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Cayman Islands

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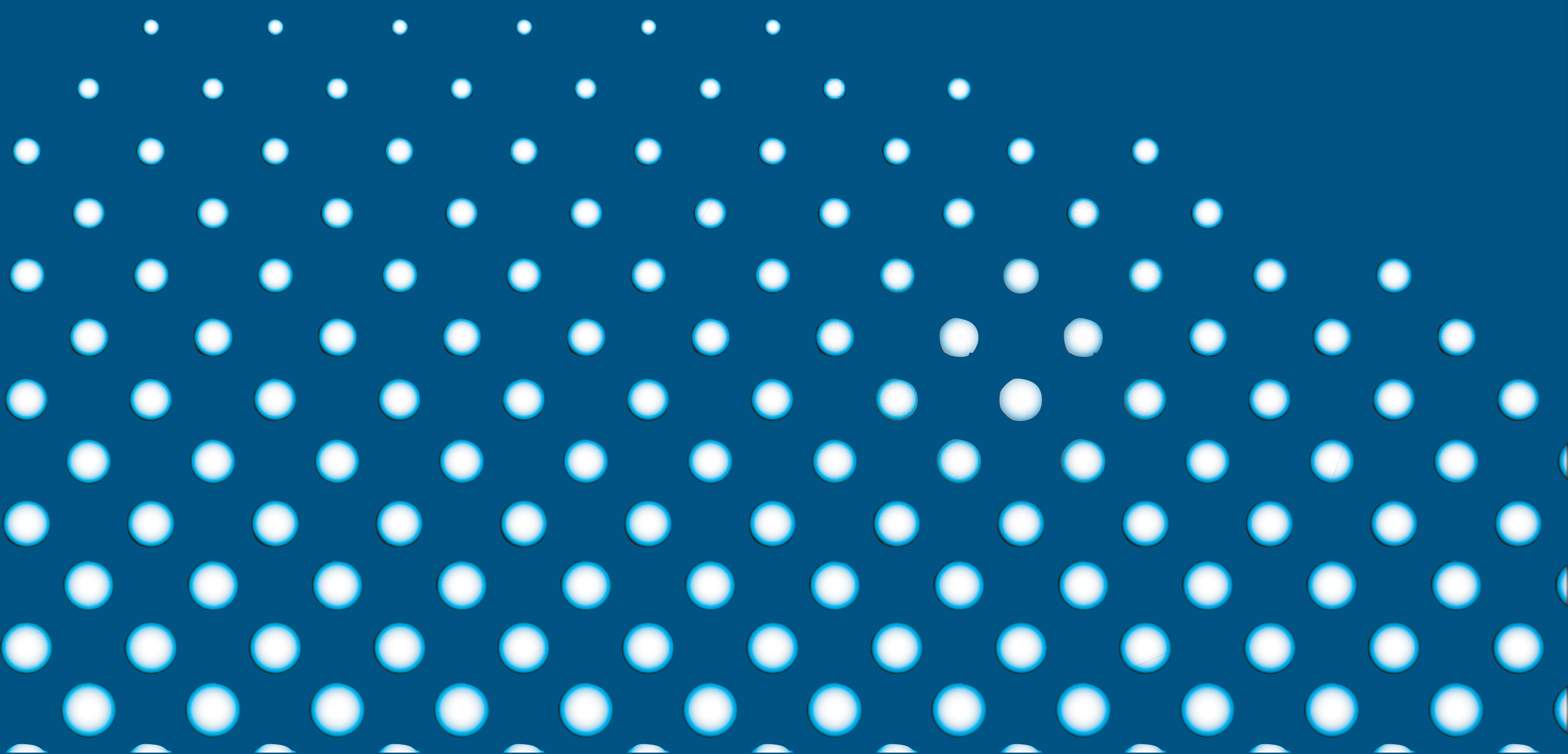


Loeb Smith | Cayman Islands Technical Brief for Investment Funds

Cayman Islands:

The New Regime For Restructuring Officers

On 31 August 2022, the Cayman Islands introduced the restructuring officer regime (“**the Regime**”) by making certain amendments to the Cayman Islands Companies Act (“**the Act**”). In this article we consider the benefits of the Regime now that it has been in place for nearly twelve months, and how it is operating in practice. We also consider the impact that the appointment of a restructuring officer has on the directors of affected companies and how, if at all, restructuring officers can review antecedent transactions.

Prior to the Regime

The introduction of the Regime was generally viewed as positive insofar as it sought to streamline and modernise the Cayman Islands’ previous stance on restructurings. Prior to the Regime, the only means by which a company could undertake a restructuring was following the presentation of a winding-up petition. Upon the hearing of that petition, the Cayman Court had the ability (but not the obligation) to give directions which enabled a restructuring to happen.

However, even if the Cayman Court was minded to exercise this discretion, the company was still required to appoint a liquidator if it wanted to have the benefit of a stay on claims and proceedings from third parties, which is generally considered necessary to give the company ‘room to breathe’ while a restructuring is implemented. Not only was the company required to bear the cost of appointing liquidators, but there were also often unintended consequences of following this ‘well-trodden path’, as the appointment of liquidators often triggered ‘termination events’ or ‘events of default’ clauses in agreements to which the company was a party.

The former process was therefore considered to be out of date, inefficient and in need of reform in order to put the Cayman Islands’ approach to restructurings on a broadly equal footing with similar processes that are available in other jurisdictions.

The Regime

The Regime is set out in Part V of the Act and provides that a petition may be presented by a company for the appointment of a restructuring officer without first obtaining a shareholders’ resolution approving the same, and regardless of whether the company’s articles of association permit this. The grounds for bringing such a petition must be because:

- the company is or is likely to be unable to pay its debts; or
- the company intends to present a compromise or arrangement to its creditors (or classes thereof) by way of a “consensual restructuring”.

It is a requirement of the Act that anyone who is proposed to be appointed as a restructuring officer must be a qualified insolvency practitioner and when so appointed shall be an officer of the Court.

Upon the presentation of a petition for the appointment of a restructuring officer, this automatically creates an immediate moratorium in respect of the company. This means that no suits, actions or other proceedings may be proceeded with or commenced, nor may any winding up resolution be passed or winding up petition be presented against the company, without the leave of the Court.

This is a significant improvement on the previous position under Cayman Islands law described above. The ability for directors to present a petition to appoint a restructuring officer is significant as it removes the requirement for a winding up petition to first be brought against the company.

Notable exceptions to this are that:

- the moratorium does not automatically apply to any criminal proceedings; and
- any creditors who have security over all or part of the company's assets will nonetheless be able to enforce their security against the company without the leave of the Cayman Court and, crucially, without reference to the restructuring officer. Whilst this is the same approach taken for liquidations, because the purpose of a moratorium is to give the company room for manoeuvre whilst it formulates a restructuring plan, it seems a contradictory step to give secured creditors the ability to take control of assets which might be crucial to the continuation of the business, and the sale of which may well frustrate any proposed restructuring and the viability of the business.

Powers of Directors on Appointment of a Restructuring Officer

The Act does not set out a list of powers or otherwise define the role of restructuring officers. This is instead decided on a case-by-case basis. The Act provides that the restructuring officer shall have "the powers and carry out only such functions as the Court may confer…in the order appointing the restructuring officer". Similarly, the order is also required to set out the "manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors."

This can be contrasted with the approach taken in the Act to liquidation, where:

- specific powers of the liquidators are set out in Schedule 3 of the Act; and
- upon the appointment of a liquidator, all the powers of the directors cease.

Since the introduction of the Regime, so far as we are aware, there have been two Court orders issued for the appointment of restructuring officers by the Court, which relate to Oriente Group Limited and Rockley Photonics Holdings Limited.

In both cases, the order appointing the restructuring officer has been quite gentle to the incumbent directors, particularly when compared with their treatment in the context of a winding up. In both cases the restructuring officers were authorised to "monitor, oversee and supervise the Board in its management of the Company, and take all necessary steps to develop and implement a restructuring of the Company's financial indebtedness in consultation with the Board".

The Court orders go on to state that the board of directors is "authorised to continue to manage the Company's day-to-day affairs in all respects and exercise the powers conferred upon it by the Company's Memorandum and Articles of Association". This includes the right to conduct the ordinary day-to-day business of the company's business operations and to operate the company's bank accounts in the ordinary course of business. The directors' powers are not completely unfettered, however, as the restructuring officer has a right of veto over new appointments to the board of directors and on the opening and closing of bank accounts. The restructuring officer may also refer matters to the Court for further directions if the restructuring officer considers that the directors are not acting in the best interests of the company.

The directors of the company are also required to provide such information to the restructuring officer as they may require in order to carry out their duties and monitor the cash-flow of the company, and to provide advance materials and notice of all board meetings.

It will be interesting to observe how practice develops in this area and whether bespoke terms of appointment of restructuring officers are used from case to case or whether a 'market standard' set of terms develops. It is perhaps too early to tell at this stage but notably the terms of appointment of the restructuring officers in Oriente Group Limited and Rockley Photonics Holdings Limited are remarkably similar. If bespoke terms do not become the norm, then it appears that liquidation

may be the only viable option where the directors cannot be relied upon to perform their duties post appointment.

Directors' Duties Pre- and Post Appointment of a Restructuring Officer

One of the fiduciary duties of directors of Cayman Islands companies is to act (in good faith) in the best interests of the company. This has historically been interpreted as being the best interests of the shareholders (taken as a whole). However, this paradigm has shifted gradually, and it is now generally accepted jurisprudence that the directors of companies are required to consider the interests of other stakeholders in the company, such as creditors and employees. In *BTI 2014 LLC vs. Sequana SA and others* (which is persuasive authority in the Cayman Islands), the Supreme Court in the UK held that the directors of companies in financial difficulty are required to consider the interests of creditors, and that the weight to be given thereto increases as such financial difficulty becomes more acute. It therefore follows that the interests of creditors should overtake those of the shareholders in the minds of the directors where the company enters into a formal insolvency process such as liquidation.

It remains unclear where using the Regime to undertake a restructuring falls along this spectrum as this will depend on the severity of the company's financial position, but clearly the interests of creditors should be towards the forefront of the minds of the directors by the time a restructuring officer is appointed.

Antecedent Transactions

Restructuring officers do not, under the Act, have the authority to consider antecedent transactions. When the regime was introduced, it was interesting to note that sections 145 (voidable preference), 146 (avoidance of dispositions made at an undervalue) and 147 (fraudulent trading) were not amended to extend this power to restructuring officers. All these sections remain drafted such that it is only the liquidator of the company that may review such transactions (or official liquidator in the case of section 146 of the Act).

Given the current global economic challenge of high inflation and the impact of the remedies being deployed to control it, it may be that the introduction of the Regime has been very well timed. If economic conditions worsen, it may be that the number of appointments of restructuring officers increases significantly as companies attempt to reinvent themselves as opposed to simply being liquidated.

Loeb Smith | Cayman Islands Technical Brief for Investment Funds

Cayman Islands: Private Funds

Introduction

This article will provide a general overview of the steps involved in the formation and running of a closed-ended investment fund in the Cayman Islands pursuant to the Private Funds Act (As Revised) (the "**Act**").

Type of legal entity used in formation of a private fund

Whilst there are no statutory requirements as to the type of legal entity that should be used in the establishment of a closed-ended fund pursuant to the Act, the type of entity most commonly used for this purpose is the Exempted Limited Partnership ("**ELP**"). Whilst other types of corporate vehicles can be used, such as a Cayman Islands Exempted Company, these are more commonly deployed in the context of an open-ended investment fund pursuant to the Mutual Funds Act (As Revised).

Who runs a private fund?

If a closed-ended fund (referred to under the Act as a private fund) is structured as an Exempted Company, it will be the directors of that company who run it. However, as part of the registration of the fund with the Cayman Islands Monetary Authority ("**CIMA**"), it will be necessary to ensure that there is a minimum of two directors appointed; this is known as the "four eyes principle" to ensure proper corporate governance and investor protection and is a prerequisite for registration as a private fund with CIMA.

If the fund is established as an ELP, the two-director rule does not apply directly to the ELP as ELPs do not have separate legal personality and therefore do not have directors. An ELP must, however, have a qualifying "general partner" who operates the ELP on behalf of the limited partners. It is at the general partner level that the "four eyes" principle will apply in this context and so a general partner must also have at least two directors.

Presently, it is **not** necessary for the directors of a private fund (or the directors of a general partner of an ELP which is registered as a private fund) to be registered pursuant to the Directors Registration and Licensing Act (As Revised).

Private Funds Act – obligation to register as a private fund

Only closed-ended funds that fall within the definition of a "private fund", as defined in the Act, will be required to register with CIMA under the Act as a private fund and will be regulated as such. The Act defines a "private fund" as:

"...a company, unit trust or partnership that offers or issues or has issued investment interests, the purpose of

effect of which is the pooling of investor funds with the aim of enabling investors to receive profits or gains from such entity's acquisition, holding, management or disposal of investments, where –

(a) the holders of investment interests do not have day-to-day control over the acquisition, holding, management or disposal of the investments; and

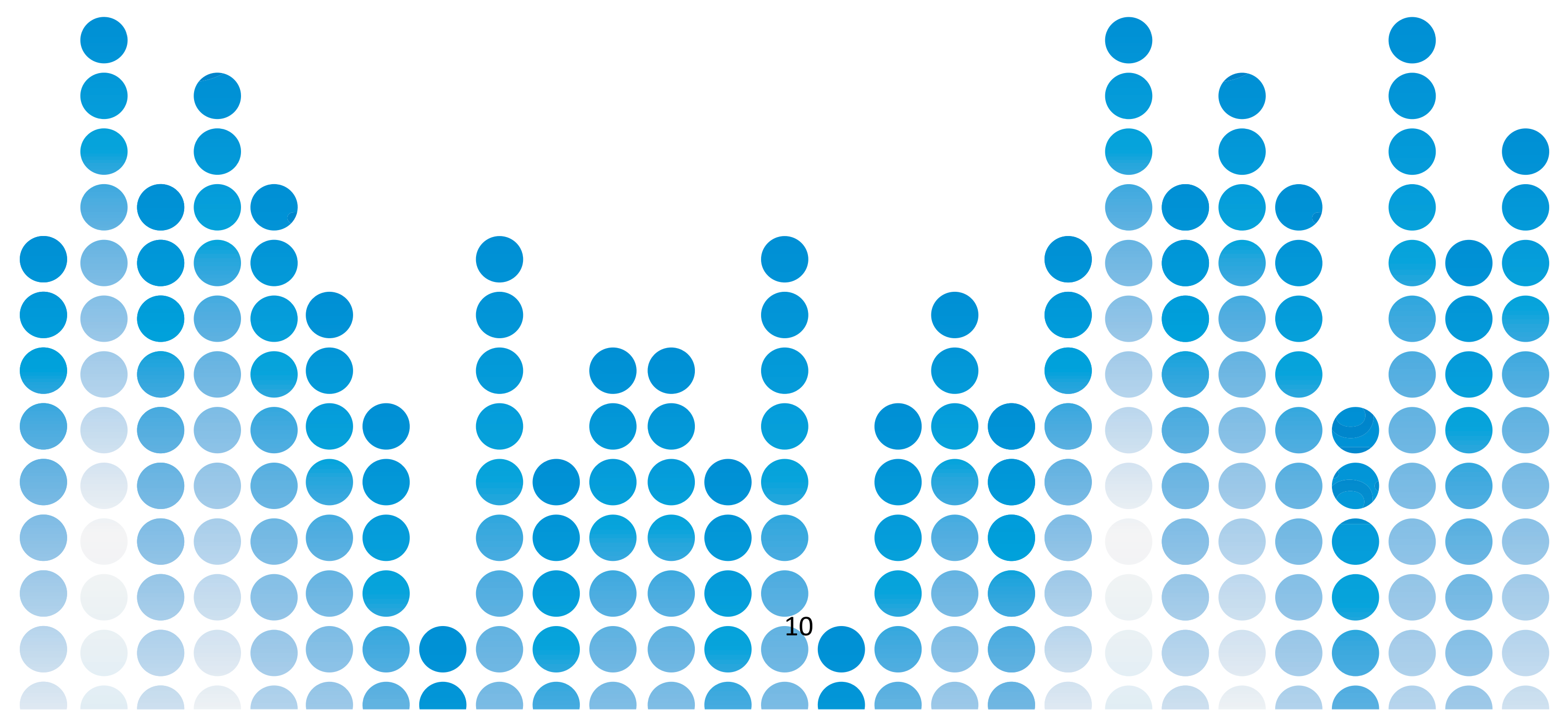
(b) the investments are managed as a whole by or on behalf of the operator of the private fund, directly or indirectly…"

It should be noted that the term "investment interest" is defined in the Act as an interest in the issuing vehicle which carries an entitlement to participate in the profits or gains of the vehicle and which interests are **not** redeemable or repurchaseable at the option of the *investor*.

Whether a particular structure will fall within this definition and be subject to regulation can be highly nuanced. We therefore recommend that you speak with an experienced Cayman Islands investment funds attorney to determine whether your proposed project would be regulated or whether an exemption from registration might be available.

For example, the Act itself contains a list of "non-fund arrangements" which are not considered to be "private funds". The list of non-fund arrangements is extensive and quite broad in remit but we would specifically highlight the following non-fund arrangements:

- Joint ventures;
- Proprietary vehicles;
- Holding vehicles;
- Debt issues and debt issuing vehicles;
- Structured finance vehicles;
- Sovereign wealth funds; and
- Single family offices.



It should also be noted that single investor funds will also fall outside of the remit of the Act on the basis that where there is only one investor, there will not be any "pooling of investor funds" as required by the above quoted definition of "private fund".

Registration as a Private Fund under the Act

Where a particular project falls within the definition of a "private fund" and where it is not a "non-fund arrangement", the corporate vehicle will be required to apply to CIMA for registration as a private fund under the Act.

In order to be registered under the Act, the fund will need to submit a completed application to CIMA via its online portal together with supporting documentation, including its offering document (which should contain, as a minimum, the information specified by CIMA in its Rules on Content of Offering Memorandum) and evidence of the appointment of an auditor and an administrator.

The application must (per section 5 of the Act) be submitted to CIMA (together with payment of the applicable registration fee) within 21 days after its acceptance of capital *commitments* from investors for the purposes of investments (although the application can be submitted at any time before capital commitments are received). The fund must be registered with CIMA as a private fund before it receives any capital *contributions* from investors.

Regulatory obligations of private funds

In addition to the above, there are certain other key obligations with which private funds must comply.

Where the fund makes any change (or becomes aware of any change) which *materially* affects any information that was delivered to CIMA as part of the fund's registration as a private fund, it must file details of the change with CIMA within 21 days of the change taking effect or of the fund becoming aware of the change. Whilst the Act only requires 'material' changes to be notified to CIMA, in practice CIMA tends to be notified of all changes given what is 'material' is open to interpretation.

Private funds must also file an annual return with CIMA and pay an annual registration fee in order to maintain its registration.

Ongoing requirements

The Act requires that private funds have in place certain mechanisms and safeguards relating to an annual audit of the fund, the valuation of the fund's assets, the safeguarding of the fund's assets, cash monitoring and the identification of securities.

- **Audit** – the fund must engage an approved Cayman Islands auditor to prepare its audited financial statements annually. CIMA maintains a list of the approved auditor firms who are able to provide this service. Such audited financial statements must be filed with CIMA within six months of the end of each financial year of the fund.

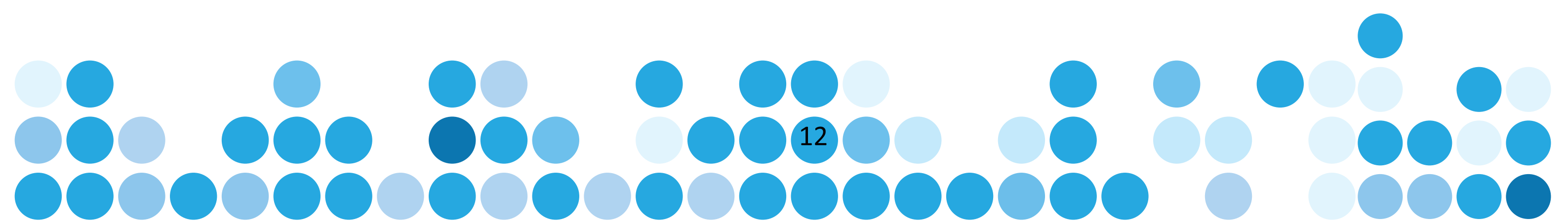
- **Valuation of fund assets** – the assets of a private fund must be valued periodically. What is considered to be an appropriate period between valuations will depend on the asset class(es) in which the fund is invested. However, valuations should, as a minimum, be carried out at least annually. Each valuation must be carried out by an independent and suitably qualified professional valuer who is familiar with the relevant asset class.

  If the valuer is not independent, then CIMA reserves the right to have the valuation independently verified at the cost of the fund. Otherwise, if the valuation of assets is carried out by the fund itself or by its investment manager, the valuation function must be independent from the portfolio management of the fund and any conflicts of interest are required to be identified, managed, monitored and disclosed to investors.

- **Safeguarding of the fund's assets** – private funds are, generally speaking, required to appoint a custodian to hold, in segregated accounts maintained in the name of the fund, the fund's assets which are capable of physical delivery or capable of registration in a separate account except that the private fund shall not be required to appoint a custodian if it has notified CIMA and it is neither practical nor proportionate to do so, having regard to the nature of the private fund and the type of assets it holds.

  The duty of custodian appointed is to verify the fund's title to its assets based on information provided by the fund together with any externally available information.

  If a custodian is not appointed, the verification of the fund's title to its assets must be carried out either by the fund's administrator or by the fund itself or its investment manager. In the case of title verification by the fund or its investment manager, the title verification function must be independent from the portfolio management of the fund and any conflicts of interest are required to be identified, managed, monitored and disclosed to investors in the fund.



- **Cash monitoring** – private funds are required to appoint any of an administrator, custodian or the investment manager to (1) monitor the cash flows of the fund; (2) ensure that all cash has been booked in cash accounts maintained in the name of the fund; and (3) ensure that payments made by investors to the fund for the purposes of investment have been received.

  If such monitoring is not undertaken by an independent third party, CIMA reserves the right to have the cash monitoring verified at the cost of the fund. In the case of cash monitoring undertaken by the fund or its investment manager, as above, the cash monitoring function must be independent from the portfolio management of the fund and any conflicts of interest are required to be identified, managed, monitored and disclosed to investors in the fund.

- **Identification of securities** – if the private fund in question regularly trades securities or holds them on a consistent basis, it must keep records of the identification codes (such as ISIN codes or CUSIP codes) of those securities that it trades and holds and such records must be made available to CIMA on request.

Other obligations

In addition to its obligations under the Act and guidance issued by CIMA, private funds are also subject to other obligations under the laws of the Cayman Islands in relation to matters such as FATCA / CRS compliance and in respect of anti-money laundering legislation and regulations.

- **FATCA / CRS** – Private funds tend to be classified as 'Reporting Financial Institutions" for the purposes of FATCA and CRS. Private funds are therefore required to undertake detailed due diligence on each of its investors (which is typically undertaken on its behalf by its administrator). The fund must also provide information to the Tax Information Authority of the Cayman Islands in respect of each of its investors who constitute 'reportable accounts'.

- **Anti-money laundering** – Private funds conduct "relevant financial business" for the purposes of the Proceeds of Crime Act (As Revised) and the Anti-Money Laundering Regulations (As Revised) (being together the "**AML Requirements**"). Private funds are therefore required to have robust policies and procedures in place to ensure that the AML Requirements are adhered to. The fund must have a detailed Anti-

Money Laundering Compliance Manual which contains detailed guidance on the policies and procedures that must be followed in carrying out the fund's activities, ranging from the onboarding process for investors, record-keeping, processes for the reporting of suspicious activity and other risk management matters.

Each private fund must also appoint three officers to assist with compliance with the AML Requirements; these are the anti-money laundering compliance officer, money laundering compliance officer and deputy money laundering compliance officer.

Economic Substance

On the basis that private funds are a form of 'investment fund', private funds that are registered under the Act are not 'relevant entities' for the purposes of the International Tax Co-operation (Economic Substance) Act (As Revised).

Whilst, therefore, private funds will not be required to demonstrate the extent of their 'substance' in the Cayman Islands, they will nonetheless be required to make an annual notification under this legislation to confirm their status as an investment fund.

Conclusion

If you are considering establishing a private fund in the Cayman Islands, it is imperative that you have experienced Cayman Islands legal counsel by your side to assist you in navigating the legislative and regulatory and compliance landscape. We have a strong reputation for our technical excellence, responsive, forward-thinking and insightful approach to advising clients on offshore Investment Funds and would be happy to be your trusted advisor on the formation, launch and ongoing advisory of your Cayman Islands private fund.

CIMA Rules and Guidance for Corporate Governance for Regulated Funds

The Cayman Islands Monetary Authority (“**CIMA**”) published a new Rule - Corporate Governance for Regulated Entities (“**Rule**”) and a new Statement of Guidance relating to Corporate Governance - Mutual Funds and Private Funds (“**Statement of Guidance**”) on 14 April 2023. In essence, both the Rule and the Statement of Guidance apply to Cayman Islands mutual funds and private funds which are registered with and regulated by CIMA (“**Regulated Funds**”). The collective purpose of the Rule and Statement of Guidance is to provide a more robust framework of baseline minimum corporate governance standards pertaining to the operators of a Regulated Fund (“**Operators**”) in order to ensure sound and prudent governance of Regulated Funds.

The Statement of Guidance replaces the Statement of Guidance - Corporate Governance for Regulated Mutual Funds from 2013 and has been expanded in scope to cover private funds.

The Operators of Regulated Funds should carefully consider the Rule and the Statement of Guidance in order to understand the baseline standards for sound and prudent governance of Regulated Funds.

What is meant by the Operators of a Regulated Fund?

The Operators constitute the governing body of a Regulated Fund (i.e. the Board of Directors of a company, the General Partner of a limited partnership, the Manager of an LLC, or the Board of Trustees for a trust).

When do the Rule and Statement of Guidance come into effect?

The Statement of Guidance is in immediate effect from 14 April 2023. The Rule will come into effect on 14 October 2023.

What are the key points for Regulated Funds to consider?

- **Skill and expertise of the Operators** - The Operators must constitute an appropriate number of individuals with expertise and skill to be competent to operate the Regulated Fund.

- **Structure** - The governance structure of a Regulated Fund must be appropriate and suitable for effective oversight of the Regulated Fund, having taken into account the size, complexity, structure, nature of business and risk profile of the operations of the Regulated Fund.

- **Oversight function** - Despite any outsourcing to service providers of the Regulated Fund (“**Service Providers**”), ultimate responsibility for overseeing and supervising the

activities of the Regulated Fund remains with the Operators of a Regulated Fund.

- **Ongoing monitoring** - The Operators should monitor and regularly take steps to satisfy themselves that the Regulated Fund is conducting its affairs in accordance with all applicable law and regulatory measures, in both the Cayman Islands and any other jurisdiction in which the Regulated Fund may operate. Furthermore, the Operators should request appropriate information from the Service Providers (including any Investment Manager) and professional advisors of the Regulated Fund to enable it to satisfy itself that the Regulated Fund is operating in compliance with applicable laws and regulatory measures.

- **Conflicts of Interest Policy** - A Regulated Fund should have a written conflicts of interest policy, which is commensurate with the size, complexity, structure, nature of business and risk profile of the Regulated Fund. The Conflicts of Interest Policy does not need to be a standalone document – it can be included in the Regulated Fund's offering document or constitutional documents. The Operators of a Regulated Fund must identify, disclose, monitor and manage all conflicts of interest consistent with the terms of the Conflicts of Interest Policy and additionally, all conflicts of interest should be disclosed in writing at least on an annual basis.

- **Operators' Meetings** - The Operators of a Regulated Fund should convene at least once a year. However, we would recommend that the frequency should be assessed by the Operators according to the type of Regulated Fund (e.g. a regulated mutual fund should typically convene more frequent meetings given the asset class, its trading frequency, and open-ended nature), the size, complexity and risk profile of the Regulated Fund. Where necessary, the Service Providers should be invited to meetings to provide any required input. A copy of the signed written minutes of any meeting of the Operators should be retained with the corporate records of the Regulated Fund.

- **Duties of the Operators** - The Operators of a Regulated Fund should (i) exercise independent judgment (ii) act honestly and in good faith and (iii) always act in the best interests of the Regulated Fund and taking into consideration the interests of its investors as a whole. This requirement of independence still applies even if the Operators also carry out the investment management function of the Regulated Fund. Furthermore, the Statement of

Guidance provides that if an Operator takes the decision to take on any additional funds, it should ensure it is able to perform its functions and duties in a responsible and effective way.

- **Communication with investors** – The Statement of Guidance states that the Operators should communicate contemporaneously adequate information to the investors of the Regulated Fund of any material changes to the Regulated Fund.

- **Communication with CIMA** – The Statement of Guidance sets out that the Operators are responsible for ensuring that CIMA is notified of any material changes to the appointments of Service Providers, that the Operators should ensure transparency with CIMA and notify CIMA of any matter which could materially and adversely affect the financial soundness of the Regulated Fund and any non-compliance with applicable laws and regulatory measures.

- **Review of Service Providers** - The Statement of Guidance sets out that the Operators must review the service contracts with Service Providers to ensure that each Service Provider is carrying out its functions and regularly assess the suitability and capability of the Service Providers. The Operators must also regularly monitor whether the Investment Manager is performing in accordance with the investment criteria, strategy and any restrictions set out in the applicable offering document.

- **Review of financials** - The Statement of Guidance sets out that the Operators should regularly monitor the Regulated Fund's NAV policy and whether the calculation of NAV is being calculated in accordance with such policy.

- **Other policies** - The Regulated Fund must adopt and oversee a written remuneration policy which must (i) as a minimum apply to the Operators, senior management and employees in control functions and (ii) must not induce excessive or inappropriate risk-taking, align with the corporate cultures and long-term interests of the Regulated Entity and have proper regard to the interests of the relevant stakeholders. Furthermore, the Regulated Fund should have policies on code of conduct, private transactions, self-dealing, preferential treatment of favored internal and external entities and an appropriate succession plan for Directors and senior management.

What action can CIMA take if a Regulated Fund does not comply with the Rule?

CIMA recognizes that application of the requirements of the Rule and the Statement of Guidance is proportionate and may vary subject to the size, complexity, structure, nature of business and risk profile of the Regulated Fund. However as stated above, Operators of Regulated Funds should carefully consider the Rule and the Statement of Guidance. Non-compliance with the Rule can lead to CIMA imposing penalties.

Further Assistance

This publication is not intended to be a substitute for specific legal advice or a legal opinion. If you require further advice relating to your ongoing regulatory compliance obligations, please contact us. We would be delighted to assist.

Loeb Smith | Cayman Islands Technical Brief for Investment Funds

Administrative Fines Regulations in respect of Cayman Private Funds

Administrative Fines Regulations in respect of Cayman Private Funds

- The administrative fine regime in the Cayman Islands was implemented pursuant to the Cayman Islands' Monetary Authority (Administrative) Fines (Amendment Regulations), 2020, as amended ("**Administrative Fines Regulations**") and extend the application of the fines administered by CIMA from the Anti-Money Laundering regime, to all regulatory laws, regulations and any rules issued by CIMA thereto.

- An individual, a body corporte, a partnership, a limited liability partnership, an exempted limited partnership, an unincorporated association, or any other person that breaches a regulatory law or the anti-money laundering regulations can be fined by CIMA.

- The Administrative Fines Regulations categorize breaches as 'minor', 'serious' or 'very serious'. For example, a Private Fund which accepts capital contributions from investors in respect of investment before it is registered with CIMA as a Private Fund is a "very serious breach".

- The Administrative Fines Regulations impose a scale of fines dependent on the categorization of the breach as set out in paragraph above, starting from an initial fixed fine of US$6,100 for a minor breach to a single discretionary fine up to a maximum of US$60,975.61 for an individual or US$121,951.22 for a body corporate (e.g. exempted companies, SPCs, LLCs), a partnership or an unincorporated association for a serious breach and a single discretionary fine of up to US$121,951.22 for an individual or US$1,219,512.20 for a body corporate, a partnership or an unincorporated association. Any administrative fines set out in the Administrative Fines Regulations which are applicable specifically to Private Funds, will be in addition to any fines which may be imposed on a Private Fund under the PFA.

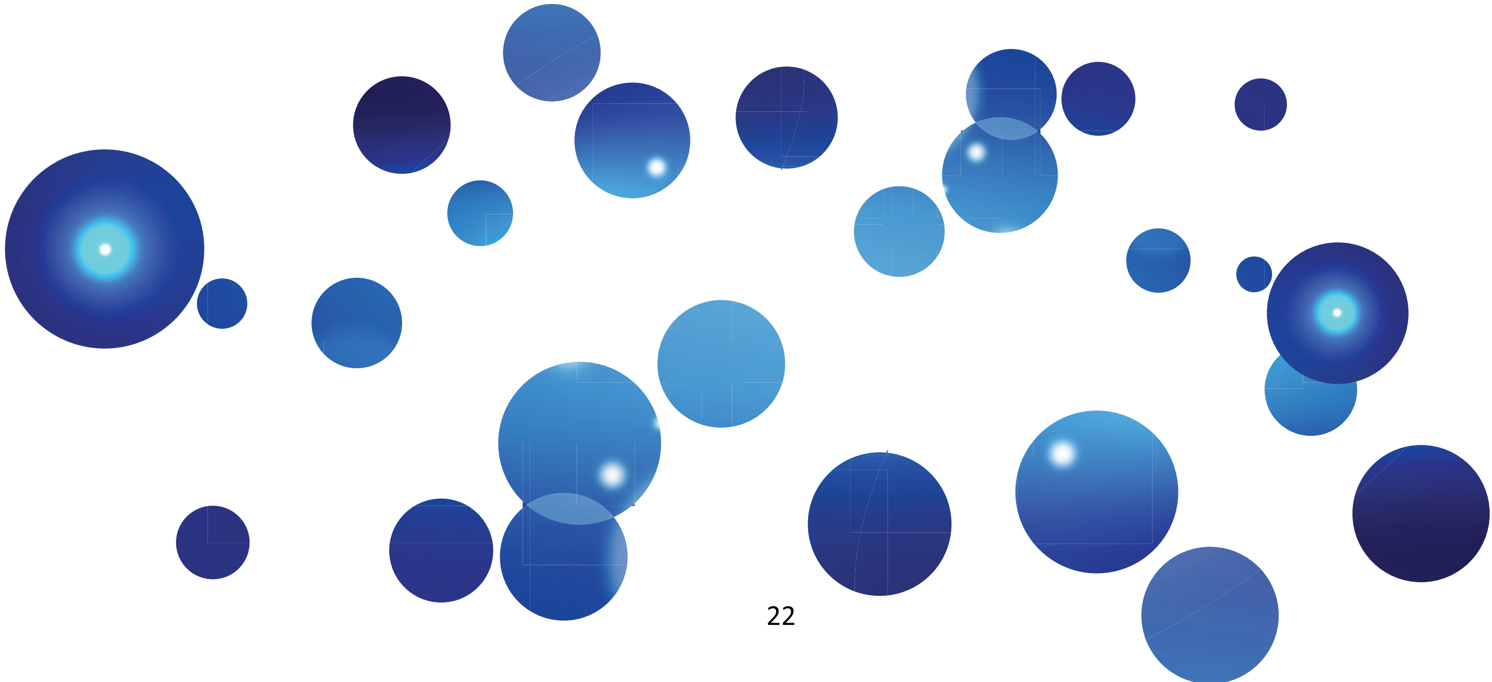
Supervisory and enforcement powers of CIMA in respect of Private Funds

- CIMA has broad discretionary supervisory and enforcements powers in respect of Private Funds.

- If CIMA knows or has reasonable grounds to believe that a Private Fund:
  - is unable or appears likely to become unable to meet its obligations as they fall due;
  - is carrying on business fraudulently or otherwise in a manner detrimental to the public interest, to the interest of its clients or to the interest of its creditors;

- is carrying on or attempting to carry on business or is winding up its business voluntarily in a manner that is prejudicial to its investors or creditors;
- has contravened any provision of PFA or Anti-Money Laundering Regulations (2023 Revision) as amended;
- has failed to comply with a condition of its registration; or
- has not conducted the direction and management of its business in a fit and proper manner or has Directors, senior officers, managers or persons who have acquired ownership or control who are not "fit and proper persons", CIMA may take certain actions, including:

  - cancel the registration of the Private Fund;
  - impose conditions or further conditions on the Private Fund and to amend or revoke those conditions;
  - require the substitution of any promoter or operator of the Private Fund;
  - appoint a person to advise the Private Fund on the proper conduct of its affairs;
  - appoint a person to assume control of the affairs of the Private Fund;
  - apply to the Cayman Islands' Grand Court for an order to take such other action as it considers necessary to protect the interests of investors in, and creditors of, the Private Fund; and
  - if a magistrate is satisfied on an application made by CIMA or a police officer of the rank of Inspector or above that there are reasonable grounds for suspecting that an offence under the PFA has been, is being or is about to be committed in certain premises, the magistrate may issue a warrant authorizing CIMA or a police officer and such other persons as may reasonably be needed to enter and search the premises.



Summaries

Cayman Islands satisfies FATF Action Plan and is scheduled to be removed from FATF "grey list"

Background

In February 2021, the Financial Action Task Force (the "**FATF**"), a global money laundering and terrorist financing watchdog, included the Cayman Islands on its list of "jurisdictions under increased monitoring" (the "**Monitoring List**") pending completion of certain prescribed actions. Whilst the FATF recognized that the Cayman Islands had satisfied 60 out of 63 action points set out in its Mutual Evaluation Report that was published in 2019 to combat money laundering, terrorist financing and proliferation financing, it nevertheless determined that it was necessary to add the Cayman Islands to the Monitoring List on the basis that the jurisdiction "*is confronted with inherent ML/TF risks, threats and associated vulnerabilities emanating from domestic and foreign criminal activities*". In line with this objective, the outstanding three action points put forward by the FATF were focused on ensuring that the Cayman Islands is: (i) applying sanctions that are effective, proportionate and dissuasive, and imposing administrative penalties and taking enforcement action against relevant entities (including service providers) to facilitate the prompt and effective remediation of breaches, (ii) imposing adequate and effective sanctions where relevant parties do not file accurate, adequate and up to date beneficial ownership information, and (iii) demonstrating that all money laundering is being prosecuted and resulting in the application of dissuasive, effective and proportionate sanctions.

The Monitoring List is distinct from the FATF's list of "non-cooperative jurisdictions" or "high-risk jurisdictions subject to a call for action" on which the Cayman Islands was not included.

Beyond any reputational issues of being included on the Monitoring List, no penalties or sanctions directly flow from this and the FATF also does not advocate for the application of enhanced due diligence measures to be applied to a jurisdiction on the Monitoring List.

Recent Development

Following the conclusion of the FATF's most recent plenary on 23 June 2023, the FATF has determined that the Cayman Islands has substantively fulfilled its action plan. Therefore, subject only to the completion of an on-site visit by the FATF later this year, which forms part of the FATF's standard process for removing a jurisdiction from the Monitoring List, the Cayman Islands will be delisted.

The likely removal of the Cayman Islands from the Monitoring List later this year will serve to underscore the jurisdiction's drive to adopt the highest standards and industry best practices.

Private Fund SP Fees to be Returned

The Cayman Islands Monetary Authority ("CIMA") has issued a notice advising financial service providers that with immediate effect, it will not be collecting annual registration fees on behalf of segregated portfolios for Private Funds structured as segregated portfolio companies (SPCs). CIMA has advised that it will be seeking to refund any such fees paid from 2020 to date, prior to the date of the notice. CIMA is currently in discussion with the Ministry and it is anticipated that the Private Funds Act (As Revised) and the associated regulations will be amended, following a broader stakeholder consultation. A statutory based registration fee will be implemented thereafter.

This publication is not intended to be a substitute for specific legal advice or a legal opinion.
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