

The Protected Cell Companies Act 2004

Information guide

1. What is a protected cell company?

A protected cell company is a company formed under the Companies Act 2000. That means that any company formed under the Companies Act 2000 can be a protected cell company. What makes a company a protected cell company is its registration under the Protected Cell Companies Act 2004. Permission to be registered as a protected cell company must be granted by the Commission. Where the company is engaged in insurance business, this is specifically provided for under the Act. However, if the company wants to engage in any other business including mutual fund business the Commission has to grant its approval.

2. What does a protected cell company do?

A protected cell company forms protected cell accounts. A protected cell company does not form other protected cell companies.

3. What obligations does a protected cell company have to inform persons dealing with it?

The protected cell company must inform any person with whom it enters into a transaction that it is a protected cell company; where the transaction relates to a protected cell account, for the purposes of that transaction identify or specify that protected cell account; and include a reference to the fact that the company is a company registered under the Act on its letterhead and contracts.

4. What is a protected cell account?

A protected cell account refers to a separate and distinct account (comprising or including entries recording data, assets, rights, contributions, liabilities and obligations linked to such account) of a protected cell company pertaining to an identified or identifiable pool of assets and liabilities of such protected cell company which are protected cell or distinguished from other assets and liabilities of the protected cell company for the purposes of this Act.

5. Is a protected cell account a separate legal person?

No; a protected cell account is not legally separate from the protected cell company to which it is attached.

6. Are the assets and liabilities of the protected cell account different from those of the protected cell company?

Yes; the Act emphasizes that any liability linked to a protected cell account shall be the liability only of that account and not the liability of any other account; the rights of the creditors in respect of such liabilities shall be the rights in respect of the relevant account and not of any other account. Any asset which is linked to a protected cell account shall be held by that protected cell company as a separate fund which is not a part of the general account of the protected cell company and shall be held exclusively for the benefit of the account owners of the protected cell account and any counter-party to a transaction linked to that protected cell account and available only to meet liabilities to account to the account owners and creditors of that protected cell account. The assets 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 protected cell company who are not creditors with claims linked to the protected cell accounts.

7. Can assets of the general account of the protected cell company itself be transferred to a protected cell account?

No; the assets of the general account of the protected cell company cannot be transferred to a protected cell account unless, on the date from which the transfer is to be effective, and taking into account that transfer, the general account of the protected cell company 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 protected cell account in breach of this. On the application of 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.

8. What is the relationship between the protected cell company and the protected cell account?

A protected cell company is authorized by its registration to form and operate protected cell accounts. The nature of the relationship between the two entities is to be found in the “governing instrument”. The governing instrument refers to the written agreements, instructions, by-laws, prospectuses, resolutions of the directors, registers or other documents (including electronic records) setting out the rights, obligations and interests of account owners in respect of a protected cell account. It is therefore up to the owner/management of the protected cell company and the account of the protected cell account to decide on the terms of the governing instrument. It is this instrument that will govern the rights, interests and obligations of the protected cell account. Where the parties fail to specify in the governing instrument specific issues concerning the management of the account, recourse can be made to the Act. The governing instrument is to be construed under the laws of Anguilla. However, the Act is not all inclusive and these issues are better dealt with in the governing instrument

9. What is a protected cell account representative and what is the role played by this person?

A protected cell account representative is appointed and maintained by the protected cell company and must be resident in Anguilla. The Commission must approve the person who has been appointed as the protected cell account representative of the company. It is the duty of the protected cell account representative, within 30 days of reaching the view that there is a reasonable likelihood of a protected cell account or the general account of a protected cell company for which he acts becoming insolvent or it coming to his knowledge or his having reason to believe that the protected cell company for which he acts has failed to comply with any requirement, condition, direction or regulation made under the Act or has become involved in any criminal proceedings in Anguilla or elsewhere, to make a written report to the Commission or the Registrar setting out all the particulars if the case that are available to him relating to the insolvency, failure, or involvement.

10. What accounts, records and registers must be kept by the protected cell company?

A protected cell company shall maintain records that will enable financial statements to be prepared in accordance with accepted 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 or rights issues, securities, reserves, assets, liabilities, income and expenses, dividends and distributions that are linked to each protected cell account; maintain a record of each transaction entered into by the company and maintain a general account which records in accordance with the Act all the assets and liabilities of the company which are not linked to a protected cell account and which discloses any assets intended by the parties to be applied to a risk of any nature, which therefore exposes such assets to the liability or loss.

11. Does the protected cell account have to prepare audited financial statements?

A protected cell company shall prepare or cause to be prepared financial statements in respect of each protected cell account. The provisions of Part 2 Division 6 of the Companies Act 2000 apply with the necessary modifications to the preparation of financial statements provided that the account owner of a protected cell account may agree in writing to waive his right to have laid before a general meeting financial statements or the auditor's report for an indefinite period but such waiver shall expressed to be revocable at the option of the relevant account owner.

12. What is the relationship between the Protected Cell Companies Act 2004 and the Companies Act 2000.

When dealing with a protected cell company, always be mindful of the fact that the protected cell company is subject to both Acts. The Protected Cell Companies Act 2004 is the first point of reference to decide on any issue. However, be mindful that the protected cell company is still a company subject to the Companies Act 2000 and reference should be made to this Act as well.