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British Virgin Islands Segregated Portfolio Companies

Foreword

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

This Memorandum has been prepared on the basis of the law and practice as at the date referred to below.

Conyers Dill & Pearman

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1. INTRODUCTION

A segregated portfolio company (“SPC”) is a company limited by shares which is permitted to create one or more ‘segregated portfolios’ in order to segregate the assets and liabilities held in or on behalf of a segregated portfolio from the assets and liabilities of the SPC:

- (a) held in or on behalf of any other segregated portfolio of the SPC; and
- (b) which are not held within or on behalf of any segregated portfolio of the SPC.

In BVI, only mutual fund companies and insurance companies are permitted to be registered as SPCs. The Financial Services Commission of the BVI (the “Commission”) is empowered to add, by regulation, other types of companies to this list, but to date no such expansion has been undertaken.

2. RATIONALE FOR ESTABLISHING A SEGREGATED PORTFOLIO COMPANY

An SPC is one discrete legal entity. A segregated portfolio is not a separate legal entity but a record or a collection of records detailing transactions relating or linked to each other. The SPC structure therefore enables a statutory segregation of accounts within a single company that could not otherwise be achieved.

Assets linked to a particular segregated portfolio are held by the company as a separate fund. Such assets are not available to meet the company’s general liabilities, and cannot (unless otherwise agreed) be made available to satisfy the liabilities linked to other accounts. Each segregated portfolio is able to grant security over its segregated portfolio assets, and this security can be made to rank ahead of the interests of the owner of the account.

Within the mutual funds industry the ability to use a SPC is particularly beneficial for fund managers wishing to establish master-feeder fund structures, structures providing for multiple classes of shares or any structure where the statutory

segregation of assets is desired. SPCs are also useful in the insurance industry, being a sensible vehicle for 'rent-a-captives', being captive insurance companies established and licensed by a sponsor who then 'rents' the capital, the insurance licence and the company's capacity to operate to various participants. Insurance companies also find SPCs useful for legally separating reserves among different insurance products, particularly long-term business such as life and disability programs.

2.1 Segregation of Assets and Liabilities

Assets of an SPC are either segregated portfolio assets or general assets. Segregated portfolio assets are those assets of an SPC held within or on behalf of the segregated portfolios created by the SPC. An SPC's general assets are those assets of the SPC which are not segregated portfolio assets. The segregated portfolio assets of any given segregated portfolio comprise:

- (a) assets representing the consideration paid or payable for the issue of segregated portfolio shares and reserves attributable to the segregated portfolio; and
- (b) all other assets attributable to or held within the segregated portfolio.

The British Virgin Islands Business Companies Act, 2004 (the "BC Act") imposes a duty on directors:

- (a) to segregate (and keep segregated) segregated portfolio assets separate (and separately identifiable) from general assets; and
- (b) 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.

2.2 Government Fees

A fee of \$1,000 is payable upon application for approval to incorporate or register a company as an SPC. A further fee of \$250 is payable in respect of each segregated portfolio included in the application.

An SPC is required to pay an initial fee of \$1,000, plus \$100 for each segregated portfolio within the company if it is incorporated or registered on or before 30 June in any year. This is reduced to \$500 plus \$50 for each additional segregated portfolio if the company is incorporated on or after 1 July in any year. The total initial fees payable by a mutual fund SPC in any year shall not exceed \$10,000.

In relation to annual fees, a mutual fund SPC shall pay an annual fee on or before 31 March of each year starting in the year following its registration or incorporation. The annual fee is \$1,000 in respect of the company and \$100 in respect of each segregated portfolio in existence. The total annual fee payable by a mutual fund SPC in any year shall not exceed \$10,000.

Taking into account these modest fees, and bearing in mind the considerable savings in legal incorporations fees and annual secretarial fees (which are usually payable 'per company') the cost benefit of the SPC structure is considerable.

3. SETTING UP A SEGREGATED PORTFOLIO COMPANY

3.1 Incorporation

The principal statute governing the formation and operation of a BVI business company is the BC Act. A business company is incorporated by the filing of the company's memorandum and articles of association with the Registrar of Corporate Affairs (the "Registrar"), together with a document in the approved form signed by the first registered agent signifying his consent to act in that capacity. There is no requirement to publicise an intention to incorporate, nor is there any pre-approval by any BVI regulatory body. The registered agent is required to perform a due diligence review on the promoters of the company.

Having been satisfied that all of the incorporation requirements of the BC Act have been met, the Registrar will register the memorandum and articles of association and issue a certificate of incorporation certifying that the company is incorporated on that date. If all appropriate information is provided to the registered agent, the filing of

the memorandum and articles of association with the Registrar for the purpose of effecting incorporation can usually be accomplished within a business day. The issuance of a certificate of incorporation will usually follow within a couple of days.

Full particulars of the incorporation process, together with a description of the constitutional documents, local requirements and the ongoing regulation of a BVI business company can be found in our publication entitled “BVI Business Companies,” copies of which are available on our website or on request.

3.2 Registration

A SPC can be tailor-made to best serve the interests of the individual portfolio owners and the company at large. In particular, SPC’s can be designed to streamline and simplify administration for investment funds and insurance companies.

A company limited by shares can be incorporated as a segregated portfolio company, or an existing company can be registered as a segregated portfolio company. Any company seeking to operate segregated portfolios must be (or upon incorporation become) (i) licensed as an insurer under the Insurance Act, 1994 or (ii) recognised as a professional or private fund or registered as a public fund under the Securities and Investment Business Act, 2010.

Full particulars of the licensing process for insurance companies, together with a description of the ongoing requirements for BVI insurance companies, can be found in our publication entitled, “British Virgin Islands Insurance Companies”. Similarly, information on the registration or recognition of a mutual fund is found in our publication, “British Virgin Islands Mutual Funds”. Both of these publications are available on our website or on request.

In order to be registered as a SPC, a company is required to file an application for approval of the Commission in the approved form attaching various documents required by the Segregated Portfolio Companies Regulations, 2005.

The Commission is empowered to request such information as it considers necessary to determine the application. If the Commission is satisfied with the information provided, and is satisfied that the company has, or has available to it, the knowledge and expertise necessary for the proper management of segregated portfolios, the Commission may approve the incorporation or registration of the company as a SPC subject to such terms as it considers appropriate. Any such approval must be in writing.

3.3 Name of SPC

The name of the SPC shall include the designation “Segregated Portfolio Company” or “SPC” placed immediately before one of the endings permitted by the Act, namely Limited, Corporation, Incorporated, Society Anonyme or Sociedad Anonima, or the abbreviations thereof.

4. TIMESCALE FOR INCORPORATION AND REGISTRATION

The usual processing time for applications for contemporaneous incorporation, registration/ recognition or licensing, as the case may be, is between two to four weeks. In order for contemporaneous registration, all documentation must be completed in full and correct.

5. ONGOING REQUIREMENTS

5.1 Functionaries

In addition to the ongoing requirements imposed by the BC Act on all BVI business companies (as detailed in our publication entitled “Continuing Requirements of the Business Companies Act of BVI”), an SPC which is a mutual fund is required to appoint certain functionaries, including administrators, managers, custodians and an auditor. In addition, it is typical for an SPC mutual fund to appoint one or more investment advisors.

A mutual fund SPC’s auditor is responsible for auditing the SPC’s financial statements. These audited financial statements are required, where the SPC is a

mutual fund, to be filed with the Commission within 6 months of the end of its financial year.

5.2 Issue of Shares

Shares whose assets and liabilities are linked to a particular segregated portfolio must be recorded in the records of the company as being linked to that segregated portfolio.

5.3 Record Keeping

An SPC must comply with the requirements of the BC Act as it pertains to the keeping of records and accounts. In addition, a SPC must keep proper records of each portfolio.

5.4 Financial Statements

The financial statements of a SPC shall take into account the segregated nature of the company and shall include an explanation of the nature of the company, how the segregation of assets and liabilities of the company impacts upon members and persons with whom the company transacts, and the effect that any existing deficit in the assets of one or more segregated portfolios has on the general assets of the company. There are restrictions and limitations on the transfer of assets or liabilities from one portfolio to another.

5.5 Dividends

A SPC may pay a dividend or otherwise make a distribution in respect of segregated portfolio shares. Segregated portfolio assets may be paid, and distributions made, by reference only to the segregated portfolio assets and liabilities attributable to the segregated portfolio in respect of which the shares were issued. When determining solvency of the company for the purposes of a dividend or distribution in respect of segregated portfolio shares, no account shall be taken of the assets and liabilities of any other segregated portfolio or of the company's general assets and liabilities.

6 SEGREGATED PORTFOLIO COMPANIES AND OTHER JURISDICTIONS

The SPC is becoming a popular and effective vehicle not just in BVI but in other jurisdictions as well. However, these types of entities have not been considered yet by the courts of BVI or any other jurisdiction. As such, it is 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. Similarly, if a liability (for example a fine or tax) is imposed by an authority of another jurisdiction, it is not known how the courts of BVI (or indeed other jurisdictions) might impose or distribute that liability among the general account of the SPC and the various segregated portfolios.

Variations on segregated cell legislation exist in an increasing number of jurisdictions, including in several US states. As the concept becomes more commonplace, so too should investor comfort with the effectiveness of such structures.

7 TAXATION

The BVI has no corporation tax, capital gains tax, wealth tax, stamp duty or any other tax applicable to a business company. Business companies are specifically exempted from income tax. The Income Tax Act also exempts a business company from the provisions of the Stamp Act and the Registration and Records Act in respect to all instruments or deeds relating to the business of the business company, including the transfer of all property to or by the business company and transactions in respect of its securities.

This publication is not a substitute for legal advice nor is it a legal opinion. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

About Conyers Dill & Pearman

Conyers Dill & Pearman advises on the laws of the Cayman Islands, British Virgin Islands, Bermuda, Mauritius and Cyprus. Conyers' lawyers specialise in company and commercial law, commercial litigation and private client matters.

The combination of Conyers' structure, culture and expertise enables the highest quality, responsive, timely and thorough legal advice. Conyers' strategic global presence in major international business centres allows a seamless 24 hour service.

Conyers' sophisticated client base includes FTSE 100 and Fortune 500 companies. Working with leading local and international firms, Conyers advises on highly complex multi-jurisdictional projects.

Affiliated companies (Codan) provide a range of trust, corporate secretarial, accounting and management services.

Founded in 1928, Conyers has 600 staff, including more than 150 lawyers.

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