John Rankin confirmed that Government will draft, table and pass such ISAC legislation as is required to ensure that Bermuda's hard-won reputation in markets such as the captive insurance market, is preserved and maintained.

This article has been written by:

Bermuda

Josephine Noddings

Associate

+441 298 3553

jnoddings@applebyglobal.com

Josephine Noddings is an associate in the Corporate department at Appleby. A copy of this column is available on the firm's web site at applebyglobal.com