



# KEY TAKEAWAYS FROM HFM VIRTUAL SYMPOSIUM

*November 2020*

[athena.ky](https://athena.ky)

Disclaimer: The information provided does not, and is not intended to, constitute legal advice, instead, the information herein is for general informational purposes only. Please contact your usual Cayman counsel for specific legal advice on any of the matters outlined below.

# Key Takeaways from HFM Virtual Symposium

**A**t the recent HFM Virtual Symposium, our General Counsel and Independent Director, **Sabrina Foster** participated on a panel: **Regulatory, Governance & Compliance: Update from Cayman: What You Need to Know.**

In case you missed the event, here is a summary of some of the key topics discussed.

---

## Cayman Regulatory Update

- Over the last decade there have been global initiatives on everything from anti-money laundering, terrorist financing, proliferation financing, more general finance regulations all the way through to tax regulations and developments.
- More recently stakeholders will be aware that Cayman was for a short time added to the EU's list of non-cooperative jurisdictions for tax purposes. Cayman was quick to respond to this and adopted several legislative measures over the last 12-18 months to address EU concerns leading to Cayman's removal from the list at the first opportunity, which occurred in early October 2020.
- Included in these measures were the **Mutual Funds (Amendment) Law, 2020**, requiring previously exempted mutual funds to register with the **Cayman Islands Monetary Authority (CIMA)**, and the **Private Funds Law, 2020 (as amended)**, requiring certain closed ended fund vehicles to register with CIMA under the new private funds regulatory regime.
- Other legislative enhancements were **CIMA's new rules and statements of guidance** on the calculation of net asset values, marketing material disclosure rules, cybersecurity and more, and the new **Monetary Authority (Administrative Fines) (Amendment) Regulations 2020** under which CIMA's power to administer administrative fines was extended to include breaches by funds and their operators under applicable laws and regulations relating to anti-money laundering, licensing and registration obligations under the Mutual Funds Law (as amended) and the Private Funds Law (as amended) and more.

## Impact of the Private Funds Law, 2020 (PFL)

- We discussed the impact of the PFL on our firms. From the investment managers, we heard that there was no great impact to costs or their overall business operations as a result of the new PFL regulatory regime. Both investment managers had some funds caught by the legislation but did not feel that the registration requirements were onerous, nor did the changes negatively impact their businesses.
- The investment managers indicated that the PFL will however impact future structuring discussions regarding product development and will likely impact the way vehicles are formally rolled out. One manager indicated that commitments will be the trigger point for registration of a private fund vehicle. This may result in longer soft openings to ensure that, prior to registration, the manager has enough commitments lined up to make the product viable.
- From an operational perspective, it was noted that US managers subject to SEC regulation are very familiar with things like disclosure requirements and accordingly, most of the items now required by CIMA are already reflected in the current form of offering documents required of SEC registered investment advisers. As a result, the investment managers did not report any significant burdens in making sure they complied with the new Cayman disclosure requirements for private funds.
- From Athena's perspective, we had several existing funds impacted by the PFL and gained several new director appointments as a result of the **'four-eye principal'** applicable to private funds, namely that:
  - a minimum of two (2) directors are required for applicants that are companies; and
  - the minimum of two (2) director test will also apply to the general partner or corporate director, requiring that a minimum of two (2) natural persons be named in respect of a general partner or corporate director of a private fund.
- At Athena, we also noted that the topic of independent directors (or advisory committee members) and specifically the use of experienced individuals based in the jurisdiction is continuing in the context of private funds as a result of the fund obligations that fund managers and fund operators need to be aware of when operating a private fund and the resulting liability for non-compliance in failing to meet these obligations. It is not surprising that private fund managers are looking for specialists in the jurisdiction who can help guide them through the private funds' regime.

## Key Obligations on Private Funds

Key obligations on private funds include, but are not limited to, the following:

- **Annual audit:** a private fund shall have its accounts audited annually by a CIMA approved auditor.
- **Annual return:** a private fund shall, in respect of each financial year of the private fund, submit an annual return in the CIMA prescribed form.
- **Retention of records:** a private fund shall maintain its records in an accessible manner and in accordance with the rules, statements of principle and guidance issued by CIMA.
- **Valuation:** a private fund shall have appropriate and consistent procedures for the purpose of proper valuations of its assets. Valuations of the assets must be carried out at least annually, and in accordance with the rules, statements of principle and guidance issued by CIMA. Valuations shall be performed by an independent third party or administrator that is appropriately professionally qualified to conduct valuations in a non-high risk jurisdiction, or by the manager or fund operator subject to certain independence criteria and conflict disclosures.
- **Safekeeping of fund assets:** a private fund shall appoint a custodian to (i) to hold in custody, in segregated accounts opened in the name or, or for the account, of the private fund the custodial fund assets (exception: a private fund shall not be required to appoint a custodian if it has notified CIMA and it is neither practical or proportionate to do so, having regard to the nature of the private fund and the type of assets it holds); and (ii) to **verify title of the fund assets and maintain a record of the assets.** In the absence of an appointed custodian, a private fund must appoint an administrator or other independent third party (or the manager, operator, or other person with a control relationship with the manager, subject to certain independence criteria and conflict disclosures).
- **Cash monitoring:** a private fund shall appoint an administrator, custodian or other independent third party (or the manager, operator, or other person with a control relationship with the manager, subject to certain independence criteria and conflict disclosures) to: (i) monitor the cash flows; (ii) ensure that all cash of the private fund has been booked in cash accounts opened in the name of, or for the account of, the private fund; (iii) ensure that all payments made by investors to the private fund in respect of its investment interests have been received.

- **Identification of securities:** a private fund that regularly trades securities or holds them on a consistent basis, shall maintain a record of the identification codes of the securities it trades and holds.

Private funds should also note that FATCA/ Common Reporting Standards and **Anti-Money Laundering (AML)** Compliance also applies to private funds.

---

## Corporate Governance and Private Funds

- It was noted that **CIMA has issued new rules** that apply to private funds registered under the Private Funds Law, 2020, governing the **calculation of net asset values**, the **contents of offering documents and marketing materials** and the **segregation of assets**. The new rules are designed to provide guidance to private funds and their operators in meeting their obligations under the private funds' regulatory regime.
- These new rules will, in our view, have the greatest impact on fund governance as it will be necessary for the fund operators of private funds to be familiar with and understand the various rules and obligations. This

may be easier for fund managers familiar with operating regulated hedge funds and may be less familiar to private equity fund managers. In either case, it is recommended that funds perform a gap analysis to ensure that they understand the obligations, are complying with the obligations and that they have systems in place to ensure compliance. This may be achieved by adding these obligations to the fund's annual compliance calendar or by adding the items as standing agenda items on the fund's quarterly board meeting agenda.

- Experienced Cayman based professional independent directors will be of great assistance and value to fund managers in reducing regulatory risk.

## Independent Directors: A Manager's Perspective

- The investment managers were very complimentary of their experience using Cayman based independent directors and expressed that independent directors offer a tremendous amount of 'added value'.
- It was noted that the role of independent directors has evolved over time and the level of inquiry has also evolved in a very good way. Following case law addressing the roles and responsibilities and the potential liabilities of directors, our managers believed that directors now take on a much more prominent role. It was felt that independent directors level the playing field in a lot of respects by asking tough and probing questions on very important topics, including the controls and processes of the manager and the various service providers to the fund.
- Conflicts of interest was another area where our managers felt that things were evolving in Cayman, with the Cayman regulator now requiring that certain disclosures are front and center in the offering materials so that investors can make fully informed decisions about the investments they are making. It was noted that directors serve as a very good sounding board in understanding, addressing, and thinking through these conflicts and potential conflict areas; even in areas where you may not think there might be conflicts.
- It was noted that directors can also offer valuable insight to managers in relation to strategic matters given a director's experience working with various managers within the industry. Directors can offer valuable industry perspectives to managers in thinking through internal infrastructure requirements related to technology, staffing, marketing, new product development and more.
- It was recognised that Cayman based directors can greatly assist US managers through their knowledge of Cayman law. This is especially so for US managers who have internal directors also serving on the Cayman boards and who may not be well versed in Cayman law or regulation.

## Administrative Fines Regime: How Will This Affect the Way That Funds are Operated?

- Fund managers and fund operators need to be aware of CIMA's administrative fines regime under the **Monetary Authority (Administrative Fines) (Amendment) Regulations 2020**. Under this regime, CIMA has the power to impose administrative fines for breaches under various laws and regulations including, but not limited to, the Anti-Money Laundering Regulations, the Directors Registration and Licensing Law, the Mutual Funds Law and the Private Funds Law and more.
- Breaches are categorised as being 'minor', 'serious' and 'very serious' and includes a sliding scale of fines from CI\$5,000 to CI\$100,000 for individuals and up to CI\$1,000,000 for entities for serious breaches.
- The regime reinforces the need for all regulated entities, registrants and licensees to know and understand the various laws, rules and regulations, and in particular the obligations thereunder and to establish and maintain appropriate systems, measures and controls in order to remain compliant with the laws, rules, regulations and guidance issued by CIMA.

---

## Outsourcing: Keeping Up With Compliance

- We heard varying views on outsourcing from our managers. From one manager's perspective, each time there is a new requirement or obligation under the Cayman regulatory regime, the manager does a cost benefit analysis of whether it is worth hiring someone to perform the role or finding the resources in-house to perform the task. Factors typically include the number of entities affected and, whether the funds can benefit from any
- scaled discounts from existing service providers in outsourcing the task.
- One manager commented that in the context of the AML officer roles, they outsource this function and have so far have found the outsourcing arrangements beneficial for them and of good value for what they spend. The overall sentiment was that having outsourced AML officers provides a great resource for the managers on lots of questions, not just with respect to the compliance oversight.

- Another manager said that they prefer to perform tasks in-house where it is deemed cost-effective to do so. The manager commented that, generally speaking, in-sourcing helps with the institutionalised knowledge of the firm and may expedite the firm's ability to identify problems and can assist in creating a more consistent approach across fund products. The manager also noted that there are however, some areas where the firm is not in a position to have the best knowledge internally, so in those areas (e.g. Cayman AML at the moment) when it makes much more sense to outsource. It was noted that with Cayman service providers being on the ground and interacting with the regulators they are generally better placed in understanding the various priorities and can communicate local requirements to the manager on a more timely basis and as such outsourcing AML officer compliance is an area that is very useful to managers.
- The value in outsourcing to professional independent directors was also re-enforced. It was noted that Cayman based directors can be very effective in helping fund managers in understanding the local regulatory regime. It was further noted that Cayman based directors have the advantage of living and working in the jurisdiction and having several funds in their stable. It was noted that experienced directors are seeing issues come up and applied and so this is another area where outsourcing can be very beneficial to fund managers.

---

## ABOUT ATHENA

**C**elebrating 15 years in 2020, Athena International Management Limited is an award-winning, boutique provider of governance solutions to the international alternative investment community. Recognised for its leadership

in governance solutions, Athena was awarded Best Offshore Governance Firm at the HFM US Services Awards 2020. Our experienced professionals serve as non-executive independent directors.





## KEY CONTACTS

### Allison Nolan

Founder and Managing Director

**E.** [anolan@athena.ky](mailto:anolan@athena.ky)

**D.** +1 (345) 943 1122

**M.** +1 (345) 323 0111

 [Connect on LinkedIn](#)

### Sabrina Foster

Director, Governance Solutions  
and General Counsel

**E.** [sfoster@athena.ky](mailto:sfoster@athena.ky)

**D.** +1 (345) 743 1124

**M.** +1 (345) 527 2211

 [Connect on LinkedIn](#)