

Update on CIMA rules and statements of guidance - corporate governance and internal controls

Insights - 12/07/2023

Further to the recent publication of our client briefing on the '**Enhancement of Cayman's corporate governance framework for regulated funds**', which provides an overview of the core elements of the Cayman Islands Monetary Authority (CIMA)'s Statement of Guidance - Corporate Governance - Mutual Funds and Private Funds (**Corporate Governance SOG**), this follow-up client briefing is intended to provide an overview of the key elements of CIMA's new Rule on Corporate Governance for Regulated Entities (**Corporate Governance Rule**) and Rule and Statement of Guidance on Internal Controls for Regulated Entities (**Internal Controls Rule and SOG**).

| Scope and effective date

The Corporate Governance Rule and the Internal Controls Rule and SOG apply to all CIMA regulated entities (including private funds regulated under Cayman's Private Funds Act and mutual funds regulated under Cayman's Mutual Funds Act (together, **Regulated Funds**)).

The Corporate Governance Rule and the Internal Controls Rule and SOG will come into effect on 14 October 2023.

| Corporate Governance Rule

The Corporate Governance Rule (which, importantly, Regulated Funds should read in conjunction with the Corporate Governance SOG^[1]) requires all regulated entities, including Regulated Funds, to establish, implement and maintain a corporate governance framework that is commensurate with the size, complexity, structure, nature of business and risk profile of their operations and which addresses, at a minimum:

- a. Objectives and strategies of the Regulated Fund
- b. Structure and governance of the Governing Body
- c. Appropriate allocation of oversight and management responsibilities
- d. Independence and objectivity
- e. Collective duties of the Governing Body
- f. Duties of individual directors of the Governing Body
- g. Appointments and delegation of functions and responsibilities
- h. Risk management and internal control systems
- i. Conflicts of interest and code of conduct
- j. Remuneration policy and practices
- k. Reliable and transparent financial reporting
- l. Transparency of communications
- m. Duties of senior management
- n. Relations with CIMA

For the purposes of the Corporate Governance Rule, a Regulated Fund's **Governing Body** means the board of directors of a fund incorporated as a company, the general partner of a fund established as an exempted limited partnership, the manager (or equivalent) of a fund incorporated as a limited liability company or the trustee of a fund established unit trust.

Importantly, and consistent with the application of the Corporate Governance SOG, CIMA has expressly stated that the adequacy and effectiveness of the corporate governance structure of a particular Regulated Fund should be assessed against, and proportionate to, the size, complexity, structure, nature of business and risk profile of such Regulated Fund's operations, thereby allowing the Operators of Regulated Funds to take a measured approach to the corporate governance framework for any particular Regulated Fund they operate, i.e. noting that there is no "one size fits all" approach to corporate governance for Regulated Funds. CIMA has also stated, in the Corporate Governance SOG, that factors determining the size, complexity, structure, nature of business and risk profile of the operations of a Regulated Fund could include, but are not limited to: assets under management; number of investors; complexity of the relevant structure; nature of the relevant investment strategy; and nature of the fund's operations.

A key requirement of the Corporate Governance Rule is that a Regulated Fund's Governing Body should, at least annually, meet to review and amend (as necessary), certain elements of such

Regulated Fund's corporate governance framework, including (without limitation): (a) the composition and collective skill set, experience and expertise of the Governing Body of the Regulated Fund; (b) the internal controls of the Regulated Fund, to ensure they are operating effectively and that any deficiencies are addressed; and (c) the implementation of risk assessment and risk management systems to ensure that all significant risks are being adequately measured, monitored and mitigated.

The Corporate Governance Rule also requires all conflicts of interest to be disclosed to the Governing Body on at least an annual basis, via a written annual declaration (and for any changes to such declaration to be communicated throughout the year). The Governing Body of a Regulated Fund should ensure that these, and all other applicable governance matters, are added to their standard agenda for consideration by the Governing Body on at least an annual basis. As a Regulated Fund's Governing Body should already be reviewing and approving such Regulated Fund's audited financial statements and NAV Calculation Policy on an annual basis, this may provide a suitable opportunity for the Governing Body to meet in order to review and evaluate the Regulated Fund's corporate governance matters; and to ensure that these are in line with all applicable Cayman requirements.

In terms of practical guidance for compliance with the Rule on Corporate Governance, CIMA has acknowledged, in its response to industry consultation on this Rule, that a Regulated Fund may deem certain of its internal governance practices and procedures to be appropriately captured in its constitutional documents and/or offering documents. CIMA has also acknowledged that a Regulated Fund may deem the policies and procedures (for example with respect to conflicts of interest and a code of conduct) of certain of its service providers engaged for governance support to be sufficient for it to demonstrate compliance with certain requirements of the Corporate Governance Rule (assuming that the Governing Body of such Regulated Fund is satisfied and can demonstrate to CIMA that such policies and procedures are sufficient to meet the relevant requirements of the Corporate Governance Rule (as may be applicable)). Additionally, with respect to the requirements of the Corporate Governance Rule relating to a conflicts of interest policy, CIMA has confirmed that such policy may be documented in a Regulated Fund's constitutional documents, offering documents and/or marketing materials (as applicable), which is consistent with industry practice in the Cayman Islands.

Internal Controls Rule and SOG

The Internal Controls Rule and SOG applies to all regulated entities, including Regulated Funds, subject to the same proportionate application as outlined above with respect to the Corporate Governance Rule.

The Internal Controls Rule and SOG is comprised of two parts. Part I sets out general rules and guidelines for all regulated entities covering five components of internal control, namely:

control environment; risk identification and assessment; control activities and segregation of duties; information and communication; and monitoring activities and correcting deficiencies in internal controls; and Part II provides sector specific rules and guidelines (which are not specific to Regulated Funds).

Within the body of the Internal Controls Rule and SOG, CIMA expressly recognises that regulated entities may outsource some business functions, delegating their duties for day-to-day management to service providers (as is typical in the context of a Regulated Fund). The Internal Controls Rule and SOG also confirms that a Regulated Fund may rely on its service providers' (for example, its investment manager, administrator or other service providers) system of internal controls over its outsourced activities, provided that the Governing Body of such Regulated Fund is satisfied and can demonstrate to CIMA that such system of internal controls meets the requirements of the Internal Controls Rule and SOG and any other applicable Cayman Islands laws and regulations.

CIMA powers

Unlike the Corporate Governance SOG (which contains recommendations as to how Regulated Funds should operate and represents a measure against which CIMA will assess their regulatory compliance), the Corporate Governance Rule and the Internal Controls Rule and SOG create binding obligations on all CIMA regulated entities in respect of which a breach may lead to the imposition of a fine or a regulatory action being taken against a regulated entity (and/or its Operators, where applicable) by CIMA pursuant to the exercise of its powers under the relevant regulatory acts. CIMA has expressed that where a regulated entity is of the view that a particular provision (or application of a provision) of the Corporate Governance Rule is not applicable to such entity based on the size, complexity, structure, nature of business and risk profile of its operations, it is the responsibility of such entity to ensure this can be comprehensively demonstrated to CIMA, as may be required.

Action points

In the current regulatory environment, new and updated regulatory measures such as those set out above should not take Regulated Funds by surprise; and CIMA's continued focus on setting out enforceable standards of corporate governance should ultimately benefit investors and sponsors alike. We would however urge Operators and sponsors of Regulated Funds to review the corporate governance framework of any Regulated Funds they operate and to ensure that they are familiar with and understand their obligations under, and implement practices that meet or exceed the requirements of, the Corporate Governance SOG – as well as all applicable provisions of the Corporate Governance Rule and Internal Controls Rule and SOG prior to the 14 October 2023 effective date. Where gaps are identified, these should be addressed with the relevant fund's Cayman counsel.

How can Ogier assist further?

Ogier's Investment Funds and Regulatory teams have extensive experience advising funds and other regulated entities in the Cayman Islands on corporate governance and compliance matters, and will be reaching out to existing Ogier clients during the course of August 2023 in order to ensure that further support in relation to the introduction of the Corporate Governance Rule and Internal Controls Rule and SOG is provided where required. For advice concerning any of the above matters, we would encourage other funds and regulated entities to contact any of the Ogier attorneys listed in this briefing.

Ogier's corporate and fiduciary business, Ogier Global, has a team of highly experienced, professional, Cayman resident directors that can serve on the boards of Cayman corporate funds, general partners and on advisory boards of exempted limited partnerships. Ogier Global's services include approval of legal agreements (including onboarding and ongoing due diligence) and ongoing governance and oversight of service providers covering review of service provider reports, governance meetings with key service providers and review and approval of financial statements.

Ogier Global can also assist Cayman funds meet their corporate governance obligations by providing full corporate secretarial service in relation to meetings of a board of directors (or the trustee of a unit trust or advisory committee of an exempted limited partnership).

[1] The purpose of the Corporate Governance SOG is to provide the Operators (i.e. the Governing Body) of a Regulated Fund with industry-specific guidance on the minimum expectations for the sound and prudent governance of any Regulated Funds that they operate and represents a measure against which CIMA will assess Regulated Funds' compliance with, for example, the Private Funds Act or the Mutual Funds Act (as applicable) in the event that CIMA needs to consider whether the direction and management of a private fund or a mutual fund (as applicable) has been conducted in a "fit and proper manner". The Corporate Governance SOG is also designed to assist Regulated Funds in addressing certain of their obligations under the Corporate Governance Rule (which creates binding obligations on all CIMA regulated entities (see more on this above – under 'CIMA Powers')).

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