



Enhancement of Cayman's corporate governance framework for regulated funds

Insights - 03/05/2023

In April 2023, further to a review of international standards, jurisdictional comparisons as well as regulatory and supervisory needs, the Cayman Islands Monetary Authority (CIMA) issued new regulatory measures, including a new rule and guidance to enhance corporate governance requirements for regulated entities, including investment funds, in the Cayman Islands.

Of particular note for investment funds, CIMA has issued a new Statement of Guidance on Corporate Governance - Mutual Funds and Private Funds (SOG) which came into effect on 14 April 2023. This client briefing provides an overview of the core elements of the new SOG which applies to all funds regulated under the Mutual Funds Act (Revised) of the Cayman Islands (**Mutual Funds Act**) and the Private Funds Act (Revised) of the Cayman islands (**Private Funds Act**) (together, **Regulated Funds**).

CIMA has also issued the following new and updated regulatory measures which are applicable to regulated entities, including investment funds: (i) a new Rule on Corporate Governance for Regulated Entities^[1]; (ii) a new Rule and Statement of Guidance on Internal Controls for Regulated Entities^[2]; and (iii) an amended Statement of Guidance on Nature, Accessibility and Retention of Records, in respect of which Ogier will issue separate client briefings.

| The SOG - scope and principles

The SOG does not fundamentally deviate from the key corporate governance principles already set out under and/or guided by the previous corporate governance framework of the Cayman Islands, including CIMA's previously issued Statement of Guidance on Corporate Governance for Regulated Mutual Funds (2013) (**2013 SOG**), which applied to funds regulated under the Mutual Funds Act (**regulated mutual funds**) only.

The new SOG remains relevant to all regulated mutual funds and their **Operators** (meaning the board of directors of a fund incorporated as a company, the general partner(s) of a fund formed as

an exempted limited partnership, the manager (or equivalent) of a fund incorporated as a limited liability company or the trustee(s) in the case of a unit trust) but also extends to all private funds regulated under the Private Funds Act (**regulated private funds**) (which is a noteworthy extension, given that regulated private funds (and their Operators) were not subject to the 2013 SOG).

Key enhancements

The core elements of the SOG are set out in more detail below under the section 'Core elements of the SOG'. However, for ease, and for the benefit of Operators and sponsors already familiar with the 2013 SOG, we would highlight, in particular, the following key enhancements to the 2013 SOG made by the newly issued SOG, namely:

- Operators of a Regulated Fund should constitute an appropriate number of individual(s) as required by applicable acts and regulations in the Cayman Islands [3] with a diversity of skills, background, experience and expertise to ensure that there is an overall adequate level of competence at the Operator level
- the frequency of Operator meetings may be reduced from twice to once per year, or held more frequently where the circumstances or size, complexity, structure, nature of business and risk profile of the Regulated Fund's operations so require
- Operators should have a written conflicts of interest policy commensurate with the size, complexity, structure, nature of business and risk profile of the Regulated Fund's operations. CIMA has helpfully confirmed that such policy may be documented in the relevant Regulated Fund's constitutional documents, offering documents or marketing materials (as applicable), which is consistent with industry practice
- disclosures of conflicts of interest must be documented in a manner consistent with a Regulated Fund's constitutional documents, offering documents or marketing materials (as applicable)
- Operators should record in their meeting minutes, all disclosed conflicts of interest relevant to a meeting during which a matter is being decided or approved - and all conflicts of interest should be disclosed at least on an annual basis
- Operators must exercise independent judgement, always acting in the best interests of the Regulated Fund (other than where lawfully permitted or required to consider other interests) and taking into consideration the interests of the Regulated Fund's investors as a whole [4]
- Operators must make relevant enquiries where issues are raised on matters fully within the scope of the Operators' responsibility and be satisfied that an appropriate and timely course of action is being taken and, specifically, that any concerns raised and related corrective action are documented
- Operators should communicate adequate information to the Regulated Fund's investors,

including any material changes to the Regulated Fund. In addition, Operators should communicate and evidence communication of material changes relating to investor rights to the investors of the Regulated Fund at the time the changes are being made or on an ongoing basis [5]

- upon registration or licensing of a Regulated Fund, and on a continuing basis, the Operators of such Regulated Fund are responsible for ensuring or receiving confirmation that the constitutional documents, offering documents or marketing materials, as applicable, of the Regulated Fund comply with applicable acts, regulations, and regulatory measures issued by CIMA from time to time
- Operators are responsible for approving the appointment and removal of the Regulated Fund's service providers and the terms of the contracts with each of such service providers and, where they delegate this authority to another service provider, the Operators will nonetheless retain overall responsibility for overseeing any outsourced functions. Operators are responsible for ensuring that the Regulated Fund's investors and CIMA are notified of any material changes to these appointments
- Operators should review the Regulated Fund's material service provider contracts (the prior guidance contained in the 2013 SOG provided for a review of all of the Regulated Fund's service provider contracts) to ensure that any outsourced or delegated roles and responsibilities are clearly defined and that, where appropriate, any such responsibilities are clearly divided as between the Regulated Fund's service providers. Operators should also ensure that they have a thorough understanding of the scope and nature of the responsibilities of each of the Regulated Fund's service providers
- Operators are responsible for ensuring that a full, accurate and clear written record is kept of all Operators' meetings and/or determinations and that, in each case, these records should address certain key matters, including a declaration of conflicts of interest

Effect and purpose of the SOG

The SOG does not create new law and is not intended as a prescriptive or exhaustive guide regarding the governance of a Regulated Fund. CIMA has indicated, as it does with statements of guidance more generally, that the purpose of the SOG is to provide: (i) the Operators of a Regulated Fund with guidance on the minimum expectations for the sound and prudent governance of any Regulated Funds that they operate; and (ii) that the adequacy and suitability of the governance structure of a particular Regulated Fund should be appropriate for, and proportionate to, the size, complexity, structure, nature of business and risk profile of such Regulated Fund's operations. CIMA has additionally stated 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 structure, nature of investment strategy, or nature of the operations.

The SOG contains recommendations on how Regulated Funds should operate and represents a measure against which CIMA will assess a Regulated Fund's compliance with, for example, the Mutual Funds Act in the event that CIMA needs to consider whether the direction and management of a Regulated Fund has been conducted in a "fit and proper manner".^[6] As such, we would urge Operators and sponsors of Regulated Funds to review the corporate governance framework of any Regulated Funds they operate, to ensure that they are familiar with the existing laws setting forth the duties and obligations of Operators, and to ensure that they implement best practices that meet or exceed the requirements of the SOG.

Core elements of the SOG

The SOG provides guidance on seven core elements, namely:

1. Oversight function of the Operators
2. Conflicts of interest
3. Operator meetings
4. Duties of Operators
5. Documentation
6. Relations with CIMA
7. Risk management

Oversight function

Under the SOG, Operators of a Regulated Fund have the ultimate responsibility for effectively overseeing and supervising the activities and affairs of the Regulated Fund and for monitoring and regularly taking steps to satisfy themselves that the Regulated Fund conducts its affairs in accordance with all applicable legislation, regulations and regulatory measures of the Cayman Islands (and those of any other jurisdictions where the Regulated Fund may operate).

As noted above, the SOG indicates that CIMA expects the Operators of a Regulated Fund to constitute an appropriate number of individual(s) as required by applicable acts and regulations in the Cayman Islands; and to have a diversity of skills, background, experience and expertise to ensure that there is an overall adequate level of competence at the Operators' level.

The SOG indicates that CIMA expects Operators to: (i) regularly take steps to satisfy themselves that the Regulated Fund's service providers are monitoring compliance with applicable acts, regulations and regulatory measures; (ii) request appropriate information from such service providers and/or any professional advisors to the Regulated Fund to enable them to regularly satisfy themselves that the Regulated Fund is operating in compliance with all applicable acts,

regulations and regulatory measures; (iii) where required, provide appropriate directions to the Regulated Fund's service providers to rectify any non-compliance with any applicable acts, regulations and regulatory measures; and (iv) require regular reporting from the Regulated Fund's investment manager and any other service providers to enable the Operators to make informed decisions and adequately oversee and supervise the operations of the Regulated Fund.

Conflicts of interest

Operators must suitably identify, disclose, monitor and manage all conflicts of interest; and must document any disclosed conflicts of interest in a manner consistent with the Regulated Fund's constitutional documents, offering documents or marketing materials (as applicable).

Operators are also expected to record, in their meeting minutes, all disclosed conflicts of interest relevant to a meeting during which a matter is being decided or approved and, furthermore, CIMA will expect all conflicts of interest to be disclosed at least on an annual basis.

Operator meetings

The SOG indicates that CIMA will also expect Operators of a Regulated Fund to convene a meeting at least once a year, or more frequently where the circumstances or size, complexity, structure, nature of business and risk profile of the operations of the Regulated Fund require, noting that board meetings for Regulated Funds are not required to take place in the Cayman Islands.

Where necessary, Operators should request the attendance of the Regulated Fund's service providers at such meetings.

Duties of Operators

The SOG provides guidance on Operators' duties, including that an Operator:

- must exercise independent judgement, always acting in the best interests of the Regulated Fund (other than where lawfully permitted or required to consider other interests) and taking into consideration the interests of the Regulated Fund's investors as a whole [7]
- must make relevant enquiries where issues are raised on matters fully within the scope of the Operators' responsibility and be satisfied that an appropriate and timely course of action is being taken; and that all concerns raised and related corrective actions are documented
- should communicate adequate information to the Regulated Fund's investors, including any material changes to the Regulated Fund and should communicate (and evidence communication of) material changes relating to investor rights to the investor(s) in the Regulated Fund at the time such changes are being made or on an ongoing basis
- must operate with due skill, care and diligence and must always act honestly and in good faith

- must oversee and supervise each Regulated Fund for which it functions and all matters falling within the scope of its related responsibilities and, before taking on any additional Regulated Funds, should ensure that it is able to perform its functions and duties in a responsible and effective manner (and in accordance with applicable acts, regulations and regulatory measures)
- upon registration or licensing of a Regulated Fund with CIMA, and on a continuing basis, should ensure or receive confirmation: (i) that the constitutional documents, offering documents and/or marketing materials (as applicable) of the Regulated Fund comply with applicable acts, regulations and regulatory measures as issued by CIMA from time to time; and (ii) that the constitutional documents, offering documents and/or marketing materials (as applicable) of the Regulated Fund clearly describe (a) the investment strategy and conflicts of interest policy of the Regulated Fund; and (b) the equity and/or investment interests in the Regulated Fund in all material respects (and contain such other information as is necessary to enable a prospective investor to make an informed decision as to whether or not to subscribe for or purchase an equity and/or investment interest in the Regulated Fund)
- is responsible for approving the appointment and removal of the Regulated Fund's service providers and the terms of the contracts with each such service provider; and, where they delegate this authority to another service provider, the Operator nonetheless retains overall responsibility for overseeing any outsourced functions and for ensuring that both investors in the Regulated Fund and CIMA are notified of any material changes to these appointments
- retains ultimate responsibility for functions delegated to service providers and should regularly monitor and supervise any such delegated functions
- should review all material service provider contracts to ensure that any outsourced or delegated roles and responsibilities are clearly defined and that, where appropriate, any such responsibilities are clearly divided as between each relevant service provider
- should ensure that the Regulated Fund's service providers are performing their functions in accordance with the terms of their respective contracts
- upon registration or licensing of a Regulated Fund with CIMA, and on a continuing basis, is responsible for regularly assessing the suitability and capability of its service providers
- should regularly verify or seek confirmation from its service providers that they are acting in accordance with the Regulated Fund's constitutional documents, offering documents and marketing materials, as applicable
- should regularly monitor whether the Regulated Fund's investment manager is performing in accordance with any defined investment criteria, investment strategy and restrictions
- should, as necessary and at all material times, inform itself of the Regulated Fund's investment activities, performance and financial position

- should review and approve the Regulated Fund's financial results and audited financial statements and regularly monitor the Regulated Fund's net asset valuation policy and whether the calculation of its net asset value is being calculated in accordance with such net asset valuation policy
- should ensure that it has sufficient and relevant knowledge and experience to carry out its duties as an Operator of a Regulated Fund
- should assess whether it has, together with any other Operator(s) of the Regulated Fund, sufficient and relevant collective knowledge and experience to perform the duties imposed upon the Operator in relation to the Regulated Fund

Documentation

Operators are responsible for ensuring that a full, accurate and clear written record is kept of the Operators' meetings and/or determinations in relation to the Regulated Fund.

Records of the Operators' meetings and/or determinations should include: (i) agenda items and any circulated documents; (ii) a list of attendees present and whether attendance was in person or via telephone or video conference; (iii) the matters considered and decisions made; (iv) any information requested from, and provided by, any service providers and advisors; and (v) a declaration of conflicts of interest.

Relations with CIMA

The SOG calls for transparent and honest communication with CIMA of any matter that could materially and adversely affect the financial soundness of a Regulated Fund (ie a Regulated Fund's ability to continue as a going concern) and/or any non-compliance by a Regulated Fund, with any applicable acts, regulations and/or regulatory measures, including those of the Cayman Islands or CIMA; and encourages communication of information to CIMA as a default in the case of uncertainty.

Risk management

Operators should provide suitable oversight of risk management, ensuring the Regulated Fund's risks are always appropriately managed and mitigated, with material risks being discussed and acted on by the Operators where necessary.

How can Ogier help?

Ogier's Investment Funds and Regulatory lawyers have extensive experience advising funds and other regulated entities in the Cayman Islands on corporate governance and compliance matters.

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).

For advice concerning any of the above matters, please contact your usual Ogier attorney or any of the contacts listed in this briefing.

[1] CIMA has confirmed that the new Rule on Corporate Governance for Regulated Entities will not come into effect until **14 October 2023** and that the SOG and the new Rule on Corporate Governance (once effective) will replace and consolidate CIMA's previous regulatory measures on corporate governance (namely the Statement of Guidance on Corporate Governance for Regulated Mutual Funds (2013), the Statement of Guidance on Corporate Governance (2016) (which was specific to the banking and insurance sector) and the Rule on Corporate Governance for Insurers (2016)).

[2] CIMA has further advised that the Rule and Statement of Guidance on Internal Controls for Regulated Entities will come into effect within six months of its date of publication in The Cayman Islands Gazette, being 14 April 2023.

[3] CIMA requires a minimum of two directors for regulated mutual funds that are companies (or two managers for LLCs), and requires a minimum of two natural persons to be named in respect of a general partner or corporate director of a regulated mutual fund. The Directors Registration and Licensing Act (Revised) of the Cayman Islands (**DRLA**) applies to all directors of Cayman regulated mutual funds and certain vehicles carrying on securities investment business, including most Cayman investment management and investment advisory companies, regulated or registered with CIMA. The DRLA requires directors of such entities to be registered with or licensed by CIMA. While CIMA also requires a minimum of two directors for regulated private funds that are companies and a minimum of two natural persons to be named in respect of a general partner or corporate director of a private fund, the operators of the general partner and directors of regulated private funds are not currently required to be registered or licensed by CIMA under the DRLA.

[4] CIMA recognises that Operators may be members of the parent company, group or business associates of the Regulated Fund, or a person providing, directly or indirectly, investment management or advisory services for such Regulated Fund; but expects all Operators to exercise independent judgement and objectivity in their decision making vis-à-vis the Regulated Fund.

[5] During the consultation process on the SOG, CIMA acknowledged that most material changes

affecting investor rights are not made without investor consent and confirmed that there is no specific additional communication intended and the purpose of this section is to encourage Operators to always keep investors in the loop on material and relevant changes.

[6] Pursuant to section 30(1)(d) of the Mutual Funds Act.

[7] As noted above, CIMA acknowledges that Operators may be closely associated with the Regulated Fund and/or its investment manager or advisor; but nonetheless expects all Operators to exercise independent judgement and objectivity in their relevant decision making.

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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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