C A D W A L A D E R

FUND FINANCE FRIDAY

The Cayman Private Funds Act 1st Anniversary – No Gifts Required!

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It may be that you woke up last Saturday morning, spotted the date 7 August on your phone, and then had that feeling that you'd forgotten something of significance on this date – a birthday perhaps, or maybe worse, a wedding anniversary?! Thankfully, there was no need to bolt out the front door and do some indiscriminate present-buying on this occasion, as all that you missed (we hope!) was the one-year anniversary of the effective date of the Cayman Islands Private Funds Act (or the PF Law as it was then known).

The 1st anniversary of PF Act "Game Day" is an opportune time, however, to take stock and see what, if anything, has changed as the PF Act settled in as part of fund finance transactions over the past year and what issues have been at the fore as sponsors and lenders have navigated their way through this new law.

Remind me – why did Cayman introduce the PF Act?

Contrary to popular belief, the PF Act was not introduced in order to give Cayman fund finance attorneys a more prominent position in transactions! In short, the PF Act was introduced so that the Cayman Islands would meet the standards of international bodies (such as the EU and OECD) and, in particular, in order to avoid being part of the EU's list of non-cooperative jurisdictions for tax matters (more often referred to as the "EU tax blacklist").

Following the registration of over 12,000 private funds ahead of the 7 August 2020 deadline, the EU Council deemed that Cayman's efforts had been sufficient in this regard and Cayman was removed from the EU tax blacklist – which remains the current position.

It's all coming back to me now – so what happened after 7 August?

Loan document negotiations pre-7 August 2020 had been very much focused on registration of funds by or before a set number of days ahead of the 7 August deadline.

From this point forward, the market shifted almost instantly to a position of requiring Cayman private funds that fell within the scope of the PF Act to be *registered* with CIMA prior to closing or being allowed to join a facility. This remains the market position from our perspective, and we have only seen it departed from in a few very situation-specific circumstances (*e.g.*, where the Cayman fund is one of a considerable number of parties across multiple jurisdictions granting security and is immaterial to the overall security – in such scenarios we have seen a post-closing deliverable to demonstrate that the registration has been finalized within a set deadline).

The other aspect of PF Act compliance that remains a feature of transactions is the requirement to maintain registration (which is uncontroversial in our view) and what, if any, the cure period should be if a Cayman private fund is in default of this provision by virtue of being involuntarily de-registered by CIMA for non-compliance with the PF Act. On this point, lenders have taken a number of approaches varying from no-cure period (*e.g.*, immediate default on it becoming apparent that a private fund has been de-registered by CIMA) to allowing for a number of days for private fund to cure the default (*i.e.*, re-register with CIMA).

Anything new for lenders to be aware of?

The main issue that has arisen continues to be one of timing – primarily, will a Cayman fund be registered with CIMA by the time the sponsor wishes it to join a facility. This has led in some instances to closings being moved to facilitate the CIMA registration occurring or, more frequently, the exclusion of the Cayman private fund from the initial closing to be subsequently joined to the facility at such time as the sponsor can demonstrate CIMA registration has occurred.

What next? Are any changes expected to the Private Funds Act?

We don't currently expect any material changes to the PF Act, but as the law remains a relatively new concept, ambiguity does still arise on the interpretation of whether certain bespoke vehicles are within scope of the PF Act or fall within "non-fund arrangements" (which are not required to register with CIMA) and, over time, it can be expected that further guidance would be issued by CIMA in this area.

Conclusion

It's perhaps surprising that the PF Act continues to be a feature of transactions one year out from its effective date, and it isn't yet showing any sign of fading into insignificance. As precedent is built on new deals and vintages of funds, however, it should result in less negotiation of these terms. Our expectation is that timing (and deal management around such timing) will end up being the main impact of the PF Act and, as CIMA continues to build efficiency in the registration process for such funds, it is hoped that this too will fade as an issue over time.