COLLAS CRILL

Regulation and compliance issues faced by Cayman Island trustees

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This article was produced by Andrew Peedom of Collas Crill and Michael Halsey of JTC for Trust Cayman 2021. To view this publication in full, click here.

Cayman has faced an increased regulatory burden as a result of a global drive for transparency and wider information exchange. Emma Parker caught up with Andrew Peedom, Counsel with law firm Collas Crill in Cayman, and Michael Halsey, Managing Director of JTC's Cayman office, to get an update.

From the very beginnings of establishing itself as a global financial centre, Cayman was an early adopter and took a proactive approach to regulation. At the same time Cayman has always sought to ensure that a level playing field is maintained globally, and that regulation does not become too much of a burden on clients, or cause Cayman to be at a competitive disadvantage when compared to other international financial centres both on and offshore.

As Michael Halsey, Managing Director of JTC in Cayman, explains: "It is a balancing act for Cayman when it comes to regulation; we of course want to ensure that we continue to meet and exceed global standards in our approach to anti-money laundering, financial reporting and transparency, but we need to ensure Cayman does not become uncompetitive.

"Increased regulation inevitably leads to increased costs. For clients where cost is the primary motivating factor, they would probably not choose a jurisdiction like Cayman and may well select a different jurisdiction where both the regulatory burden and the associated administration costs are lower.

"The quality business will continue to come to Cayman, and quality service providers will thrive. There is likely to be some consolidation in the market as smaller service providers are less equipped to deal with the increased regulatory workload, but the well-staffed and well-resourced businesses will have no issues." Cayman enjoys a good level of cooperation and partnership between the public and private sector. The Government and the private sector service providers have worked well together for many years to ensure Cayman is at the forefront of global standards and proactive in its response to global regulation.

CRS update

A review of regulatory changes that took place in 2020 isn't complete without touching on updates in relation to the Common Reporting Standards (CRS). Halsey comments: "The CRS reporting portal, which we have been waiting on for some time, is now open and there are more countries that we now have to report on, so CRS reporting is an ever changing task.

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"In addition the Cayman Government is planning on implementing a new CRS Compliance Form in March 2021, whereby every entity that has to report for CRS will have to produce a CRS Compliance Certificate. We are not clear whether this will be a common standard across all competitor jurisdictions, but it's worth stating that Cayman has always been very compliant with both CRS and FATCA reporting, and in fact Cayman's first exchange of information with the USA goes back to 1996."

Economic substance

Cayman has been a member of the OECD Inclusive Framework for Base Erosion and Profit Shifting (BEPS) for some time and has enacted its Economic Substance (ES) Law in response to requirements for companies with geographical mobile activities.

Andrew Peedom is Counsel with Collas Crill in Cayman, and has been watching the implementation of ES legislation with interest. He commented: "Cayman's economic substance law doesn't apply directly to trusts, but does apply to a relevant entity, which could include a company within a trust structure. Since the law came into force in 2019, we have had to look at whether entities are carrying out 'relevant activities' identified in the law and if they do, there are additional reporting requirements."

Halsey comments that: "Cayman has not been as affected by economic substance legislation as some IFCs. Trustees in Cayman have been talking to their clients about substance since long before the laws were enacted, and we have many clients who not only have their structures in Cayman, but their businesses are headquartered here, and we have many clients who have physically moved here with their families too. "Cayman is a very easy sell and clients are very happy to move here or run a business from here."

Cayman's beneficial ownership regime

Cayman's beneficial ownership regime applies to certain companies, but not trusts. Following changes to Cayman's Companies Law and the Limited Liability Companies Law, from October 2020, members of the public have been able to apply for basic information about a Cayman company on payment of a fee of USD 61. However, details about the beneficial ownership of companies remains unavailable to the public.

In October 2020 Cayman's regulator, the Cayman Islands Monetary Authority (CIMA) issued a Beneficial Ownership Enforcement Manual, which outlines the statutory powers that the Cayman Companies Registry has to impose administrative fines for breaches of the beneficial ownership regime.

Halsey commented that: "There is now more information required under the beneficial ownership regime, and there are heavy fines in place for non-compliance, in line with many other jurisdictions."

Peedom added: "Cayman has taken a balanced approach to the implementation of our beneficial ownership regime. It's demonstrated that the jurisdiction appreciates the risks associated with making certain information publicly available, thus ensuring that we don't leave clients exposed to 'fishing expeditions' that could cause security issues for them. Given Cayman's proximity to Latin America and Central America, there are some serious and legitimate security concerns and a need to ensure that these clients are protected."

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Regulatory fines

Cayman trustees were also informed in June 2020 that CIMA has been given additional teeth when it comes to fines for regulatory breaches, which cover a raft of legislation including the Insurance Law, Private Trust Companies Law and Securities and Investment Business Law.

The value of the fines which might be imposed has increased, and Halsey thinks that: “This will ensure a continued flight to quality, where only the firms with necessary resources and infrastructure will prosper, given the increased regulatory burden and the commercial threat posed by these high-level fines.”

Private Funds Bill

The advent of Cayman’s Private Funds Bill in 2020 brought Cayman in line with other international financial centres, which required an independent audit of single investor funds. Peedom commented that: “This has been a positive move for the jurisdiction, as it balanced the need for efficiency from investors, with a desire for transparency and security. It was implemented to ensure that investor confidence in Cayman continued, and to ensure good corporate governance, and I think it has been a great example of the fact that entities and investors favour Cayman as a jurisdiction, and appreciate the good corporate governance and US-based manager confidence that Cayman fund structures offer.”

Virtual asset service provider legislation

Halsey explains that: “The flight to quality has been extended to the new virtual asset legislative framework, which came into force in October 2020. The new legislation was implemented to attract and maintain good crypto-business in the Cayman Islands. The fact that Cayman is leading the way at such an early stage will ensure investor confidence.”

Privacy in Cayman Islands litigation

Another important aspect of Cayman’s legal landscape is the court’s ability to understand the need for trust litigation to remain confidential when required. One of the key drivers for confidentiality is often security issues. Peedom explains that: “A departure from the general principle of open justice requires a party to demonstrate to the court why there are legitimate concerns about trust proceedings being open to the public. The fact the Cayman court is prepared to order that such proceedings should be heard in private and the names of the parties should be anonymised certainly gives clients with assets held in Cayman trust structures a degree of confidence in the jurisdiction.”

What’s next?

Looking ahead to 2021, it is anticipated that the level of regulation in Cayman will continue to evolve and develop at a rapid rate. There are some additional proposed changes to legislation and regulations around the submission of annual accounts, which are yet to be confirmed.

Halsey sums up that: “The regulatory landscape has been extremely fluid for the past few years. This is expected to continue, and Cayman will continue to respond and adapt. The key thing is that everyone wants to

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be seen as the leading IFC globally and we have the resources and expertise to make this happen."

The Blacklist

In closing, Cayman was surprised to find itself temporarily on the EU Blacklist in early 2020, and its swift removal was expected by everyone in Cayman's financial services industry. Peedom commented: "Cayman has positioned itself as an early adopter and worked hard to ensure compliance with EU directives, and its removal from the blacklist has validated the steps that were already being taken to implement new legislation and regulations in line with the latest EU recommendations."

Halsey added: "Since Cayman's removal in October 2020, there has been a renewed commitment from the government, the financial services industry and Cayman Finance to ensure that Cayman avoids any further 'foot faults' with the EU. Cayman's financial services industry is diverse and covers trusts and private wealth, insurance, investment funds and banking. All of these industries work extremely hard individually, and as a whole, to champion the continued recognition of Cayman as a world-class financial services centre."

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