



7 May 2020

## NOTICE

### RE: Private Funds Law FAQs Update

The purpose of these FAQs is to provide guidance to ensure common, uniform and consistent application of the concepts that comprise the definition of “*private fund*” in the Private Funds Law, 2020 (“the PFL”), by clarifying each of these concepts as well as the Cayman Islands Monetary Authority’s (“CIMA”) expectations in respect of the application of the various provisions of the PFL.

Appropriate consideration should be given to the interaction between the individual concepts of the definition of a private fund, and an entity should not be considered a private fund unless all the elements included in the definition of a private fund under the PFL are present. Fund operators should consider a “*collective investment scheme*” to be a private fund if all the elements included in the definition of a private fund under the PFL are present *or otherwise established*.

By way of example, private funds which do offer and issue investment interests, the purpose or effect of which is the pooling of investor funds, but do not do so with the aim of spreading investment risk, should not be considered a private fund for the purposes of the PFL.

Nevertheless, fund operators should not consider that the absence of all or any one of the characteristics under each of the concepts in the definition of private fund in the PFL (i.e. offering and issuing of investment interest, pooling of investor funds, and spreading of investment risks), as set out in these FAQs, conclusively demonstrates that a collective investment scheme does not fall under the relevant concept. For the avoidance of doubt, these FAQs illustrate and explain in more detail the characteristics likely to lead to a collective investment scheme or other such undertaking being considered a private fund, but they in no way alter the provisions of the PFL.

### **General**

#### 1. **What is a Private Fund?**

- (1) The PFL defines a “*private fund*” as a company, unit trust or partnership whose principal business is the offering and issuance of its investment interests, the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risks and enabling investors to receive profits or gains from such entity’s acquisition, holding, management or disposal of investments, where-

- (a) the holders of investment interests do not have day-to-day control over the acquisition, holding, management or disposal of the investments; and
- (b) the investments are managed as a whole by or on behalf of the operator of the private fund, directly or indirectly, for reward based on the assets, profits or gains of the company, unit trust or partnership.

(2) It does not include:

- (a) a person licensed under the Banks and Trust Companies Law (2020 Revision) or the Insurance Law 2010;
- (b) a person registered under the Building Societies Law (2020 Revision) or the Friendly Societies Law (1998 Revision); or
- (c) any non-fund arrangements.

## 2. **What is a collective investment scheme?**

- (1) The following characteristics, if all of them are exhibited by an undertaking, should show that the undertaking is a collective investment scheme that is captured by the definition of a private fund under the PFL.
- (2) The characteristics are that: (a) the undertaking does not have a general commercial or industrial purpose; (b) the undertaking pools together capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors; and (c) the unitholders or shareholders of the undertaking, as a collective group, have no day-to-day discretion or control.
- (3) The fact that one or more but not all of the aforementioned unitholders or shareholders are granted day-to-day discretion or control should not be taken to show that the undertaking is not a collective investment scheme.

## 3. **How should investment compartments of a private fund be treated?**

- (1) Taking as an example, a Segregated Portfolio Company (“SPC”), where there is a single investor in each underlying Segregated Portfolio (“SP”), fund operators should not consider that the absence of all, or any one of the characteristics under each of the concepts in the definition of a private fund under the PFL (for example the ‘offering and issuing of investment interest’, ‘pooling of investor funds’, or ‘spreading of investment risks’), as set out in these FAQs, conclusively demonstrates that a SPC or an underlying SP does not fall under the relevant concept.
- (2) It should also be noted that where an investment compartment, that is itself a separate legal entity and which in its own right meets the definition of a private fund pursuant to the PFL, then it would be expected that such investment compartment is separately registered under the PFL.

## 4. **What is considered “offering and issuing of investment interests”?**

- (1) The commercial activity of taking direct or indirect steps by a private fund or a person or entity acting on its behalf (typically, the investment manager) to procure the transfer or commitment of capital by one or more investors to the private fund for

the purpose of investing it in accordance with its offering document or summary of terms, should amount to the activity of offering and issuing investment interests.

- (2) For the purpose of the previous paragraph, it should be immaterial whether- (a) the activity takes place only once, on several occasions or on an ongoing basis; (b) occurs through only one of the entities within a multi-fund/related fund entities structure; or (c) the transfer or commitment of capital takes the form of subscriptions in cash or in kind.
- (3) Without prejudice to the above paragraphs, when capital is invested in a private fund by an existing investor, this is not likely to be within the scope of raising capital.

5. **Are collective investment schemes that only have one investor exempted from being required to register as private funds under the PFL?**

- (1) Yes. Where the constitutive documents of the private fund, or any other provision or arrangement of binding legal effect, expressly states that the fund only has and is only intended to ever have a single investor of record.

6. **How should the “spreading of investment risks” be treated?**

- (1) Taking as an example, collective investment schemes that have only one investment/ one type of investment, fund operators should not consider that the absence of all or any one of the characteristics under each of the concepts in the definition of “private fund” in the PFL (for example the ‘offering and issuing of investment interest’, ‘pooling of investor fund”, or ‘spreading of investment risks’) conclusively demonstrates that a collective investment scheme does not fall under the relevant concept.
- (2) The nature of the investment(s) into which investors’ pooled funds are placed should not be the sole consideration for whether or not a private fund, pursuant to the PFL, has been created.

## ***Registration***

7. **How do I submit a Private Fund registration application?**

- (1) Applications are submitted electronically through CIMA’s secure Regulatory Enhanced Electronic Forms Submission (REEFS) web portal.

8. **What documents/fees are required to register as a Private Fund under the Private Funds Law?**

- (1) CIMA requires the following:
  - (a) REEFS Application Form (APP-101-77);
  - (b) Certificate of Incorporation/Registration (as applicable);
  - (c) Constitutive Documents (Memorandum & Articles of Association/Trust Deed/Declaration of Partnership (as applicable);
  - (d) Offering Memorandum/Summary of Terms/Marketing Material (as applicable);

- (e) Auditor's letter of consent<sup>1</sup>;
- (f) Administrator's letter of consent (if applicable);
- (g) Structure Chart;
- (h) Application Fee<sup>2</sup>

9. **Why are the constitutive documents required for the registration of a private fund?**

- (1) The Authority requires details of the terms of the offer to investors for making an investment in the private fund.
- (2) The Authority understands that a number of the private funds currently in existence do not have a separate offering document, summary of terms or marketing materials and that the terms of the offer are outlined in the constitutive documents of the private fund. In these circumstances, a private fund must provide at the time of registration its constitutive documents and any subsequent changes made thereto.

10. **Where a private fund has a separate offering document, summary of terms or marketing materials that contains the relevant information on the terms of offer, will that private fund still be required to file its constitutive documents at the time of registration?**

- (1) No. In these circumstances, the private fund need only file the offering document, summary of terms or marketing materials at the time of registration<sup>3</sup>.
- (2) However, the Authority reserves the right to request a copy of the private fund's constitutive documents if the Authority determines that the offering document, summary of terms or marketing materials filed does not contain all of the relevant information on the terms of offer or determines that the constitutive documents are necessary for it to discharge its supervisory or other legal obligations, duties or functions.

11. **When is a Private Fund application viewed as complete and ready for processing by CIMA?**

- (1) All documentation (as outlined above) and payment must be submitted to CIMA before the processing of the application will commence.

12. **Under what circumstances will CIMA reject a Private Fund's registration application?**

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<sup>1</sup> If the appointment of the CIMA approved local auditor has not been finalized at the time of the fund's registration, the application can proceed without the auditor's letter of consent but such consent letter must be submitted to CIMA prior to the filing of the fund's first set of audited accounts.

<sup>2</sup> There will be no annual registration fee assessed for funds registering during the transition period, which ends on 7 August 2020; however, an application fee of \$300 is due. Funds registering subsequent to the end of the transition period will pay the annual registration fee of \$3,500 and the \$300 application fee.

<sup>3</sup> In these situations, the fund should attach the offering document, summary of terms or marketing materials in lieu of the constitutive documents when requested in the application form.

- (1) A Private Fund's registration application will be rejected where the documentation submitted is incorrect or incomplete. Please see the following [Notice](#)<sup>4</sup> for further information.
13. **Using the risk-based approach that is included in the PFL, how will CIMA ensure a timely processing of a registration application for a Private Fund?**
- (1) Private Funds submitting complete applications, where there are no adverse findings in respect of the information submitted, will be processed and approved within the stated timeline.
- (2) Factors that might impact registration turnaround time include:
- (a) Adverse findings from the fitness and propriety checks conducted on the fund's operators or officers; and/or
- (b) Fund/related group entities/operators/officers being the subject of an ongoing regulatory or criminal investigation.
14. **What date will be reflected on the Private Fund's registration certificate?**
- (1) The registration date of a Private Fund will be the date that a complete application has been received by CIMA - i.e. the submission date when the Private Fund has submitted all documents, fees and information as required pursuant to the PFL.
15. **Will CIMA extend the four eyes principle to a Private Fund?**
- (1) Yes. A minimum of two (2) directors are required for applicants that are companies.
16. **Will the two (2) director test be applied to the general partner or corporate director of a Private Fund?**
- (1) Yes. CIMA will require a minimum of two (2) natural persons to be named in respect of a general partner or corporate director of a Private Fund.
17. **Will marketing materials or offering documents need to be submitted as part of the application process for Private Funds?**
- (1) Yes. A copy of the marketing materials, summary of terms or offering document will be required upon registration.
- (2) The Authority understands that a number of the private funds currently in existence do not have a separate offering document, summary of terms or marketing materials and that the terms of the offer are outlined in the constitutive documents of the private fund. In these circumstances, a private fund must provide at the time of registration its constitutive documents and any subsequent changes made thereto.

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<sup>4</sup> See the answer to question 2 on the Notice. However, it should be noted that directors appointed to Private Funds are not required to be registered pursuant to the Director Registration and Licensing Law (2014 Revision).

18. **How will the Alternative Investment Vehicle (“AIV”) entities under the Private Fund registered with CIMA be handled; will they also need to be separately registered?**
- (1) No. AIV entities will not require a separate registration. However, information in respect of each such entity will be collected at the time of registration, with any changes to such information to be reported to the Authority as a part of the ongoing obligations of the Private Fund.
19. **How will the Cayman AIV entities under a non-Cayman main Private Fund (i.e. not registered with CIMA) be handled?**
- (1) A Cayman AIV meeting the definition of a Private Fund will be required to register under the PFL. A group registration option, as outlined in question #18 will be available for any AIVs in the fund structure.
20. **Will a Private Fund that is in liquidation/being wound-up or that has commenced the liquidation/wind-up process prior to the end of the transition period be required to submit a registration application to CIMA?**
- (1) A Private Fund that completes its liquidation/winding-up prior to the end of the transition period will not be required to apply for registration pursuant to the PFL. The completion of the liquidation/winding-up process means that the private fund has disposed of all its investments and has made final investor distributions.

## ***Audit Requirements***

21. **What are the audit requirements for Private Fund?**
- (1) A Private Fund, pursuant to section 13(1) of the PFL, is required to have its accounts audited annually by an auditor approved by CIMA. The Private Fund is also required to submit its audited accounts, along with the Fund Annual Return (“FAR”), to CIMA within six months of the end of each financial year.
22. **Will an audit for a Private Fund be required for 2020?**
- (1) Yes. A Private Fund is required to submit an audit for its 2020 financial year within six months of the financial year end or within such extension of that period as the Authority may allow.

## ***Valuation***

23. **How will the valuation requirement under section 16 of the PFL be applied to Private Funds that hold assets that are not subject to regular valuation?**
- (1) The valuation of the assets of a Private Fund should be conducted in accordance with the Private Fund’s valuation policy. Valuations of a Private Fund should be carried out on at least on an annual basis.

- (2) CIMA will issue rules establishing the policies and procedures of CIMA with respect to the valuation of the assets of a Private Fund.

24. **Will CIMA expect a Private Fund to have its assets valued annually even if the investors do not require it themselves?**

- (1) Yes. Good market practice is for a fund to ensure that their investors are kept abreast of the performance of the fund. CIMA is of the view that while investors are aware that any capital contributions made into a Private Fund will not be distributed until the timeframe indicated in the relevant fund documents has been completed, investors should still be made aware of the fund's performance on an ongoing basis. The PFL provides for various ways in which this obligation can be met.

### ***Cash Monitoring Requirements***

25. **Will cash monitoring need to be done internally?**

- (1) A Private Fund has a choice of whether to conduct this function internally (by the investment manager) or to hire a third-party service provider (such as an administrator or custodian) to ensure that this function is carried out.
- (2) Should this function be conducted internally, the Private Fund's Operator should engage an independent third party, for example the Private Fund's auditor, to provide independent verification that the cash monitoring was done throughout the year.

26. **Will CIMA determine what is proper regarding the cash monitoring process or will the Private Fund decide what is a proper process?**

- (1) CIMA's assessment of the process undertaken by the Private Fund, in respect of cash monitoring, will seek to confirm that such process, based on the investment strategy of the fund, is sufficient having regard to the type of assets held by the Private Fund.
- (2) CIMA will issue rules establishing the policies and procedures with respect to the cash monitoring requirements of a Private Fund.

27. **Will CIMA review a Private Fund's processes and advise whether improvements are necessary without risk of penalty?**

- (1) All regulated funds are subject to ongoing monitoring by CIMA and, in keeping with CIMA's current approach, matters will be addressed as they arise in the manner commensurate with the level of seriousness of the breach.