

Cayman legal and regulatory update - July 2017

Insights - 27/07/2017

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1. Beneficial Ownership

1.1 The Cayman Islands beneficial ownership regime (**Regime**) came into force on 1 July 2017. It establishes a secure, non-public centralised platform on which beneficial ownership information of in-scope companies (**ISCs**) must be maintained. From 1 July 2017, both ISCs and "Registrable Persons" of ISCs must comply with the Regime.

1.2 Many categories of Cayman legal entities fall outside the scope of the Regime. However, even legal entities that are out-of-scope may be Registrable Persons, with obligations under the Regime and material penalties for breach. Therefore, all Cayman legal entities and their direct and indirect shareholders should consider if they are affected by the Regime.

1.3 For practical guidance of the steps that should be taken now to ensure compliance please

see our client advisory [The Cayman Islands Beneficial Ownership Regime](#). This provides a detailed description of which vehicles will be in-scope and which will be out-of-scope; an explanation of who will be beneficial owners and other Registrable Persons; a summary of the duties both of ISCs and those who may hold interests in an ISC.

2. CRS Update

2.1 The Common Reporting Standard (CRS) is an international tax information exchange framework that has been implemented in the Cayman Islands. Cayman companies and other vehicles must comply with the Cayman CRS regulations. Those that don't comply face significant penalties. The deadline for reporting for the 2016 period has been extended and is now set for 31 August 2017, which is the final extension. The Cayman AEOI Portal is open for notification and reporting and a new AEOI Portal User Guide has been published together with a revised list of Reportable Jurisdictions.

2.2 Cayman entities should confirm their classification for the purposes of CRS. All Financial Institutions (whether Reporting or Non-Reporting) must appoint persons authorised to correspond with the tax authority and making an initial notification by 31 July. All Reporting Financial Institutions must also review any delegation of their responsibilities, adopt written policies and procedures and submit reports which are due by 31 August.

2.3 For a description of the core requirements under CRS and the practical step necessary to ensure compliance, see our client briefing [CRS in Cayman – Ensuring Compliance](#).

3. Data Protection Law, 2017

3.1 On 5 June 2017 the Data Protection Law, 2017 (**DP Law**) was published in the Cayman Islands Gazette. Once proclaimed into force, the DP Law will introduce for the first time in the Cayman Islands a legislative framework on data protection that will apply to almost all entities that are either established in the Cayman Islands (including investment funds) or are otherwise processing personal data in the Cayman Islands.

3.2 Broadly, the DP Law specifies eight data protection principles. It is the duty of a data controller to comply with the principles:

- (a) personal data shall be processed fairly.
- (b) personal data shall be processed only for one or more specified lawful purposes.
- (c) personal data shall be adequate, relevant and not excessive.
- (d) personal data shall be accurate and up to date.
- (e) personal data shall not be kept for longer than is necessary.

(f) personal data shall be processed in accordance with the rights of data subjects.

(g) appropriate technical and organisational measures shall be taken in relation to personal data.

(h) personal data shall not be transferred outside the Cayman Islands unless an adequate level of protection for the rights and freedoms of data subjects is ensured.

3.3 As mentioned above, data controllers generally have the obligation to process information fairly and notify data subjects if their personal data is being processed. If personal data is being processed, a data subject has a number of rights under the DP Law including the right to receive the following information from the data controller as soon as is reasonably practicable:

(a) a description of the personal data held in respect of the data subject; and

(b) a description of the purposes for which the personal data is being processed.

3.4 The DP Law will come into effect on a date to be determined and set by Cabinet Order and different dates may be appointed for different provisions of the DP Law in relation to different matters (our expectation is that different parts of the DP Law will be phased in over a period of time – 1 to 2 years). Once in effect, all entities captured by the DP Law will be required to take certain steps with respect to privacy and personal data. No immediate steps are required at this time and we will provide a further update once the effective date of the DP Law is known. However we recommend that you implement the following proactive measures prior to the commencement of the DP Law:

(a) understand your organisation's treatment under the DP Law and the extent of any exemptions that may apply to it.

(b) conduct an audit (whether formal or informal) of your organisation's current arrangements and understand how personal data is processed.

(c) create or update your internal data protection policies and procedures (including procedures to validate information held about data subjects).

(d) create or update your external data protection policies and procedures to inform your clients and employees about the data held on them and the purposes for which such data is processed.

(e) agree to responsibilities within your organisation to ensure compliance with the DP Law and to enforce your privacy policies and to deal with information requests from data subjects.

3.5 To prepare you in advance of the proclamation of the DP Law, we have produced a

comprehensive guide which covers the key concepts and obligations that clients should be aware of. The guide can be downloaded [here](#).

3.6 We expect that regulations and guidance on the Law will be issued prior to its implementation. We shall provide a further update in due course.

4. Foundation Companies Law, 2017

4.1 The Foundation Companies Law, 2017 was passed in late March 2017 and is currently awaiting its commencement order. This new legislative development paves the way for the much anticipated creation of foundation companies (**Foundation Companies**) in the trusts and financial services industries of the Cayman Islands, allowing Foundation Companies to transcend the application of trusts in the jurisdiction and move into the field of companies law. Foundation Companies have the ability to function similarly to a trust and civil law foundation while retaining the benefits of the protections available to companies in accordance with the Companies Law (Revised).

4.2 It is expected that Foundation Companies will have a wide variety of uses for both corporate/commercial clients and private clients. Foundation Companies may be particularly useful in corporate and funds transactions where orphan structures are desirable or as special purpose vehicles in finance transactions. Private clients will find Foundation Companies attractive as a trust alternatives for philanthropic and wealth structuring purposes and it is anticipated that Foundation Companies may be used as protectors or enforcers in relation to existing trust structures or within private trust company structures. Charitable and non-charitable trust structuring could also easily involve the use of a Foundation Company in the particular circumstances.

4.3 When the law comes into force by Cabinet Order (on a date which is yet to be determined), we will issue a further client briefing on the process to form a Foundation Company and legislative requirements.

5. Limited Liability Partnership Law, 2017

5.1 The Limited Liability Partnership Law, 2017 (**LLP Law**) has created a new vehicle in the Cayman Islands, the Limited Liability Partnership (**LLP**), which combines certain elements of a company and of a partnership. Unlike a general or limited partnership, an LLP will have separate legal identity from its partners and will provide its partners with limited liability. An LLP is not, however, a body corporate and retains the nature of a partnership.

5.2 Although we anticipate that this will be of particular interest to professional firms within Cayman, combining the flexible features of a general partnership with the benefit of separate legal personality may also provide additional attractive structuring opinions within the financial services industry.

5.3 The key features of an LLP are as follows:

- (a) separate legal personality capable of contracting in its own name and able to sue and be sued;
- (b) limited liability for all its partners;
- (c) requires two persons who may carry on a business in common for any lawful purpose although there is no requirement for an LLP to undertake its business 'with a view to profit';
- (d) no requirement for a general partner and no restriction on any partner being actively involved in day to day operation of the LLP's business (unlike Cayman exempted limited partnerships);
- (e) internal management governed by a partnership agreement that does not need to be filed with the Cayman Islands Government. The partnership agreement may also set forth the economic and voting rights of the partners; to the extent not covered by such agreement, such rights and obligations shall be as set forth in the LLP Law;
- (f) a foreign LLP may be re-registered and continue as an LLP in the Cayman Islands and, correspondingly, a Cayman LLP may transfer out and continue as a foreign entity in any other jurisdiction;
- (g) an LLP must use one of the following suffixes in its name: 'Limited Liability Partnership', 'LLP' or 'L.L.P.'; and
- (h) an LLP is eligible to apply for a tax undertaking from the Cayman Islands Government that will provide a 50 year exemption from payment of direct corporate taxes if ever introduced in the Cayman Islands, in similar form as those currently available for exempted limited partnerships, exempted companies, exempted trusts and limited liability companies.

5.4 The LLP Law also provides a conversion mechanism for an existing Cayman Islands general partnership to convert into an LLP.

6. Intellectual Property Laws

6.1 During the latter half of 2016, Ogier published two briefings on the steps taken by the Cayman Islands' Government to reform the intellectual property laws of the Cayman Islands. In those briefings we covered the overhaul of the copyright regime and the tabling of legislation relating to patents, trade marks and registered design rights.

6.2 On 19 December 2016, the Legislative Assembly of the Cayman Islands took an additional step forward and passed the following laws, all of which are to be proclaimed in force pursuant to Cabinet Order:

(a) The Patents and Trade Marks (Amendment) Law, 2016

(b) The Trade Marks Law, 2016

(c) The Design Rights Registration Law, 2016

6.3 After a period of anticipation, the necessary commencement orders and certain regulations were published and gazetted on 26 May 2017 and set 1 August 2017 as the date of commencement of the laws referenced above. In our client briefing Commencement of Revised Cayman Islands Intellectual Property Laws we provide a high level summary of the intellectual property landscape that will be effective on 1 August 2017. We anticipate that in due course the Government will publish further regulation supplementing the legislation referred to above and we will provide a further, more detailed briefing at that time.

7. Limited Liability Companies

7.1 The new vehicle introduced in the Cayman Islands in 2016, the Limited Liability Company (LLC), continues to gain popularity for a variety of fund and corporate structures. Ogier was one of the first firms to register an LLC in July 2016 and since this date over 525 LLCs have been registered in the Cayman Islands for a variety of transactions. Global Funds partner Giorgio Subiotto reflects on the first year of Cayman LLCs in his article Cayman LLCs: one year on. Ogier's Hong Kong office advised on one of Asia's first hedge funds to be structured using an LLC, the high profile Vanhau Fund and Vanhau Master Fund arranged by Vanhau Asset Management Limited. Our client briefing relating to this transaction may be accessed here.

7.2 An LLC may be an appropriate vehicle for a range of uses in investment funds, joint venture companies, private equity transactions, securitisations and other corporate transactions and international structures. In addition to forming and registering new LLCs, it is possible to convert existing exempted companies into LLCs and to migrate US LLCs to Cayman. For more information regarding LLCs please see our client briefing Cayman Islands Limited Liability Companies.

Global Developments

8. ESMA Opinion on EU Supervisory Convergence

8.1 In the context of the UK's withdrawal from the EU, the European Securities and Markets Authority (ESMA) has issued an opinion (**Opinion**) setting out its expectation for national regulators to apply significant substance requirements when assessing applications from "third country" regulated entities hoping to establish an EU presence. The Opinion can be found here.

8.2 ESMA says that the Opinion should be seen as a practical tool addressing the risks of regulatory and supervisory arbitrage that may arise in the context of a large volume of

applications by firms seeking to relocate to the EU. In particular, the Opinion will be of interest to UK regulated businesses when undertaking contingency planning in advance of Brexit and such businesses should be aware of the challenges it poses if, for example, they are intending to rely on outsourcing to mitigate the impact of Brexit.

8.3 The Opinion contains nine general principles that, although they largely restate the current rules applying to national competent authorities (NCAs), are strongly worded in their support for strict supervisory convergence. For example, ESMA expects each NCA to scrutinise applications where it appears that an entity intends to pursue the greater part of its activities in other member states from the member state of authorisation.

8.4 We will be keeping a close eye on developments in this area, especially given that ESMA intends to develop further sector specific guidance in respect of asset managers, investment firms and secondary markets.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

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Meet the Author



[Giorgio Subiotto](#)

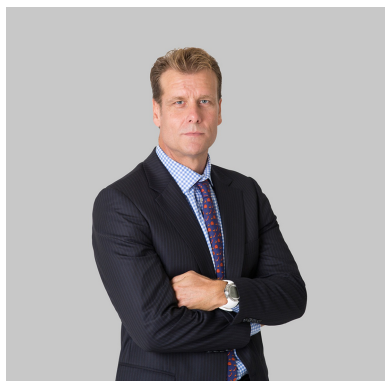
Partner

[Cayman Islands](#)

E: giorgio.subiotto@ogier.com

T: [+1 345 815 1872](tel:+13458151872)

Key Contacts



James Bergstrom

Partner

Cayman Islands

E: james.bergstrom@ogier.com

T: [+1 345 815 1855](tel:+13458151855)



Angus Davison

Partner

Cayman Islands

E: angus.davison@ogier.com

T: [+1 345 815 1788](tel:+13458151788)



Kate Hodson 律師 . 律師

Partner and Head of ESG (Legal) 律師

Hong Kong

E: kate.hodson@ogier.com

T: +852 3656 6049



Joanne Huckle

Partner

Cayman Islands

E: joanne.huckle@ogier.com

T: +1 345 815 1895



Bradley Kruger

Partner

Cayman Islands

E: bradley.kruger@ogier.com

T: +1 345 815 1877



Nicholas Plowman 0000

Partner 0000

Hong Kong

E: nicholas.plowman@ogier.com

T: +852 3656 6014



Nathan Powell

Partner 0000

Hong Kong

E: nathan.powell@ogier.com

T: +852 3656 6054



Nick Rogers

Partner

Cayman Islands

E: nick.rogers@ogier.com

T: [+1 345 815 1844](tel:+13458151844)



Justin Savage

Partner

Cayman Islands

E: justin.savage@ogier.com

T: [+1 345 815 1816](tel:+13458151816)

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