

REGULATORY UPDATE

CAYMAN ISLANDS – Q4 2022

INTRODUCTION

The regulatory environment continues to remain active and this update from Appleby's Cayman office takes a closer look at the significant developments in the past quarter, including the new regulatory procedures from the Cayman Islands Monetary Authority (**CIMA**), the EU's "new" position¹ on public access to beneficial ownership registers and developments regarding the imposition of sanctions. We hope you will find its contents useful.

HOT TOPICS

LIMITED LIABILITY COMPANIES ACT

The Cayman Islands Limited Liability Companies Act was amended on 19 October 2022 by the Limited Liability Companies (Amendment) Act, 2022 (LLC Amendment Act) which came into operation on that date.

The LLC Amendment Act no longer requires an LLC to file a certificate of amendment on membership changes with the Registrar; however, the LLC is still required to maintain at its registered offices, the names and addresses of each person who is a member, date they became/ceased to be a member(s) and the nature of their voting rights.

ECJ SAYS PUBLIC ACCESS TO BENEFICIAL OWNERSHIP REGISTERS INVALID

The European Court of Justice's (**ECJ**)² recent judgment held that a directive³ requiring Member States to ensure that beneficial ownership information of corporate and other legal entities were accessible in all cases and to any member of the general public was invalid. The directive was held to be invalid

¹ The Court of Justice of the European Union

² [2022] EUECJ C-37/20 - 22 November 2022, Luxembourg

³ Directive (EU) 2015/849 (as amended)

UPCOMING FILING DEADLINES

31 DECEMBER 2022

Economic Substance Return (ESR) Deadline for in-scope entities having a financial year-end of 31 December to file their ESR with the DITC for the 2021 reporting year.

As the deadline is a Saturday, we would suggest clients submit their ESR by **Friday 30 December 2022**.

In-scope entities are 'relevant entities' conducting 'relevant activity' in accordance with the International Tax Cooperation (Economic Substance) Act (as revised).

1 January 2023

CIMA Annual Fees Due

Entities and directors still registered with CIMA on 1 January will be required to pay full annual fees to CIMA even if they de-register at some point during 2023.

as it was incompatible with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (**Charter**).

The ECJ's decision has cast serious doubts on whether mandated public access to beneficial ownership registers can remain in force as they are incompatible with the fundamental rights to a private and family life (Article 7 of the Charter) and the right to the protection of personal data (Article 8 of the Charter).

This decision does not bind the UK or the Cayman Islands as since *Brexit*, ECJ decisions are not binding on English courts and the Charter was not incorporated into UK law as part of the European Union (Withdrawal) Act 2018. However, English courts and the UK government will need to consider this decision as the right to a private and family life remains in UK law as part of the 1998 Human Rights Act and beneficial ownership registers have featured heavily in the government's policy and approach to the reduction of financial crime. In the Cayman Islands the right to Private and Family Life is also enshrined within Article 9 of the Constitution.

As a result of the judgment, EU Member States have reportedly already started to restrict access to their beneficial ownership registers for companies.

The Cayman Islands Government is currently considering industry feedback in relation to the Beneficial Ownership Transparency Bill, 2022 and associated regulations, which propose to consolidate all beneficial ownership legislation into one act. On the 30 November 2022, the Cayman Islands Ministry of Financial Services (**MFS**) stated that in line with the request of the United Kingdom, and with the assistance of external counsel, they were *currently reviewing the ECJ judgment to determine if there are any implications with respect to the proposal to introduce public beneficial ownership registers*⁴.

We shall have to wait and see what the Cayman Islands government's final position is in light of the ECJ decision.

NEW RESTRUCTURING REGIME

The Companies (Amendment) Act, 2021 came into force on 31 August 2022.

The amendments create a new standalone restructuring regime, separate from the existing company winding-up procedures. Under the new regime, directors will be empowered to petition the Court for the appointment of a restructuring officer if the company is (or is likely to become) unable to pay its debts and intends to present a compromise or arrangement to its creditors.

⁴ <https://www.mfs.ky/news/statement-on-eu-court-of-justice-ruling-on-business-registers/>

The directors will be empowered to do so without the sanction of a resolution of the company's members or an express power permitting such action in the company's articles of association.

The filing of the petition will trigger an automatic moratorium on claims against the company. Leave of the court would be required to bring any action, proceeding or resolution for the winding up of the company once the petition has been filed. The moratorium will apply not only to proceedings brought against the company in the Cayman Islands, but also to any proceedings brought in a foreign jurisdiction. However, the position of secured creditors would not be impacted by the amendments; a secured creditor remains free to enforce its security in accordance with the terms of the security documents without having to seek leave of the court.

The amendments also amend the existing company winding-up procedures so that where expressly provided for in the articles of association of a company, the directors of a company incorporated before 31 August 2022 have the authority to (a) present a winding up petition; or (b) where a winding up petition has been presented, apply for the appointment of a provisional liquidator, on behalf of the company without the sanction of a members' resolution, provided that the articles of association of the company may expressly remove or modify this directors' authority in respect of (a) and/or (b).

INVESTMENT FUNDS & SANCTIONS

NEW CIMA RULE & REGULATORY PROCEDURE FOR THE CANCELLATION OR DEREGISTRATION OF A FUND

CIMA issued a new **Rule** and Regulatory Procedure in August 2022 for the cancellation of licences or deregistration of regulated Mutual Funds and registered Private Funds (**regulated funds**).

The principal aim of the changes is to streamline the process for the cancellation and deregistration of regulated funds.

Regulated funds must be in good standing with CIMA when they file their deregistration application under the new Rules. Good standing requires that funds must have paid all prescribed fees and submitted all required audited financial statements and must not have any outstanding queries or regulatory filings with CIMA.

Consistent with the previous rules, regulated funds must still notify CIMA when they intend to cease carrying on business or have ceased carrying on business

within 21 days from the date the fund cease to carry on business. CIMA may levy an administrative fine for failure to comply with this requirement. Accordingly, please reach out to Appleby at the early stages whenever you are considering a restructure or whether to cease carrying on business as a regulated fund.

For further information click this [link](#).

GENERAL LICENCE GRANTED UNDER THE RUSSIAN SANCTIONS REGIME

On 4 October 2022 the Governor of the Cayman Islands issued General Licence [GL/2022/0001](#) (GL)⁵ for 'Relevant Investment Funds'.

A 'Relevant Investment Fund' is an investment fund whose assets are frozen under the Modified Regulations⁶ due to its assets being 50% or more owned or controlled by a Designated Person.

Where a 'Relevant Investment Fund' has a Designated Person (a Designated Person being a sanctioned investor) which has been identified and confirmed by the fund, the fund manager or by its administrator, the Relevant Investment Fund must: (i) freeze the assets and funds of the Designated Person; (ii) report the issue to the Cayman Islands Financial Reporting Authority; and (iii) not take any action which could be considered to be 'dealing' with the assets of the sanctioned investor, nor make any funds or economic resources available to them.

The GL does not assist where there are minority holdings in a fund held by a Designated Person. Further, the GL does not assist most funds as it provides only for the redemption/withdrawal of non-designated persons or non-sanctioned investors.

As a result of the above, once the Designated Person has been identified the Relevant Investment Fund has few options that it can take in respect of that investor once it has frozen the assets.

The GL, subject to certain conditions, allows a Relevant Investment Fund or the fund manager to:

⁵The GL was issued under Regulation 64 of the UK's Russia (Sanctions) (EU Exit) Regulations, 2019, as extended to the Cayman Islands, with modifications, by the Russia (Sanctions) (Overseas Territories) Order, 2020 (the Modified Regulations).

⁶ Russia (Sanctions) (EU Exit) Regulations, 2019, as extended to the Cayman Islands, with modifications, by the Russia (Sanctions) (Overseas Territories) Order, 2020 (Modified Regulations).

- (i) redeem, withdraw or otherwise deal with an investment interest of a person that is **not** a Designated Person or owned or controlled directly or indirectly by a Designated Person.
- (ii) make payments for the basic needs of the Relevant Investment Fund, including the payment of insurance premiums, accounting fees, registered office fees, corporate & regulatory fees, directors' fees and of course legal fees or any other reasonable routine expense from frozen accounts.
- (iii) make payment for reasonable fees or reasonable service charges arising from the routine holding and maintenance of the Relevant Investment Fund's frozen funds or economic resource

Where the GL is relied upon, the following notification requirements apply:

- (i) The Governor's Office must be notified by email to GovernorsOffice.Cayman@fcdo.gov.uk as soon as practicable the first time the GL is relied upon.
- (ii) Monthly reporting to the Governor's Office on the 16th of each month after the initial notification in (i) above, setting out the use of the GL in the preceding month.
- (iii) If the Relevant Investment Fund is regulated by CIMA, they must also notify CIMA of the use of the GL within three business days. Notifications to CIMA should be e-mailed to: generallicencenotification@cima.ky.

The GL is currently in effect and will expire on 4 April 2023.

COMMON REPORTING STANDARD (CRS)

DITC REQUEST FOR INFORMATION & ISSUING BREACH NOTICES

In recent months Appleby have become aware that the Cayman Islands Tax Information Authority's Department for International Tax Cooperation (DITC) have issued requests for information and subsequent breach notices where this information has not been provided. These requests and breach notices were issued where there had been a failure to respond appropriately to the DITC.

The DITC generally communicate and send requests for information via e-mail and as a result a request for information is generally sent to the email address

provided as the principal point of contact (PPoC) on the DITC Portal. Information requests may also be sent to the entity's Authorising Person (AP) as provided on the DITC portal. Do keep these e-mail contact addresses up-to-date and monitored regularly.

Failing to respond appropriately to a request for information from the DITC is a breach of the (Common Reporting Standard) Regulations (2021 Revision) and can result in an administrative penalty of CI\$10,000 (approximately US\$12,195).

THE CAYMAN ISLANDS MONETARY AUTHORITY

ADMINISTRATIVE FINES

CIMA continues to impose administrative fines for both prudential and AML breaches, with four fines being imposed on both individuals and companies during this quarter. In this current regulatory environment, it is now more important than ever to seek regulatory advice from Appleby's regulatory and industry experts as early as possible.

During Q4 the Cayman Islands Grand Court presided over two matters that involved CIMA imposing administrative fines on a regulated entity. These matters are reported in brief below.

INTERTRUST SETTLES ADMINISTRATIVE FINE WITH CIMA

Under the terms of a consent order filed on the 10 October 2022, and published by the Grand Court on 7 November 2022, Intertrust Corporate Services (Cayman) Limited has agreed to pay fines totalling approximately US \$5.1 million imposed on them by CIMA for a series of breaches of the AMLRs.

STERLING ASSET MANAGEMENT INTERNATIONAL

On the 6 May 2022 CIMA imposed discretionary administrative fines against Sterling Asset Management International Limited (**Sterling**) totalling approximately US \$359,000 for breaches of the AMLRs.

On the 11 November 2022, the Grand Court of the Cayman Islands granted Sterling leave to appeal its fine, with the fine being stayed pending the appeal.

In his judgment and whilst granting leave, Justice Ian Kawaley stated that CIMA as a statutory body must provide reasons or an explanation for: (i) imposing a fine and exercising its fine discretion; and (ii) the quantum of the fine as the *"regulations seemed to require a quasi-judicial explanation."*

In addition, Kawaley J. further stated that CIMA as a statutory authority is subject to section 19 of the Cayman Islands Constitution which creates a constitutional right for Sterling or anyone else in their dealings with CIMA to receive reasons for administrative decisions, which made it arguable that reasons for rejecting matters should be explained.

This case has highlighted the legal requirement of CIMA needing to give reasons for all administrative decisions. We will be watching this case very closely.

2021 REVIEW OF TCSPs COMPLIANCE WITH THE AMLRs: SANCTIONS SCREENING POLICIES AND PROCEDURES

On the 17 June 2022 - CIMA published an **information circular** reminding all Trust and Corporate Service Providers (TCSPs) of their role in the prevention of financial crime. This includes ensuring that the TCSP's clients – whether fund vehicles, virtual asset service providers, correspondent banks or other legal persons and arrangements - are not subject to, or seeking to circumvent, targeted financial sanctions ("TFS").

When establishing a business and on an ongoing basis, TCSPs are required by the AMLRs to assess whether the client, its directors, shareholders, beneficial owners, and other related parties are, or are involved with, persons or entities designated under the TFS applicable in Cayman Islands. Upon identification of such persons or entities, TCSPs and other financial institutions are required to freeze such accounts, funds or economic resources and report to the Governor, through the Financial Reporting Authority ("FRA").

NEW BANK ACCOUNTS FOR CIMA

On 17 August 2022, CIMA published an **information notice** informing regulated entities of changes to its bank account numbers for the payment of all fees.

Effective immediately, all electronic fee payments to CIMA should be processed using the new bank account numbers for domestic electronic transfers and wire transfers.

As of 1 October 2022, CIMA will no longer accept fee payments to the previous bank accounts (RBC # 06975-1141266 KYD & RBC #06975-2632008 USD).

Please note that payments currently in transition via the previous bank account number(s) will still be accepted and recorded accordingly.

Please do not hesitate to contact us should you wish to receive additional information.

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ABOUT APPLEBY

Appleby is one of the world's leading international law firms. Our global teams of legal specialists advise public and private companies, financial institutions and private individuals. We are a full-service law firm providing comprehensive, expert advice and services across corporate, dispute resolution, property, regulatory, and private client and trusts practice areas. We work with our clients to achieve practical solutions, whether from a single location or across multiple jurisdictions. We operate in 10 highly regarded and well-regulated global locations. These include the key international jurisdictions of the Cayman Islands, Bermuda, the British Virgin Islands, Guernsey, Isle of Man, Jersey, Mauritius, and the Seychelles, as well as the international financial centres of Hong Kong and Shanghai. Our global presence enables us to provide comprehensive, multi-jurisdictional legal advice at the times most beneficial to our clients. We are regularly recognised for our professionalism, integrity and excellent client service, and these are the values we pride ourselves on and are at the core of our business.

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