

Segregated Portfolio Companies in the BVI

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A look at registration, key features and licensing considerations

Incorporation/registration as a segregated portfolio company

In order to be incorporated or registered as a segregated portfolio company, a BVI entity must:

- be a company limited by shares;
- be either incorporated as a segregated portfolio company or if already incorporated, registered as such by the Registrar; and
- obtain the prior written approval of the FSC in order to be incorporated or registered as a segregated portfolio company.

To obtain approval from the FSC, the applicant needs to demonstrate “knowledge and experience necessary for the proper management of segregated portfolios”. Any company may apply to be incorporated or registered as a segregated portfolio company, except for those that are either:

- licensed to undertake investment business under the Securities and Investment Business Act, 2010 (i.e. broker dealers, investment managers, investment advisors etc.);
- licensed to act as an insurance manager or insurance intermediary under the Insurance Act 2008; or
- licensed to carry on any activity regulated under the Banks and Trust Companies Act, 1990, Company Management Act, 1990 or Financing and Money Services Act, 2009.

Key Features

A segregated portfolio company is a single legal entity and each segregated portfolio **does not** constitute a separate legal entity.

Assets and liabilities of a segregated portfolio company are either (a) segregated portfolio assets and liabilities (i.e. belonging to a specific segregated portfolio); or (b) general assets and liabilities of the company (i.e. not comprised in any of the segregated portfolios).

A segregated portfolio company may issue more than one class of shares within each segregated portfolio and the proceeds of such shares are included in the assets of that particular segregated portfolio.

Any dividends paid out by a segregated portfolio company can only be paid out by reference to the assets and liabilities attributable to the particular segregated portfolio. Therefore the solvency test will be applied in relation to the assets and liabilities constituting the particular segregated portfolio and **not** the assets and liabilities of the other segregated portfolios or the general assets.

Directors of a segregated portfolio company are under a duty to establish and maintain procedures for keeping the assets of a segregated portfolio separate from the general assets of the company and the assets of other segregated portfolios.

Assets of one segregated portfolio can only be used to meet the liabilities of creditors of that segregated portfolio and not the liabilities of any other creditor.

The segregated portfolio company's liability to a creditor **only** extends to, and the person only has recourse against, **(i)** the assets of the segregated portfolio with whom the creditor has contracted; and **(ii)** if the assets in that segregated portfolio are insufficient, to the general assets of the segregated portfolio company.

The following terms are implied, unless otherwise excluded in writing, into every transaction entered into by a segregated portfolio company:

- no party will seek to make the assets of any segregated portfolio liable in respect of a liability not attributable to that segregated portfolio;
- if any party does succeed in making the assets of a segregated portfolio liable for a liability not attributable to that segregated portfolio, it is liable to pay the segregated portfolio company a sum equal to the value of the benefit it obtained; and
- if any party succeeds in seizing or attaching or levying execution against the assets of a segregated portfolio in respect of liabilities not attributable to that portfolio, the party holds the assets and their proceeds on trust for the segregated portfolio company and must keep

them separate and identifiable.

The assets of a segregated portfolio company may only be transferred to another person, wherever resident or incorporated and whether or not a segregated portfolio company, in accordance with the terms of a Court Order. However, a Court Order is not required to simply invest and change the investment of segregated portfolio assets or otherwise to make payments or transfers from segregated portfolio assets in the ordinary course of the segregated portfolio company's business.

A segregated portfolio company may terminate a segregated portfolio which has no assets or liabilities (and may also reinstate a portfolio that was previously terminated, following which reinstatement the segregated portfolio company must notify the FSC).

On a liquidation of a segregated portfolio company, the BVI Insolvency Act 2003 applies with one modification in that a liquidator is required to observe the provisions for segregating assets and can only apply assets of a particular segregated portfolio to those entitled to have recourse to that segregated portfolio.

Licensing Considerations

License applications to the FSC need to detail the functionaries responsible for each segregated portfolio.

If the applicant is not a new incorporation (i.e. an existing company applying to be registered as a segregated portfolio company), the application will need to include a statement signed by a director setting out **(i)** the assets and liabilities of the company as at a date no more than six months prior to the application; **(ii)** details of any transactions, events or other matters not reflected in the statement of assets and liabilities that has materially affected or is likely to have a material effect on the assets and liabilities of the company; **(iii)** the assets of the applicant intended to be segregated assets and the assets intended to be general assets; and **(iv)** how the liabilities will be satisfied.

A segregated portfolio company shall at all times have one or more administrators, managers and custodians and may appoint one or more investment advisors.

A segregated portfolio company is required to have an auditor and file its annual accounts with the FSC within 6 months of its financial year end.

A segregated portfolio company that is a public fund is not permitted to create an additional segregated portfolio without the prior written consent of the FSC.

Where a segregated portfolio company which is a professional or private fund intends to create an additional segregated portfolio, if, the additional segregated portfolio has the same

functionaries as the existing segregated portfolios, it must notify the FSC within 14 days of the creation of the new segregated portfolio. If, however, the additional segregated portfolio has different functionaries, the FSC's prior written consent is required.

This client briefing is intended to provide a general summary of the position in law as at the date shown above, and is not to be taken as specific legal advice applicable to particular issues or circumstances. If such advice is required, please contact your usual Ogier contact or one of our partners listed here.

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