



Segregated Account Companies in The Bahamas

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Preface

This memorandum sets out a brief summary of segregated accounts companies in The Bahamas. For further information please contact the Securities department at Higgs & Johnson.

The segregated accounts company (the “SAC”), was introduced in The Bahamas by the Segregated Accounts Companies Act, 2004 (the “Act”). The concept of a SAC is that a company, which remains a separate legal entity, may create segregated accounts (each a “Segregated Account”) such that the assets and liabilities of each Segregated Account are separate from the assets and liabilities of each other Segregated Account. A SAC consists of (i) a general account or core cell (the “General Account”) containing assets and liabilities which are statutorily separated from the assets and liabilities of the other Segregated Accounts and (ii) one or more Segregated Accounts.

The concept of a SAC (otherwise known as a segregated portfolio company or segregated cell company) exists in various other jurisdictions including Guernsey, the British Virgin Islands, Bermuda, St. Vincent and the Grenadines and The Cayman Islands.

This memorandum provides a summary of the key features of a SAC as provided by the Act and considers the use of the SAC as a popular vehicle for multi-class investment funds and captive insurance companies.

ESTABLISHING A SAC

Any company which is incorporated or registered under the Companies Act (the “Companies Act”) or the International Business Companies Act, 2000 (the “IBC Act”) of The Bahamas may apply to the Registrar of Companies (the “Registrar”) to be registered as a SAC, with the prior written consent of its primary regulator, so long as it is engaged in one of the businesses set out below, as follows:

- the business of investment funds, with the consent of the Securities Commission of The Bahamas (the “Commission”) or if applicable, its investment fund administrator;
- the business of issuing securities, with the written consent of the Commission;
- insurance business, with the written consent of the Registrar of Insurance;
- if it is a subsidiary of a bank or trust company and not licensed by the Central Bank of The Bahamas, with the written consent of the Central Bank of The Bahamas; or
- if it is engaged in any other business, with the written consent of a primary regulator who may be prescribed by the Minister Responsible for Companies.

The primary regulator may impose various conditions on the company applying for registration as a SAC to ensure

the reputation of The Bahamas as an offshore financial centre and in particular, to verify the identity of the account owners of the SAC and to ensure compliance with the Act. Banks and trust companies licensed to conduct banking or trust business in The Bahamas are not permitted to apply for registration to become a SAC.

The Act requires that a SAC in miscellaneous business (where the Minister has to designate a primary regulator) appoint a segregated accounts representative (the “Representative”) in The Bahamas, who must be appointed by the primary regulator. The Representative must be resident in The Bahamas and licensed in The Bahamas as a licensee under any of the following Acts: the Banks and Trust Companies Regulation Act, the Financial and Corporate Services Providers Act, the Securities Industry Act, the Investment Funds Act, the Insurance Act or the External Insurance Act.

The application for registration as a SAC must contain (i) the name of the proposed company with the expression “SAC” or “Segregated Accounts Company”, (ii) the nature of the business of the company, (iii) the address of the registered office of the company in The Bahamas and (iv) the date of incorporation of the company.

Upon approval of the application by the Registrar and payment of the prescribed registration fees, the Registrar will register the company as a SAC, publish notice of such registration in the Gazette and issue a certificate of registration.

ADMINISTRATION OF A SAC

Section 9 of the Act requires that a SAC inform any person with whom it enters into a transaction of the following: (i) that it is a SAC, (ii) where the transaction relates to a segregated account for the purposes of that transaction, identify that segregated account and (iii) include a reference to the fact that the company is registered under the Act on its letterheads and contracts. If a SAC contravenes either of these requirements, the directors shall, notwithstanding any provision in the SAC’s governing instrument, the “Governing Instrument”, (i) incur personal liability in respect of that transaction and (ii) unless otherwise provided for in the Governing Instrument of the SAC, have a right of indemnity against the assets of the general account unless they were fraudulent, reckless negligent or acted in bad faith. However, the Court has the power to relieve a director of all or part of his personal liability if satisfied that (i) he was not aware of the circumstances giving rise to his liability and in being unaware was not fraudulent, reckless or negligent and did not act in bad faith or (ii) he expressly objected and

exercised his rights as a director so as to try and prevent the circumstances giving rise to his liability.

The Governing Instrument of the SAC consists of the agreements, memorandum and articles, resolutions, registers or other documents setting out the rights, obligations and interests of account owners in respect of each Segregated Account.

STRUCTURAL FEATURES

The Governing Instrument of a SAC will need to take note of and give effect to certain key structural provisions, as follows:

- **Name** – The name of a SAC must include the letters “SAC” or the words “Segregated Accounts Company”;
- **Rights and obligations of Account Owners**– The rights and obligations of account owners must be evidenced in a Governing Instrument.
- **Governing Law** – The Governing Instrument in relation to each Segregated Account of the SAC must be governed by the laws of The Bahamas and the parties thereto must submit to the jurisdiction of the courts of The Bahamas.
- **Classes of Shares** – The Governing Instrument must identify each Segregated Account to which each class of shares is linked.
- **Dividends and Redemptions** – A SAC may pay a dividend in respect of securities linked to a particular Segregated Account whether or not a dividend is declared on any other class of securities linked to the same or any other Segregated Account or any other securities issued by the SAC. A SAC may also repurchase the shares or securities linked to a particular Segregated Account. However, payments in respect of dividends, distributions and redemptions of shares may only be paid (i) out of the assets of the Segregated Account to which the relevant shares or securities are linked and (ii) if the statutory solvency test for the relevant Segregated Account set out in the Act is met.
- **Segregation of Assets and liabilities** – The assets and liabilities of a SAC are either linked to a Segregated Account or to the General Account. A SAC is required to maintain (i) records in accordance with generally accepted accounting principles used in the preparation of the financial statements of the SAC so that the records of the SAC to the best of the knowledge, information and belief of the directors and officers clearly show the share capital, proceeds of

rights, issues, reserves, assets, liabilities and expenses linked to each segregated account and (ii) a General Account with records in accordance with the Act showing the assets and liabilities which are not linked to a Segregated Account and which discloses any assets intended to be applied to a risk of any nature and which therefore exposes such assets to liability or loss.

- Subject to the provisions of the Act, any liability linked to a Segregated Account is a liability of that Segregated Account only and any asset linked to a Segregated Account is held exclusively for the benefit of the account owners of the Segregated Account and any counterparty to any transaction linked to that Segregated Account. Only the assets recorded in the General Account are available to meet liabilities not linked to a Segregated Account.
- **Financial Statements** – A SAC is required to prepare or cause to be prepared financial statements in respect of each Segregated Account. However, any account owner of a Segregated Account (i.e. any holder of shares linked to a Segregated Account or any person expressly identified in the Governing Instrument or in the records of the SAC as being an account owner for the purposes of the Act in respect of that Segregated Account) may agree in writing to waive his right to have laid before a general meeting financial statements or the auditor’s report thereon for an indefinite period of time, so long as such waiver is expressed to be revocable at the option of such account owner. Subject to the foregoing waiver right, a copy of the financial statements for each Segregated Account must be made available to account owners of that Segregated Account at such intervals and for such periods as are agreed between the SAC and the account owner, but in any event, not less than once in each financial year.

A company which is in existence and has conducted business prior to its registration may also apply to be registered as a SAC. However, in addition to filing the documentation outlined above in the section headed ‘Establishing a SAC’, such company must:

- file a statutory declaration made by at least two (2) of its directors with its primary regulator, setting out a true and accurate statement as to the financial position of the company;
- declare that on registration, the company and each Segregated Account will be solvent, no known creditor will be prejudiced, that all known creditors have

consented to the registration or that no creditors have valid grounds for objecting to registration; and

- attach evidence of consent in writing of 75% of the persons who would on registration of the company as a SAC, be the account owners of the Segregated Accounts of the company and 75% of those who would, on registration of the company be creditors.

CROSS BORDER CONTRACTS

Whilst the Act provides that the assets and liabilities of each Segregated Account are separate from the assets and liabilities of each other Segregated Account, there is a risk that if proceedings are brought in another jurisdiction, a Court in such other jurisdiction might not recognize such segregation. Currently, we are not aware of any case law in any other jurisdiction where the structure of a Bahamian SAC has been tested. As the assets of a SAC will likely be held outside of The Bahamas, it is recommended that, where possible, contracts entered into by a SAC be governed by the laws of The Bahamas and subject to the exclusive jurisdiction of Bahamian Courts.

If a contract entered into by a SAC is neither governed by Bahamian law nor subject to the exclusive jurisdiction of the Courts of The Bahamas, we recommend that provisions be inserted in the relevant contract limiting the recourse of the counterparty to the assets of the relevant Segregated Account.

ANNUAL REQUIREMENTS

Because a SAC must be incorporated under the Companies Act or the IBC Act prior to its registration as a SAC, each SAC must comply with the filing requirements and pay the annual fees prescribed by the Companies Act or the IBC Act, as the case may be. In addition, a SAC is required to (i) file an annual declaration with the Registrar of Companies by the 31st January of each year, signed by at least two (2) directors certifying that the SAC is and that its operations during the preceding year were in compliance with the provisions of the Act and (ii) pay the annual fees set out in the 'Bahamas Government Fees' section of this guide.

WINDING UP AND RECEIVERSHIP

A SAC incorporated under the provisions of the Companies Act or the IBC Act may be wound up voluntarily or by the Court in accordance with the provisions of the Companies Act or the IBC Act as the case may be. In either case, the

SAC must be wound up in accordance with the provisions of the Act and the liquidator must deal with the assets and liabilities linked to each Segregated Account in accordance with the provisions of the Act.

In addition, a receivership order may be made by the Courts of The Bahamas in respect of one or more Segregated Accounts upon application by the SAC, the directors of the SAC, any creditor of the SAC in respect of that Segregated Account, any account owner of that Segregated Account or the primary regulator of the SAC so long as the Court is satisfied that:

- the particular Segregated Account is not solvent, the general account is not solvent, a liquidation has been commenced in relation to the company or for other reasons it appears to the Court to be just and equitable that a receiver should be appointed; and
- the making of a receivership order would achieve (i) the orderly management, sale, rehabilitation, run off or termination of the business of, or attributable to, the Segregated Account, or (ii) the distribution of the assets linked to the Segregated Account to those entitled thereto.

During the period of operation of a receivership order, the functions and powers of the directors and managers and any liquidator of the SAC cease in respect of the business and assets linked to the Segregated Account in respect of which the order was made. Further, once a receiver has been appointed in respect of any Segregated Account, the SAC or any account owner or creditor of that Segregated Account may, where any action or proceeding against the SAC in respect of that Segregated Account is pending, apply to the Court for a stay of those proceedings and upon such application, the Court may stay the proceedings on such terms as it thinks fit.

However, the stay of proceedings does not prevent a counterparty with a valid security interest over the Segregated Account from enforcing his security in accordance with its terms, subject to applicable law.

APPLICATIONS

The Bahamas SAC has become an increasingly popular vehicle for use by investment funds, particularly multi-class funds where different investment strategies are employed in investing the assets of each Segregated Account.

BAHAMAS GOVERNMENT FEES

Initial Registration/Annual fees

Companies Incorporated under the Companies Act

- Government Incorporation fee - \$330.00;
- Stamp duty - \$60 for authorized share capital not exceeding \$5,000 and \$3.00 for each additional \$1,000 of authorized capital thereafter; and
- Annual fee
 - \$350 per annum entities which are Bahamian owned
 - \$1,000 per annum for foreign owned entities

Companies Incorporated under the IBC Act

- Government Incorporation fee - \$330.00; and
- Annual fee - Authorized capital not exceeding US\$50,000 - \$350 per annum
- Authorized capital of US\$50,000+ - B\$1,000 per annum

Segregated Accounts Companies fees

- Initial application fee for registration as a SAC \$500.00
- Initial filing fee for the establishment of the Segregated Accounts \$500.00
- Annual fee payable by the SAC \$500.00
- Annual fee payable in respect of each Segregated Account \$500.00