



Cayman Islands Segregated Portfolio Companies

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Preface

This publication has been prepared for the assistance of anyone who is considering establishing a segregated portfolio company in the Cayman Islands. It deals in broad terms with the requirements of Cayman Islands 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 Cayman Islands on their specific proposals before taking any steps to implement them.

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TABLE OF CONTENTS

| | | |
|----|-----------------------------------------------------------------|---|
| 1. | INTRODUCTION | 4 |
| 2. | RATIONALE FOR ESTABLISHING A SEGREGATED PORTFOLIO COMPANY | 4 |
| 3. | SETTING UP A SEGREGATED PORTFOLIO COMPANY | 5 |
| 4. | ONGOING REQUIREMENTS | 6 |
| 5. | PORTFOLIO INSURANCE COMPANIES OF SEGREGATED PORTFOLIO COMPANIES | 8 |
| 6. | SEGREGATED PORTFOLIO COMPANIES AND OTHER JURISDICTIONS | 8 |
| 7. | TAXATION | 9 |

1. INTRODUCTION

Part 14 of the Companies Act of the Cayman Islands provides for the establishment of a Cayman Islands exempted company as a “segregated portfolio company” (“**SPC**”), with protected cells or segregated portfolios for the purpose of ring fencing separate pools of assets and liabilities.

An SPC is a single legal entity whose assets and liabilities can be allocated to different cells or segregated portfolios within the company. Where assets have been allocated to a particular segregated portfolio, those assets are held separately within that segregated portfolio and so are not part of the general assets of the company itself. Such segregated portfolios are held exclusively for the benefit of the owners of those segregated portfolios and any counterparty to a transaction linked to those segregated portfolios. Only persons who have entered into transactions with a segregated portfolio, or who otherwise have become creditors of the segregated portfolio concerned, will have recourse to that segregated portfolio’s assets. Any asset which attaches to a particular segregated portfolio is not available to meet liabilities of the SPC or any of the other segregated portfolios.

Segregated portfolio assets comprise the proceeds of any segregated portfolio share capital and any other assets attributable to or held within the relevant segregated portfolio, including profits, retained earnings, capital reserves and share premiums. All assets that are held by an SPC but not allocated to individual segregated portfolios are regarded as general assets.

2. RATIONALE FOR ESTABLISHING A SEGREGATED PORTFOLIO COMPANY

2.1. Segregation of Assets and Liabilities

Part 14 of the Companies Act came into force in 1998 in response to strong demand, particularly from the international insurance sector. The main purpose of the legislation is to provide a means for different groups to protect their interests when carrying on business with different risks through a single legal entity. In effect, each segregated portfolio or cell operates like a separate limited liability company but is actually a segregated part of a single company. Whilst the assets and liabilities of a segregated portfolio are ring fenced from the assets and liabilities of other segregated portfolios within an SPC, each segregated portfolio of or within an SPC does not constitute a legal entity that is separate from the SPC. The provisions of Part 14 of the Companies Act therefore enable a statutory segregation of accounts or operations within a single company that could otherwise only be achieved by incorporating subsidiaries.

Within the investment funds industry, SPCs can be used by fund managers wishing to establish structures such as umbrella funds and fund of funds structures or any structure where the statutory segregation of assets is desired.

The SPC has obvious practical application to the insurance and reinsurance industries as it allows insured persons to better assess and handle the risks of the insurer by focusing only on the sufficiency of reserves of the relevant segregated portfolio as opposed to conducting an assessment of the business and reserves of the company as a whole. From the insurer’s point of view, the SPC offers advantages over traditional methods of legal separation of accounts including reduced administrative expenses and relative simplicity of the structure. Companies incorporated to hold significant assets (for example, aircraft or ships) may also find it beneficial to have each asset attributed to a separate segregated portfolio. Other types of companies may also benefit from the segregated portfolio structure and specific

advice should be sought to determine whether on the facts of each case an SPC is the best available option.

2.2. Cost

The fees to register a Cayman SPC are set on a sliding scale calculated on the basis of the company's authorised share capital ranging from US\$1,464 (CI\$1,200) to US\$3,742 (CI\$3,068) per company. Similarly, the annual government fees are also set on a sliding scale depending on the authorised share capital ranging from US\$3,567 (CI\$2,925) to US\$5,845 (CI\$4,793). There is also an annual fee per segregated portfolio of US\$488 (CI\$400) up to a maximum of US\$7,318 (CI\$6,000). Regulated mutual funds and insurance companies pay an additional fee (for registration, annual fees and annual per portfolio fees). However, taking into account the legal incorporation fees and annual secretarial fees which are usually payable per company, the cost-benefit in setting up one company with minimal authorised capital but administering a number of segregated portfolios is likely to be significant.

3. SETTING UP A SEGREGATED PORTFOLIO COMPANY

An exempted company may be formed as an SPC or an existing exempted company may be converted into an SPC. Depending on the business that the SPC is being set up to carry on, registration or licensing with the Cayman Islands Monetary Authority ("**CIMA**") may be required.

The name of an SPC must include the words "Segregated Portfolio Company" or the letters "SPC". An SPC may create one or more segregated portfolios, each of which must have its own distinct name or designation and must include "Segregated Portfolio" or "SP" or "S.P." in its name. There is no limit on the number of segregated portfolios that an SPC can create.

3.1. Incorporation

Incorporation of an SPC is accomplished by submitting the Memorandum and Articles of Association to the Registrar of Companies together with the prescribed fee, as in the case of the incorporation of a regular exempted company. A notice containing the name of each segregated portfolio created must also be furnished to the Registrar at the same time. Full particulars of the incorporation process, together with a description of the constitutional documents, local requirements and the ongoing regulation of a Cayman Islands exempted company can be found in our publication entitled "Cayman Islands Exempted Companies" copies of which are available on our website or on request.

3.2. Conversion

The application for the conversion of an existing exempted company into an SPC comprises a declaration made by at least two directors of the company setting out an accurate statement:

- (a) of the assets and liabilities of the company as at a date within three months prior to the date of the declaration;
- (b) of any transaction or event which, as at the date of the declaration, has occurred or is expected to occur between the date of the statement of assets and liabilities prepared pursuant to paragraph (a) above and the date of registration of the company as an SPC

which, if it had occurred before the date of the declaration, would have caused material changes to the assets and liabilities disclosed in the declaration;

- (c) that the company intends to operate and the assets and liabilities which the company proposes to transfer to each of the segregated portfolios;
- (d) that, on registration as an SPC, the company and each segregated portfolio will be solvent; and
- (e) that each creditor has consented in writing to the transfer of assets and liabilities into segregated portfolios or, alternatively, that adequate notice has been given to all creditors of the company and 95% by value of the creditors have consented to that transfer of assets and liabilities into segregated portfolios. For this purpose, adequate notice is deemed to be given if notice in writing is sent to each creditor having a claim against the company exceeding US\$1,220 (C\$1,000).

The company must pass a special resolution authorising the transfer of assets and liabilities into segregated portfolios and attach a copy of that resolution to the declaration. In addition, where the company is licensed by CIMA, the written consent of CIMA must also be attached to the declaration.

3.3. Time Frame

An exempted company can usually be incorporated as an SPC, or converted into an SPC, within 5 to 10 full business days of submission to the Registrar of Companies of the relevant documents.

4. ONGOING REQUIREMENTS

4.1. Ongoing Segregation of Assets

The assets of an SPC comprise segregated portfolio assets and general assets. The directors of an SPC are under a duty to establish and maintain procedures to:

- (a) segregate, and keep segregated, portfolio assets separate and separately identifiable from general assets of the SPC;
- (b) segregate, and keep segregated, portfolio assets of each segregated portfolio separate and separately identifiable from segregated portfolio assets of any other segregated portfolio; and
- (c) ensure that assets and liabilities are not transferred between segregated portfolios or between a segregated portfolio and the general assets otherwise than at full value.

It is suggested that proper discharge of the directors' duty to segregate the assets and liabilities will require physical segregation, for example, by way of maintaining separate bank accounts, and not merely separate accounting for each segregated portfolio.

Liabilities attributable to a particular segregated portfolio may only extend to, and recourse may only be had to, firstly, the segregated portfolio assets attributable to that particular segregated portfolio and, secondly, unless prohibited by the articles of association of the SPC, the SPC's general assets but only

to the extent that the segregated portfolio assets attributable to that particular segregated portfolio are insufficient to satisfy the liability, and to the extent that the general assets exceed any applicable regulatory prescribed minimum capital amounts. Such liabilities may not extend to, and recourse may not be had to, the segregated portfolio assets attributable to any other segregated portfolio.

Liabilities of an SPC not attributable to any of the segregated portfolios of the SPC are discharged from the SPC's general assets. Similarly, income, receipts and other property or rights of or acquired by an SPC and not otherwise attributable to any particular segregated portfolio are applied to and become part of the SPC's general assets.

4.2. Shares and Dividends

An SPC may create and issue shares in one or more classes or series of shares, including different classes or series relating to the same segregated portfolio, and the proceeds of the issue of such shares must be included in the segregated portfolio assets of the segregated portfolio in respect of which such shares are issued. The proceeds of the issue of any shares other than segregated portfolio shares must be included in the general assets of the SPC.

An SPC may pay a dividend or other distribution in respect of segregated portfolio shares of any class or series and whether or not a dividend or other distribution is declared on any other class or series of segregated portfolio shares or other shares. Dividends or other distributions in respect of segregated portfolio shares must be paid by reference only to the accounts of and out of the segregated portfolio assets and liabilities of the segregated portfolio in respect of which the segregated portfolio shares were issued and otherwise in accordance with the rights of such shares.

4.3. Execution of Contracts for the Benefit of Segregated Portfolios

Any transaction which is to be binding on or is for the benefit of a particular segregated portfolio must be executed by or on behalf of the directors of the SPC and on behalf of that particular segregated portfolio, which must be identified or specified, and it must be indicated that the transaction is in the name of, or by, or for the account of, that particular segregated portfolio.

If the SPC is in breach of this obligation, the directors are obliged forthwith on becoming aware of the breach to make necessary enquiries, remedy the situation and notify all relevant persons of the error.

4.4. Winding-up and Receivership Orders

The liquidator of an SPC is required to deal with the assets of the SPC in accordance with the segregated procedures established by the directors of the company and, in discharging the claims of creditors of the SPC, may only apply the company's assets to those entitled to have recourse, as described above.

The Court may make a receivership order in respect of a segregated portfolio of an SPC if it is satisfied that the segregated portfolio assets attributable to that segregated portfolio (taking into account the SPC's general assets, unless there are no creditors in respect of that segregated portfolio who are entitled to have recourse to the SPC's general assets) are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio, and that the making of the order would achieve the orderly

closing down of the business of that segregated portfolio and the distribution of its assets to those entitled to have recourse to those assets.

An application for a receivership order in respect of a segregated portfolio may be made by the SPC, its directors, any of its creditors in respect of that segregated portfolio, any holder of shares in respect of that segregated portfolio and by CIMA, in relation to any company regulated by CIMA.

A receivership order may not be made if the SPC is in winding up and a receivership order will cease to have effect upon the commencement of the winding up of the SPC. It should also be noted that a resolution for the voluntary winding up of an SPC of which any segregated portfolio is subject to a receivership order will only become effective with the leave of the Court. Further, when an application has been made for a receivership order and also during the period of operation of a receivership order of a segregated portfolio, no suit, action or other proceedings may be instituted against the SPC in relation to the segregated portfolio except with the Court's consent, which may be made subject to conditions.

During the period of operation of a receivership order in respect of a segregated portfolio, the functions and powers of the directors of the SPC will cease in respect of the business and assets of or attributable to the segregated portfolio and those functions and powers will be vested in the receiver who may apply to the Court for directions as to the extent or exercise of any function or power.

5. PORTFOLIO INSURANCE COMPANIES OF SEGREGATED PORTFOLIO COMPANIES

As mentioned above, a segregated portfolio of an SPC is not a separate legal entity but is instead a constituent part of the SPC. For this reason, segregated portfolios of the same SPC cannot legally contract with each other and a segregated portfolio cannot have its own separate board of directors. In some circumstances, these features can be seen as a drawback for an SPC set up as an insurer or reinsurer. Therefore, in 2015 legislation was enacted in the Cayman Islands enabling an SPC insurer or reinsurer to form one or more portfolio insurance companies. A portfolio insurance company is in substance an incorporated version of the segregated portfolio - and therefore a legal entity in its own right - that is under the control of the SPC and is permitted, by registering with CIMA, to write insurance or reinsurance business. Further details can be found in our publication entitled "Portfolio Insurance Companies" copies of which are available on our website or on request.

6. SEGREGATED PORTFOLIO COMPANIES AND OTHER JURISDICTIONS

The SPC has become a popular and effective vehicle not just in the Cayman Islands but in other jurisdictions as well. Variations on segregated cell legislation exist in an increasing number of jurisdictions, including in several US states.

As the concept has become more commonplace, so too should investor or counterparty comfort with the effectiveness of such structures. It is, however, 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. Accordingly, where segregated portfolio assets are located outside the Cayman Islands, legal advice from insolvency practitioners in those

jurisdictions is highly recommended. Parties may also want to consider selecting Cayman Islands law to govern contracts to which an SPC is a party as well as a Cayman jurisdiction clause in an effort to ensure that the laws of Cayman Islands will apply and that the courts of the Cayman Islands will have jurisdiction to determine any disputes which may arise.

7. TAXATION

As an exempted company, an SPC enjoys a highly favourable tax position under Cayman Islands law. This is because the Cayman Islands has no corporation tax, income tax, capital gains tax, inheritance tax, gift tax, wealth tax, or any other tax applicable to a company conducting off-shore business. Certain documents are subject to stamp duty which is generally nominal. All exempted companies are entitled to receive from the government a “Tax Exemption Undertaking” exempting them from any possible future Cayman taxes for a period of twenty years.

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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