

APPLEBY

Q1 2020

**CAYMAN ISLANDS
REGULATORY UPDATE**



CONTENTS

Introduction.....	2
Hot Topics.....	2
Economic Substance and Automatic Exchange of Tax Information...	6
Appleby’s Cayman Regulatory Team.....	8
About Appleby	10

INTRODUCTION

Welcome to a brand new year! 2020 is off to a busy start on the regulatory front. Appleby Cayman's first quarterly publication of the year focuses on the topics making waves now, including investment funds legislative reform, the end of the transition period for Excluded Person re-registration, the latest on economic substance, proposed changes to beneficial ownership reporting and AEOI updates. We hope you will find its contents useful.

HOT TOPICS

THE NEW PRIVATE FUNDS LAW AND AMENDMENT TO THE MUTUAL FUNDS LAW IN FORCE NOW

Application

For the purposes of the Private Funds Law, a 'private fund' is a company, unit trust or partnership whose principal business is the offering and issuing of its investment interests, 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 fund. Private funds do not include, however, single investor funds; regulated mutual funds under the Mutual Funds Law (as amended); persons licensed under the Banks and Trust Companies Law or the Insurance Law; persons registered under the Building Societies Law or the Friendly Societies Law; or, importantly, any non-fund arrangements – the list of which is extensive and includes:

pension funds; securitisation special purpose vehicles; contracts of insurance; joint ventures; proprietary vehicles; officer, manager or employee incentive, participation or compensation schemes, and programmes or schemes to similar effect; holding vehicles; individual investment management arrangements; debt issues and debt issuing vehicles; structured finance vehicles; preferred equity financing vehicles; funds whose investment interests are listed on a specified stock exchange; sovereign wealth funds; and single family offices.

Registration and Audit

A private fund will need to register, pay an annual fee, and file prescribed details with CIMA within 21 days following the fund's acceptance of capital commitments from investors for the purposes of investments. However, the private fund may not accept capital contributions from investors in respect of investments until it is registered. The registration date of a fund is expected to be the date that a complete application is filed with CIMA, assuming that the application is fully compliant with the law. A private fund must also have its accounts audited annually by an approved auditor and signed off on and filed with CIMA by a local auditor within six months of its financial year end

WHAT TO DO NOW

Operators of existing investment funds not currently registered with the Cayman Islands Monetary Authority (**CIMA**) should consider whether either the Private Funds Law or the Mutual Funds (Amendment) Law applies to their fund, so as to now bring their fund into the scope of CIMA's regulation.

Recommended compliance steps include:

- Check the fund's current registration status on CIMA's website
<https://www.cima.ky/search-entities>
- Consult with Appleby or your other advisors to determine (i) the basis on which the fund was previously excluded from registration with CIMA and (ii) whether registration is now required
- If registration is required:
 - register with CIMA by the applicable deadline
 - engage with your fund's auditors to ensure audit arrangements for the 2020 financial year are put in place

along with an annual return (in the same manner as for mutual funds). An offering document need not be prepared or filed.

Valuation

A private fund must have appropriate and consistent procedures for the purposes of proper valuations of its assets to be carried out at a frequency that is appropriate to the assets held and, in any event, at least annually (e.g. as part of the audit process). Valuations of the assets of a private fund may be performed by independent third parties appropriately professionally qualified to conduct valuations; by the manager or operator of the private fund, or a person who has a control relationship with the manager of the private fund (provided that the valuation function is independent from the portfolio management function or potential conflicts of interest are properly identified and disclosed to the investors of the fund); or by an administrator appointed by the fund. CIMA may exempt a private fund from the valuation requirements either absolutely or subject to such conditions as it may deem appropriate.

Safekeeping

A private fund must also appoint a custodian to hold in custody, in segregated accounts opened in the name, or for the account, of the fund, the custodial fund assets; and verify, based on information provided by the fund and available external information, that the private fund holds title to any other fund assets and maintain a record of those assets. A private fund shall not be required to appoint a custodian, however, if it has notified CIMA and it is neither practical nor proportionate to do so, having regard to the nature of the fund and the type of assets it holds. Where a private fund so notifies CIMA, the fund must appoint one of the following to carry out the title verification: an administrator or another independent third party; or the manager or operator, or a person with a control relationship with the manager of the fund (provided that the title verification function is independent from the portfolio management function or potential conflicts of interest are properly identified and disclosed to the investors of the fund).

Cash Monitoring

A private fund must appoint an administrator, custodian or an independent third party or the manager or operator to monitor the cash flows of the fund; ensure that all cash of the private fund has been booked in cash accounts opened in the name, or for the account, of the private fund; and ensure that all payments made by investors to the private fund in respect of investment interests have been received.

Identification of Securities

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 (e.g. ISIN codes).

Alternative Investment Vehicles and Restricted Scope Private Funds

Under the Private Funds Regulations, an 'alternative investment vehicle' means a company, unit trust, partnership or other similar vehicle that (a) is formed in accordance with the constitutional documents of a private fund 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 (b) only has as its members, partners or trust beneficiaries, persons that are members, partners or trust beneficiaries of the private fund.

Where IFRS or GAAP of a non-high risk jurisdiction permit consolidated or combined financial account reporting and a private fund chooses to report consolidated or combined financial statements with an alternative investment vehicle, the requirements described above pertaining to audit, valuation, safe keeping, cash monitoring and identification of securities do not apply to such alternative investment vehicle.

Under the Private Funds Regulations, a 'restricted scope private fund' is a private fund that is (a) an exempted limited partnership; (b) managed or advised by a person who is licensed or registered by CIMA or authorised or registered by a recognised overseas regulatory authority; and (c) in which all of the investors are non-retail in nature, being either high net worth persons or sophisticated persons.

Aside from these provisions, there are no further references to either alternative investment vehicles or restricted scope private funds and we expect that further guidance will be issued in due course with respect to these new categories.

Supervision and Enforcement

CIMA has been given broad supervision and enforcement powers in respect of private funds analogous to those already in place in the context of mutual funds.

Timing

Existing private funds and private funds formed after 7 February 2020 must register with CIMA no later than 7 August 2020 (or such later date as may be specified by CIMA).

Mutual Funds (Amendment) Law

This law primarily introduces a registration requirement for what was previously referred to as an 'exempt' fund, having fifteen or fewer investors the majority of whom have the power to remove/appoint the operator. This will now be a regulated fund required to register, pay a fee, and file with CIMA prescribed details as well as audited accounts (annually, via an approved auditor). Such funds must register with CIMA no later than 7 August 2020 (or such later date as may be specified by CIMA).

The new laws seek to strike a balance to achieve their dual purposes of strengthening investor confidence in Cayman Islands investment funds and ensuring that the Cayman Islands remains the preeminent jurisdiction for investment fund formation. The new laws also address EU suggestions for investment fund oversight, as set forth in a report dated 27 May 2019 from the EU Code of Conduct Group (Business Taxation). The Ministry of Financial Services worked closely with a Cayman Islands based working group comprised of CIMA and fund professionals, including accounting, audit, administration, governance and legal firms, in drafting the laws.

CIMA has released notices and FAQs confirming procedures. Funds that register before the 7 August 2020 deadline will not incur registration fees for

2020 (only an application fee of USD366). The annual fee going forward will be USD4,268.

CIMA has also indicated that an audit for the 2020 financial year will be required (to be filed by no later than 30 June 2021).

END OF THE TRANSITION PERIOD FOR EXCLUDED PERSONS UNDER THE SECURITIES INVESTMENT BUSINESS LAW

Appleby's [e-alert from July 2019](#) explained certain key changes to the regulatory framework and ongoing filings required for persons regulated under the Securities Investment Business Law (Revised) (**SIBL**), including the requirement for former 'Excluded Persons' to re-register as 'Registered Persons'.

The deadline for re-registration of Excluded Persons was 15 January 2020. A former Excluded Person who did not file a re-registration application by that date will be required to file a new application for registration after that date. Previous failure to comply with filing requirements under the SIBL may be grounds for CIMA to refuse to register an applicant going forward.

See also our note below regarding the application of economic substance requirements to re-registering Excluded Persons.

REGISTER OF MEMBERS REQUIREMENTS UNDER THE COMPANIES LAW

Operators of Cayman Islands companies are reminded that 7 February 2020 was the deadline to ensure that their register of members specifies, with respect to each category of shares, whether such category of shares carries voting rights and, if so, whether such voting rights are conditional. The Companies (Amendment) Law, 2019 had introduced this requirement on 8 August 2019. Companies incorporated on or before that date had six months (until 7 February 2020) to update their register of members.

For the purposes of the register of members, the Companies (Amendment) Law, 2020 redefined 'voting rights' to include the right to appoint or remove directors.

BENEFICIAL OWNERSHIP REGISTRATION REGIME

The Companies (Amendment) Law, 2020 and the Limited Liability Companies (Amendment) Law, 2020, although largely in force from 19 February 2020, introduced certain changes to the Cayman Islands beneficial ownership registration regime which are not yet in force. The pending changes are:

- (i) the threshold for including an UBO on the register will be amended to 25% or more (rather than more than 25%); and
- (ii) one of the thresholds for determining whether an entity (Company S) is a subsidiary of one or more legal entities will be amended to such legal entities, separately or collectively, holding 75% or more (rather than in excess of 75%) of the shares or voting rights in Company S.

Where an entity has not filed with the Registry of Companies either a declaration stating that it is exempt or filed a register if not exempt (including

a nil register), that entity will not be entitled to receive a Certificate of Good Standing (**COGS**) until such time as the register is filed.

Government is still deciding how to deal with newly-incorporated entities, i.e. how long they will have to file a register following incorporation before the failure to do so would result in not being able to obtain a COGS. Government has also been examining and considering reducing available exemptions from the requirement to prepare beneficial ownership registers, including for investment funds. In the initial proposal, whilst the information for an investment fund would not need to be filed with government, it would need to be maintained in the event it was requested.

Additionally, the Cayman Islands government has introduced an online protocol for the filing of beneficial ownership information. Some users have experienced technical issues with the use of the new online portal. Where that is the case, government has advised that the manual filing protocol should be continued to allow industry to fulfill its legal obligations. Once the technical issues are resolved, government expects to issue amended user guidance.

ECONOMIC SUBSTANCE AND AUTOMATIC EXCHANGE OF TAX INFORMATION

ECONOMIC SUBSTANCE: INTERNATIONAL TAX CO-OPERATION (ECONOMIC SUBSTANCE) LAW (2020 REVISION)

The new year ushered in a 2020 revision of the International Tax Co-operation (Economic Substance) Law (**ES Law**).

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. We had anticipated the final publication of version 3.0 of the ES Guidance Notes during 2019, following the release of a consultation draft in late November of that year. No such publication occurred, however, and we now expect that updated ES Guidance Notes will not be released until mid-2020 at the earliest.

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 endeavour. 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 the 2019 notification and reporting requirements and the anticipated release of updated ES Guidance Notes during 2020.

ES NOTIFICATION AND REPORTING

Operators of Cayman Islands exempted companies, LLCs and LLPs and foreign companies registered under the Companies Law are reminded that each such entity is required to file a 2019 notification form under the ES Law (**ES Notification**) by no later than 31 March 2020.

IMPORTANT DATES

31 March 2020: Deadline for 2019 ES Notification filings

June 2020: Launch of new DITC Portal for CRS and FATCA registrations and reporting

31 July: New deadline for FATCA and CRS annual reporting

18 September 2020: The deadline for 2019 FATCA and CRS reporting **only** given the new DITC Portal will only be fully functional beginning in June 2020

The ES Notification is filed by the entity's registered office via the General Registry system of the Registrar of Companies of the Cayman Islands. The notification form is separate from the General Registry's annual return for companies but, in terms of timing, the completion and filing of the ES Notification is a prerequisite to filing the annual return. Entities that fail to file their ES Notification and/or annual return by the deadline noted above will not be in good standing with the Registrar of Companies.

AUTOMATIC EXCHANGE OF TAX INFORMATION (AEOI)

The Cayman Islands Department of International Tax Cooperation (**DITC**) is in the process of building a new portal for CRS and FATCA registrations and reporting (**DITC Portal**). The DITC Portal is expected to be available 1 June 2020. All user accounts from the former AEOI Portal will be migrated to the new DITC Portal along with their assigned Financial Institution (**FI**) numbers.

The DITC will not be accepting any new FI registrations until the new DITC Portal is launched in June 2020.

Under the Tax Information Authority (International Tax Compliance) (United States of America) (Amendment) Regulations, 2020 and Tax Information Authority (International Tax Compliance) (Common Reporting Standard) (Amendment) Regulations, 2020 (together, the **New AEOI Regulations**), the annual reporting deadline for FATCA and CRS has changed from 31 May to 31 July (of the year following the relevant reporting period). In recognition of the delayed launch of the new DITC Portal, the deadline for 2019 FATCA and CRS reporting (**only**) will be 18 September 2020.

The New AEOI Regulations also remove the requirements for an Authorising Person and a Principal Point of Contact to be an individual. These roles may now be filled by either an individual **or** an entity.

Several new Reportable Jurisdictions have been added for CRS purposes. Albania, Ecuador, Kazakhstan, Maldives, Nigeria, Oman, and Peru will be Reportable Jurisdictions for reports due in 2020 and onwards.

Country-by-country (**CbC**) reporting for multinational enterprises (**MNEs**) will also migrate to the new DITC Portal. On 2 March 2020, the DITC announced that the CbC reporting portal is scheduled to go offline on 25 March 2020 to facilitate the migration over to the new DITC Portal. It is anticipated that the CbC reporting will be available in the fourth quarter of 2020. The DITC also announced that MNE Groups with a fiscal year starting in the range 1 July 2018 - 31 December 2018 will be required to file their CbC report no later than 31 December 2020 and that CbC reports made by 31 December 2020 will not result in compliance measures being taken for late filing.

APPLEBY CAYMAN'S REGULATORY TEAM



JENNIFER PARSONS

+1 345 814 2702

jparsons@applebyglobal.com

Jennifer is Counsel in the Corporate Group 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.



PETER COLEGATE

+1 345 814 2745

pcolegate@applebyglobal.com

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.



CHRISTIAN VICTORY

+1 345 814 2093

cvictory@applebyglobal.com

Christian is a partner and a member of the Corporate Group and is ranked as a 'next generation partner' in Legal 500 2019 and a 'rising star' according to IFLR1000's 2019 financial and corporate law rankings.

Christian specialises in advising on all matters relating to Cayman Islands and BVI funds and investment services, including the formation and establishment of, and on-going advice to mutual funds and hedge funds, master-feeder structures and the formation of stand-alone vehicles, including segregated portfolio companies, exempted limited partnerships, unit trusts and private equity structures as well as listing applications. Christian also advises on regulatory and compliance matters as well as investment business and licensing matters.



SIMON RAFTOPOULOS

+1 345 814 2748

sraftopoulos@applebyglobal.com

Simon Raftopoulos is a partner and a member of the Corporate Finance and Private Equity teams. He represents clients in a wide variety of corporate finance transactions, including private equity and fund finance, joint ventures, mergers, acquisitions, leveraged buyouts, initial and secondary public offerings and private placements of equity and debt securities. Simon also represents clients on large private equity transactions and his team has a deep PE formation and transactional presence in Cayman.

For 2020, he has been recognised by Who's Who Legal as one of the world's leading banking lawyers and ranked as a 'market leader' in IFLR1000. Chambers Global described him as a "brilliant lawyer, with excellent and creative ideas for complex issues". For 2019 he is ranked as a 'leading individual' and in 2018, he was a 'recommended' lawyer in Legal 500 and described as "very technically sound, a problem-solver and extremely knowledgeable on Cayman law" in Chambers Global.



BRYAN HUNTER

+1 345 814 2052

bhunter@applebyglobal.com

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". 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 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.

© Appleby Global Services 2020.

This publication is for general guidance only and does not constitute definitive advice.

Clifton House
71 Fort Street
PO Box 190
Grand Cayman KY1-1104
Cayman Islands

T: +1 345 949 4900

E: cayman@applebyglobal.com
