

Mutual Funds established as Segregated Portfolio Companies in the British Virgin Islands

Pursuant to the BVI Business Companies Act 2004 and related regulations, the Financial Services Commission in the British Virgin Islands (the **FSC**) may approve the incorporation of a company, or the registration of an existing company, as a segregated portfolio company (**SPC**) if the company will be licensed as an insurer under the Insurance Act 2008, as a mutual fund or private investment fund under the Securities and Investment Business Act 2010 (**SIBA**) or for more general unregulated use under the Segregated Portfolio Companies (BVI Business Company) Regulations 2018. This guide focuses on mutual funds set up as SPCs.

An SPC is a single company with the benefit of statutory segregation of assets and liabilities between segregated portfolios (**Segregated Portfolios**) established within the company. The assets and liabilities of each Segregated Portfolio are legally segregated from (a) the assets and liabilities of any other Segregated Portfolio of the company and (b) the assets and liabilities of the company which are not held within or on behalf of any Segregated Portfolio (the **General Assets**). A Segregated Portfolio does not constitute a legal entity separate from the SPC.

The SPC is a popular vehicle in the context of multi-class or umbrella investment funds in which two or more Segregated Portfolios use different investment strategies, including different levels of leverage that create potentially substantial liabilities to third parties.

Regulation of SPCs

The prior approval of the FSC is required to register any fund as an SPC. Open-end funds can apply to be registered as SPCs on the basis that the entity seeking permission is or will, upon incorporation be recognised or registered as a fund under SIBA.

To grant approval to a fund recognised or registered under SIBA, the FSC must be satisfied that the applicant has, or has available to it, the knowledge and expertise necessary for the proper management of Segregated Portfolios. The application for approval must contain the designation of the Segregated Portfolios that are to be initially created and for which approval is sought.

Additional requirements applicable to SIBA mutual funds set up as SPCs include:

- An offering memorandum (or investment warning for incubator or approved funds) must be submitted for each Segregated Portfolio for which approval is sought
- The SPC must appoint an administrator, investment manager and custodian and may appoint an investment adviser. The FSC can exempt a fund from appointing a manager and/or custodian but all mutual fund SPCs must appoint an administrator. The instrument under which any such functionary is appointed must specify in respect of which Segregated Portfolio(s) the functionary is appointed and the responsibilities and duties in respect of each Segregated Portfolio
- An SPC that is a private, professional or public fund must have an auditor and the audited financial statements must be filed with the FSC within six months of the end of its financial year. Incubator and approved fund SPCs must prepare and submit their financial statements in accordance with SIBA but do not have to appoint an auditor.

Special features of an SPC

Duty of directors

It is the duty of the directors of an SPC to establish and maintain procedures to segregate and keep segregated, segregated portfolio assets separate and separately identifiable from General Assets and other Segregated Portfolios and where relevant to apportion or transfer assets and liabilities between Segregated Portfolios and the General Assets.

Segregation of assets

Each Segregated Portfolio's assets are only to be made available and used to meet liabilities to the creditors of the SPC who are creditors in respect of that Segregated Portfolio and who are thereby entitled to have recourse to the specific assets attributable to that Segregated Portfolio.

Segregation of liabilities

Segregated Portfolio assets are not to be used to meet liabilities to creditors of the SPC who are not creditors in respect of that Segregated Portfolio. These assets are "absolutely protected from" such creditors who are not entitled to have recourse to the Segregated Portfolio's assets attributable to that Segregated Portfolio.

Creditors

Where a Segregated Portfolio is liable to a person, that person is entitled to recourse only firstly to the Segregated Portfolio assets attributable to such Segregated Portfolio and secondly to the General Assets, to the extent that the Segregated Portfolio assets are insufficient to satisfy the liability and attributable to the SPC.

Liquidation

The court may make a portfolio liquidation order in respect of a specific Segregated Portfolio if it is satisfied that the assets attributable to a Segregated Portfolio 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 will achieve the purpose of the orderly closing down of the business of the Segregated Portfolio and the distribution of the assets attributable to the Segregated Portfolio to those entitled to recourse thereto.

Shares

Segregated Portfolios may issue shares in more than one class and a class of shares may be issued in more than one series. There is however no requirement to state in the SPC's memorandum of association the classes of segregated portfolio shares that the SPC is authorised to issue. Dividends and distributions paid in respect of segregated portfolio shares can only be made by reference to the assets and liabilities attributable to that Segregated Portfolio in respect of which the shares were issued.

SPC's financial statements

The financial statements of an SPC must take account of the segregated nature of the company and include an explanation of the purpose of the SPC, how the segregation of the assets and liabilities of the SPC impacts on the members of the SPC and persons with whom the SPC transacts and the effect that any existing deficit in the assets of one or more Segregated Portfolios of the SPC has on the General Assets of the SPC.

SPC ongoing regulatory requirements

In addition to the ongoing requirements applicable to all BVI mutual funds, the Segregated Portfolio Companies (Mutual Funds) Regulations 2018 stipulate that the following need to be observed:

- An SPC which is a public, incubator or approved fund is required to obtain the prior written approval of the FSC before it can create a new Segregated Portfolio
- In relation to private and professional funds, a prior written approval is not necessary where the SPC has its principal place of business in a “recognised jurisdiction” or the persons who will be appointed to act as functionaries of the new Segregated Portfolio are the same persons notified to the FSC on the initial application of the SPC. Private and professional funds are nevertheless required to notify the FSC, in the approved form, of the creation of a new Segregated Portfolio within 14 days of the creation of the Segregated Portfolio
- The SPC must not create a new Segregated Portfolio unless it has previously issued an offering document with respect to the Segregated Portfolio (or an investment warning for incubator or approved fund SPCs) and a copy of the offering document/investment warning is submitted to the FSC

Costs

A fee of US\$1,265 is payable to Harneys Corporate Services Limited for the incorporation of an SPC. An annual fee of US\$1,530 is also payable in advance to Harneys Corporate Services Limited for providing the SPC’s registered office and acting as its registered agent.

A fee of US\$550 is payable to the BVI Registry of Corporate Affairs for the incorporation of an SPC. Annual fees of \$550 are also payable to the BVI Registry of Corporate Affairs.

An application fee is payable to the FSC for approval to incorporate a mutual fund company as an SPC, comprising US\$1,500 in respect of the SPC and US\$350 in respect of each Segregated Portfolio included in the application. Annual fees of US\$1,500 in respect of the company and US\$350 in respect of each Segregated Portfolio are payable to the FSC.

An application and recognition fees totalling \$2,050 are payable to the FSC in respect of a professional or private funds and an annual fee of \$1,200 must be paid thereafter. An application fee of \$2,000 is payable to the FSC in respect of approved and incubator funds and an annual fee of \$1,200 must be paid thereafter.

Timing

In our experience, it generally takes between two and four weeks from receipt of a draft offering document/investment warning to prepare the memorandum and articles of association for the SPC, settle the form of the offering document/investment warning and to be in a position to submit the application for approval to the FSC to register as an SPC. This period can, however, be shorter or longer depending on the particular circumstances of the fund.

Once the application for approval to register as an SPC is submitted it generally takes five to seven business days for the FSC and the Registry of Corporate Affairs to deal with the application for approval and to incorporate the company.

Registration of public funds is a more involved and, typically, considerably longer process.



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