Cayman Islands
Technical Brief for Investment Funds

Loeb Smith Attorneys

British Virgin Islands | Cayman Islands | Hong Kong

Current issue | May 2021

FATCA/CRS Summary

Cayman Islands investment funds will fall within the definition of "investment entities" and therefore generally be required to register and report as financial institutions ("**Financial Institutions**") under the Cayman Islands legislation implementing the Foreign Account Tax Compliance Act of the United States (FATCA) and the OECD's equivalent scheme, the Common Reporting Standard (CRS). FATCA and CRS aim to facilitate onshore tax compliance by requiring the automatic exchange of information for tax purposes (AEOI). Certain investment funds that invest in non-financial assets, such as real estate and certain pension funds fall outside the scope of FATCA and CRS.

Cayman Islands investment funds that are not exempted from AEOI reporting are required to obtain a Global Intermediary Identification Number (GIIN) for FATCA purposes by registering on the U.S. IRS web portal within 30 days of commencing business. They must then register on the web portal of the Department of International Tax Co-operation of the Cayman Islands Government (DITC) for FATCA and CRS reporting by the end of April following launch of the investment fund and report on any reportable accounts by the end of July following each calendar year end.

Cayman Islands investment funds must appoint a Principal Point of Contact (PPoC) and an Authorising Person (AP) in all cases. It is the responsibility of the Cayman Islands investment funds to assign persons and ensure that they can access their account on the DITC portal.

Cayman funds must also collect due diligence on investors for purposes of AEOI reporting, which is generally satisfied by requiring investors to provide a self-

certification with their subscription application, and to update any information that later changes. For CRS purposes, Cayman funds must maintain a written compliance policy and file a CRS Compliance Form with the DITC in respect of each reporting year.

The following are reporting deadlines for the 2019 and 2020 reporting period:

Registration	Reporting obligation	Deadline
	Notification	30 April 2021
2019 & 2020	CRS Reporting	31 July 2021
2019 & 2020	CRS Filing Declaration	31 July 2021
2019 & 2020	FATCA Reporting	31 July 2021
2019 & 2020	CRS Compliance Form	15 September 2021

CRS Compliance Form Deadline

The deadline for submitting the 2019 CRS Compliance Form has been further extended to 15 September 2021. As a result, the deadlines for the 2019 CRS Compliance Form and the 2020 CRS Compliance Form are now the same (see table above).

The DITC advised the Cayman financial services industry earlier this month that it will be conducting CRS compliance measures from April 2021. In the interest of promoting a robust CRS and FATCA compliance culture, the DITC recommends that all registered office service providers remind all client entities to carefully double-check that they have been correctly classified for CRS and FATCA purposes and are complying with all applicable obligations.

CRS Compliance and Administrative Penalties

The DITC Compliance Team reported that it has identified a number of areas where Financial Institutions have potentially not complied with the CRS Regulations. In addition to cases of mis-classification, some further examples are provided below (e.g. undocumented documents and Missing TINs & date of birth

in XML uploads). **It should be noted that a contravention of the CRS Regulations may result in the application of an Administrative Penalty of up to $50,000 for a body corporate, or otherwise $20,000. In appropriate cases, criminal prosecution may also be initiated in the Cayman Islands.**

1. Undocumented accounts

According to the DITC, financial Accounts should only be reported as an undocumented account (i.e. Receiving Country is Cayman Islands ["KY"]) in specific circumstances. These circumstances are limited to Preexisting Individual Accounts. For these accounts, where the only indicium discovered in the electronic search is a "hold mail" instruction or "in-care-of" address **and** a paper search fails to establish an indicium **and** the attempt to obtain the self-certification or documentary evidence is not successful, the account should be reported as an undocumented account. According to the DITC, in no other circumstances should an account be reported as an undocumented account. The DITC has also reiterated that for New Accounts a valid self-certification must always be obtained.

2. Missing TINs & date of birth in XML uploads

According to the DITC, the Tax Identification Number (TIN) and, in relation to individuals, the date of birth must always be reported for each Account Holder and Controlling Person where this information is available in the records of the Financial Institution (FI). In the case of New Accounts, this information is required to be collected in the self-certification form and should therefore always be available (unless the Reportable Jurisdiction does not issue TINs or does not require TINs to be collected). Further information on TINs and their structures for each jurisdiction can be found on the OECD website.

The DITC has reported that though the CRS XML Schema User Guide indicates that the TIN and date of birth elements are "Optional (Mandatory)", this does not mean that it is optional to provide data in this element. In all cases described in the paragraph above (and further explained in the CRS Regulations), it is mandatory to provide data in the TIN and data of birth elements.

Considerations for Directors of Cayman Regulated Open-ended Funds

Powers of Authority

The considerations set out in this section also apply to Cayman Regulated Private Funds, but this section focuses on open-ended mutual funds.

The constitutional documents of a Cayman Islands company consist of the Memorandum of Association and the Articles of Association ("**Articles**"), which set out the governance rules and the powers of the Directors. The Directors also must ensure that the Fund is operated in accordance with the terms of the private placement memorandum or offering memorandum respectively ("**PPM**") issued by the Fund from time to time, and which has been communicated to investors to set out, among other things, the terms of the offering of shares or interests in the Fund.

In practice, the Directors of the Fund engage, and exercise supervisory oversight and control over, service providers to the Fund (e.g. Investment Manager, Administrator, and Custodian/Prime Broker). The functions that these service providers undertake for the Fund are performed on the basis of powers delegated to them by the Fund. In addition, all exempt companies are required to maintain a registered office in the Cayman Islands, and certain corporate services are delegated to the Registered Agent of the Fund in the Cayman Islands. Finally, an audit firm on the CIMA list of approved audit firms is appointed in order to undertake the annual audit of the Fund's financial statement as required under the Mutual Funds Act.

Directors are entitled to trust the competence and integrity of the service

providers, subject to a continuing duty to supervise and monitor their activities. Continuous lack of any supervision and control may be deemed wilful neglect or breach of duties by the Directors, potentially exposing Directors to liability. The Fund's Directors should evidence this supervision and control through conducting regular meetings of the Board of the Fund (e.g. quarterly meetings) where reports and updates from service providers can be reviewed and assessed.

Registration Obligations

Directors of the Fund who are natural persons are required to register with CIMA under the Directors Registration and Licensing Act, 2014 as amended (the "**DRLL**"). Each Director of the Fund is required to pay an annual fee in January of each year to CIMA in respect of his/her registration under the DRLL.

Directors' Duties

Under English common law, directors owe fiduciary duties to the Fund and certain duties of skill and care. Among the principal **fiduciary duties**:

i. Directors should act, in good faith, in what they consider reasonably to be the best interests of the Fund.
ii. Directors should exercise their powers under the Articles for the purposes for which those powers are conferred.
iii. Directors should avoid conflict between the interests of the Fund and their personal interests and duties or (where conflicts are permitted by the Articles) should ensure that any conflicts are properly disclosed during Board meetings.
iv. Directors should exercise their powers independently, without

subordinating to the will of others.

v. Directors should not misuse the property of the Fund and should not make secret profits from their position as a Director of the Fund.

Fiduciary duties are owed to the Fund and not to individual shareholders/ investors of the Fund.

Directors of the Fund should also:

(a) acquire and maintain a sufficient knowledge of the business of the Fund on a continuing basis; and

(b) attend diligently to the affairs of the Fund and exercise supervisory oversight over the Fund's advisers and service providers.

These duties need to be carried out with **reasonable care, diligence and skill**. As developed by English case law and adopted by the Cayman Islands courts, this standard of conduct implies that:

i. A Director should act like a reasonably diligent person.

ii. There is a continuing duty to acquire/maintain sufficient knowledge and understanding of the Fund's business.

ii. Directors must exercise independent judgment, in the ordinary course of business.

Directors also have certain statutory obligations under the Companies Act (2021 Revision), the Mutual Funds Act (2021) and the Proceeds of Crime Act (2020 Revision). The Fund's service providers typically assist in ensuring that these obligations are discharged but the primary duty is on the Fund and its Directors.

Liabilities

Broadly speaking, Directors are not liable except in cases of negligence, fraud, breach of fiduciary duty, or when they take an action not within their authority and not ratified by the Fund. The Fund typically includes in its Articles an indemnity for the benefit of all directors and officers. Under Cayman Islands laws, the Fund may indemnify its directors and officers against personal liability for any loss they may incur arising out of the Fund's business, including in case of negligence and breach of duty (other than breaches of fiduciary duty), except in cases of wilful default or fraud. Neglect or default is not deemed wilful unless a director made a conscious or deliberate decision to act or failed to act in knowing breach of his duties.

Guidance from CIMA

In 2011, in a decision *Weavering Macro Fixed Income Fund (In Liquidation) v. Peterson and Ekstrom*, the Grand Court of the Cayman Islands provided certain guidelines for Directors. Following this decision, CIMA published a Statement of Guidance (SoG) of the best practices and minimum standards for Directors, who are deemed to be responsible for supervising the business of Funds registered with CIMA. In this respect, Directors must ensure that:

i. the governance structure of the Fund is appropriate for effective oversight, taking account of the Fund's size, nature and complexity;
ii. sufficient time / attention is allocated to overseeing and supervising the Fund;
iii. the Fund has procedures to identify, disclose, monitor and manage conflicts of interest;
iv. Directors receive regular reporting from the Investment Manager and the other service providers to monitor that the investment strategy and restrictions are respected, as well as applicable laws;
v. meetings (either in person or by conference call, but with written records kept) occur at least twice a year, including with the Investment Manager and the service providers;
vi. investors and CIMA are informed of any changes in service providers; and
vii. the Fund's investors receive from the Investment Manager and the

Administrator sufficient information in accordance with the PPM.

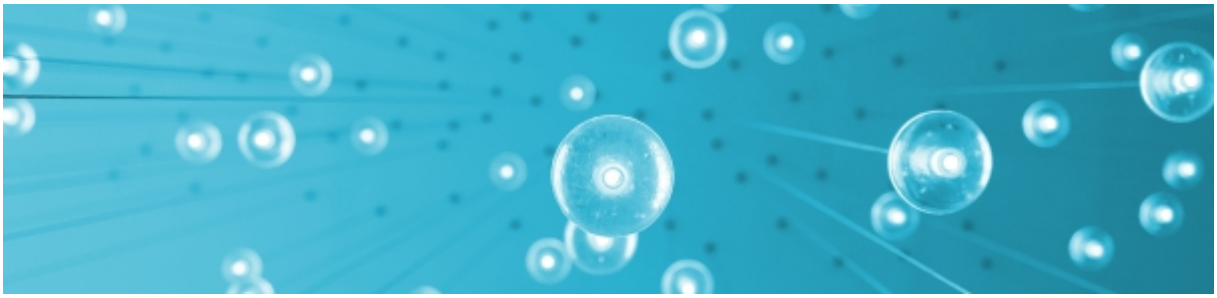
Director Checklist before Launch of the Fund

i. Directors should review the overall structure of the Fund and the PPM.
ii. Directors should understand which tasks are delegated to service providers, and should review terms of the service provider contracts to assess whether terms are reasonable and conform with market practice. Any non-standard terms should be disclosed in the PPM.

Independent Directors appointed to the Fund are not expected to be involved in negotiations with service providers. However, they should receive copies of the agreements negotiated by the Investment Manager on behalf of the Fund with other service providers and understand their terms.

iii. Since the Directors of the Fund are collectively responsible for the contents of the PPM, they need to satisfy themselves that the PPM describes the equity interests being offered to investors in all material respects and provides such information as is necessary for an investor to make an informed decision.

For Independent Directors, preparation of the PPM is normally delegated to the Investment Manager or to the promoter of the Fund, together with the Fund's legal counsel. However, Directors are required to verify that the PPM was drafted and verified to a reasonable standard by competent people. They should also go through the final draft PPM to satisfy themselves that personally they are not aware of anything which would lead them to doubt the accuracy of the statements made in the PPM. Directors cannot simply rely on the presence of advisers, but instead they should ask questions and understand the process of preparing and reviewing the PPM.



Cayman Islands' Rule on Cybersecurity for Regulated Entities and Statement of Guidance on Cybersecurity for Regulated Entities.

The Cayman Islands Monetary Authority ("**CIMA**") released its Rule - Cybersecurity for Regulated Entities ("**Rule**") and a Statement of Guidance - Cybersecurity for Regulated Entities in May 2020 ("**Statement of Guidance**"). The Rule and the Statement of Guidance came into effect on 27 November 2020.

The Rule, which sets out CIMA's requirements in relation to the management of cybersecurity risks creates legally binding obligations, the breach of which may lead to a fine or other regulatory sanctions being imposed by CIMA.

Who does the Rule and Statement of Guidance apply to?

The Rule and the Statement of Guidance apply to all entities regulated by CIMA (each a "**Regulated Entity**"), including, but not limited to, an entity regulated under the following laws:

(a) the Mutual Funds Act (2021 Revision), excluding regulated mutual funds;
(b) the Securities Investment Business Act (2020 Revision);
(c) the Companies Management Act (As Revised);
(d) the Directors Registration and Licensing Act, 2014 (As Revised);
(e) the Banks and Trust Companies Act (As Revised); and
(f) the Insurance Act (Revised).

Accordingly, the Rule and the Statement of Guidance apply to all of the following which are licensed by CIMA: banks, mutual fund administrators, insurance companies, broker dealers, entities with a Companies' Management licence (e.g. registered office agents), and entities registered with CIMA as "Registered Persons" (e.g. Investment Managers and Investment Advisers).

Investment funds are not within the scope of the Rule or the Statement of

Guidance. However, the Directors of Cayman investment funds should be checking whether or not its service providers which are Cayman Regulated Entities are in compliance with the Rule.

What is the purpose of the Rule and Statement of Guidance?

The Rule requires that: "***Regulated entities must establish, implement, and maintain a documented cybersecurity framework that is designed to promptly identify, measure, assess, report, monitor and control or minimize cybersecurity risks as well as responding to and recovering from cybersecurity breaches that could have a material impact on their operations.***"

While the Rule sets out requirements which are binding on each Regulated Entity, the Statement of Guidance supplements the Rule by providing detailed guidance on implementing the Rule's requirements, including in relation to risk identification and assessment, risk monitoring and reporting, incident response, containment and recovery, use of the internet, employee training and awareness, outsourcing arrangements and data protection. The Statement of Guidance is intended to assist Regulated Entities in their compliance with the Rule and represents a measure against which CIMA will assess such compliance and implementation.

What is the effect of the Rule and Statement of Guidance?

All Regulated Entities should implement the requirements of the Rule in proportion to the risks, size, nature and complexity of their business, following an appropriate assessment of their IT risks, including cybersecurity.

Additionally, each Regulated Entity should carry out regular self-assessments of their cybersecurity framework against (i) the Statement of Guidance, and (ii) any other reputable standard used to develop its framework (i.e. the International Organization for Standardization (ISO), and (iii) any emerging trends in cybersecurity, as a minimum annually.

What should be included in a Regulated Entity's cybersecurity framework?

The Statement of Guidance states that a Regulated Entity must establish, implement and maintain a written cybersecurity framework which should, at a minimum:

(a) include a well-documented cybersecurity risk management strategy, cybersecurity and IT policies and procedures;
(b) include written strategies, policies and procedures, which set out the internal responsibilities and controls, enforcements and disciplinary actions for non-compliance;
(c) include a training programme relating to cybersecurity and cyber-resilience;
(d) be approved by the governing body of the Regulated Entity;
(e) consider and comply with the Statement of Guidance and the Rule;
(f) be appropriate given the size and complexity of the Regulated Entity and the nature of its cyber risk exposures;
(g) ensure that the Regulated Entity has appropriate and sufficient resources in place to oversee and manage its cybersecurity and information systems;
(h) set out the Regulated Entity's tolerance level or risk limit relating to cybersecurity risk; and
(i) an internal audit function to provide independent assurance to the Regulated Entity's governing body in respect of its cybersecurity framework.

New Administrative Fines for breach of Regulatory Laws

As previously reported, the Monetary Authority Act gives CIMA the power to impose administrative fines under the Monetary Authority (Administrative Fines) Regulations (2019 Revision) as amended for breaches committed by persons (entities and individuals), under the following laws (and associated regulations and rules):

(a) Anti-Money Laundering Regulations (2020 Revision) (as amended)
(b) Banks and Trust Companies Act (2021 Revision) (as amended)
(c) Companies Management Act (As Revised) (as amended)
(d) Directors Registration and Licensing Act, 2014 (as amended)
(e) Insurance Act (As Revised)
(f) Money Services Act (As Revised)
(g) Mutual Funds Act (2021 Revision)
(h) Private Funds Act, 2020 (as amended)
(i) Virtual Asset (Service Providers) Act, 2020
(j) Securities Investment Business Act (2020 Revision) (as amended).

Breaches fall into three (3) categories: (1) “minor”, (2) “serious” or (3) “very serious”. The process involves the issuance by CIMA of a breach notice to a relevant party followed by a thirty (30) days opportunity to reply to the breach notice and to rectify a 'minor' breach to CIMA's satisfaction. If CIMA is not satisfied that a minor breach has been rectified, it is required to impose a fine. For “serious” or “very serious” breaches, CIMA has the discretion whether to impose a fine, and in what amount, up to the cap for the relevant category.

Category of breach	Cayman Dollars	US Dollars
Minor	CI$5,000	US$6,100
Serious (individual)	CI$50,000	US$61,000
Serious (corporate)	CI$100,000	US$122,000
Very Serious (individual)	CI$100,000	US$122,000
Very Serious (corporate)	CI$1,000,000	US$1,220,000

As shown in the table above, there is a sliding scale of fines from CI$5,000 for minor breaches to CI$100,000 for individuals and CI$1 million for entities for very serious breaches. Fines for ongoing minor breaches can be applied at intervals on a continuing basis, up to a CI$20,000 (US$24,400) cap.

CIMA will have six (6) months from becoming aware of a minor breach, or having received information from which the fact of the breach can be reasonably inferred, to impose a fine. There is a two (2) year time limit in respect of the imposition of fines for serious or very serious breaches.

Application to of Administrative fines regime to Regulated Funds

Mutual Funds

All regulated mutual funds fall within the scope of the administrative fines regime. The following areas are categorised as very serious offences in respect of a mutual fund:

i. carrying on or attempting to carry on business as a mutual fund in or from the Cayman Islands without a valid licence or registration (including the requirement to file a current offering document with CIMA);
ii. supplying information in a licence application that the person knows or should reasonably know is false or misleading;
iii. a person, other than a regulated mutual fund, representing in any way that the person is carrying on or attempting to carry on business in or from the Cayman Islands as a mutual fund;
iv. failure of the operator of a mutual fund to ensure that the mutual fund

complies with any conditions contained in its licence;

v. failure of a licensed mutual fund administrator to give CIMA the prescribed details and fee in respect of a mutual fund immediately upon starting to provide the principal office of a regulated mutual fund;

vi. failure of a mutual fund administrator to immediately give CIMA written notice of knowledge or belief that a regulated mutual fund:
   (a) is or is likely to become unable to meet its obligations as they fall due;
   (b) is carrying on business otherwise than in accordance with the Mutual Funds Act or any other law; or
   (c) is carrying on business in a manner that is or is likely to be prejudicial to investors or creditors of the mutual fund;

vii. knowingly giving false or misleading information in relation to alleged breaches of sections 4 and 10 of the Mutual Funds Act; and

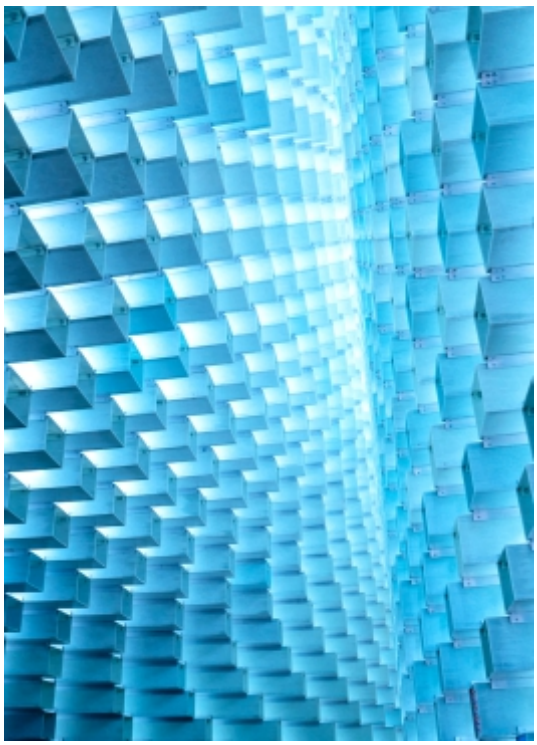
viii. failure of a person appointed in respect of a mutual fund, regulated EU Connected Fund or licensed mutual fund administrator to:
   (a) supply CIMA with requested information in respect of the mutual fund or the EU Connected Fund;
   (b) prepare and supply to CIMA a report on the affairs of the mutual fund or the EU Connected Fund, making recommendations where appropriate;
   (c) supply to CIMA such other information, reports and recommendations as specified after the report.

Private Funds

Private Funds regulated by CIMA also fall within the scope of the administrative fines regime.

The following are categorised as very serious offences in respect of private funds:

i. failure of an operator of a private fund to ensure compliance with the Private Funds Act;



ii. carrying on or attempting to carry on business as a private fund in or from the Cayman Islands without a valid registration application;

iii. accepting capital contributions from investors in respect of investments while the private fund is not registered;

iv. a person, other than a private fund, representing in any way that the person is carrying on or attempting to carry on business in or from the Cayman Islands as a private fund;

v. failure of a private fund to comply with an instruction by CIMA to:

(a) have the private fund's accounts audited by a CIMA approved auditor and submitted to CIMA; or

(b) provide a one-off or periodic report to CIMA on certain matters;

vi. failure of a private fund to comply with a request by CIMA to provide such documents, statements or other information in respect of a private fund as CIMA may reasonably require;

vii. failure to provide information to CIMA in connection with an alleged breach or providing information which the person knows to be false or misleading;

viii. failure of a person appointed by CIMA to advise on, or assume control of, the proper conduct of the Fund's affairs to supply the relevant information and reports; and

ix. hindering CIMA in the exercise of its powers under the Private Funds Act.

The administrative fines set out above for both Mutual Funds and Private Funds are in addition to any penalties applicable under the Mutual Funds Act and the Private Funds Act respectively.

Loeb Smith in the Cayman Islands
Investment Funds Technical team

Contact information

Gary Smith
Tel.: +1 (345) 749 7590
Email: gary.smith@loebsmith.com

Elizabeth Kenny
Tel: +1 (345) 749 7594
E: elizabeth.kenny@loebsmith.com

Yun Sheng
Tel: +1 (345) 749 7493
E: yun.sheng@loebsmith.com

Faye Huang
Tel: +1 (345) 749 7499
E: faye.huang@loebsmith.com

Vivian Huang
Tel: +1 (345) 749 7497
E: vivian.huang@loebsmith.com

Santiago Martinez-Carvajal
Tel: +1 (345) 749 7593
E: santiago.carvajal@loebsmith.com

Address:
Suite 329 | 10 Market St.
Camana Bay |Grand Cayman
KY1-9006 | Cayman Islands

Loeb Smith Attorneys

British Virgin Islands | Cayman Islands | Hong Kong

www.loebsmith.com