

APPLEBY

Q4 2019

**CAYMAN ISLANDS
REGULATORY UPDATE**



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INTRODUCTION

Appleby Cayman is pleased to introduce our new Regulatory Newsletter. The first edition of this quarterly publication focuses on key topics for Q4 2019, including Cayman's new Data Protection Law, public access to director and officer registers and the latest on economic substance. We hope you will find its contents useful. Stay tuned for our next instalment, The Cayman Regulatory Year in Review: 2019.

HOT TOPICS

DATA PROTECTION LAW, 2017 -IN FORCE NOW

The Cayman Islands' Data Protection Law, 2017 (**DPL**) came into force on 30 September 2019. Cayman entities that have not already done so should take immediate steps to ensure they understand their obligations under the new law. Policies and procedures should be put in place to ensure the proper protection of all personal data under the Cayman entity's control and to create an effective governance regime for approving, overseeing, implementing and reviewing those policies. With reputations and criminal liability at stake, Cayman entities need to get it right.

DATA CONTROLLERS

Personal data is defined widely under the law to include any data relating to a living individual which allows that individual to be identified. Under the DPL, personal data must be processed fairly and lawfully and used for a legitimate purpose that has been notified to the data subject in advance. Personal data holdings should not be excessive in relation to the purposes for which they are collected and should be securely purged once those purposes have been fulfilled. If personal data is processed for any new purposes, this processing should only be undertaken if fresh consent is obtained or there is another legal ground authorising that processing.

Data controllers (those entities or individuals who alone or jointly with others determine the purposes, conditions and manner in which any personal data are, or are to be, processed) are required to set out the purposes for which personal data is being collected and details of whom that data may be shared with.

THIRD PARTY SERVICE PROVIDERS

In an age where highly sensitive information can be exchanged at the touch of a button, data protection issues must be considered before any transfers of personal data are made to third parties. There is no substitute for proper due diligence on the systems, policies and procedures of those providers to ensure that personal data is handled appropriately and securely. Regular physical audits and independent testing of a service provider's controls would also be advisable.

Contractual provisions should be put in place between the Cayman entity (as the data controller) and the third party service provider (as data processor) to

IMPACT ON THE INVESTMENT FUNDS INDUSTRY

The average investment fund potentially generates and retains a large amount of personal data. Fund managers may also hold proprietary research and investment strategies, proprietary and personal information about markets, companies and individuals, high value email and contact lists and net worth information for individuals.

While it is very unlikely that a fund manager will use personal data other than for the purposes of processing an investment and meeting legitimate reporting and record keeping obligations, the fund must set out the purposes for which personal data is being collected and details of whom that data may be shared with.

Recommended best practice would be for this information to be set out in a separate privacy notice which can be provided with the offering memorandum and subscription documents.

ensure that any personal data is processed only for authorised purposes, that all data is stored and transmitted securely and that loss containment and recovery practices are in place in the event of a data breach. Use of subcontractors by the service provider should be prohibited without the prior approval of the Cayman entity, as applicable.

ACHIEVING COMPLIANCE

The DPL gives individuals the right to access personal data held about them and to request that any inaccurate data is corrected or deleted. Cayman entities will need to have policies and procedures in place to manage these requests. The law also obliges businesses to cease processing personal data once the purposes for which that data has been collected have been exhausted.

Prescribed data retention periods are not set out in the DPL but an analysis will need to be undertaken to determine how long data should be kept for. Similarly, it will be important to evaluate how personal data can be securely deleted once the purposes for holding it have been fulfilled.

Implementing a data protection compliance programme involves engaging with the right stakeholders and creating an effective governance regime for approving, overseeing, implementing and reviewing the various policies. A coordinated chain of command should be developed, together with written reporting procedures, authority levels and protocols including seeking and complying with legal advice. The appointment of official roles such as a Data Protection Officer is not mandatory under the DPL but is also recommended.

Breaches of the DPL could result in fines of up to CI\$100,000 (US\$122,000) per breach, imprisonment for a term of up to 5 years, or both. Other monetary penalties of up to CI\$250,000 (US\$305,000) are also possible under the law. The Office of the Ombudsman, which has responsibility for enforcing the new law, has issued a Guide for Data Controllers to assist with the implementation process.

Protecting personal data is now business critical for Cayman entities. Even if monetary losses are not sustained as a result of personal data being mishandled, the reputational damage to a business following a breach could be devastating. Appleby would be pleased to assist any persons seeking advice on complying with the requirements of DPL. Please contact a member of our Regulatory Team or your usual Appleby contact.

DIRECTORS AND OFFICERS OF CAYMAN COMPANIES AND LLCs NOW PUBLIC

The Companies (Amendment) Law, 2019 has introduced a new section 55A that requires the Registrar of Companies to make a list of the names of the directors and alternate directors (if any) of a company available for inspection by any person, with Schedule 5 (Fees) now including a fee of \$50 payable for each inspection of that list. Equivalent requirements apply in respect of managers of an LLC. Inspection of the list of directors/managers will be facilitated at a kiosk at the Office of the Registrar. The lists will not be accessible online. These requirements came into force on 1 October 2019.

ECONOMIC SUBSTANCE

ECONOMIC SUBSTANCE: INTERNATIONAL TAX CO-OPERATION (ECONOMIC SUBSTANCE) LAW, 2018

The Cayman Islands' International Tax Co-operation (Economic Substance) Law, 2018 (**ES Law**) and The International Tax Co-Operation (Economic Substance) (Prescribed Dates) Regulations, 2018 (**ES Regulations**) came into force on 1 January 2019. The regime became applicable immediately to new relevant entities incorporated or registered after that date. For existing relevant entities, there was a six-month transition period which ended on 1 July 2019.

The ES Law is supplemented by the Cayman Islands guidance for economic substance for geographically mobile activities (**ES Guidance Notes**), version 2.0 of which was published on 30 April 2019.

A "relevant entity" is only in scope of the Cayman Islands economic substance requirements if and to the extent that it conducts any "relevant activity". Cayman Islands exempted companies, limited liability companies (**LLCs**), limited liability partnerships (**LLPs**) and foreign companies registered in the Cayman Islands will be considered to be "relevant entities" unless they meet the definition of "investment fund" or "domestic company" under the ES Law, or are "tax resident outside of the Cayman Islands", as contemplated under the ES Law and within ES Guidance Notes.

Relevant activities include banking business, distribution and service centre business, financing and leasing business, fund management business, headquarters business, holding company business, insurance company business, intellectual property business and shipping business.

Whilst many clients have already undertaken the exercise of classifying their Cayman Islands entities for purposes of the ES Law, we continue to get enquiries from persons with existing entities seeking guidance on the regime and its application to their circumstances. We strongly recommend that anyone who has not yet addressed the implications of the ES Law on their Cayman entities do so as a matter of urgency. Appleby would be pleased to assist in this endeavor. Please contact a member of our Regulatory Team or your usual Appleby contact.

Additionally, we encourage those who have already undertaken the classification exercise to remain mindful of certain developments that are still anticipated to occur before year end, as discussed below.

ES REGULATIONS AND GUIDANCE NOTES

In an industry update circulated on 26 July 2019, the Department of International Tax Cooperation (**DITC**) advised, among other things, that version 3.0 of the ES Guidance Notes was being drafted and that the next iteration of the notes would include sector-specific guidance for each relevant activity, as well as guidance for investment funds. Working groups from industry sector groups met with the DITC at the end of August 2019. The consultation period has now concluded, and version 3.0 of the ES Guidance Notes is anticipated to be released towards the end of October or at the beginning of November 2019.

ECONOMIC SUBSTANCE ONLINE TOOL

Appleby has an online Economic Substance Entity Classification Questionnaire which offers guidance through the economic substance regime of the Cayman Islands (as well as the regimes of Bermuda, the BVI, Guernsey, the Isle of Man and Jersey). It was developed by our legal and regulatory experts and is available online free of charge. If an entity is in scope of a jurisdiction's economic substance requirements, the Questionnaire will provide a summary of steps required to meet those requirements.

On 10 September 2019, the Cayman Islands government (through Cabinet) amended the ES Regulations to include provisions relating to "MNE Groups". "MNE Group" refers to any group that includes two or more enterprises for which the tax residence is in different jurisdictions or includes an enterprise that is resident for tax purposes in one jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction". MNE Groups are specifically excluded from the definition of "domestic company" under the ES Law in order to ensure that a company which is carrying on business both within the Cayman Islands and also business exterior to the Cayman Islands cannot avail itself of the exemption from the definition of "relevant entity" for domestic companies. Corresponding changes to the ES Guidance Notes version 2.0 were published on 17 September 2019.

ES NOTIFICATION AND REPORTING

Exempted companies, foreign companies, LLCs and LLPs will each be required to file a notification form under the ES Law (**ES Notification**). The ES Notification will be filed via the General Registry system of the Registrar of Companies of the Cayman Islands. The notification form will be separate from the General Registry's annual return for companies but, in terms of timing, the completion and filing of the ES Notification will be a prerequisite to filing the annual return. The below reference document published by the DITC shows exactly what each entity will have to disclose in the ES Notification form:

ENTITY #	ES STATUS	EXEMPTION TYPE	RELEVANT ACTIVITY	TBL	LCCL	NOT FOR PROFIT / NPO	CIMA	GIIN	FI	FINANCIAL YEAR-END	CONTACT INFO
	N/A		No relevant activity								
	N/A	INVESTMENT FUND	No relevant activity				*	*	*		
	N/A	TAX RESIDENT OUTSIDE CI	Distribution and Service Centre, Financing and Leasing, Hdqtrs, Holding Company, IP, Shipping								*
	N/A	TAX RESIDENT OUTSIDE CI	Banking, Fund Management, Insurance				*	*	*		*
	N/A	DOMESTIC	Distribution and Service Centre, Financing and Leasing, Hdqtrs, Holding Company, IP, Shipping	*	*	*					
	N/A	DOMESTIC	Banking, Fund Management, Insurance	*	*	*	*	*	*		
	ES		Distribution and Service Centre, Financing and Leasing, Hdqtrs, Holding Company, IP, Shipping							*	*
	ES		Banking, Fund Management, Insurance				*	*	*	*	*

Entities claiming to be exempt by virtue of tax residence elsewhere will be required to support their claim with additional information that follows the OECD's Nominal Tax Jurisdiction schema, which is still in development.

TIMING

- October 15 – ES Notification form released
- Late October/early November – sector specific guidance notes
- July 2020 - ES Portal should be live
- December 2020 – first ES return due

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Jennifer is Counsel within the Corporate department at Appleby. She specialises in providing regulatory advice to clients within the banking, investment fund and fund administration, insurance and securities sectors.

Jennifer also has extensive experience advising hedge funds, hybrid funds and private equity funds, top tier investment managers, administrators and other fund service providers on all aspects of fund formation, ongoing regulation and compliance, restructuring and termination.



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Peter Colegate is Counsel in the Corporate Group and co-head of Appleby's Global Technology and Innovation Group. His practice is focused on privacy, data protection and strategic corporate-commercial and regulatory work in the technology and innovation sectors.

Peter has a keen interest in emerging technologies and has worked on numerous blockchain based token offerings and smart contract projects across multiple jurisdictions. A privacy and data protection specialist, Peter is a member of the International Association of Privacy Professionals and sits on the Cayman Islands Government's Working Group on Data Protection. Peter has written and spoken extensively about privacy, data protection and new technologies across Asia and the Caribbean region, recognising that regulatory issues are often the threshold question for new business models, products and services. He is a member of the Financial Services Legislative Committee Fintech Sub-Committee, the Cayman Finance Fintech Innovation Lab, the Cayman Islands Blockchain Association and the Fintech Professionals Association.



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Bryan Hunter is the managing partner of the Cayman office and the Corporate Group Head in Cayman. Bryan is also the Global Head of the Funds and Investment Services team. He has extensive experience in the structuring and formation of hedge funds, funds of funds and private equity funds. He regularly advises on various operational and regulatory issues in relation to these funds. His practice also includes general corporate matters, corporate finance and merger and acquisition transactions.

For 2019, IFLR1000 ranks Bryan as a 'highly regarded' lawyer and Chambers Global 2018 described him as "a real expert on Cayman funds", stating that "he speaks with real authority and nearly always has the answer at hand". Previous Chambers Global rankings note that Bryan is a 'Leading Individual', describing him as a "prominent practitioner who is particularly well regarded for his extensive funds experience." They have also noted Bryan as a leading lawyer in the investment funds arena and recognised him as "one of the better lawyers here – well versed in the law, professional and easy-going." IFLR1000 comments as follows: Bryan Hunter is admired by clients for his international perspective.

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 Bermuda, the British Virgin Islands, the Cayman 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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This publication is for general guidance only and does not constitute definitive advice.

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