

# VARIABLE CAPITAL COMPANIES BILL

(No. III of 2022)

## Explanatory Memorandum

The object of this Bill is to provide for the legal framework for setting up and operation of variable capital companies and ancillary matters.

**M. K. SEERUTTUN**

*Minister of Financial Services and  
Good Governance*

01 April 2022

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# VARIABLE CAPITAL COMPANIES BILL

(No. III of 2022)

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### *Clause*

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SCHEDULE

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**A BILL**

**To provide for the legal framework for setting up and operation of  
variable capital companies and ancillary matters**

ENACTED by the Parliament of Mauritius, as follows –

**PART I – PRELIMINARY**

**1. Short title**

This Act may be cited as the Variable Capital Companies Act 2022.

**2. Interpretation**

(1) In this Act—

“Chief Executive” has the same meaning as in the Financial Services Act;

“CIS administrator” means a CIS administrator under section 99 of the Securities Act;

“CIS manager” has the same meaning as in the Securities Act

“closed-end fund” has the same meaning as in the Securities Act;

“collective investment scheme” has the same meaning as in the Securities Act;

“Commission” has the same meaning as in the Financial Services Act;

“Court” means the Bankruptcy Division of the Supreme Court;

“custodian” has the same meaning as in the Securities Act;

“Director-General” has the same meaning as in the Mauritius Revenue Authority Act;

“financial crime” has the same meaning as in the Financial Services Act;

“FSC Rules” has the same meaning as in the Financial Services Act;

“IFRS” has the same meaning as in the Financial Reporting Act;

“Minister” means the Minister to whom responsibility for the subject of financial services is assigned;

“relevant Acts” has the same meaning as in the Financial Services Act;

“Registrar” has the same meaning as in the Companies Act;

“special purpose vehicle” means a special purpose vehicle set up under section 9;

“sub-fund” means a sub-fund set up under section 8;

“VCC fund” means all the sub-funds of a variable capital company, together with its special purpose vehicles, where applicable.

(2) Subject to subsection (3), any word or expression defined in the Companies Act shall, unless the context otherwise requires, have the same meaning in this Act.

(3) The sections of the Companies Act set out in the Schedule shall not apply to this Act.

## **PART II – INCORPORATION, REGISTRATION AND CONTINUATION**

### **3. Setting up of a variable capital company**

(1) A company may be incorporated under the Companies Act as a variable capital company.

(2) A company incorporated in Mauritius may be converted into a variable capital company.

(3) A company established in a jurisdiction other than Mauritius may be registered by way of continuation as a variable capital company.

### **4. Specific provisions relating to continuation**

(1) Where a company is registered by way of continuation under section 3(3), its articles of continuation shall –

(a) contain –

- (i) the name of the company and the name under which it is being continued;
  - (ii) the name of the jurisdiction under which it is incorporated;
  - (iii) the date on which it was incorporated;
  - (iv) the information required to be included in the constitution of a company in accordance with section 42 of the Companies Act; and
  - (v) the amendments to its constitution, or its equivalent, that are to be effective upon registration under this Act of the articles of continuation; and
- (b) be submitted to the Registrar, together with –
- (i) a copy of the constitution of the company, or its equivalent; and
  - (ii) any evidence satisfactory to the Registrar that the company is in good standing.

(2) The articles of continuation containing the particulars in subsection (1) shall be approved –

- (a) by a majority of the directors or the other persons who are charged with exercising the powers of the company; or
- (b) in such other manner as may be established by the company for exercising the powers of the company.

(3) The Registrar shall, on payment of such fee as may be prescribed and on registration of the articles of continuation, issue a certificate of continuation, certifying that the company is registered as a variable capital company.

### **PART III – LEGAL PERSONALITY, STRUCTURE, NAME, CONSTITUTION AND OPERATION**

#### **5. Legal personality and structure**

- (1) A variable capital company shall –
- (a) be a body corporate; and

- (b) carry out its business through sub-funds and special purpose vehicles.

(2) A sub-fund or special purpose vehicle may have a legal personality that is distinct from a variable capital company.

## **6. Name and Constitution**

(1) Notwithstanding section 35 of the Companies Act, the name of a variable capital company shall include the words "Variable Capital Company" or "VCC" after its name.

(2) A sub-fund or special purpose vehicle of a variable capital company may have its own distinct name.

(3) A company incorporated under a foreign law and continued as a variable capital company may use the name designated in the articles of continuation with the addition of the word "Variable Capital Company" or "VCC" after its name.

(4) A variable capital company shall, at all times, have a written constitution which shall –

- (a) comply with the Companies Act; and

- (b) specify –

- (i) that the primary object of the company is to operate as a fund;

- (ii) that the assets and liabilities of the company shall be measured on a fair value basis;

- (iii) the rights attached to each category of shares of the company;

- (iv) subject to subsection (5), that a share in a sub-fund operating as a collective investment scheme shall, subject to any applicable fee or charge provided in the constitution, be issued, redeemed or repurchased at a price equal to the proportion of the net asset value of the sub-fund represented by the share; and

- (v) the policy of the company behind setting up a sub-fund or special purpose vehicle.

(5) Subsection (4)(b)(iv) shall not apply to a share –

- (a) issued during an initial offer period; or
- (b) of a closed-end fund listed on a securities exchange which is to be issued, redeemed or repurchased in accordance with the listing requirements of the securities exchange.

## **7. Operation of variable capital company**

(1) No company shall operate as a variable capital company unless that company is authorised by the Commission to operate a VCC fund.

(2) An application for an authorisation under this section shall be made in accordance with Part IV of the Financial Services Act and in such form and in such manner as may be specified in FSC Rules.

(3) The Commission may approve the operation of a sub-fund as a collective investment scheme or a closed-end fund and the sub-fund shall comply with the requirements of –

- (a) the relevant Acts;
- (b) FSC Rules; and
- (c) any guideline issued by the Commission which is relevant to that category of collective investment schemes or closed-end funds.

## **PART IV – SUB-FUNDS AND SPECIAL PURPOSE SUB-FUND**

### **8. Creation of sub-fund**

(1) A variable capital company may create one or more sub-funds in accordance with this Act and its constitution.

(2) Where a sub-fund elects to have a legal personality separate from a variable capital company, it shall –

- (a) be incorporated in accordance with section 10; and
- (b) comply with such requirements as may be set out in –
  - (i) regulations made under this Act;
  - (ii) FSC Rules; or
  - (iii) the constitution of the variable capital company.

(3) No sub-fund shall be created without the prior approval of the Commission.

(4) An application for the creation of a sub-fund shall be –

(a) made in such form and manner as the Commission may specify; and

(b) accompanied by such fee as may be specified in FSC Rules.

(5) Where the Commission approves an application under subsection (4), it may assign an approval number to the sub-fund.

## **9. Creation of special purpose vehicle**

(1) A variable capital company may create one or more special purpose vehicles in accordance with this Act and its constitution.

(2) A special purpose vehicle –

(a) shall not operate as a fund;

(b) shall operate as a vehicle ancillary to –

(i) the variable capital company; or

(ii) a sub-fund of the variable capital company.

(3) Where a special purpose vehicle elects to have a legal personality separate from the variable capital company, it shall –

(a) be incorporated in accordance with section 10; and

(b) comply with such requirements as may be set out in –

(i) the regulations made under this Act;

(ii) FSC Rules; or

(iii) the constitution of the variable capital company.

(4) No special purpose vehicle shall be created without the approval of the Commission.

(5) An application for creation of a special purpose vehicle shall be –

- (a) made in such form and manner as the Commission may specify; and
- (b) accompanied by such fee as may be specified in FSC Rules.

(6) Where the Commission approves an application under subsection (5), it may assign an approval number to the special purpose vehicle.

#### **10. Incorporation of sub-fund or special purpose vehicle**

(1) Where a sub-fund or special purpose vehicle elects to have a legal personality separate from the variable capital company, the sub-fund or special purpose vehicle shall be incorporated as a company under the Companies Act.

(2) The name of an incorporated sub-fund or special purpose vehicle shall include the expression "incorporated VCC sub-fund" or "incorporated VCC special purpose vehicle".

(3) The constitution of an incorporated sub-fund or special purpose vehicle shall state whether it is an incorporated sub-fund or special purpose vehicle of a variable capital company.

(4) Notwithstanding the provisions of any other enactment, a sub-fund or special purpose vehicle incorporated under this Act shall not be a subsidiary of its variable capital company by virtue only of the fact that it is a sub-fund or special purpose vehicle of that variable capital company.

(5) A sub-fund or special purpose vehicle incorporated under this Act shall have the same registered office as its variable capital company.

(6) Unless otherwise provided by its constitution, the directors of the variable capital company shall be the directors of each of its sub-funds or special purpose vehicles.

#### **11. Segregated assets and liabilities of sub-fund and special purpose vehicle**

(1) The assets of a sub-fund or special purpose vehicle of a variable capital company shall not be used to discharge any liability of the variable capital company or any other sub-fund or special purpose vehicle of the variable capital company, including during the winding up, administration or receivership of the sub-fund, special purpose vehicle or variable capital company.

(2) Without prejudice to subsection (1), every asset attributable to a sub-fund or special purpose vehicle shall –



- (a) be available only to the creditors of the company who are creditors in respect of that sub-fund or special purpose vehicle; and
- (b) subject to section 48A of the Income Tax Act, be protected from the creditors of the company who are not creditors in respect of that sub-fund or special purpose vehicle, including from any statutory, regulatory or Government body.

(3) Any provision of an agreement or the constitution of a variable capital company that it is inconsistent with subsection (1) shall be void.

(4) A variable capital company may allocate any asset or liability that is not attributable to any particular sub-fund or special purpose vehicle, between its sub-funds or special purpose vehicles in such manner as it considers not to be prejudicial to participants in the sub-funds or special purpose vehicle.

## **12. CIS manager, CIS administrator and custodian**

(1) Subject to subsection (2), where a sub-fund of a variable capital company is required by law or the Commission to appoint a CIS manager, CIS administrator, custodian or other service provider, the variable capital company may appoint that CIS manager, CIS administrator, the custodian or other service provider, as the case may be.

(2) Nothing in this section shall prevent a sub-fund from appointing, where required, its own CIS manager, CIS administrator, custodian or other service provider.

## **13. Disclosure in transactions**

- (1) A variable capital company shall –
  - (a) inform a person with whom it transacts that it is a variable capital company;
  - (b) disclose the following in every agreement, contract, document or transaction that refers to any of its sub-funds or special purpose vehicles –
    - (i) the name of the sub-fund or special purpose vehicle;
    - (ii) whether the sub-fund or special purpose vehicle has a separate legal personality, and, if so, its registration number;

- (iii) the approval number of the sub-fund or special purpose vehicle; and
- (iv) the fact that the assets and liabilities of the sub-fund or special purpose vehicle are segregated in accordance with this Act.

(2) Where a special purpose vehicle of a variable capital company issues debentures, the register of debentures of the variable capital company shall state the name and the registration number of that special purpose vehicle.

(3) Where the assets of a special purpose vehicle of a variable capital company are subject to a charge, the deed of the charge shall specify the name and registration number of that special purpose vehicle.

#### **14. Cross sub-fund or special purpose vehicle investment**

(1) Subject to subsection (2) and the constitution of a variable capital company, a sub-fund or special purpose vehicle of that variable capital company may invest its assets into another sub-fund or special purpose vehicle of the variable capital company.

(2) (a) A sub-fund of a variable capital company shall not invest in another sub-fund or special purpose vehicle of the company that has already invested in it.

(b) A special purpose vehicle of a variable capital company shall not invest in another sub-fund or special purpose vehicle of the company that has already invested in it.

#### **15. Legal proceedings**

Where a variable capital company is initiating, or is subject to, any legal proceeding in respect of a sub-fund or special purpose vehicle, any order or judgment shall be restricted to that sub-fund or special purpose vehicle.

#### **16. Voluntary winding up of sub-fund or special purpose vehicle**

(1) No sub-fund or special purpose vehicle shall be wound up voluntarily, except in accordance with a plan approved by the Commission.

(2) The Commission shall not approve a plan for the winding up of a sub-fund or special purpose vehicle unless it is satisfied that the interests of the participants in that sub-fund or special purpose vehicle are properly protected.

(3) Where the Commission approves the voluntary winding up of a sub-fund or special purpose vehicle that has a legal personality separate from its

variable capital company, the provisions of the Insolvency Act relating to voluntary winding-up shall apply with such adaptations and modifications as may be necessary.

#### **17. Winding up of sub-fund or special purpose vehicle by Court**

(1) Without prejudice to section 102(2) of the Insolvency Act, the Court may, on an application made by –

- (a) the Commission;
- (b) a creditor of a sub-fund or special purpose vehicle;
- (c) the CIS manager of a variable capital company or any of its sub-funds; or
- (d) the Board of a variable capital company or any of its sub-funds,

order the winding up of a sub-fund or special purpose vehicle.

(2) Where an application under subsection (1) is made by a person other than the Commission, the Commission shall be a party to the application.

(3) The Court shall not make an order under subsection (1) unless it is satisfied that –

- (a) the sub-fund or special purpose vehicle is being operated in contravention of this Act, any FSC Rule or its constitutive documents;
- (b) the winding up of the sub-fund or special purpose vehicle is necessary to protect the interests of investors in, or creditors of, the sub-fund or special purpose vehicle; or
- (c) it is just and equitable to make the order.

(4) A sub-fund or special purpose vehicle that has a legal personality separate from its variable capital company shall be wound up in accordance with the relevant provisions of the Insolvency Act.

#### **18. Withdrawal of approval of sub-fund or special purpose vehicle**

(1) Without prejudice to its powers under the relevant Acts, the Commission may revoke an approval granted under section 8 or 9 where it is satisfied that a sub-fund or special purpose vehicle –

- (a) has contravened any of the relevant Acts, any direction or order issued under any of the relevant Acts or any condition of an authorisation or approval granted by the Commission;
  - (b) is carrying out his business in a manner which threatens the integrity of the financial system of Mauritius or is contrary or detrimental to the interest of the public;
  - (c) has committed a financial crime;
  - (d) no longer fulfils any condition or criterion relating to the approval granted under section 8 or 9;
  - (e) no longer carries out the activity in respect of which the approval was granted under section 8 or 9; or
  - (f) has failed to commence business within 6 months of the approval being granted under section 8 or 9.
- (2) Where the Commission has withdrawn an approval under subsection (1) –
- (a) it may issue to the variable capital company a direction to take such measures as it thinks fit to safeguard the interests of investors and the reputation of Mauritius as an international financial centre, including a direction to wind up a sub-fund or special purpose vehicle; and
  - (b) the variable capital company shall, within 7 days, inform the Registrar of the withdrawal the approval.

#### **19. Direction to suspend activities of sub-fund or special purpose vehicle**

(1) Where the Chief Executive is satisfied, on reasonable grounds, that it is urgent and necessary to do so –

- (a) for the prevention or mitigation of damage to the integrity of the financial services industry or to any part thereof;
- (b) for the protection of the interests of the investors in a variable capital company or the interests of the public in general; or
- (c) for the protection of the good repute of Mauritius as a centre for financial services,

he may, by notice, direct a variable capital company to suspend the activities of any of its sub-funds or special purpose vehicles.

(2) The Chief Executive shall not give a direction under subsection (1) unless he gives a variable capital company –

- (a) prior notice of his intention together with reasons for the proposed direction; and
- (b) a reasonable opportunity to make representations in relation to the proposed decision.

## **PART V – SHARES AND CAPITAL**

### **20. Shares**

(1) (a) A variable capital company may issue shares in its sub-funds and special purpose vehicles.

(b) The proceeds of the shares issued under paragraph (a) shall be comprised in the assets attributable to the sub-fund or special purpose vehicle in respect of which the shares were issued.

(2) A dividend may be paid in respect of shares of a sub-fund or special purpose vehicle by reference only to the assets and liabilities attributable to that sub-fund or special purpose vehicle.

### **21. Power to redeem and buy back shares**

(1) A variable capital company may redeem or buy back its shares or those of its sub-funds and special purpose vehicles in accordance with its constitution.

(2) Where shares in a sub-fund or special purpose vehicle are redeemed or bought back, a shareholder shall be entitled to a refund in accordance with the number of shares he owns.

### **22. Reduction of share capital**

(1) (a) A variable capital company may make an application to the Registrar for an authorisation to reduce its share capital or that of its sub-funds or special purpose vehicles.

(b) A shareholder in a variable capital company may make an application to the Registrar for an authorisation to reduce the share capital of the sub-fund or special purpose vehicle in which he holds shares.

(2) A reduction under subsection (1) may be authorised –

- (a) to extinguish or reduce the liability on any shares in respect of share capital not paid up; or
- (b) with or without extinguishing or reducing any liability on any shares, to –
  - (i) cancel any paid-up share capital which is lost or unrepresented by available assets; or
  - (ii) pay off any paid-up share capital which exceeds the requirements of the variable capital company.

(3) The Registrar shall authorise the reduction of share capital where he is satisfied that –

- (a) a special resolution for the reduction of share capital is filed;
- (b) the variable capital company has provided sufficient guarantees to secure payment of its liabilities to every creditor;
- (c) no creditor is unfairly prejudiced by the reduction; and
- (d) the variable capital company demonstrates that it satisfies the solvency test.

(4) For the purpose of subsection (3)(d), a variable capital company shall be regarded as satisfying the solvency test where –

- (a) the company is able to pay its debts as they become due in the normal course of business; and
- (b) the value of the company's assets is greater than the value of its liabilities, including contingent liabilities.

(5) For the purpose of subsection (4)(b), the following may be considered –

- (a) the most recent financial statements of the company;
- (b) all other circumstances that all directors know, or ought to know, that affect, or may affect, the value of the company's assets and the value of the company's liabilities, including its contingent liabilities;
- (c) any valuation of assets or estimates of liabilities that are reasonable in the circumstances;

- (d) the likelihood of any contingency occurring;
- (e) any claim that the company is entitled to make and can reasonably expect to be met; or
- (f) any contingent liability that the company can reasonably expect to reduce or extinguish.

(6) (a) Any creditor that is prejudiced by an authorised reduction of capital under this section may apply to the Court for redress or for an order restraining or prohibiting such reduction.

(b) The Court shall, in determining an application under paragraph (a), have regard to this section and such other factors or circumstances as it may deem fit.

## **PART VI – REPORTING OBLIGATIONS**

### **23. Record keeping**

In addition to the record keeping requirements provided in the Companies Act and the relevant Acts, a variable capital company shall –

- (a) keep separate records for the variable capital company and each of its sub-funds and special purpose vehicles that –
  - (i) sufficiently explain the transactions and financial position of the variable capital company and its sub-funds and special purpose vehicles; and
  - (ii) would be necessary for the preparation of true and fair financial statements; and
- (b) establish and maintain adequate internal accounting controls to ensure that –
  - (i) the assets of the variable capital company and each of its sub-funds and special purpose vehicles are safeguarded against loss from unauthorised use or disposition; and
  - (ii) the transactions of the variable capital company and each of its sub-funds and special purpose vehicles are properly authorised and recorded in such manner as to permit the preparation of true and fair financial statements and maintain accountability of assets.

## **24. Filing of accounts**

(1) Notwithstanding sections 210 and 211 of the Companies Act, but subject to subsection (3), a variable capital company incorporated under this Act may, at any time, by giving irrevocable notice in writing simultaneously to the Registrar and to the Director-General, elect to present separate financial statements in respect of each of its sub-funds and special purpose vehicles in accordance with IFRS or any other internationally accepted accounting standards.

(2) Where a variable capital company makes an election under subsection (1), it shall present separate financial statements in respect of each of its sub-funds and special purpose vehicles as from the accounting period in respect of which the notice is given.

(3) Where a sub-fund or special purpose vehicle has a legal personality that is separate from its variable capital company, it shall file its financial statements separately from the variable capital company.

(4) A variable capital company, sub-fund or special purpose vehicle shall, where applicable, comply with the requirements of the relevant Acts or Companies Act regarding the filing of financial statements, annual reports and other relevant accounting documents.

## **PART VII – MISCELLANEOUS**

### **25. Offence**

Any person who contravenes this Act shall commit an offence and shall, on conviction, be liable to a fine not exceeding 500,000 rupees and to imprisonment for a term not exceeding 5 years.

### **26. Consequential amendments**

(1) The Financial Intelligence and Anti-Money Laundering Act is amended, in section 2, by deleting the definition of “financial institution” and replacing it by the following definition –

“financial institution” means –

- (a) an institution or a person licensed, registered or authorised under –
  - (i) the Captive Insurance Act;
  - (ii) section 14, 77, 77A or 79A of the Financial Services Act;



- (iii) the Insurance Act, other than an insurance salesperson;
- (iv) section 12 of the Private Pension Schemes Act;
- (v) the Securities Act, other than an entity registered with that Act as a reporting issuer and which does not conduct any financial activities;
- (vi) the Trusts Act as a qualified trustee;
- (vii) the Variable Capital Companies Act 2022;
- (viii) the Virtual Asset and Initial Token Offering Services Act 2021; or

(b) a credit union;

(2) The Financial Services Act is amended, in the First Schedule, by inserting, in the appropriate alphabetical order, the following item –

Variable Capital Companies Act 2022

(3) The Income Tax Act is amended –

(a) in section 2 –

(i) by deleting the definition of “company” and replacing it by the following definition –

“company” –

(a) means a body corporate, other than a local authority, incorporated in Mauritius or elsewhere; and

(b) includes –

(i) a non-resident société;

(ii) a cell of a protected cell company;

(iii) a variable capital company, its sub-fund or special purpose vehicle;

(iv) a Foundation;

(v) a trust; or

- (vi) a trustee of a unit trust scheme; but
- (c) does not include a Land Area Management Unit;
- (ii) by inserting, in the appropriate alphabetical order, the following new definitions –

“special purpose vehicle” has the same meaning as in the Variable Capital Companies Act 2022;

“sub-fund” has the same meaning as in the Variable Capital Companies Act 2022;

- (b) by inserting, after section 48, the following new section –

#### **48A. Variable capital company**

(1) Where a variable capital company has made an election under section 24(1) of the Variable Companies Act 2022 to present separate financial statements for each of its sub-funds or special purpose vehicles, each sub-fund or special purpose vehicle shall be deemed to be an entity separate from the variable capital company and shall be liable to income tax in respect of its own income.

(2) Notwithstanding section 11 of the Variable Capital Companies Act 2022, the Director-General may recover any income tax due by a sub-fund or special purpose vehicle of a variable capital company from the company or from that sub-fund or special purpose vehicle.

- (4) The Financial Services (Special Purpose Fund) Rules 2021 are amended, in rule 2, by deleting the definition of “scheme” and replacing it by the following definition –

“scheme” means –

- (a) a collective investment scheme authorised by the Commission under section 97 of the Securities Act;
- (b) a closed-end fund authorised by the Commission under section 97 of the Securities Act; or
- (c) a sub-fund under the Variable Capital Companies Act 2022.

(5) The Securities (Real Estate Investment Trusts) Rules 2021 are amended, in rule 2, by deleting the definition of “scheme” and replacing it by the following definition –

“scheme” means –

- (a) a collective investment scheme or a closed-end fund authorised by the Commission under section 97 of the Act; or
- (b) a sub-fund under the Variable Capital Companies Act 2022.

## **27. Regulations**

(1) The Minister may –

- (a) make such regulations as he thinks fit for the purposes of this Act; and
- (b) by regulations, amend the Schedule.

(2) Any regulations made under subsection (1) may –

- (a) provide for the taking of fees and levying of charges;
- (b) make provision for the sound management of a variable capital company;
- (c) impose such reporting obligations as the Minister may deem necessary including a report in respect of the liquidity analysis and the profit and loss statement of a variable capital company; and
- (d) provide that any person who contravenes them shall commit an offence and shall, on conviction, be liable to a fine not exceeding 5,000 rupees and to imprisonment for a term not exceeding one year.

## **28. Commencement**

This Act shall come into operation on a date to be fixed by Proclamation.

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**SCHEDULE**  
[Section 2(3)]

Sections 6, 62, 63(2)(c), 211(2) and 226

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