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EXECUTIVE SUMMARY

Over the last two years we have seen a significant number of regulatory initiatives impacting on the organization and ongoing operations of funds domiciled in the Cayman Islands. The most recent of these initiatives, both published on 7 February, 2020, are:

- (i) The Cayman Private Funds Law, 2020 which brings within the scope of regulation, certain closed-ended funds with the Cayman Islands Monetary Authority ("CIMA").
- (ii) The Mutual Funds (Amendment) Law, 2020 which brings within the scope of regulation, open-ended funds formed in the Cayman Islands that have 15 or fewer investors who have the ability to appoint or remove the operator of the fund; these funds were previously referred to as "exempted funds" or "section 4(4) funds".

This paper deals **only** with the Private Funds Law. It aims to give (i) global context to the increasing regulatory burden on Cayman Funds; (ii) an overview of the key requirements of the new Private Funds Law; and (iii) practical insight into what Investment Managers must do to comply with the new requirements.

BACKGROUND & CONTEXT – WHY ARE WE SEEING SO MUCH LEGISLATIVE CHANGE?

Global focus on AML

The Financial Action Task Force (FATF) is the global standard setting body with respect to international anti-money laundering and combating the financing of terrorism and proliferation of weapons of mass destruction (AML/CFT) standards. The FATF methodology to assess the effectiveness of AML/CFT systems is carried out by way of peer reviews of each country on an ongoing basis to assess levels of implementation of the FATF Recommendations, providing an in-depth description and analysis of each country's system for preventing criminal abuse of the financial system. In common with all other recognized global fund domiciling jurisdictions, the Cayman Islands is subject to mutual evaluations or peer reviews by the Caribbean FATF ("CFATF") and enhances its regime in accordance with the resulting recommendations.

Global focus on Tax

Under the Organization for Economic Co-operation and Development (OECD) / G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS), over 135 countries are collaborating to put an end to tax avoidance strategies that exploit gaps and mismatches in tax rules in order to avoid paying tax. In common with all other recognized global fund domiciling jurisdictions, the Cayman Islands is a member of this Framework. The European Union has a strong interest in these matters and collaborates with the OECD on various initiatives.

Convergence of these twin pillars

At a high level, the combination of these two international pressures is leading to changes in regulatory and tax regimes in all global fund domiciling jurisdictions. Although this note is focused on the Cayman Islands, similar requirements are being imposed across the globe.

RECENT CAYMAN DEVELOPMENTS

FATF Driven Developments / AML Regulations

Following a CFATF review of the Cayman Islands in December 2017, Cayman took measures to upgrade its AML environment to stay ahead of international standards through the introduction of; CIMA Administrative Fines regime on 16 March 2018, AML Regulations which came into force on 31 May 2018, and the appointment of AML Officers by 31 Dec 2018 for Private Funds.

OECD Driven Developments / Economic Substance Legislation

From 1 January 2019, new legislation came into effect in the Cayman Islands, requiring in-scope entities that carry on particular activities to have demonstrable economic substance in Cayman. The International Tax Co-operation (Economic Substance) Law, 2018 was enacted after an extensive process of consultation with the EU Code of Conduct Group, the OECD and Cayman stakeholders. Significantly, investment funds were exempt from the economic substance requirements, a move which was welcomed by the industry.

NEW CAYMAN DEVELOPMENT – PRIVATE FUNDS LAW, 2020

As noted above, investment funds are exempt from Economic Substance requirements. In order to be excluded it was necessary to better define what constitutes a fund. In particular, from an EU perspective, a fund requires a Supervisory Framework and an authority with defined enforcement powers. To date, Private Funds have been exempt from registration with CIMA which was at odds with the EU view of a fund. In response to this, the Private Funds Law 2020 ("PF Law") created a regulatory regime for closed-end funds (such as private equity funds) structurally similar to the existing regime for hedge funds but with some additional operational features.

WHAT IS A PRIVATE FUND?

A Private Fund is an investor pooling vehicle without a right to redeem, which includes typical private equity and venture capital funds. The definition of investor should be carefully reviewed as it excludes parties closely associated with the establishment and management of the fund.

WHAT ARE THE NEW REQUIREMENTS?

As noted above, there are many features of the PF Law that mirror the requirements that are currently imposed on Cayman open ended funds. There are also some requirements that are unique to the PF Law. For this analysis, the PF Law has been broken into:

(A) PF Law requirements SIMILAR TO the existing regime for registered open-ended funds:

Registration

The information required under Application Form 101-77 is similar to that required under the forms for open ended funds, including details of Fund, service providers, structure, and AML officers.

The following are the items required to be submitted:

1. Application Form (APP-101-77);
2. Application Fee – C\$ 3002 (US\$1 = ~C\$0.8);
3. Certificate of Incorporation/Registration (as applicable);
4. Constitutive Documents (Memorandum & Articles of Association/Trust Deed/Declaration of Partnership (as applicable);

5. Offering Memorandum/Summary of Terms/Marketing Material (as applicable);
6. Administrator's letter of consent (optional);
7. Auditor's letter of consent (if available); and
8. Structure Chart.

There are three elements to the successful registration of a Private Fund / Fund Complex. DMS can assist with all (or some) of these requirements, as needed by the Investment Manager, as follows:

- (i) Classification analysis** – Investment Managers can rely on DMS to provide the full scope analysis of their fund complex via a best-in-class "decision-tree" technology solution in conjunction with a market-leading regulatory compliance team. This service is entirely flexible and can be provided for a full analysis or a simple "sense check", depending on the comfort level of the IM with the registration requirements.
- (ii) Form preparation** – Investment Managers can rely on DMS to assist with form preparation via technology solution and manual review process, as needed.
- (iii) Form submission** – The Investment Manager is required to rely on a third-party service provider in Cayman with access to the REEFS filing system to file on their behalf. DMS is well placed to provide this service.

Annual Audit Requirement

A Private Fund shall have its accounts audited annually by an auditor approved by CIMA and signed off by their Cayman office, and those accounts will need to be submitted to CIMA within 6 months of the end of the financial year. Again, this will be familiar to those within the existing regime for open ended funds in Cayman.

In practical terms the vast majority of audit firms recognized in the global private fund industry have a presence in Cayman and will be capable of providing this additional layer of review and sign-off. For those funds that are not currently subject to audit, this should be an immediate focus for the Investment Manager, in particular as CIMA has confirmed that a Private Fund is required to submit an audit for its 2020 financial year within six months of the financial year end.

Extension of four eyes principle to Private Funds

The four eyes principle is a requirement that two individuals must

approve an action before it can be taken. It is confirmed that CIMA will extend the four eyes principle to Private Funds. A minimum of two (2) directors are required for applicants that are companies, and a minimum of two (2) natural persons are to be named in respect of a general partner or a corporate director of a Private Fund.

Unlike the open-ended fund regime, it is not currently required that these individuals be CIMA Registered Directors, and there is currently no independence requirement. It is, however, anticipated that non-Cayman Investment Managers will require at least one independent person who is familiar with Cayman requirements to be named as a director of a fund / manager of a GP. Independent governance can also be introduced through committees established through amendments of the limited partnership agreement. The dual pressures of increased regulatory complexity and increased investor scrutiny could potentially drive managers to appoint at least one local independent director in order to have oversight of Cayman private funds.

(B) PF Law requirements DIFFERENT FROM the existing regime for registered open-ended funds:

Under the PF Law there are some new requirements that anyone familiar with the European AIFMD Regime will recognize. Some of these requirements mirror the European depositary requirements, but it must be stressed that these are far less onerous than the full AIFMD depositary regime. We call them “pseudo-depositary” requirements. Most of them can be carried out by the Investment Manager, provided the requisite internal controls are in place:

(i) Valuation

A Private Fund shall have appropriate and consistent procedures for the purposes of proper valuations of its assets. Valuations of the assets of a private fund shall be carried out at a frequency that is appropriate to the assets held by the private fund and on at least an annual basis.

Section 16 of the PF Law requires valuations of the assets to be performed by:

- a. an independent third party that is appropriately professionally qualified to conduct valuations in a non-high risk jurisdiction;
- b. the manager or operator of the private fund, or a person who has a control relationship with the manager of the private fund, provided that –
 - (i) the valuation function is independent from the portfolio management function; or

- (ii) potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the private fund; or

- c. an administrator not falling under subsection (a) who is appointed by the private fund.

Where the valuation of the assets of a private fund is not performed by an independent third party, CIMA may require the private fund to have its valuations verified by an auditor or independent third party.

CIMA recommends that good market practice is for a fund to ensure that their investors are kept abreast of the performance of the fund, even if the investors do not require annual valuation. CIMA is of the view that while investors are aware that any capital contributions made into a private fund will not be distributed until the timeframe indicated in the relevant fund documents has been completed, investors should still be aware of the fund’s performance on an ongoing basis.

For most institutional Private Fund Managers, this requirement is likely something to which they adhere already and should simply require an updating of their firm’s valuation policy. It is, however, important to ensure that current practice is in line with the CIMA requirements, or that additional measures are put in place ahead of the deadline.

CIMA will issue further rules establishing the policies and procedures of CIMA with respect to the valuation of the assets of a Private Fund. With the ever-increasing focus on independent valuation in the U.S., Europe, and now Cayman, we are seeing an increasing number of sophisticated specialist valuation firms bringing an offering to market.

(ii) Safekeeping of fund assets

A Private Fund shall appoint a custodian to:

- a. hold in custody in segregated accounts opened in the name, or for the account, of the private fund, the custodial fund assets; and
- b. verify, based on information provided by the private fund and available external information, that the private fund holds title to any other fund assets and maintain a record of those other fund assets.

A 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, with regard to the nature of the private fund and the type of assets it holds.

If the private fund is not appointing a custodian, then title verification must be carried out by

- a. an administrator or another independent third party; or
- b. the manager or operator, or a person with a control relationship with the manager of the private fund, provided that –
 - (i) the title verification function is independent from the portfolio management function; or
 - (ii) potential conflicts of interest are properly identified and disclosed to the investors of the private fund.

The most logical service providers for this function would be the banking institution or, in certain cases, the administrator that the Private Fund retains. This would allay any independence concerns and the function already aligns with the operational and regulatory requirements of a fund custodian.

As per DMS' interpretation of the legislation, DMS Bank is providing this service as an extension of its existing banking and custodial service offerings. DMS Bank will:

- Create a segregated account in the name of the fund to custody its assets via a correspondent relationship with State Street Global
- Provide title verification of assets for the Private Fund
- Maintain custodian records of purchases, sales etc for all custodied assets.
- Provide secure access to all custody data via customized portal.

(iii) Cash monitoring

A Private Fund has a choice of whether to conduct this function by:

- a. an administrator or another independent third party; or
- b. the manager or operator, or a person with a control relationship with the manager of the private fund, provided that –
 - (i) the cash monitoring function is independent from the portfolio management function; or
 - (ii) potential conflicts of interest are properly identified and disclosed to the investors of the private fund.

The most logical service provider for this function would be (i) appointed fund administrator or (ii) the banking institution that the Private Fund retains for its fund operating account. This would allay any independence concerns, and the function already

aligns with the operational and regulatory requirements of these providers. Additionally, the required data would already be within the possession of these institutions.

As per DMS' interpretation of the legislation, DMS Bank is providing this service as an extension of its existing banking and custodial service offerings. DMS Bank will:

- Ensure all cash of the Fund is booked in accounts with compliant credit institutions (this would apply only to external clients)
- Reconcile all cash flow movements and perform reconciliations on a daily basis, or when cash flow movements occur
- Implement appropriate procedures to identify, as of close of business each day, significant cash flow movements, in particular those inconsistent with Fund Operations
- Monitor on an on-going basis the outcomes of the reconciliations and notify the Fund/Manager if irregularity has not been rectified without undue delay
- Check the consistency of its own records of cash positions with the Manager/Fund.
- Receive information daily about payments made by or on behalf of investors upon the subscription of units
- Receive all relevant information to ensure that the payments are booked in cash accounts opened in the name of or for the benefit the Fund
- Reconcile the subscription orders with the subscription proceeds and the number of units/ shares with the subscription proceeds
- Reconcile the redemption orders with the redemptions paid and the number of units/ shares with the subscriptions paid
- Verify on a regular basis that the reconciliation procedure is appropriate
- Create and present cash monitoring reports to the fund's BOD, as appropriate.

(iv) Identification of securities

A private fund that regularly trades securities or holds them on a consistent basis shall maintain a record of the identification codes of the securities it trades and holds as specified in the PF Law and shall make this record available to the Authority upon request. Investment Managers should already be able to comply with this.

HOW CAN DMS HELP FUNDS COMPLY WITH THE PRIVATE FUND LAW 2020 REQUIREMENTS?

DMS can provide the following services to assist with meeting the new requirements:

- Initial consulting / scoping / gap analysis to assist managers when deciding what entities must be included in registration
- Registration services to collate and upload required documentation and provide information to CIMA via REEFS Portal
- Director/Governance services - providing upfront consultation on Four Eyes requirements and assisting in designing appropriate governance framework
- Safekeeping of fund assets via DMS Bank
- Cash-monitoring via DMS Bank
- Assist in sourcing third party service providers to fulfill audit and valuation requirements where necessary.
- AML Services

In addition, DMS can provide the following complementary services to fulfill existing obligations:

- International Tax Compliance (FATCA / CRS) services covering 23 jurisdictions
- Corporate Administration for SPVs domiciled in all key global jurisdictions
- European AIFM hosting solutions in Luxembourg, Ireland and UK.

SCHEDULE OF USEFUL INFORMATION

KEY DATES:

7 August 2020 - All Private funds, whether formed before or after the passage of the PF Law, must register with CIMA by this date.

30 June 2021 - All Private funds must file financial statements audited by a CIMA approved auditor by this date.

KEY PRIMARY SOURCES:

[PRIVATE FUNDS LAW 2020](#)

[CIMA NOTICE RE: PRIVATE FUNDS LAW, 2020 \("PFL"\) - Frequently Asked Questions](#)