

**SEGREGATED ACCOUNTS COMPANIES AMENDMENT ACT
2002**



**BERMUDA
2002 : 10**

**SEGREGATED ACCOUNTS COMPANIES AMENDMENT ACT
2002**

[Date of Assent: 21 May 2002]

[Operative Date: 14 June 2002]

ARRANGEMENT OF SECTIONS

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WHEREAS it is expedient to amend the Segregated Accounts Companies Act 2000:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:—

Citation

1 This Act which amends the Segregated Accounts Companies Act 2000 ("the Act") may be cited as the Segregated Accounts Companies Amendment Act 2002.

General amendment

2 The Act is amended generally by deleting the words "beneficial owner", "a beneficial owner" and "beneficial owners" wherever they appear and substituting the words "account owner", "an account owner" and "account owners" respectively.

Repeal and replacement of section 2

3 Section 2 of the Act is repealed and the following is substituted:

"Interpretation and application

2 (1) In this Act—

"account owner" in relation to a segregated account means any person who is—

- (a) the registered holder of shares which are—
 - (i) issued by the segregated accounts company, and
 - (ii) linked to that segregated account;

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- (b) expressly identified in the governing instrument linked to a segregated account as being an account owner for the purposes of this Act in respect of that segregated account; or
- (c) expressly designated in the records of the segregated accounts company as being an account owner in respect of that segregated account;

and the interests of an account owner in any of the foregoing capacities in relation to any segregated account are referred to in this Act as "account holdings";

"appointed newspaper" means the Gazette or newspaper appointed by the Registrar under section 2(6) of the Companies Act 1981;

"contract" includes written agreements, instruments or other writings (including electronic records) which create or affect rights or obligations;

"counterparty" means any party (other than the segregated accounts company itself, save where section 17A(1) applies) to a transaction to which the segregated accounts company is a party, and under which assets or liabilities are wholly or partly linked to a segregated account, but an account owner shall not (in that capacity) also be a counterparty;

"court" means the Supreme Court;

"creditor" means, in respect of any segregated account (and in that regard may include a counterparty of the segregated account) or the general account respectively, any person to whom any liability is owed by the segregated accounts company and such liability is linked to that segregated account or is a liability of the general account, as the case may be; but, except as provided for in section 18(14), an account owner shall not (in that capacity) also be a creditor;

"general account" means an account comprising all of the assets and liabilities of a segregated accounts company which are not linked to a segregated account of that company;

"general shareholder" means any member of a segregated accounts company not being the holder of a share linked to a segregated account;

"governing instrument" means one or more written agreements, instruments, bye-laws, prospectuses, resolutions of directors, registers or other documents (including electronic records),

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setting out the rights, obligations and interests of account owners in respect of a segregated account;

"insurance business" means insurance business as defined in section 1(1) of the Insurance Act 1978;

"known creditors" means creditors whose identity and whereabouts are known to, or with due diligence could be discovered by, the company, or other persons known to the company;

"linked" means referable by means of—

- (a) an instrument in writing including a governing instrument or contract;
- (b) an entry or other notation made in respect of a transaction in the records of a segregated accounts company; or
- (c) an unwritten but conclusive indication,

which identifies an asset, right, contribution, liability or obligation as belonging or pertaining to a segregated account;

"manager" means any person who, by virtue of the terms of a governing instrument or otherwise with the consent of a segregated accounts company and the account owners of any segregated account, has control of a segregated account;

"mutual fund" means a mutual fund within the meaning of section 156A of the Companies Act 1981;

"officer" in relation to a segregated accounts company, includes director and secretary;

"operative date" means the date on which this Act comes into force;

"the Minister" means the Minister of Finance;

"register" means the register of segregated accounts companies maintained under section 6;

"registered" means registered under section 6;

"Registrar" means the Registrar of Companies appointed under section 3 of the Companies Act 1981;

"security" in relation to a segregated accounts company, means any share, note, bond, debenture, evidence of indebtedness, certificate, unit, warrant, or right conferring an option to acquire shares or any other right issued by or pertaining to

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the company, but does not include a contract of insurance unless the terms of the contract so provide;

"segregated account" means a separate and distinct account (comprising or including entries recording data, assets, rights, contributions, liabilities and obligations linked to such account) of a segregated accounts company pertaining to an identified or identifiable pool of assets and liabilities of such segregated accounts company which are segregated or distinguished from other assets and liabilities of the segregated accounts company for the purposes of this Act;

"segregated accounts company" means a company which is registered under section 6 and, unless the context otherwise requires, references to "the company" shall be construed as references to such company;

"transaction" means any dealing of whatever nature, which may be evidenced by a governing instrument (in the case of a transaction with an account owner) or contract (in the case of a transaction with a counterparty), including the issue of any security, by which assets or liabilities become linked to a segregated account or by which the assets or liabilities linked to a segregated account are otherwise affected, or, in the case of assets linked to a segregated account which are intended by the parties to be applied to a risk of any nature, any dealing which exposes such assets to liability or loss.

(2) For the purposes of this Act, excluding section 24(1)—

(a) a segregated accounts company shall be deemed to be solvent if the general account is able to pay its liabilities as they become due;

(b) a segregated account shall be deemed to be solvent if it is able to pay its liabilities (excluding obligations to account owners in that capacity) as they become due.

(3) Nothing in this Act shall be construed as requiring a company which operates segregated accounts under the authority of a private Act or otherwise to be registered.

(4) For the avoidance of doubt it is declared that, notwithstanding section 18, a segregated accounts company is not by reason only of the operation of segregated accounts carrying on trust business in or from within Bermuda for the purposes of the Trust (Regulation of Trust Business) Act 2001."

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Amendment of section 3 of Act

4 Section 3 of the Act is amended—

- (a) in subsection (1), by deleting "section 4" and substituting "section 5".
- (b) by deleting subsections (2) and (3) and substituting the following—
 - "(2) From the date of registration under this Act, a segregated accounts company shall be bound by, and may avail itself of, the provisions of this Act and from such date it may, without in any way limiting the generality of the foregoing, establish one or more segregated accounts to which the provisions of this Act shall apply."

Repeal of section 4 of Act

5 Section 4 of the Act is repealed.

Amendment of section 5 of Act

6 (1) The heading to section 5 of the Act is amended to read—
"Notice and documents to be filed".

(2) Section 5 of the Act is amended—

- (a) in subsection (1)—
 - (i) by deleting "under section 4",
 - (ii) by deleting paragraph (a) and substituting the following—
 - "(a) the name of the company which, in cases where the Registrar so directs, shall include the expression "(SAC)";";
- (b) in subsection (2)—
 - (i) by deleting "section 4" and substituting "subsection (1)";
 - (ii) in paragraph (a)—
 - (A) by inserting "made by at least two directors" after "statutory declaration",
 - (B) by inserting "or description" after "statement";
 - (C) in subparagraph (ii)—
 - (i) by deleting "a description of"

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- (ii) by deleting "significant" and substituting "material",
 - (D) by deleting subparagraph (iv) and substituting the following—
 - "(iv) on registration, the company and each segregated account will be solvent and—
 - (A) no known creditor of the company will be prejudiced,
 - (B) the known creditors of the company have consented in writing to the company proceeding to register, or
 - (C) adequate notice has been given in accordance with subsection (3) to all known creditors of the company and no creditor objects to the registration otherwise than on grounds that are frivolous or vexatious;"
- (iii) in paragraph (b), by deleting "counterparties to any undischarged or open transactions linked to a segregated account" and substituting "creditors";
- (c) by deleting subsections (3) to (7) and substituting the following—
 - "(3) For the purposes of subsection (2)(a)(iv)(C) adequate notice is given if—
 - (a) a notice in writing is sent to each known creditor having a claim against the company that exceeds \$1,000; and
 - (b) notice is published in an appointed newspaper, in each case stating that the company intends to register and that a creditor of the company may object to the registration within 28 days from the date of such notice, or publication of such notice, as the case may be.
 - (4) Subject to subsection (5), an account owner or creditor who objects to the registration of the company may apply to the court for the annulment of the registration of the company.
 - (5) An application under subsection (4) may only be made by—

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(a) not less than 20% in number of such persons who would, on the registration of the company, be account owners;

(b) not less than 20% in number of such persons who would, on the registration of the company, be creditors; or

(c) not less than 20% in number of such persons as are mentioned in paragraphs (a) and (b) combined who would be account owners or creditors on registration:

provided that an application shall not be made by any person who has voted in favour of the registration or has given to the company a statement in writing duly signed that he, having had notice, consents to the registration.

(6) An application under subsection (4) shall be made within 28 days from the date of registration, and may be made on behalf of the persons entitled to make the application by one or more of their number as they may appoint in writing for the purpose.

(7) On an application under subsection (4) the court may make an order annulling or confirming the registration, either wholly or in part, and on such terms and conditions as it thinks fit, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase or other disposition of the interests of dissentient persons, and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

provided that no part of the capital of the company or of any segregated account shall be expended in the purchase or other disposition of the interests of dissentient persons.

(8) Where a company—

(a) has conducted business prior to filing a notice under subsection (1); and

(b) has filed such notice,

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it shall cause a copy of the notice to be contemporaneously given to all persons who, on the registration of the company, would be account owners and to its known creditors.

- (9) If there is any material alteration of the particulars set out in subsection (2) between the date of the notice filed pursuant to subsection (1) and the date of registration, then the company shall give further notice to the Registrar of such alteration of particulars.
- (10) The notice filed pursuant to subsection (1) and any documents accompanying that notice shall be treated as confidential by the Registrar and all public officers having access thereto, but this subsection does not preclude the disclosure of information for the purpose of enabling the Minister to exercise any functions conferred upon him by this Act."

Amendment of section 6 of Act

7 (1) The heading of section 6 of the Act is amended to read "**Registration and register of segregated accounts companies**".

(2) Section 6 of the Act is amended in subsection (2)—

- (a) in paragraph (a), by deleting "will be in compliance" and substituting "is capable of complying";
- (b) by deleting "shall" and substituting "may".

Amendment of section 7 of Act

8 Section 7 of the Act is amended—

- (a) in subsection (1), by deleting "to any undischarged or open transactions linked to segregated accounts" and substituting "who are creditors";
- (b) in subsection (2)—
- (i) by deleting the words "averring that no creditor of the segregated accounts company" and substituting "made by a majority of the directors of the segregated accounts company to the effect that no creditor of the company",
- (ii) by inserting the word "known" before "creditors";

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- (c) in subsection (4), by deleting "counterparties to any undischarged or open transactions linked to a segregated account" and substituting "creditors";
- (d) in subsection (5), by deleting "counterparty to any undischarged or open transactions linked to a segregated account" and substituting "creditor";
- (e) in subsection (8), by deleting "counterparty to an open or undischarged transaction linked to a segregated account" and substituting "creditor".

Amendment of section 8 of Act

9 (1) Section 8 of the Act and the heading thereto are amended by deleting the words "Private Act" wherever they appear and substituting the words "private Act".

(2) Section 8 of the Act is amended—

(a) in subsection (1)—

- (i) in paragraph (b), by inserting "subject to paragraph (c)," before "any contracts",
- (ii) by adding after paragraph (b) the following—

"and

(c) subsections 17A(1) to (4) shall apply with retrospective effect to any transaction entered into by the company in respect of and between accounts to the same extent that those sections would have applied to that transaction if that company had been a segregated accounts company under this Act at the time of the transaction.";

(b) by deleting subsection (3) and substituting the following—

"(3) The notice filed pursuant to subsection (2) and any documents accompanying that notice shall be treated as confidential by the Registrar and all public officers having access thereto, but this subsection does not preclude the disclosure of information for the purpose of enabling the Minister to exercise any functions conferred upon him by this Act.

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- (4) For the avoidance of doubt it is declared that, where a private Act confers authority on a company to operate segregated accounts but also contains other provisions not pertaining to the operation of such accounts, those other provisions shall not be affected by the registration of the company under section 6.
- (5) For the purposes of this section and section 2(3) only, the meaning of the term "transaction" and "segregated account" provided for in this Act shall not be strictly applied and, for the avoidance of doubt, the meaning of the term "segregated account" shall include "separate accounts", "segregated reserves", "suites" or any cognate expressions thereof importing similar meaning (including such terms where capitalised) which may be used in a private Act."

Amendment of section 9 of Act

10 Section 9 of the Act is amended—

- (a) by deleting the word "and" following paragraph (a);
(b) by adding the following at the end of paragraph (b)—

"and

- (c) include reference to the fact that the company is a company registered under the Segregated Accounts Companies Act 2000 on its letterhead and contracts."

Amendment of section 10 of Act

11 Section 10 of the Act is amended—

- (a) in subsection (1), by adding "who shall be a person approved by the Minister as the segregated account representative of the company";
(b) in subsection (3)—
(i) in paragraph (a), by inserting "reasonable" before "likelihood",
(ii) in paragraph (b)(i)(B), by deleting "or 15" and substituting ", 15 or 16".

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Repeal and replacement of section 11 of Act

12 Section 11 of the Act is repealed and the following substituted—

"Governing instruments and contracts

11 (1) The rights, interests and obligations of account owners in a segregated account shall be evidenced in a governing instrument and the rights, interests and obligations of counterparties shall be evidenced in the form of contracts.

(2) The governing instrument in relation to any segregated account shall be deemed to be governed by the laws of Bermuda and the parties thereto shall be deemed to submit to the jurisdiction of the courts of Bermuda and, in relation to such governing instrument—

- (a) a person shall become an account owner and shall become bound by the governing instrument if such person complies with the conditions, if any, for becoming an account owner as set out in the governing instrument;
- (b) an account owner shall take such interest in a segregated account as may be stipulated in respect of him in accordance with the terms of the governing instrument and, absent such stipulation or other compelling indication (in the discretion of the directors of the company, exercised reasonably), the extent of the interest of such account owner shall be nil;
- (c) if no other provision for management is specified in the governing instrument, the segregated accounts company shall manage the segregated account and may—
 - (i) appoint and supervise the officers, managers, employees and other persons who have management of the segregated account; and
 - (ii) enter into financial arrangements for payment for services including the charging of fees, disbursements and other charges which the manager shall be authorized to withdraw from the segregated account;
- (d) unless otherwise provided in the governing instrument, the segregated accounts company may take any action, including—
 - (i) the amendment of the governing instrument;
 - (ii) the appointment of one or more managers;

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(iii) for the benefit of the segregated account only, the sale, lease, exchange, transfer, pledge or other disposition of all or any part of the assets of the segregated account, or the orderly winding-up of the affairs and termination of the segregated account,

or may provide for the taking of any action to create under the provisions of the governing instrument a class, group or series of account holdings that was not previously outstanding, without the vote or approval of any particular manager or account owner, or class, group or series of managers or account owners;

(e) the segregated accounts company may, if and to the extent that voting rights are granted under the governing instrument, set forth provisions relating to—

(i) notice of the time, place or purpose of any meeting at which any matter is to be voted on;

(ii) waiver of any such notice;

(iii) action by consent without a meeting;

(iv) the establishment of record dates;

(v) quorum requirements;

(vi) voting in person, by proxy or in any other manner; or

(vii) any other matter with respect to the exercise of any voting rights;

(f) unless otherwise provided in the governing instrument in relation to a segregated account, the segregated accounts company may in respect of that account grant to, or withhold from, all or certain managers or account owners, or a specified class, group or series of managers or account owners, the right to vote, separately or with any or all other classes, groups or series of managers or account owners, on any matter, such voting being on a per capita, number, financial interests, class, group, series or any other basis;

(g) unless otherwise provided in the governing instrument in relation to a segregated account, the segregated accounts company in respect of that account may create further segregated accounts to which all or any part of the assets, liabilities, profits or losses linked to any

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existing segregated account may be transferred, and for the conversion of the interest (or any part thereof) of all or certain account owners in an existing segregated account into interests of account owners in the separate segregated account; and

- (h) unless otherwise provided in the governing instrument in relation to a segregated account, the segregated accounts company in respect of that account may set forth provisions therein regarding—
 - (i) the governance of the business (or any aspect thereof) of the segregated account and the rights, powers and duties of the company, any manager and the account owner and their respective servants, agents, employees, successors or assigns;
 - (ii) the identity of the segregated account to which the transaction and any assets or liabilities are linked; and
 - (iii) the extent of the interest of the account owners and others (if any) therein and subordination thereof (if any).

(3) Any contract governing a transaction with a counterparty, including those executed outside Bermuda, shall include the name of the counterparty, and, unless otherwise provided therein, shall include an implied term that the parties select the law of Bermuda as its governing law and submit to the jurisdiction of the courts of Bermuda.

(4) Unless otherwise expressly agreed in writing by the parties to the transaction—

- (a) by virtue of a governing instrument or contract which is binding on those parties in relation to the affected segregated accounts or general account, as the case may be, and which is executed by parties having authority in relation to those accounts; and
- (b) in the case of a mutual fund only where the document or documents mentioned in paragraph (a) clearly indicate an intention of the parties to extend liability to more than one segregated account or the general account as permitted by this section and contain a specific reference to this subsection and to subsection 17(5),

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any contract pertaining to a transaction shall be deemed to contain a statement that the rights of the counterparty shall not extend to, and the counterparty will not have recourse to, the assets which are linked to any other segregated account or to the general account.

(5) For the avoidance of doubt, it is hereby declared that any provision of a contract or governing instrument relating to the segregation of assets or liabilities of a segregated account shall be governed by and construed in accordance with this Act, and the parties may not contract otherwise in such regard."

Repeal and replacement of section 12 of Act

13 Section 12 of the Act is repealed and the following is substituted—

"Apportionment of assets and liabilities

12 (1) Notwithstanding any other provision of this Act, a segregated accounts company that is not a mutual fund company (and in the case of a mutual fund company only where the relevant contract or governing instrument contains a specific reference to sections 11(4) and 17(5)) may apportion an asset or liability among two or more segregated accounts and the general account.

(2) Where a segregated accounts company has apportioned an asset or liability pursuant to subsection (1), the extent to which the asset or liability is linked to each segregated account shall be clearly indicated in the contract or governing instrument effecting the apportionment."

Repeal of section 13 of Act

14 Section 13 of the Act is repealed.

Amendment of section 14 of Act

15 Section 14 of the Act is amended by inserting after subsection (2) the following—

"(2A) Notwithstanding any enactment to the contrary except section 66 of the Companies Act 1981, no record or register or that part of a record or register detailing any ownership of such security shall be open to public inspection save that any owner thereof shall be entitled to receive a copy of the information contained therein pertaining to such security.

(2B) For the avoidance of doubt, the provisions of section 65(6) and 66 of the Companies Act 1981 shall not apply to a segregated accounts company that is a mutual fund."

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Amendment of section 15 of Act

16 (1) The heading to section 15 of the Act is amended to read "**Dividends, distributions, redemptions, repurchases and reduction of capital**".

(2) Section 15 of the Act is amended—

(a) by deleting subsection (2) and substituting the following—

"(2) Notwithstanding any other provision of this Act, a dividend shall not be declared or paid, or a distribution declared or made, in respect of shares or other account holdings linked to a segregated account if there are reasonable grounds for believing that—

(a) the segregated account is not, or would after the payment not be, solvent; or

(b) the realisable value of the assets of the segregated account would thereby be less than the aggregate of its liabilities and its issued share capital and share premium accounts.";

(b) by deleting subsection (5) and substituting the following—

"(5) Notwithstanding subsections 42(2) and 42A(5) of the Companies Act 1981, a segregated accounts company may redeem or repurchase the shares or other account holdings using the assets linked to the relevant segregated account provided that—

(a) on the date of redemption or repurchase, after taking into account the redemption or repurchase, there are reasonable grounds for believing that the relevant segregated account is solvent; or

(b) all creditors with claims linked to that segregated account on that date have expressed in writing their concurrence to the redemption or repurchase.";

(c) by adding the following new subsections—

"(6) Sections 15(2)(b), 15(5) and 16(4) shall not apply to a mutual fund.

(7) A segregated accounts company which is a mutual fund may redeem or repurchase for cancellation shares

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using the assets linked to the relevant segregated account provided that, on the date of redemption or repurchase, there are reasonable grounds for believing that the relevant segregated account is solvent and would remain so after the redemption or repurchase.

(8) A segregated accounts company which is a mutual fund on the redemption or repurchase of shares linked to a segregated account may—

- (a) repay the capital paid on such shares out of paid in capital, additional paid in capital or other reserves of the company linked to the relevant segregated account;
- (b) pay the premium, if any, out of realised or unrealised profits, additional paid in capital or other reserves of the company linked to the relevant segregated account, on such terms and in such manner and at such price as may be determined having regard to the asset value of such shares as ascertained in accordance with the governing instrument.

(9) A segregated accounts company which is a mutual fund on the redemption or repurchase of shares linked to a segregated account may effect the redemption or repurchase out of the assets of the company linked to the relevant segregated account, on such terms and in such manner and at such price as may be determined having regard to the asset value of such shares as ascertained in accordance with the governing instrument.

(10) In any case where a segregated accounts company in respect of a segregated account has share capital, if authorised in a general meeting of the account owners of the segregated account to which the shares are linked and subject to the governing instrument in relation to that segregated account, on such terms as it may decide, the company may reduce its capital in any way, and in particular, without prejudice to the generality of the foregoing power, by—

- (a) extinguishing or reducing the liability on any of its shares in respect of capital not paid up;
- (b) either with or without extinguishing or reducing liability on any of its shares, cancelling any paid

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- up capital that is lost or unrepresented by available assets; or
- (c) either with or without extinguishing or reducing liability of any of its shares and either with or without reducing the number of such shares, paying off any paid up capital that is in excess of the requirements of the company.
- (11) No company shall reduce the amount of its share capital in respect of a segregated account—
- (a) unless, at a date not more than thirty days and not less than fifteen days before the date on which the reduction of the share capital is to have effect, the company causes a notice to be published in an appointed newspaper stating—
- (i) the amount of the capital of the segregated account as last determined by the company;
- (ii) the amount to which the share capital of the segregated account is to be reduced; and
- (iii) the date on which the reduction is to have effect; and
- (b) if, on the date the reduction is to be effected, there are reasonable grounds for believing that the segregated account is not, or after the reduction would not be, solvent.
- (12) Unless the governing instrument pertaining to the affected segregated account otherwise provides, where the capital of a segregated account is reduced by the cancellation of shares and part only of a class of shares is to be cancelled, the shares to be cancelled shall be selected—
- (a) by lot in such manner as the directors shall determine;
- (b) as nearly as may be in proportion to the number of shares of the class registered in the name of each account holder; or
- (c) in such other manner as the directors determine with the consent of the majority of the account owners of the class to be cancelled.

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- (13) Where shares are to be cancelled in order to reduce the capital of a segregated accounts company in respect of a segregated account, the shares shall be acquired at the lowest price at which, in the opinion of the directors, the shares are obtainable, but not exceeding an amount, if any, stated in or determined by the governing instrument.
- (14) Where a company in respect of a segregated account having share capital reduces the amount of that share capital, then within thirty days after the date as from which the reduction has effect the company shall file a memorandum, with a copy of the notice referred to in subsection (11)(a) in the office of the Registrar stating that this section has been duly complied with.
- (15) If any company fails to comply with subsection (11), (12) or (13) every officer of the company shall be liable to a fine of \$5,000, and if the company fails to comply with subsection (14) the company shall be liable to a fine of \$20 for every day during which such failure continues."

Amendment of section 16 of Act

17 Section 16 of the Act is amended—

- (a) in subsection (1)—
- (i) in paragraph (a), by deleting ",and the records shall clearly show the share capital, proceeds of" and substituting "or other accounting principles so that the records shall, to the best of the knowledge, information and belief of the directors and officers of the company, clearly show the share capital, proceeds of rights issues,"
- (ii) in paragraph (b), by deleting "linked to a segregated account maintained" and substituting "entered into";
- (b) in subsection (4), by inserting "or (in such capacity) the general account" after "other segregated account";
- (c) in subsection (5), by adding the following—
- "provided that the account owner of a segregated account may, for the purposes of section 88(1) of the Companies Act 1981, agree in writing to waive his right to have laid before a general meeting financial

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statements or the auditor's report thereon for an indefinite period but such waiver shall be expressed to be revocable at the option of such account owner.";

- (d) in subsection (7), by inserting ", on application by the affected account owner," after "court may";
- (e) in subsection (9), by adding at the end thereof "and in the case of a segregated accounts company which is a mutual fund, the register of account owners shall not be open to inspection by any person without the consent of the company, provided that an account owner shall be entitled to receive a copy of the information in the register pertaining to his interest in the company.".
- (f) by adding the following—

"(10) The register of account owners shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein."

Repeal and replacement of section 17 of Act

18 Section 17 of the Act is repealed and the following is substituted—

"Nature of segregated accounts, application of assets and liabilities

17(1) Notwithstanding any other provision of this Act, the establishment of a segregated account does not create a legal person distinct from the segregated accounts company.

(2) Notwithstanding any enactment or rule of law to the contrary, but subject to this Act, any liability linked to a segregated account shall be a liability only of that account and not the liability of any other account and the rights of creditors in respect of such liabilities shall be rights only in respect of the relevant account and not of any other account, and, for the avoidance of doubt, any asset which is linked by a segregated accounts company to a segregated account—

- (a) shall be held by the segregated accounts company as a separate fund which is—
 - (i) not part of the general account and shall be held exclusively for the benefit of the account owners of the segregated account and any counterparty to a transaction linked to that segregated account, and

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(ii) available only to meet liabilities to the account owners and creditors of that segregated account; and

(b) shall not be available or used to meet liabilities to, and shall be absolutely and for all purposes protected from, the general shareholders and from the creditors of the company who are not creditors with claims linked to segregated accounts.

(3) For the purposes of this Act, the Companies Act 1981 and otherwise at law, the assets recorded in the general account shall be the only assets of a segregated accounts company available to meet liabilities of the segregated accounts company that are not linked to a segregated account.

(4) No assets of the general account may be transferred from the general account to a segregated account unless, on the date from which the transfer is to be effective, and taking into account that transfer, the general account is solvent or all the shareholders and creditors of the general account on that date have expressed in writing their concurrence to the transfer, and in the event a transfer is made to a segregated account in breach of this subsection, on an application by an affected party, the court may declare that the transfer is void, without prejudice to the rights of *bona fide* purchasers for value without notice.

(5) Unless otherwise expressly agreed in writing by the affected parties—

(a) by virtue of one or more contracts, governing instruments or other documents which are binding on those parties in relation to the affected segregated accounts or general account, as the case may be, and which are executed by parties having authority in relation to those accounts; and

(b) in the case of a mutual fund only where the documents mentioned in paragraph (a) clearly indicate an intention of the parties to extend liability to more than one segregated account or the general account as permitted by this section and contain a specific reference to this subsection and to subsection 11(4),

where a liability of a segregated accounts company to a person arises from a transaction or matter relating to, or is otherwise imposed in respect of or attributable to, a particular segregated account, that liability shall—

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- (c) extend only to, and that person shall, in respect of that liability, be entitled to have recourse only to, the assets linked to that segregated account;
- (d) not extend to, and that person shall not, in respect of that liability, be entitled to have recourse to, the assets linked to any other segregated account; and
- (e) not extend to, and that person shall not in respect of that liability, be entitled to have recourse to, the general account.

(6) Where a liability of a segregated accounts company to a person—

- (a) arises otherwise than in respect of a particular segregated account; or
- (b) is imposed otherwise than in respect of a particular segregated account,

that liability shall extend only to, and that person shall, in respect of that liability, be entitled to have recourse only to, the general account.

(7) In the event that a segregated account has insufficient assets to pay all of its obligations in full, the order and priority of the rights in relation to assets linked to a segregated account shall (without prejudice to the rights of any parties holding valid security interests against assets linked to that segregated account and any valid preferential claims in respect of that segregated account) be determined by the terms of the governing instrument and any contracts pertaining to that account, and any ambiguity in respect of the order and priority rights shall be resolved as follows:

- (a) the claims of creditors shall rank ahead of the claims of account owners;
- (b) the claims of creditors *inter se* shall rank *pari passu*; and
- (c) the claims of account owners *inter se* shall rank *pari passu*.

(8) A segregated accounts company may, with the consent in writing of all account owners of, or counterparties who are creditors with claims linked to, a given segregated account, transfer to the general account or another segregated account an asset from the segregated account to which it is linked, if the segregated account to which such asset is linked, taking into account the proposed transfer, remains solvent, and, in the event a transfer is made to the general account in breach of this subsection, on an application by an affected party, the

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court may declare that the transfer is void, without prejudice to the rights of *bona fide* purchasers for value without notice.

(9) Any asset transferred in accordance with subsection (8) shall cease to be linked to the segregated account from which it was transferred on the date of the transfer.

(10) Subject to the terms of the governing instrument relating to a given segregated account, on dissolution of the segregated accounts company or termination of the segregated account and after paying creditors of the segregated account, any property linked to that segregated account shall be paid *pro rata* to the account owners of such segregated account or, if there are no account owners, shall be deemed to fall into the general account.

(11) Without prejudice to the rights of parties to resolve disputes by reference to arbitration or to the court, where—

- (a) there is, on grounds that are reasonable, uncertainty as to whether any given interest in a segregated account is an interest as a counterparty or an interest as an account owner, that interest shall be deemed to be an interest as a counterparty;
- (b) a given liability is not linked to a particular segregated account, or where there is, on grounds that are reasonable, uncertainty as to whether the liability is linked to a segregated account, that liability shall be deemed to be the liability of the general account.

Internal transactions

17A (1) Notwithstanding any enactment or rule of law to the contrary—

- (a) a segregated accounts company acting in respect of the general account may enter into transactions with the company acting in respect of one or more segregated accounts; and
 - (b) a segregated accounts company acting in respect of a segregated account may enter into transactions with the company acting in respect of one or more other segregated accounts.
- (2) For the avoidance of doubt—
- (a) a transaction referred to in subsection(1); and
 - (b) any transaction between the company in respect of one segregated account and a third party,

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shall have effect or otherwise (as the case may be) as the transaction would have done under the general law if the transaction had been entered into between the company and a third party, and without restricting the generality of the foregoing—

- (c) such a transaction shall be void, voidable, illegal or reversible at the instance of any creditor of the company in respect of the relevant segregated account or at the instance of the company itself in respect of the relevant segregated account or at the instance of any other person if the transaction would have been void, voidable, illegal, or reversible (as the case may be) by such person under any rule of law (including Part IVA of the Conveyancing Act 1993) which would have applied to the transaction if the transaction had been entered into between the company and a third party in the same circumstances; and
 - (d) an account owner, counterparty, or receiver of any given segregated account shall have standing to pursue, on behalf of the relevant segregated account, any rights of action (including recourse to arbitration under subsection (4)) available to the segregated accounts company in respect of that segregated account pursuant to this section.
- (3) Notwithstanding any enactment or rule of law to the contrary—
- (a) where a manager or officer of or other person on behalf of a segregated accounts company or a segregated account is also acting in respect of the general account and one or more of the segregated accounts or in respect of two or more segregated accounts which are entering into a transaction, he may so act notwithstanding any material interests or conflicts which may exist as between the manager, officer or directors or which any of them may have in acting in respect of such accounts; and
 - (b) where—
 - (i) a given segregated account enters into a transaction as described in paragraph (a), and
 - (ii) the governing instrument of the segregated account so authorises, or a majority of the account owners consent in writing to the entry into of such a transaction,

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then the manager, officer or such other person, the segregated accounts company and the company in respect of any segregated accounts (as the case may be) shall not be held liable to the company in respect of that segregated account or any of its account owners in respect of any conflict of interest arising in relation to the transaction.

(4) Any dispute which arises in connection with a transaction under subsection (1)—

- (a) as between the company in respect of a given segregated account and the company in respect of any one or more other segregated accounts; or
- (b) as between the company in respect of the general account and the company in respect of one or more segregated accounts;

may (notwithstanding any submission to the governing law of choice otherwise provided for in this Act or otherwise) be referred to the court or may be submitted to arbitration under the Bermuda International Conciliation and Arbitration Act 1993 and (if the matter is submitted to arbitration) as if the arbitration were an international commercial arbitration.

(5) If the managers, officers, legal advisers or others representing the company in respect of the separate interests of the affected accounts cannot agree on whether a particular matter should be referred to court or to arbitration, then that matter shall be referred to arbitration.

Creditor enforcement rights limited to account assets

17B (1) There shall be implied (except in so far as the same is expressly excluded in writing) in every contract and governing instrument entered into by a segregated accounts company the following terms:-

- (a) that no party shall seek, whether in any proceedings or by any other means whatsoever or wheresoever, to make or attempt to make liable any assets attributable to any segregated account of the company in respect of a liability not attributable to that segregated account;
- (b) that if any party shall succeed by any means whatsoever or wheresoever in making liable any assets attributable to any segregated account of the company in respect of a liability not attributable to that segregated account, that

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party shall be liable to the company to pay a sum equal to the value of the benefit thereby obtained by him; and

- (c) that if any party shall succeed in seizing or attaching by any means or otherwise levying execution against any assets attributable to any segregated account of the company in respect of a liability not attributable to that segregated account, that party shall hold those assets or their proceeds on trust for the company and shall keep those assets or proceeds separate and identifiable as such trust property.

(2) All sums recovered by a segregated accounts company as a result of any such trust as is described in subsection (1)(c) shall be credited against any concurrent liability pursuant to the implied term set out in subsection (1)(b).

(3) Any asset or sum recovered by a segregated accounts company pursuant to the implied term set out in subsection (1)(b) or (1)(c) or by any other means whatsoever or wheresoever in the events referred to in those subsections shall, after the deduction or payment of any costs of recovery, be applied by the company so as to compensate the segregated account affected.

(4) Notwithstanding subsections 17(4) and (8), in the event of any assets attributable to a segregated account being taken in execution in respect of a liability not attributable to that segregated account, and in so far as such assets or compensation in respect thereof cannot otherwise be restored to the segregated account affected, the company shall—

- (a) cause or procure its auditor, acting as expert and not as arbitrator, to certify the value of the assets lost to the segregated account affected; and
- (b) in priority to all other claims against the account transfer or pay, from the assets of the account to which the liability was attributable to the segregated account affected, assets or sums sufficient to restore to the segregated account affected the value of the assets lost."

Amendment of section 18 of Act

19 Section 18 of the Act is amended—

- (a) in subsection (1), by deleting ", in respect of which" to the end of the subsection;
- (b) by repealing subsections (2) and (6);

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- (c) in subsection (7)—
- (i) in paragraph (b), by deleting the words "under the governing instrument",
 - (ii) by adding the following—

"(c) exercise the same rights of set-off (if any) as between accounts as apply under the general law in respect of companies, including, on an insolvent liquidation of the company, the same rights of set-off which arise in an insolvent liquidation of a company."
- (d) by deleting subsection (8) and substituting the following—
- "(8) The property of a segregated account is subject to orders of the court as it would have been if the segregated account were a separate legal person (and notwithstanding that it is not a separate legal person).";
- (e) by deleting subsections (10) to (14) and substituting the following—
- "(10) Except to the extent it may be agreed otherwise by virtue of the governing instrument or contract, as the case may be, an account owner of a segregated account and any counterparty who is a creditor in respect of a transaction linked to that segregated account shall have an undivided beneficial interest in the assets linked to a segregated account, and, after satisfying in full the claims of creditors of the segregated account, account owners shall share in the profits and losses of the segregated account in such proportions of the residual undivided beneficial interest in the segregated account owned by that account owner as may be specified in any governing instrument relating to such segregated account.
 - (11) An account owner's or counterparty's beneficial interest in a segregated account is personal property notwithstanding the nature of the property of the segregated account.
 - (12) Except to the extent it may be agreed otherwise by virtue of the governing instrument or

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contract, as the case may be, an account owner or counterparty has no interest in specific segregated account property.

- (13) Except to the extent it may be agreed otherwise by virtue of the governing instrument or contract, as the case may be, but subject to the provisions of the Exchange Control Act 1972, an account owner's or counterparty's beneficial interest in the segregated account is freely transferable.
- (14) Subject to the segregated accounts company complying with section 15, and except to the extent it may be agreed otherwise by virtue of the governing instrument or contract, as the case may be, at the time an account owner or counterparty becomes entitled to receive a payment, distribution, allocation or dividend pursuant to any governing instrument, he has the status of, and is entitled to all remedies available to, a creditor of the segregated account with respect to the payment, distribution, allocation or dividend, and the governing instrument or contract may provide for the establishment of record dates with respect to such payment, distribution, allocation or dividend."
- (f) in subsection (15)—
- (i) in paragraph (a), by inserting "or contract" after "governing instrument" where it first occurs and by inserting "or contract to which that account owner or counterparty is a party" after "governing instrument" where it secondly occurs,
- (ii) in paragraph (b), by inserting "to which the person is a party" after "governing instrument";
- (g) by deleting subsection (16) and substituting the following—
- "(16) Subject to section 17B(1)(c) and (2), the provisions of this section and section 11 operate to the exclusion of any rule of law relating to trusts treating with the same subject matter, and no rule of law relating to trusts may be pleaded by any person to augment or

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modify the operation of this Act, but nothing in this section shall be construed so as to deny—

- (a) the remedy of tracing in law and in equity the assets or the proceeds of the assets of any segregated account where such assets or proceeds have been commingled with the assets of any other segregated account or the general account; or
- (b) any remedies available under the doctrine of constructive trusts or similar equitable remedies where those remedies would otherwise be available.

(17) To the extent permitted in the governing instruments of the affected segregated accounts, a company in respect of a segregated account may be an account owner of one or more other segregated accounts of the same segregated accounts company."

Amendment of section 19 of Act

20 Section 19 of the Act is amended—

- (a) by deleting subsection (1)(a) and substituting the following—

"(a) a 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 just and equitable that a receiver should be appointed;"

- (b) in subsection (3)—

(i) in paragraph (a), by inserting "management, sale, rehabilitation, run-off or" before "termination",

(ii) by deleting "and" following paragraph (a) and substituting "or";

- (c) in subsection (4), by deleting "voluntary".

Amendment of section 20 of Act

21 Section 20 of the Act is amended—

- (a) by deleting subsection (1)(e);

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(b) in subsection (2)(b), by deleting "voluntary".

Amendment of section 21 of Act

22 Section 21 of the Act is amended—

- (a) in subsection (3), by deleting "fraud or dishonesty" and substituting "misfeasance";
- (b) in subsection (5), by inserting "and any liquidator" after "managers";
- (c) by adding the following—

"(6) At any time after the appointment of a receiver in respect of a segregated account, the company or any account owner or creditor of that account may, where an action or proceeding against the company in respect of that account is pending, apply to the court for a stay of those proceedings, and, on such an application being made, the court may stay the proceedings accordingly on such terms as it thinks fit."

Amendment of section 22 of Act

23 Section 22 of the Act is amended by adding the following—

"(3) When making an order discharging the receiver, the court may release the receiver from liability save in respect of misfeasance."

Repeal and replacement of section 23 of Act

24 Section 23 of the Act is repealed and the following is substituted—

"Remuneration of receiver

23 The remuneration of a receiver and any expenses properly incurred by him shall be payable in priority to all other unsecured claims from the assets linked to the segregated account in respect of which the receiver was appointed but not from any assets of the general account or any assets linked to other segregated accounts."

Amendment of section 24 of the Act

25 Section 24 of the Act is amended—

- (a) by inserting after subsection (1) of the following—

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"(1A) For the purposes of determining whether a segregated accounts company may be wound up on the ground of insolvency—

- (a) the test of insolvency which applies under section 162 of the Companies Act 1981 and (in the case of an insurance company) section 33 of the Insurance Act 1978 shall apply; and
 - (b) assets and liabilities linked to segregated accounts shall not be taken into account."
- (b) by deleting subsection (2)(b) and substituting the following—
- "(b) the segregated accounts company is solvent under section 2(2) of this Act,";
- (c) by adding the following—

"(3) A segregated accounts company shall not be voluntarily wound up without the consent of the Registrar."

Amendment of section 25 of Act

26 Section 25 of the Act is amended—

- (a) in subsection (1), by adding "or contract" after "instrument";
- (b) in subsection (2), by deleting "the court must first approve that apportionment" and substituting "approved by the court".

Amendment of section 26 of Act

27 Section 26 of the Act is amended—

- (a) in subsection (1),
 - (i) by deleting "section 4" and substituting "section 5".
 - (ii) in paragraph (a), by deleting the comma after "16";
- (b) in subsection (4), by inserting "made by at least two directors" after "declaration".

Insertion of new section 27A in Act

28 The Act is amended by inserting after section 27 the following—

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**"Effect on transaction and interests in a segregated
account of infringement of this Act**

27A Subject to subsections 17(4) and (8), no transaction or interest in a segregated account shall be void or voidable by reason only that at the relevant time the segregated accounts company fails to comply with, or is in breach of, any provision of this Act."

Amendment of section 30 of Act

29 Section 30(b) of the Act is amended by inserting "or section 9" after "section 6(3)".

Commencement

30 This Act comes into operation on such day as the Minister of Finance may appoint by notice published in the Gazette.

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