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VARIABLE CAPITAL COMPANIES ACT 2018 (ACT 44 OF 2018)

VARIABLE CAPITAL COMPANIES (APPLICATION OF BANKRUPTCY ACT PROVISIONS) REGULATIONS 2020

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In exercise of the powers conferred by section 165 of the Variable Capital Companies Act 2018, the Minister for Finance makes the following Regulations:

PART 1

PRELIMINARY

Citation and commencement

1. These Regulations are the Variable Capital Companies (Application of Bankruptcy Act Provisions) Regulations 2020 and come into operation on 14 January 2020.

PART 2

APPLICATION OF BANKRUPTCY ACT PROVISIONS
TO WINDING UP OF VCC

**Modifications of sections 98, 99, 100, 102 and 103 of
Bankruptcy Act**

2.—(1) For the purposes of section 130 of the Act (called in this Part the VCC Act) read with section 329 of the Companies Act (Cap. 50), sections 98, 99, 100, 102 (other than subsections (7), (8) and (9)) and 103 of the Bankruptcy Act (Cap. 20) apply subject to —

- (a) the modifications set out in paragraph (2) and this Part; and
- (b) any textual and other modifications as are necessary for their application to a VCC being wound up.

(2) The modifications are —

- (a) a reference to section 98, 99, 100 or 102 of the Bankruptcy Act is to that section as applied under paragraph (1); and

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- (b) a reference to an associate of a person or an individual, or a person who is connected with an individual or a person, is to a person connected with a VCC against which a winding up order has been made.

Person connected with VCC

3.—(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) a reference in section 101 (other than in subsections (2) and (7)) of the Bankruptcy Act to an individual is to a person;
- (b) the following subsection applies in place of section 101(6) of the Bankruptcy Act:

“A company is an associate of a person if the person has control of it or if the person and persons who are the person’s associates together have control of it.”;

- (c) a company is an associate of another company if —
 - (i) the same person has control of both companies;
 - (ii) a person has control of one company and other persons who are the person’s associates, or the person and other persons who are the person’s 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 the person is an associate;

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- (d) regulation 5(4) and (5) applies for the purpose of determining whether a person that is an umbrella VCC is an associate of a person under the provision that replaces section 101(6) of the Bankruptcy Act under sub-paragraph (b), and under sub-paragraph (c);
 - (e) an umbrella VCC that is a beneficiary or one of the beneficiaries of a trust, or for whose benefit a power under a trust may be exercised, is an associate of a person under section 101(5) of the Bankruptcy Act only if it is an associate of the person on account of the sub-fund (within the meaning of regulation 5) in relation to which it is such beneficiary, or in relation to which the power may be exercised for its benefit.

(3) In paragraph (2), “company” has the meaning given by section 101(10) of the Bankruptcy Act and, accordingly, includes a VCC.

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

4.—(1) 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, the umbrella VCC is connected with —

- (e) the VCC; or
- (f) in the case of sub-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 the following (whichever is applicable) on account of the sub-fund of the umbrella VCC as defined in regulation 5:

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

(2) In paragraph (1), a reference to a provision of the Bankruptcy Act is to that provision as applied by regulation 2.

Associate on account of sub-fund

5.—(1) For the purposes of regulations 3(2)(e) and 4 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 a 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 regulation);

- (*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 regulation);
- (*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), (g) and (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;

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- (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 sub-paragraph (a)(i) or (ii), (b)(i) or (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 this regulation —
- (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 one sub-fund.
- (6) In paragraph (1)(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 as modified by regulation 3(2).

Orders under section 98 of Bankruptcy Act

6. The court must not make an order mentioned in section 98 of the Bankruptcy Act in respect of a transaction at an undervalue if the court 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

7. Section 99 of the Bankruptcy Act does not affect the operation of section 331 of the Companies Act as applied by section 130 of the VCC Act.

References to Official Assignee

8. A reference in section 102(1)(a) and (g) of the Bankruptcy Act to the Official Assignee is to the VCC being wound up.

Other available remedies

9. To avoid doubt, the application of sections 98, 99, 100, 101, 102 and 103 of the Bankruptcy Act (as modified by this Part) in relation to a VCC being wound up does not affect the availability of any other remedy, including a remedy in respect of a transaction or preference which the VCC had no power to enter into or give.

PART 3

APPLICATION OF BANKRUPTCY ACT PROVISIONS TO WINDING UP OF SUB-FUND

Modifications of sections 98, 99, 100, 102 and 103 of Bankruptcy Act

10.—(1) For the purposes of section 33(2) of the Act (called in this Part the VCC Act) read with section 329 of the Companies Act,

sections 98, 99, 100, 102 (other than subsections (7), (8) and (9)) and 103 of the Bankruptcy Act apply subject to —

- (a) the modifications set out in paragraph (2) and this Part; and
 - (b) any textual and other modifications as are necessary for their application to a sub-fund against which a winding up order has been made (called in this Part the sub-fund being wound up).
- (2) The modifications are —
- (a) a reference to section 98, 99, 100 or 102 of the Bankruptcy Act is to that section as applied under paragraph (1); and
 - (b) a reference to an associate of a person or an individual, or a person who is connected with an individual or a person, is to a person connected with the sub-fund being wound up.

Person connected with sub-fund

- 11.—**(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 5.
- (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 as modified by regulation 3(2).

Antecedent transactions

- 12.—**(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*);

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- (b) the transaction mentioned in section 100(3) of the Bankruptcy Act is entered into by *A* for the 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*), being an interest that arose from an unfair preference or transaction given or entered into by *A* for the purpose of *AI*; or
 - (d) the benefit from a transaction 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*), being a transaction or unfair preference entered into or given by *A* for the purpose of *AI*,

then, for the purpose of that provision of the Bankruptcy Act, *B* is connected with —

- (e) *AI*; or
- (f) in the case of sub-paragraph (c) or (d), the person with whom *A* entered into the transaction for the purpose of *AI* or to whom *A* gave the unfair preference for the purpose of *AI* (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 *A* on account of *BI*; or
- (h) *B* is an associate of the person mentioned in sub-paragraph (f) on account of *BI*,

as the case may be.

(2) In paragraph (1), a reference to a provision of the Bankruptcy Act is to that provision as applied by regulation 2.

(3) 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 5.

(4) For the purpose of paragraph (1)(g), *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;
- (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 that member 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 5), has control of *AI*; or
- (f) *A*, either through *AI* or together with a person to whom *A* is an associate on account of *AI* (as defined in regulation 5), has control of *BI*.

(5) Regulation 5(4)(b), (d), (e), (f) and (g) applies for the purpose of determining if a person who has control of *AI* or *BI* under paragraph (4).

(6) 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, as modified by regulation 3(2).

Orders under section 98 of Bankruptcy Act

13. The court must not make an order mentioned in section 98 of the Bankruptcy Act in respect of a transaction at an undervalue if the court is satisfied —

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

Scope of section 99 of Bankruptcy Act

14. Section 99 of the Bankruptcy Act does not affect the operation of section 331 of the Companies Act as applied by section 33(2) of the VCC Act.

References to Official Assignee

15. A reference in section 102(1)(a) and (g) of the Bankruptcy Act to the vesting of any property in the Official Assignee is to the vesting of the property in the umbrella VCC for the purpose of the sub-fund being wound up.

Other available remedies

16. To avoid doubt, the application of sections 98, 99, 100, 101, 102 and 103 of the Bankruptcy Act (as modified by this Part) upon a sub-fund being wound up does not affect the availability of any other remedy, including a remedy in respect of a transaction or preference entered into or given by the umbrella VCC for the purpose of the sub-fund, which the umbrella VCC had no power to enter into or give.

Made on 13 January 2020.

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