

Article

The Cayman Islands Private Funds Law: A Pre-Summer Holiday Lender Checklist

Authors: **Derek Stenson**, Partner | **Michael O'Connor**, Associate

With Q2 shortly coming to a close it's almost time to think about summer holidays but, before powering down their computers and heading to the beach (or back garden!) lenders will want to keep in mind the 7 August 2020 registration deadline for private funds falling within the scope of the Cayman Islands Private Funds Law, 2020 (the "PF Law") – if for nothing else so that they can enjoy an uninterrupted Piña Colada during the first week of August.

This note sets out some practical steps lenders can take in respect of existing Cayman counterparties in their portfolio in the run up to 7 August.

Cayman private funds that are party to pre-February 2020 credit agreements (which have not been recently amended)

The vast majority of each lender's Cayman Islands counterparties will likely fall into this scenario. The fact that specific PF Law provisions have not been added to a credit agreement does not of course mean that the Cayman private fund need not comply with the PF Law.

Aside from the fact that it is in a sponsor's interest that vehicles it manages or advises are fully in compliance with the applicable laws of the Cayman Islands, almost all credit agreements will already contain covenants requiring credit parties to comply with all applicable law (an "Applicable Law Covenant").

While the terms of the Applicable Law Covenant will vary in each case, broadly speaking the requirement for Cayman private funds in this scenario will be to simply comply with the terms of the PF Law by 7 August 2020, most notably register with the Cayman Islands Monetary Authority (CIMA) by this date.

From a lender perspective, while this is not an ideal scenario (as a default caused by the failure of a Cayman private fund to register with CIMA could lead to an imperfect climate for enforcement post-7 August 2020, until such registration is obtained), lenders can take some comfort from the fact that Cayman Islands counsel will be actively encouraging each private fund they advise to register and comply with the PF Law as far ahead of 7 August as possible.

In terms of steps for lenders who wish to undertake diligence on their current books for prospective PF Law compliance, we would suggest the following steps:

1. check the CIMA online database (which is searchable here: <https://www.cima.ky/search-entities>) to determine if the applicable Cayman private fund is already registered with CIMA;
2. if the Cayman private fund is not yet registered, make contact with the applicable borrower to obtain an update on progress towards PF Law compliance;
3. request that evidence of the filing with CIMA by the Cayman private fund is provided upon the filing being made (see below for an explanation of what can be provided in this regard); and
4. request that the CIMA Certificate of Registration (which is electronically generated by CIMA) is provided when obtained by the Cayman Islands legal counsel to the Cayman private fund.

Cayman private funds that are party to post-February 2020 credit agreements

Most subscription credit facilities which have originated (or in some cases, been amended) post-February 2020 and involve Cayman private funds will contain specific PF Law provisions.

We would suggest the following steps in such circumstances:

1. identify the relevant requirement which has been agreed to, meaning:
 - (i) is the requirement that “*an application must be submitted to CIMA*” (or similar wording), by a set date;
 - (ii) is the requirement that “*registration must be obtained*”, by a set date; and
 - (iii) is such requirement qualified in any way (e.g. “*use best endeavors*” or “*take all reasonable steps*”).
2. identify the relevant deadline (e.g. 30/15 days ahead of 7 August 2020) and note whether the requirement is “Business Days”;
3. monitor whether the applicable PF Law registrations have taken place via the CIMA online database (which is searchable here: <https://www.cima.ky/search-entities>);
4. where the requirement in the applicable PF Law provision is that “*an application must be submitted to CIMA*” (or similar wording) by a set date, request that evidence of the filing with CIMA by the Cayman private fund is provided upon the filing being made (see below for an explanation of what can be provided in this regard); and
5. where the requirement in the applicable PF Law provision is that “*registration must be obtained*” by a set date, request that the CIMA Certificate of Registration (which is electronically generated by CIMA) is provided when obtained by the Cayman Islands legal counsel to the Cayman private fund.

What can be obtained as evidence that a filing has taken place with CIMA?

Up until very recently the CIMA online system (‘REEFs’) did not issue an automatic receipt that a PF Law filing had been completed containing the name of the Cayman private fund and date of filing. This system has now been updated and the person making the filing on behalf of the Cayman private fund should receive an automatic email back from CIMA confirming that an application has been received and is under review. This email contains the name of the fund and the date of the application and can be provided to evidence a filing having taken place.

It should be noted that the submission of an application to CIMA does not mean the Cayman private fund is automatically registered. The application needs to be processed and approved by CIMA prior to their registration of the Cayman private fund. Accordingly, a Cayman private fund is not ‘registered’ for the purposes of the PF Law (and able to accept capital contributions for the purposes of investments under section 5(6) of the PF Law) until its registration has been confirmed by CIMA.

What if a Cayman borrower does not fall within the definition of “private fund” under the PF Law?

Each Cayman private fund vehicle needs to be considered on its own merits and a determination made as to whether it needs to be registered under the PF Law. If a Cayman borrower does not fall within the definition of ‘private fund’ in the PF Law it does not need to register but, given the potential importance of such classification to a lender’s security, lenders would be prudent to seek confirmation with their own independent legal advisors of any such analysis provided by borrowers.

Authors:

Derek Stenson

Partner

derek.stenson@conyers.com

+1 345 814 7392

Michael O’Connor

Associate

michael.oconnor@conyers.com

+1 345 814 7395

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For further information please contact: media@conyers.com