

# Key 'Take-Aways' from the Clifford Chance & Mourant Global Funds Conference 2019

UPDATE

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At the recent annual funds conference held in New York, over 150 funds managers, administrators and lawyers came together to hear about and discuss recent trends and projections for the global funds industry. We are proud to have co-hosted this event with Clifford Chance and wanted to share some of our top take-away points from the high quality panel discussions.

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## Global Fundraising: Recent Trends

- There is a growing trend towards large investors wanting their own vehicle as a fund of one and demand for co-invest vehicles is growing.
- One of the drivers for managers to expand into new strategies is limited partner demand and another is market opportunities.
- Limited partners increasingly request provisions in side letters requiring funds to disclose any actual or perceived conflicts of interest, but this is not always feasible.
- Managers are receiving more questions in the due diligence phase from investors in relation to environmental social and governance (ESG) standards.
- Limited partnership agreements typically now have boilerplate provisions in relation to fiduciary duties.

## Topical Issues Relevant to Cayman Islands Funds

### Recap

- Cayman Islands is the jurisdiction of choice for US sponsors structuring funds for US tax-exempt investors and non-US investors.
- As of 30 September 2019, the Cayman Islands Monetary Authority reported that the total number of Cayman Islands regulated funds was **10,931**. There are also significant numbers of private equity and other closed-ended alternative investment funds domiciled in the Cayman Islands.
- The Mutual Funds Law (2019 Revision) of the Cayman Islands is the principal legislation relevant to the regulation of open-ended investment funds in the Cayman Islands.
- Funds of one fall outside the definition of a 'mutual fund', along with private equity vehicles which do not permit redemption or repurchase of interests at the option of the investors.
- Open-ended funds with 15 or fewer investors, the majority of whom have the power to appoint or remove the operators of the fund (ie the directors, general partner or the trustee, as applicable), are exempt from registration.
- The Cayman Islands government is currently working on new legislation that will modernize the regulation of funds in the Cayman Islands in line with evolving international standards and best practices.

## Governance

- Cayman funds act through their directors and there will be a focus on whether, and how, directors are discharging their duties
- There is a mix of fiduciary and tortious duties which a director will have. Fiduciary duties will include a duty to act in good faith, act honestly and not act in conflict of interest. Other non-fiduciary duties will include a duty of care (ie to act with reasonable care and skill).
- With respect to the duty of care, a number of recent Cayman Islands decisions have confirmed the standard of care for directors is relatively low
- There are also various clauses usually included in fund articles and in director services agreements which indemnify or otherwise limit the liability of directors for things like negligence.
- However, a clause which purports to exclude liability for breaches of fiduciary duty will not be enforceable.

## Recent changes to Regulation of Cayman Managers

- The Securities Investment and Business Law (2019 Revision) (as amended) of the Cayman Islands (**SIBL**) was amended in June 2019 to provide that any entity which is currently registered as an excluded person (such as an investment manager based in the Cayman Islands) will need to re-register as a registered person by 15 January 2020 in order to continue to carry on securities investment business in or from the Cayman Islands.
- The Cayman Islands economic substance regime will apply to entities conducting 'fund management business':
  - for new registered persons conducting discretionary management for funds – upon registration under SIBL; and
  - for existing excluded persons which re-register as a registered person conducting discretionary management for funds – from 15 January 2020.

## Service Providers

- Similar considerations apply to the standard of care to be exercised by service providers.
- A recent issue covered by the Cayman Courts surround whether a fund can be contributorily negligent in respect of a breach of duty by a service provider. Traditionally the answer was thought to be no where the parties have allocated responsibility pursuant to contract. However, this principle is subject of an appeal to the Privy Council (Cayman's highest appellate court)

## Economic Substance

- The International Tax Cooperation (Economic Substance) Law, 2018 of the Cayman Islands came into force in 1 January 2019 and requires in-scope (such as companies, limited liability companies and foreign companies registered in the Cayman Islands) that undertake relevant activities (such as banking business and shipping business) to demonstrate that they have economic substance in the Cayman Islands.
- An investment fund and the entities through which an investment fund directly or indirectly operates (such as blockers and general partners, provided that they do not undertake operating business outside of the investment fund structure) are out of scope.
- All relevant entities (including investment funds) must complete a simple economic substance notification which will be filed along with its annual return, with the first notification being due on 31 January 2020.

## Beneficial ownership

- The beneficial ownership regime requires in-scope entities to maintain a register of its beneficial owners.
- The regime does not apply to limited partnerships but will apply to corporate general partners incorporated in the Cayman Islands.
- Generally speaking, an investment fund will not be caught by the regime if it is a company (or a subsidiary of a company) which is managed, arranged, administered, operated or promoted by an approved person as a

special purpose vehicle, private equity fund, collective investment scheme or investment fund. Similarly, a company (or subsidiary of a company) which is a general partner of such vehicle, fund or scheme is exempt where the vehicle, fund or scheme is registered or holds a licence under a regulatory law or is managed, arranged, administered, operated or promoted by an approved person.

- Approved persons include a person (or a subsidiary of a person) that is regulated, registered or licensed under a Cayman Islands regulatory law or which is regulated in an equivalent jurisdiction (such as the US) – including regulated managers and advisers.

#### **Data Protection for Cayman Islands**

- The Data Protection Law, 2017 of the Cayman Islands came into force on 30 September 2019.
- Funds are classified as 'data controllers' as they determine the purposes, conditions and manner in which personal data are to be processed and are therefore subject to obligations under the Data Protection Law.
- Practically speaking, compliance with the Data Protection Law by funds involves the following steps:
  - preparing a privacy notice that sets out information required by the Data Protection Law and dispatching the privacy notice to its investors;
  - potentially updating the offering documents and subscription agreements to include disclosure in relation to the Data Protection Law; and
  - ensuring that its agreements with service providers who process personal data on its behalf contain certain provisions.

#### **International Limited Partner Association (ILPA) publishes a Model Limited Partnership Agreement**

- The International Limited Partner Association has published a model limited partnership agreement for the private equity industry on 30 October 2019.
- The model limited partnership agreement contains several investor-friendly provisions applicable to private equity buyout funds and is expected to reduce the reliance on side letters and provide a benchmark to emerging fund sponsors.

## Contacts

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