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Collas Crill explains... Ongoing obligations of private funds in the Cayman Islands

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Ongoing obligations of private funds

There has been considerable change in the business environment for private funds in the Cayman Islands, most notably, the introduction of the Private Funds Act (as revised), which required previously unregulated closed-ended funds to be registered with CIMA as "private funds". This has increased the level of regulatory requirements and volume of ongoing obligations that private funds must adhere to.

The purpose of this Collas Crill explains is to provide those newly registered private funds with a guide on these obligations, to ensure not only that they remain within complete compliance, but can plan accordingly around the specific criteria and deadlines.

A private fund registered with Cayman Islands Monetary Authority (CIMA) under the Private Funds Act (Private Fund), can be structured as an exempted company, limited partnership, limited liability company or unit trust. The applicable ongoing obligations will vary depending on the structure chosen.

The key obligations relating to Private Funds are summarised below.

Registration with CIMA

All Private Funds must be registered with CIMA within 21 days of receiving capital commitments and before accepting any capital contributions.

Registration is through CIMA's REEFS web portal. The registration fee is US$365.85 and the annual CIMA fee is US$4,268.29.

Notifications to CIMA

CIMA is required to be notified within 21 days of any material change to information which was provided in a Private Fund's registration application, registered office changes or annual declaration.

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For example: A notice of Director change must be submitted to CIMA within 21 days. Once CIMA is notified, the change is immediately effected. Failure to comply may result in the application of financial penalties. A filing fee will be applied to process the change. If the Private Fund has failed to comply with the deadline, a penalty under the Private Funds Act of approximately CI$20,000/US$24,390 may be applied.

Annual filings and fees

Private Funds are required to file an annual return to CIMA and pay an annual fee on or before 15 January each year.

Failure to comply with the deadline, will result in a penalty equating to 1/12 of the annual fee due being applied each month that the payment remains outstanding. The annual fee is currently US CI$3,500 / US$4,268,29.

Financial statements and Fund Annual Return (FAR)

All Private Funds are required to have their accounts audited annually by a CIMA approved auditor. They are also mandated to submit their audited financial statement to CIMA, along with a Fund Annual Return (FAR), within six (6) months of the end of each financial year. The FAR fee is currently CI$300 / US$366.

A private fund will need to prepare annual accounts in accordance with the International Financial Reporting Standards or generally accepted accounting principles of the United States of America, Japan, Switzerland or a non-high risk jurisdiction and an audited set of accounts must be filed with CIMA within six months of the fund's year end.

Management and corporate governance

Private Funds established as exempted companies are required to have two directors whom must be natural persons. Alternatively, it may have one corporate director, provided such corporate director has a minimum of two directors who are natural persons. Where a Private Fund is established as an exempted limited partnership, its general partner must have two natural persons who as its directors of operators.

The board of directors (or, in the case of an exempted limited partnership, the general partner)has responsibility for monitoring and supervising the Private Fund's activities and affairs. This requires(without limitation), holding meetings at least twice a year, supervising all service providers, monitoring conflicts of interest and ensuring compliance with all applicable regulatory requirements.

Other general requirements

(i) Valuation

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A private fund must have appropriate and consistent procedures for the proper valuation of its assets. Valuations must be carried out at least once a year.

Valuations must be carried out by an independent third party, an administrator or the manager or operator of the fund. Where valuations are carried out by the manger or operator of the fund, the valuation function must be independent of the management function or where the function is not independent, potential conflicts of interest must be properly identified, managed, monitored and disclosed to investors.

Under the rule on "Calculation of Net Asset Values – Registered Private Funds", Private Funds must disclose their valuation policy within their constitutional documents, marketing materials or other form of investor communication. CIMA may exempt a Private Fund from this valuations requirement, either absolutely or subject to such conditions as CIMA may determine.

(ii) Safekeeping

A private fund must either:

- appoint a custodian to hold the custodial fund assets which custodian must verify that the fund holds title to any other fund assets and maintain a record of those assets; or
- notify CIMA that it is neither practical nor proportionate to appoint a custodian having regard to the nature of the assets which it holds.

Where a private fund notifies CIMA that it is neither practical nor proportionate to appoint a custodian, the Private Fund must appoint an independent third party or the manager or operator of the fund to carry out the title verification function. If this function is carried out by the manager or operator, it must be independent from the portfolio management function or where the function is not independent, potential conflicts of interest must be properly identified, managed, monitored and disclosed to investors.

(iii) Custody

The Private Fund shall appoint a custodian to hold and verify the title of assets which are capable of being held physically or in registered form via a custodian account, unless it is not practical nor proportionate given the nature of the Private Fund and the types of assets held. If the verification of the assets are not performed by a custodian or an independent party, CIMA has the authority to request that the title of assets be verified by an auditor or professionally qualified independent third party.

The appointed custodian must be authorized in an approved jurisdiction to provide custody services and not have a control relationship with the manager or operator of the Private Fund.

(iv) Cash monitoring

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The cash monitoring consist of cash flows, cash accounts receipts and payments to investors. The function can be conducted by an independent third party, custodian, administrator, manager or operator of the Private Fund subject to appropriate operational independence and disclosure of potential conflicts of interest to investors.

In instances where the cash monitoring duties are not performed independently, CIMA has the authority to request that the cash monitoring obligation be verified by an auditor or professionally qualified independent third party.

Identification of securities

A Private Fund that regularly trades securities or hold them in a consistent basis, must maintain records of the identification codes, such as International Securities Identification Number (ISIN) or a Legal Entity Identifier code (LEI) and make the records available to CIMA upon request. CCCS can assist with the registration of an LEI and in obtaining ISINs from the Cayman Islands Stock Exchange.

Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) regulations

The Cayman Islands AML/CFT framework requires all persons engaged in relevant financial businesses (including Private Funds) to implement policies and procedures which allow for:

1. Customer due diligence;
2. Recordkeeping;
3. Implementing a risk-based approach;
4. Ongoing monitoring;
5. Complying with lists of targeted financial sanctions;
6. Internal reporting of suspicious activities; and
7. Appointment of Anti-Money Laundering Officers – namely an Anti-Money Laundering Compliance Officer (AMLCO), Money Laundering Reporting Officers (MLRO) and Deputy MLRO (DMLRO).

Private Funds also have ongoing obligations in relation to ensuring that all persons receive adequate AML/CFT training and that the entity undergoes a periodic AML/CFT Internal Audit that covers the following:

1. The adequacy of AML/CFT policies and procedures, systems and controls implemented;
2. The maintenance of client identification and risk assessment procedures for onboarding;
3. The adequacy of the periodic reviews of its operations and clients;
4. The existence of internal reporting procedures, including the maintenance of all associated logs; and
5. The suitability and independence of AML Officers (including gap analysis of outsourcing and evidence of AML training).

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FACTA/CRS

A Private Fund registered under the Private Fund Act (as revised), is subject to Foreign Account Tax Compliance Act (FATCA) and Common Reporting Standard (CRS) obligations.

Entities classified as a Financial Reporting Institutions (FRI) will have the following obligations to the Cayman Islands Tax Information Authority (TIA) for the purposes of FACTA/CRS compliance:

1. To adopt written policies and procedures;
2. To appoint a principal point of contact (PPOC) and an authorised person (AP);
3. To register on the Internal Revenue Service (IRS) and to obtain Global Intermediary Identification Number (GIIN);
4. To register on the Department of International Cooperation (DITC) portal;
5. To identify those account holders or controlling persons that are caught within the reportable or participating jurisdictions;
6. To perform the relevant due diligence on the self certification forms completed by each investor to ensure it meets the requirements;
7. To prepare and submit the return (if applicable) prior to 31 July each year, for the calendar year to which such return relates. For those Private Funds that are in liquidation, dissolved, struck off or being wound up must proceed with reporting prior to closing;
8. To retain all records relating to self-certifications, returns and supporting due diligence documentation for a period of fives years as per the Cayman Islands Statement of Guidance on Nature, Accessibility and Retention of Records; and ix. To submit a CRS Compliance Form annually.

Data protection

The Data Protection Act (DPA) applies to legal and natural persons that process and/or handle personal data.

The DPA provides data subjects with specific rights which enables data subjects to determine how their personal data is processed. A Private Fund must implement internal procedures and policies to ensure that it complies with the DPA. The internal procedures and policies should include information addressing how data is obtained, stored, processed, protected, a data retention schedule, how data subjects can access their personal data and how data breaches are handled.

Economic substance

The International Tax Co-operation (Economic Substance) Act (as revised) (ESA) requires that "relevant entities" that carry on "relevant activities" must demonstrate that such entities have ‘economic substance’ (ES test) in the Cayman Islands for each relevant activity that is being conducted.

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Private Funds are caught under the definition of "Investment Fund" which means that they will not be a relevant entity and will not be required to comply with the ES test.

An "Investment Fund" is defined as entities whose principal business is the issuing of investment interests to raise funds or pool investor funds with the aim of enabling a holder of such an investment interest to benefit from the profits or gains from the entity's acquisition, holding, management or disposal of investments (including any entity through which an investment fund directly or indirectly invests or operates), but does not include a person licensed under the Banks and Trust Companies Act (as revised) or the Insurance Act, (as revised), or a person registered under the Building Societies Act (as revised) or the Friendly Societies Act (as revised).

An investment fund is required to notify the TIA of the date of the end of its financial year and to provide any CIMA Registration Numbers, GIIN or FI Number.

De-registration

In order for a Private Fund to de-register, CIMA will require that the Private Fund to be in good standing, having paid all fees due and submitted all filings prior to de-registration. A filing fee of approximately CI$600/ US$732 is applied.

Deadlines 2021 - 2022

15 January 2021: Private Fund fees and declaration deadline.

15 January 2021: Audited Financial Statement and FAR fees Filings.

31 January 2021: CCCS to submit fees and annual return to the registrar of Companies.

30 April 2021: FATCA/CRS registration for new entities in scope .

31 July 2021: FATCA/CRS Reporting Deadline (2020 Reporting period).

15 September 2021: CRS Compliance Form deadline (2019 and 2020 Reporting period). This was moved from 31st March 2021.

15 December 2021: CCCS must be notified of any material changes to the entity, that will be required to be submitted as part of the 2021 declaration.

31st December 2021: Directors to pay annual fees.

31st December 2021: CCCS invoice fees due.

31st January 2022: Economic Substance 2021 Notification due.

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About this guide

This guide gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.

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