



# **The New Regulatory Regime for Cayman Islands Close-Ended Funds**

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**June 2020**

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# What We Will Cover

- An introduction to the regulatory framework
- Classification analysis and a look at vehicles that fall inside and outside of the new regime
- Practical implications for fund sponsors – timing, next steps, documentation and registration
- An overview of the ongoing operating conditions

# Regulatory Framework In Cayman

1. Private Funds Law, 2020 (“PF Law”)
2. Private Funds Regulations, 2020; Private Funds (Fees) Regulations; Private Funds (Savings and Transitional Provisions) Regulations 2020
3. CIMA Rules – Segregation of Assets, Calculation of Asset Values, Marketing Materials (currently in draft) – align with IOSCO Principles 16, 25, 26 and 27. These rules also adopted by the largest global offshore and onshore fund domiciles, including the US and EU
4. CIMA FAQs – ongoing iterations being by CIMA

Note: Economic Substance Law does not apply to partnerships, investment funds or wholly owned SPV’s thereof

Anti-money laundering laws, FATCA/CRS and data protection laws do apply, in line with the other key global fund domiciles

# What Entities are In-Scope?

A "Private Fund" is :

any company, unit trust or partnership whose principal business is the offering and issuing to investors of its investment interests [participating, non-redeemable], 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 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, for reward based on the assets, profits or gains of the company, unit trust or partnership, but does not include certain specified regulated entities and any non-fund arrangements

# Current CIMA FAQ Interpretation of “Private Fund”

- FAQ’s contemplate various “elements or concepts”. Three key concepts of the definition of a Private Fund highlighted in RED in the previous slide - offering and issuing to investors of its investment interests, pooling of investor funds, aim of spreading investment risks
- Concepts then defined by certain key “characteristics”
- Private Funds *generally* must fulfil all three concepts to meet the definition of a Private Fund, however where a concept is missing from the definition, certain characteristics may still lead to the definition being satisfied e.g. spreading of investment risks still present through a single investment in a collective investment scheme or a single investment in a fund of fund that itself has spread its own investment risk through multiple underlying investments
- Substance over Form approach required

# Scope of the New Regime

## In-scope

A traditional multi-investor, multi-asset Cayman private equity fund vehicle would typically meet each of the elements of the definition of a Private Fund and would be clearly in-scope. Including:

- Main fund – company, ELP, unit trust
- Feeder funds – same as above
- Parallel funds (that offer / market the interests to external investors)
- Fund of Funds

Strategy agnostic: covers all closed-ended vehicles, including real estate

# Scope of the New Regime

## What about more complex PE structures?

- **AIVs** – is the vehicle formed for the purposes of making, holding and disposing of one or more investments wholly or mainly related to the business of that private fund and does it have the same (indirect) investors as its private fund? Note, AIVs attract an additional per vehicle annual fee
- **Master funds** – no "offering" of interests? No external investors?
- **Co-investment vehicles** – fact dependent: any fees? was the vehicle marketed in the PPM? single investment? single investor? Holding vehicle?

Note – collection of data on certain downstream group vehicles expected in the Fund Annual Return (FAR) and consolidated audited financials

# Scope of the New Regime

## Potentially out of scope (ultimately fact dependent)

- **Single investor** – no "pooling"? Must be noted in private fund's constitutive documents or other provisions/arrangements with legal effect
- **Single investment entities** – no "spreading investment risks"?
- **Self-managed entities** – if investors have day-to-day control over the acquisition, holding, management or disposal of investments, out of scope
- **Liquidating / distribution SPVs** – single asset? holding company? no offering?
- **Employee investment vehicles** –no "investors"? i.e. promoters, operators and proprietary investors excluded under the PF Law
- **Non-fund arrangements** – single family offices, holding vehicles, JVs, proprietary vehicles, securitization SPVs, sovereign wealth funds, preferred equity financing vehicles, others



# Scope of the New Regime

## In/outside scope?

- **Funds in wind-down** – CIMA expects registration by 7 August 2020, unless final distributions made by a Private Fund (but question fund "principal business" and "purpose" at late stage)
- **SPCs** – mix of closed-ended and open-ended portfolios – Mutual Fund or Private Fund? Single investor invested in the SPC (across all SPs) vs a single (but different) investor invested in each segregated portfolio? Single investment held by SPC (across all of its SPs) vs a single (but different) investment held by each segregated portfolio? Case by case analysis based on circumstances

# Scope of the New Regime

## In Summary

- Case by case analysis required
- Classification is fact and structure specific
- Substance over form approach taken by CIMA
- FAQs, Rules and guidance ongoing
- Evolving market approach

# In-Scope: What is the Deadline / Other Timing?

## Transitional period and beyond

- Existing entities (and new funds launching now) to submit registration applications by the end of the transitional period which is **7 August 2020**
- Post 7 August, new funds must submit application to CIMA within 21 days of accepting capital commitments
- Fund may not accept capital contributions in respect of its investments from investors until CIMA registered (note: potentially some flexibility where initial calls are for fees and expenses only)
- Notification of any material changes to be made to CIMA within 21 days after making the change/becoming aware of the change

# Registration Fees and Process

**Fees:** an initial application fee of US\$366 plus an annual fee of US\$4,269. Annual fee waived for year 2020 if registered on or before **7 August 2020**. No director registration fees or other hidden fees or disbursements

## Registration process and documentation:

- Supplement incorporating PFL Disclosures (if an existing PPM)
- Summary of Terms – (if no PPM and LPA cannot be filed)
- Constitutional Documents (e.g. LPA/M&A where no PPM, Supplement or SOT available to file)
- Auditor and Administrator (if necessary) consent letters
- Structure chart
- Investor notice (important for conflicts disclosures where no PPM/Supplement)
- GP / board resolutions
- Online portal application (Ogier)

# Operating Conditions under the PF Law

- **Valuation** – frequency must be appropriate, on at least an annual basis. Note CIMA's Rules on Calculation of Asset Values should be considered
- **Custody/Title Verification** – a custodian to custody, in segregated accounts, the “custodial fund assets”, to verify title to any other fund assets; and maintain a record of those other fund assets. Option to notify CIMA that it is *“neither practical nor proportionate to appoint a custodian having regard to the nature of the private fund and the type of assets it holds”* e.g. where no Custodial Fund Assets
- **Cash monitoring** – a private fund must appoint a person to: monitor the cash flows of the private fund; ensure that all cash has been booked in cash accounts opened in the name of the private fund; and ensure that all payments made by investors in respect of investment interests have been received

**Independence/Disclosure of Conflicts:** If valuations, custody or cash management are not performed by a third party, the function (or in the case of custody, the title verification of the fund assets) must be independent from the portfolio management function or the potential conflicts must be disclosed to investors (and CIMA may require verification of this function by a qualified, independent third party)

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## Operating Conditions under the PF Law

- **Annual audit** – signed off by a Cayman Islands auditor, submitted to CIMA within six months of the financial year end, together with Fund Annual Return. Expectation is for Asian based auditors to carry out substantive work with their Cayman office signing off on these audited accounts, in a similar fashion to the Cayman hedge fund industry
- **Securities identification** – a private fund that regularly trades securities or holds them on a consistent basis must maintain a record of the identification codes of the securities it trades and holds and make it available to CIMA upon request eg ISIN numbers
- **Four eyes policy** – private funds must to have at least two natural persons acting as, or for, the operator (board of directors, general partner etc.)

# Questions

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Ogier