

Annex B

**Variable Capital Companies (Application of Bankruptcy Act Provisions)
Regulations 2019**

**THIS VERSION OF THE REGULATIONS IS IN DRAFT FORM AND IS
SUBJECT TO CHANGE. IT IS ALSO SUBJECT TO REVIEW BY THE
ATTORNEY GENERAL'S CHAMBERS.**

**Variable Capital Companies (Application of Bankruptcy Act Provisions)
Regulations 2019**

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No. []

VARIABLE CAPITAL COMPANIES ACT
(NO. 44 OF 2018)

VARIABLE CAPITAL COMPANIES (APPLICATION OF BANKRUPTCY ACT
PROVISIONS) REGULATIONS 2019

PART I

PRELIMINARY

Citation

1. These Regulations may be cited as the Variable Capital Companies (Application of Bankruptcy Act Provisions) Regulations.

Modifications for a VCC in relation to sections 98, 99, 100, 101, 102 and 103 of Bankruptcy Act

2. For the purposes of section 130 of the Act read with section 329 of the Companies Act, sections 98, 99, 100, 101, 102 and 103 of the Bankruptcy Act (Cap. 20) shall be read subject to —

- (a) section 5 of the Act and the modifications in section 130 of the Act;
- (b) the modifications set out in Part II of these Regulations; and
- (c) such textual and other modifications as may be necessary for their application to a VCC being wound up.

Modifications for a sub-fund in relation to sections 98, 99, 100, 101, 102 and 103 of Bankruptcy Act

3. For the purposes of section 33(2) of the Act read with section 329 of the Companies Act, sections 98, 99, 100, 101, 102 and 103 of the Bankruptcy Act shall be read subject to —

- (a) section 5 of the Act and the modifications in the First Schedule to the Act;
- (b) the modifications set out in Part III of these Regulations; and
- (c) such textual and other modifications as may be necessary for their application to a sub-fund being wound up.

PART II

MODIFICATIONS IN APPLICATION TO WINDING UP OF A VCC

References to associate

4. Any reference to an associate of a person or an individual who has been adjudged bankrupt (except any such reference in section 101 of the Bankruptcy Act) shall be read as a reference to a person connected with a VCC against which a winding-up order has been made.

Person connected with a VCC

5.—(1) In this Part, a person is connected with a VCC if —

- (a) the person is a director of the VCC or an associate of such director;
- (b) the person is the manager of the VCC or an associate of such manager; or
- (c) the person is an associate of the VCC.

(2) In paragraph (1), “associate” has the meaning given by section 101 of the Bankruptcy Act, subject to the following modifications:

- (a) The references in section 101 of the Bankruptcy Act to an individual, except where it is in relation to the spouse or a relative of that individual, is to a person;
- (b) A company shall be regarded as an associate of another company if —

- (i) the same person has control of both companies;
 - (ii) a person has control of one company and persons who are his associates, or he and persons who are his associates, have control of the other company; or
 - (iii) a group of 2 or more persons has control of each company, and such groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate;
- (c) In determining whether a person that is an umbrella VCC is an associate of a person or has control of a company under section 101(5) or (6) of the Bankruptcy Act as applied by regulation 2, or under paragraph (1)(b), regulation 7 applies;
- (d) To avoid doubt, the definition of “company” in section 101(10) of the Bankruptcy Act applies for the purposes of this regulation and includes a VCC.

Antecedent transactions involving an umbrella VCC for the purpose of its sub-fund

6. Where —

- (a) the unfair preference mentioned in section 99(5) or 100(1)(b) of the Bankruptcy Act is given by the VCC to an umbrella VCC for the purpose of a sub-fund of the umbrella VCC;
- (b) the transaction mentioned in section 100(3) of the Bankruptcy Act is entered into by the VCC with an umbrella VCC for the purpose of a sub-fund of the umbrella VCC;
- (c) the interest mentioned in section 102(3A) of the Bankruptcy Act is acquired by an umbrella VCC for the purpose of a sub-fund of the umbrella VCC; or
- (d) the benefit or unfair preference mentioned in section 102(3A) of the Bankruptcy Act is received by an umbrella VCC for the purpose of a sub-fund of the umbrella VCC,

then, for the purpose of that provision of the Bankruptcy Act as applied by regulation 2, the umbrella VCC is connected with —

- (e) the VCC; or

- (f) in the case of paragraph (c) or (d), the person with whom the VCC entered into the transaction, or to whom the VCC gave the unfair preference, as the case may be,

only if the umbrella VCC is an associate of —

- (g) the VCC or the manager or any director of the VCC; or
- (h) the person mentioned in paragraph (f), as the case may be,

on account of the sub-fund of the umbrella VCC as defined in regulation 7.

Associate on account of a sub-fund

7. —(1) For the purposes of regulation 6 and this regulation, an umbrella VCC (*B*) is an associate of a person (*A*) on account of a sub-fund of *B* (*BI*) if —

- (a) *A* is in partnership with *B*, either in relation to *BI* only or 2 or more of *B*'s sub-funds that include *BI*;
- (b) *A* is a spouse or relative of any individual who is in partnership with *B*, either in relation to *BI* only or 2 or more of *B*'s sub-funds that include *BI*;
- (c) *A* is employed by *B* for the purpose of *BI* only or 2 or more of *B*'s sub-funds that include *BI*;
- (d) *A* is trustee of a trust the beneficiary or one of the beneficiaries of which is *B* in relation to *BI* only or 2 or more of *B*'s sub-funds that include *BI*, or a person to whom *B* is an associate on account of *BI* (as defined by this paragraph);
- (e) *A* is a trustee of a trust the terms of which confer a power that may be exercised for the benefit of *B* in relation to *BI* only or 2 or more of *B*'s sub-funds that include *BI*, or a person to whom *B* is an associate on account of *BI* (as defined by this paragraph);
- (f) *A* is a corporation and —
 - (i) the same person has control of *A* and *BI*;
 - (ii) a person has control of one of them and persons who are that person's associates, or that person and that person's associates, have control of the other; or
 - (iii) a group of 2 or more persons has control of each of them, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a

member of either group as replaced by a person of whom the member is an associate;

- (g) *A* (either alone or together with *A*'s associates) has control of *BI*; or
- (h) *A* is a corporation and *B*, either through *BI* or together with a person to whom *B* is an associate on account of *BI* (as defined in this regulation), has control of *A*.

(2) Where *B* has one or more sub-funds besides *BI*, then, by reason of paragraph (5), *B* is considered an associate of *B* on account of *BI* in relation to any of those other sub-funds.

(3) For the purpose of paragraph (1)(d) or (e), where the person to whom *B* is an associate on account of *BI* is also an umbrella VCC, then *B* is an associate of *A* on account of *BI* by reason of that provision if, and only if —

- (a) the person's sub-fund on account of which the person is an associate of *B* on account of *BI*; and
- (b) any of the person's sub-funds in relation to which the person is the beneficiary or one of the beneficiaries of the trust, or in relation to which the trust power mentioned in that provision may be exercised for the person's benefit,

is the same sub-fund.

(4) The following apply for the purpose of paragraph (1)(f) to (h):

- (a) A person that is not an umbrella VCC (*C*) has control of a corporation (*D*) if—
 - (i) the directors of *D* or of another corporation which has control of *D* (or any of those directors) are accustomed to act in accordance with *C*'s directions or instructions; or
 - (ii) *C* is entitled to exercise, or control the exercise of, one-third or more of the voting rights at any general meeting of *D* or another corporation which has control of *D*;
- (b) *C* has control of a sub-fund (*EI*) of an umbrella VCC (*E*) if —
 - (i) the directors of *E* or of another corporation which has control of *EI* (or any of those directors) are accustomed to act in accordance with *C*'s directions or instructions; or

- (ii) *C* is entitled to exercise, or control the exercise of, one-third or more of the total voting rights of all persons holding shares of *E* issued in respect of *EI* at any general meeting of *E* or of the voting rights at any general meeting of another corporation that has control of *EI*;
 - (c) A person that is an umbrella VCC (*F*) has control of a corporation (*G*) if, by reason of shares of *G* or another corporation that has control of *G* that are held by *F* as property of one of *F*'s sub-funds (*FI*), *F* is entitled to exercise, or control the exercise of, one-third or more of the voting rights at any general meeting of *G* or that other corporation;
 - (d) *F* has control of a sub-fund (*HI*) of an umbrella VCC (*H*) if, by reason of shares of *H* issued in respect of *HI* or shares of another corporation that has control of *HI* that are held by *F* as property of one of *F*'s sub-funds (*FI*), *F* is entitled to exercise, or control the exercise of, one-third or more of the total voting rights of all persons holding shares issued in respect of *HI* at any general meeting of *H* or of the voting rights at a general meeting of that other corporation;
 - (e) another person (*I*) is an associate of *F* only if *F* is an associate of *I* on account of *FI*;
 - (f) where *I* is itself an umbrella VCC, *I* controls *G* or *HI* only if —
 - (i) the sub-fund through whose property *I* controls *G* or *HI*; and
 - (ii) the sub-fund of *I* on account of which *I* is an associate of *F* on account of *FI*,is the same sub-fund;
 - (g) where 2 or more persons together satisfy paragraph (a)(i), (a)(ii), (b)(i), (b)(ii), (c) or (d), they are taken as having control of *D*, *EI*, *G* or *HI* as the case may be.
- (5) For the purpose of paragraph (4) —
- (a) an umbrella VCC in relation to one sub-fund is treated as a separate person from the same umbrella VCC in relation to a different sub-fund; and
 - (b) whether an umbrella VCC has control of another person or sub-fund is to be determined in relation to shares it held for a single sub-fund as if the umbrella VCC has only that sub-fund.

(6) In paragraph (1)(c), (f) and (g), “associate” (except in the expression “associate on account of a sub-fund”) has the meaning given by section 101 of the Bankruptcy Act, subject to the modifications in regulation 5(2).

Orders under section 98 of Bankruptcy Act

8. The court shall not make an order referred to in section 98 of the Bankruptcy Act in respect of a transaction at an undervalue if it is satisfied —

- (a) that the VCC which entered into the transaction did so in good faith and for the purpose of carrying on its business; and
- (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the VCC.

Scope of section 99 of Bankruptcy Act

9. Section 99 of the Bankruptcy Act shall not prejudice the operation of section 331 of the Companies Act as applied by section 130 of the Act.

References to Official Assignee

10. The references in section 102(1)(a) and (g) of the Bankruptcy Act to the Official Assignee shall each be read as a reference to the VCC being wound up.

Other available remedies

11. For the avoidance of doubt, the application of sections 98, 99, 100, 101, 102 and 103 of the Bankruptcy Act (as modified by these Regulations) upon a VCC being wound up shall be without prejudice to the availability of any other remedy, including a remedy in respect of a transaction or preference which the VCC had no power to give.

PART III

MODIFICATIONS IN APPLICATION TO WINDING UP OF A SUB-FUND OF AN UMBRELLA VCC

References to associate

12. Any reference to an associate of a person or an individual who has been adjudged bankrupt (except any such reference in section 101 of the Bankruptcy Act) shall be read as a reference to a person connected with a sub-fund against which a winding-up order has been made.

Person connected with a sub-fund

13.—(1) In this Part, a person is connected with a sub-fund if —

- (a) the person is a director of the umbrella VCC of the sub-fund or an associate of such director;
- (b) the person is the manager of the umbrella VCC or an associate of such manager; or
- (c) the umbrella VCC is an associate of the person on account of the sub-fund, as defined in regulation 7.

(2) In paragraph (1), “associate” (except in the expression “associate on account of a sub-fund”) has the meaning given by section 101 of the Bankruptcy Act, subject to the modifications in regulation 5(2).

Antecedent transactions involving an umbrella VCC for the purpose of its sub-fund

14. —(1) Where —

- (a) the unfair preference mentioned in section 99(5) or 100(1)(b) of the Bankruptcy Act is given by the umbrella VCC (*A*) of the sub-fund being wound up (*AI*) for the purpose of *AI* to another umbrella VCC (*B*) for the purpose of a sub-fund of that other umbrella VCC (*BI*);
- (b) the transaction mentioned in section 100(3) of the Bankruptcy Act is entered into by *A* for purpose of *AI* with another umbrella VCC (*B*) for the purpose of a sub-fund of that other umbrella VCC (*BI*);

- (c) the interest mentioned in section 102(3A) of the Bankruptcy Act is acquired by another umbrella VCC (*B*) for the purpose of a sub-fund of that other umbrella VCC (*BI*); or
- (d) the benefit or unfair preference mentioned in section 102(3A) of the Bankruptcy Act is received by another umbrella VCC (*B*) for the purpose of a sub-fund of that other umbrella VCC (*BI*),

then, for the purpose of that provision of the Bankruptcy Act as applied by regulation 3, the umbrella VCC (*B*) is connected with —

- (e) *AI*; or
- (f) in the case of paragraph (c) or (d), the person with whom *A* entered into the transaction, or to whom *A* gave the unfair preference, as the case may be,

only if —

- (g) either —
 - (i) *B* is an associate of *A* on account of *BI*, and *A* is an associate of *B* on account of *AI*; or
 - (ii) *B* is an associate of the manager or any director of the *A* on account of *BI*; or
- (h) *B* is an associate of the person mentioned in paragraph (f) on account of *BI*,

as the case may be.

(2) Whether *B* is an associate of the manager or any director of *A* on account of *BI* under paragraph (1)(g)(ii), and whether *B* is an associate of a person on account of *BI* under paragraph (1)(h), are each determined by regulation 7.

(3) For the purpose of paragraph (1)(g)(i), *B* is an associate of *A* on account of *BI*, and *A* is an associate of *B* on account of *AI*, if —

- (a) *A* and *B* are in partnership in relation to both *AI* and *BI* or in relation to 2 or more of their sub-funds that include *AI* and *BI*;
- (b) the same person has control of *AI* and *BI*;
- (c) a person has control of *AI* or *BI* and persons who are that person's associates, or that person and that person's associates, have control of the other; or
- (d) a group of 2 or more persons has control of *AI* and a group of 2 or more persons has control of *BI*, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate;

- (e) *B*, either through *BI* or together with a person to whom *B* is an associate on account of *BI* (as defined in regulation 7), has control of *AI*;
- (f) *A*, either through *AI* or together with a person to whom *A* is an associate on account of *AI* (as defined in regulation 7), has control of *BI*.

(4) Regulation 7(4)(b), (d) to (g) apply for the purpose of determining if a person who has control of *AI* or *BI* under paragraph (3).

(5) In this regulation, “associate” (except in the expression “associate on account of a sub-fund”) has the meaning given by section 101 of the Bankruptcy Act, subject to the modifications in regulation 5(2).

Orders under section 98 of Bankruptcy Act

15. The court shall not make an order referred to in section 98 of the Bankruptcy Act in respect of a transaction at an undervalue if it is satisfied —

- (a) that the umbrella VCC which entered into the transaction on behalf of the sub-fund did so in good faith and for the purpose of carrying on the business of the sub-fund; and
- (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the sub-fund.

Scope of section 99 of Bankruptcy Act

16. Section 99 of the Bankruptcy Act shall not prejudice the operation of section 331 of the Companies Act as applied by section 33(2) of the Act.

References to Official Assignee

17. The references in section 102(1)(a) and (g) of the Bankruptcy Act to the Official Assignee shall each be read as a reference to the umbrella VCC for the purpose of the sub-fund being wound up.

Other available remedies

18. For the avoidance of doubt, the application of sections 98, 99, 100, 101, 102 and 103 of the Bankruptcy Act (as modified by these Regulations) upon a sub-fund being wound up shall be without prejudice to the availability of any other remedy, including a remedy in respect of a transaction or preference which the umbrella VCC for the purpose of the sub-fund had no power to give.

Made on [] 2019.

TAN CHING YEE
Permanent Secretary
Ministry of Finance,
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