

Segregated Portfolio Companies in the British Virgin Islands

Service area / [Corporate](#)

Location / [British Virgin Islands](#)

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A segregated portfolio company (“SPC”) is incorporated under the BVI Business Companies Act, 2004 (as amended) (the “BCA”). It is possible for a company to (i) be incorporated as an SPC or, (ii) if incorporated already, apply to the BVI Registrar of Corporate Affairs (the “Registrar”) to be registered as an SPC. The Registrar will not incorporate or register a company as an SPC until it has received written confirmation from the BVI Financial Services Commission (the “FSC”) that it has approved the SPC.

This client guide covers the law as it currently stands under the BCA. However, we would note that the BVI government is seeking to enact the BVI Business Companies (Amendment) Act 2018 (the “Amendment”) which proposes changes to the SPC regime under the BCA. No timeline for the promulgation of the Amendment has as yet been indicated.

Portfolios

An SPC is a single legal entity which may create, by a resolution of directors or in the manner otherwise set out in its memorandum and articles of association, one or more segregated portfolios (the “Portfolios” and each a “Portfolio”). The purpose of a Portfolio is to segregate and keep separate its assets and liabilities from the assets and liabilities of any other Portfolio of the SPC or those of the SPC. Therefore, the assets held by an SPC will either be classified as general assets of the SPC or Portfolio assets. Each Portfolio must be separately identified and include the words “Segregated Portfolio” in such identification.

If pursuant to the Segregated Portfolio Companies Regulations, 2005 (“Regulations”), an SPC is required to obtain the approval of the FSC for the creation of a Portfolio, the SPC is not permitted to create a Portfolio without the prior written approval of the FSC. Failure by the SPC to comply with this provision can result in a fine of US\$10,000 being levied.

Where a Portfolio has no assets or liabilities attributable to it, directors of the SPC may resolve to terminate the Portfolio. Any terminated Portfolio may be reinstated by a resolution of the directors or in such other manner as may be contemplated by the memorandum and articles of association of the SPC. Where the SPC required the approval of the FSC for the creation of that Portfolio, notice of termination of the same Portfolio must subsequently be filed with the FSC. The re-instatement of a terminated Portfolio may also require the prior written approval by the FSC.

Restrictions on use

As the law currently stands, the FSC will only approve the incorporation or registration of an SPC if the company is, or on its incorporation will be:

- licensed as an insurer under the Insurance Act, 2008 (“Insurance Act”); or
- recognised as a professional or private fund or, registered as a public fund under the Securities Investment Business Act, 2010 (“SIBA”).

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General assets and liabilities

Assets and liabilities of an SPC which are not attributable to a specific Portfolio will be applied as general assets and liabilities of the SPC. Where an SPC has a general liability to a person, such liability will only extend to the SPC, and that person is only entitled to have recourse to the SPC's general assets.

Segregated assets and liabilities

The clearly identified segregated assets of a Portfolio are only available and can only be used to satisfy the liabilities owed to creditors or shareholders of that particular Portfolio. The assets held in each Portfolio are protected from any claim from a creditor in respect of a general liability of the SPC or a liability arising in a different Portfolio. Where the assets available in a Portfolio are not sufficient to satisfy the liabilities owed to a creditor or shareholder in respect of the same Portfolio then such person may, to the extent that the necessary capital requirements of the SPC are satisfied, have recourse against the SPC's general assets.

Issue of shares and distributions

The SPC may create and issue shares in one or more classes or series and a class of Portfolio shares may be issued in one or more series. The proceeds of the issue of any Portfolio specific shares must be included in the relevant Portfolio's assets and the SPC's records must link the shares to that Portfolio.

Subject to the SPC's memorandum and articles of association and satisfaction of the BVI solvency test set out in the BCA, an SPC may pay a dividend or other distribution in respect of shares of a Portfolio or the SPC. Portfolio dividends or other distributions must be paid by reference to the assets and liabilities of the Portfolio in which the relevant shares are issued. As such, the satisfaction of the solvency test will be in reference to the specific Portfolio in which a distribution is to be made or in respect of the SPC, if the distribution is to the shareholders of the SPC.

Ongoing obligations

The BCA stipulates that directors of an SPC have a duty to establish and maintain procedures to segregate, and keep segregated:

- Portfolio assets separate and separately identifiable from general assets; and
- Portfolio assets of each Portfolio separate and separately identifiable from Portfolio assets of any other Portfolio.

Where relevant, the directors also have a duty to establish a procedure to apportion or transfer assets and liabilities between Portfolios, or between Portfolios and general assets of the SPC. This does not mean that the assets are incapable of being jointly invested; the SPC is simply required to keep the assets segregated and identifiable.

Any act, contract, instrument or arrangement which is to be binding on or to enure to the benefit of a Portfolio, must be executed by the SPC on behalf of such Portfolio, with such Portfolio being identified in the contract and it being noted that such execution is in the name of, or by, such Portfolio.

There will also be further ongoing requirements depending on whether the SPC is registered as a fund under SIBA or as an insurance company under the Insurance Act.

Recognition of SPC's in foreign courts

Whilst the statutory segregation of assets and liabilities of each Portfolio will be recognised and enforced by the courts in the BVI, it is uncertain as to whether other jurisdictions in which the SPC might operate will also recognise and enforce this segregation. Accordingly, although SPCs (and equivalent vehicles incorporated in other jurisdictions, such as protected cell companies) are becoming increasingly popular throughout the World, appropriate legal advice should be sought on this point from counsel in the jurisdictions in which the SPC is to operate.

Application

The application for approval to incorporate or register an SPC must be made to the FSC in the prescribed form and be accompanied by such documentation as prescribed in the Regulations. The FSC's approval will be given if it is satisfied that the company has or has available to it, the knowledge and expertise necessary for the management of the Portfolios.

It is a requirement that any company incorporating or registering as an SPC include the letters "SPC" or the words "Segregated Portfolio Company" immediately prior to its corporate suffix.

Fees

An application fee of US\$1,000 is payable in respect of any application to incorporate or register an SPC with the FSC together with a fee of US\$250 for each Portfolio. If the approved SPC is incorporated or registered on or before 30 June, a further initial fee of US\$1,000 is payable to the FSC together with an additional fee of US\$100 for each approved Portfolio. If the incorporation or registration of an SPC occurs on or after 1 July, the initial fees are reduced to US\$500 for the SPC and US\$50 for each approved Portfolio. The annual Registry fees for each SPC are US\$1,000 per annum together with a fee of US\$100 for each Portfolio. Irrespective of the number of Portfolios, the initial fees and annual Registry fees (in any one year) are capped at US\$10,000.

Continued

Registered agent

Each company incorporated in the BVI must have a BVI resident registered agent. SPCs licensed as mutual funds under SIBA will also require additional functionaries to be appointed. The functionaries required under SIBA include managers, custodians, auditors and administrators. The fees referenced above are in respect of the BVI Registry fees only and any registered agent and functionary fees will be in addition to those fees. CO Corporate Services (BVI) Ltd. is able to assist with various corporate services including some of the functionary services if the SPC is a fund licensed under SIBA.

Timescales

Subject to all of the relevant documents being provided in an orderly and timely manner, an SPC can usually be incorporated or registered within two to four weeks.

Should you require any further information or advice on SPC please contact one of the Carey Olsen BVI team.



FIND US

Carey Olsen
Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
E bvi@careyolsen.com



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Visit our corporate team at
careyolsen.com

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