

Cayman Islands Private Funds

1 Introduction

- 1.1 On 7 February 2020, the Private Funds Law, 2020 and the Private Funds (Savings and Transitional Provisions) Regulations 2020 (together, the "**Law**") came into force.
- 1.2 The Law provides for the registration of certain closed-ended funds (termed "**private funds**") with the Cayman Islands Monetary Authority (the "**Authority**").

2 Definition of a Private Fund

- 2.1 A vehicle is a "private fund" where:
 - (a) its principal business is the offering and issuing of its investment interests the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risks and enabling investors to receive profits or gains from such vehicle's investments;
 - (b) its investment interests carry an entitlement to participate in the profits or gains of the vehicle and are not redeemable or repurchasable at the option of the investor, i.e. are closed-ended;
 - (c) its purpose or effect is the pooling of investor funds with the aim of spreading investment risks;
 - (d) the investors do not have day-to-day control over the investments;
 - (e) its investments are managed as a whole by or on behalf of the operator, directly or indirectly, for reward based on the assets, profits or gains of the vehicle; and
 - (f) it does not constitute a "non-fund arrangement", as listed in the schedule to the Law.

3 Which private funds are caught?

- 3.1 The Law applies to private funds set up as Cayman Islands partnerships, companies, unit trusts and limited liability companies unless out of scope on the basis set out in the Law.
- 3.2 The Law also applies to non-Cayman Islands private funds which make an "invitation to the public in the Islands".

4 What is required to register a private fund with the Authority?

- 4.1 The following are required to be uploaded to the Authority's secured Regulatory Enhanced Electronic Forms Submission (REEFS) web portal in order to register a private fund under the Law:
- (a) Application Form;
 - (b) Certificate of Incorporation/Registration (as applicable);
 - (c) Constitutive Documents (Partnership Agreement, Memorandum and Articles of Association, Trust Deed (as applicable));
 - (d) Offering Memorandum/Summary of Terms/Marketing Material (as applicable);
 - (e) Auditor's letter of consent (if applicable)¹;
 - (f) Administrator's letter of consent (if applicable)²; and
 - (g) Structure Chart.
- 4.2 There will be no annual registration fee assessed for existing private funds registering during the transition period (which ends on 7 August 2020), however, an application fee of CI\$300 (US\$366) will be payable. Private funds registering after the end of the transition period will be required to pay the annual registration fee of CI\$3,500 (US\$4,268) and the \$300 (US\$366) application fee at the time of registration.
- 4.3 All registered private funds will then be required to pay the annual registration fee of CI\$3,500 (US\$4,268) in January of each subsequent year.

5 At what point must a new private fund be registered?

- 5.1 The Law provides that a new private fund which is required to register must:
- (a) submit its registration application to the Authority within 21 days after its acceptance of capital commitments from investors for the purposes of investments; and
 - (b) be registered by the Authority before it accepts capital contributions from investors in respect of investments.
- 5.2 The Law provides certain transitional provisions for private funds that were carrying on business prior to the commencement date of the Law or which commence carrying on business at any time prior to 7 August 2020 (each a "**transitional private fund**").
- 5.3 For these purposes, a private fund will be carrying on business if it has received capital contributions from investors for the purpose of investment.

¹ If the appointment of the CIMA approved local auditor has not been finalised at the time of the private fund's registration, the application can proceed without the auditor's letter of consent but such consent letter must be submitted to CIMA prior to the filing of the fund's first set of audited accounts.

² A letter of consent will only be required if the private fund has appointed an administrator, rather than the private fund undertaking the administration function itself.

- 5.4 A transitional private fund will have until 7 August 2020 to register with the Authority and comply with the Law.

6 Operational Requirements for Private Funds

- 6.1 The Law contains certain operational requirements for a registered private fund including provisions relating to valuation of assets, safekeeping of fund assets, cash monitoring and identification of securities as summarised in the remainder of this section 6.

- (a) **Valuation of assets:** the Law requires appropriate and consistent valuation procedures and that valuations be carried out at least annually. Such valuation can be performed by any of the manager or operator of the private fund (subject to functional independence or conflicts management requirements), an independent valuer or an administrator.
- (b) **Safekeeping of fund assets:** the Law requires a custodian:
- (i) to hold private fund assets which are capable of physical delivery or capable of registration in a custodial account except where that is neither practical nor proportionate given the nature of the private fund and the type of assets held; and
 - (ii) to verify title to, and maintain records of, fund assets.

Where having a custodian is neither practical nor proportionate given the nature of the private fund and the type of assets held, title verification can be carried out by any of the manager or operator of the fund (subject to functional independence or conflicts management requirements), an independent administrator or another independent third party.

- (c) **Cash monitoring:** the Law requires that monitoring of cash flows and checking of cash accounts and receipt of investor payments be carried out by any of the manager or operator of the private fund (subject to functional independence or conflicts management requirements), an independent administrator, independent custodian or other independent third party.
- (d) **Identification of securities:** the Law requires a private fund that regularly trades securities, or holds them on a consistent basis, to maintain a record of the identification codes of the securities in question.

- 6.2 The Authority has the power to issue rules and guidance in relation to the application of the above requirements.

7 Appointment of local auditor and filing of audited accounts

- 7.1 The Law also includes a requirement that all registered private funds must have their accounts audited annually by a Cayman Islands based auditor.
- 7.2 A private fund is required to have its accounts audited annually by an auditor approved by the Authority. A private fund is also required to submit its audited accounts, along with the Fund Annual Return ("**FAR**"), to the Authority within six months of the end of each financial year.

- 7.3 A Private Fund registering in 2020 is required to submit an audit for its 2020 financial year within six months of the financial year-end or within such extension of that period as the Authority may allow.

8 Authority's Powers

- 8.1 Wide-ranging powers are given to the Authority under the Law. If the Authority is satisfied, in respect of a regulated private fund, that:

- (a) the private fund is or is likely to become unable to meet its obligations as they fall due;
- (b) the private fund is carrying on business fraudulently or otherwise in a manner detrimental to the public interest or to the interests of its investors or creditors,
- (c) the private fund is carrying on (or attempting to carry on) business or winding up in a manner that is likely to be prejudicial to investors or creditors;
- (d) the private fund is carrying on (or attempting to carry on) business without complying with the Law or the Anti-Money Laundering Regulations (2020 Revision);
- (e) the direction and management of the private fund has not been conducted in a fit or proper manner; or
- (f) a person holding a position as an operator, manager or officer of the private fund is not a fit and proper person to hold the respective position,

then the Authority has wide powers, e.g. to notify investors if circumstances permit, to appoint persons to advise the private fund on the proper conduct of its affairs, to appoint a person to assume control of the affairs of a private fund, to reorganise the affairs of a private fund or apply to the Grand Court for it to be wound up or generally to take such other action as is considered necessary to protect the interests of investors or creditors including the cancellation of a private fund's registration. The exercise of all such powers is subject to appeal.

- 8.2 An auditor is under a statutory obligation, when auditing the accounts of a regulated private fund, to notify the Authority if it obtains information or suspects that the private fund:

- (a) is or is likely to become unable to meet its obligations as they fall due;
- (b) 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;
- (c) is carrying on or attempting to carry on business without keeping any or sufficient accounting records to allow its accounts to be properly audited;
- (d) is carrying on or attempting to carry on business in a fraudulent or criminal manner; or
- (e) is carrying on or attempting to carry on business otherwise than in compliance with the Law or certain other Cayman Islands laws and regulations (including as to anti-money laundering).

9 Continuing Requirements for a Regulated Private Fund

- 9.1 Once a private fund has registered with the Authority, its obligations are as follows:

- (a) A private fund must inform the Authority if it makes a change, or becomes aware of any change, that materially affects any information submitted to the Authority as part of its initial registration application. Details of the change need to be filed with the Authority within 21 days of the change, or the private fund becoming aware of the change.
- (b) A private fund must have its accounts audited annually and send a copy of those accounts to the Authority within 6 months of the end of the relevant financial year.
- (c) A private fund must submit a FAR form annually with the Authority. The Authority publishes the FAR form on its website and has an internet portal through which a funds' local auditor must submit the required returns. Although the FAR form must be submitted through the fund's auditor, the operators of the private fund remain responsible for the accuracy of the contents of the FAR form. All operators and investment managers of registered private funds should therefore put in place procedures to ensure compliance with these requirements.
- (d) A private fund must also inform the Authority if it has changed its registered office or its principal office.
- (e) A private fund is required to pay the prescribed annual registration fee (currently US\$4,268) on or before 15 January in each year. There are penalties for late payment.
- (f) A private fund must also comply with any special conditions which the Authority has imposed in respect of its registration as a private fund.

9.2 It should also be noted that the Authority has prescribed procedures which must be followed in order to deregister a regulated private fund, failing which the above continuing requirements (including the payment of annual fees) will continue to apply, regardless of whether the private fund has ceased operations as a business matter. Accordingly legal advice should be sought in advance of any proposed termination of operations.

10 Conclusion

The adoption and implementation of the Law reflects the Cayman Islands' commitment as a co-operative jurisdiction, is responsive to EU and other international recommendations and covers similar ground to existing or proposed legislation in a number of other jurisdictions.

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