

GETTING THE
DEAL THROUGH 

Private Equity 2015

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Formation and terms operation

1 Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

An exempted limited partnership (ELP) established under the Cayman Islands Exempted Limited Partnership Law (2014 Revision) (the ELP Law) is the most commonly used structure in the Cayman Islands for forming private equity funds (PE Funds). An ELP does not have a separate legal personality. An ELP must consist of:

- one or more persons called general partners who shall, in the event that the assets of the ELP are inadequate, be liable for all debts and obligations of the ELP; and
- one or more persons called limited partners who shall not be liable for the debts and obligation of the ELP except as provided in the partnership agreement and to the extent specified in the ELP Law.

Investors in an ELP are issued partnership interests and join the ELP as limited partners. Generally speaking, a limited partner's liability in an ELP is limited to the extent of the limited partner's partnership interests (but this limited liability status can be lost in instances where the limited partner takes part in the conduct of the business of the ELP). The general partner of the ELP is responsible for the management and conduct of the business of the ELP.

The general partner of a PE Fund is usually a company or another ELP established specifically as part of the overall PE Fund structure. At least one general partner of the ELP must, if a company, be registered (either as a foreign company or a Cayman Islands incorporated company) under the Companies Law (2013 Revision) of the Cayman Islands (the Companies Law) or, if a partnership, be registered (either as a foreign partnership or an ELP) under the ELP Law.

A PE Fund can also be established as a company using a Cayman Islands exempted company incorporated with limited liability. The exempted company is established with a share capital and shares are issued to investors in consideration of investment proceeds. Each investor's or shareholder's liability is limited to the amounts unpaid on its shares, if any.

2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

Being a partnership, the ELP is established firstly by both the general partner and an initial limited partner (eg, a principal of the PE Fund manager) entering into an initial limited partnership agreement. Secondly, by a section 9 registration statement (Section 9 Statement) being filed with the Cayman Islands Registrar of Exempted Limited Partnerships (the Registrar) signed by the general partner of the ELP and including the following details:

- the name of the ELP;
- the general nature of the business of the ELP;
- the address of the ELP's registered office in the Cayman Islands (legally required to be in the Cayman Islands);

- the term, if any, for which the ELP is entered into or, if for unlimited duration, a statement to that effect and the date of its commencement;
- the name and address of each general partner; and
- a declaration that the ELP will not undertake business with the public in the Cayman Islands other than so far as may be necessary for the carrying on of the business of that ELP exterior to the Cayman Islands.

There are certain supporting documents that must also be filed in respect of the general partner (for example, in the case of a corporate general partner, Certificate of Incorporation and Certificate of Good Standing).

Upon paying the requisite fee and filing the completed registration documents, the Registrar will issue a Certificate of Registration, which is conclusive evidence that compliance has been made with all the requirements of the ELP Law in respect of formation and registration of the ELP.

A Cayman Islands exempted company is established by filing:

- an affidavit of the subscriber to its Memorandum of Association;
- its Memorandum of Association and Articles of Association with the Cayman Islands Registrar of Companies; and
- payment of the requisite filing fees.

The timescale and costs depend on the nature and complexity of the transaction. However, the registration of an ELP or the incorporation of an exempted company can be done on an express basis within 24 hours. Cayman Islands legal counsel will be able to provide an estimate of legal fees and disbursement costs once they have conducted an overview of the overall PE Fund structure. The registration fee payable to the Registrar for an ELP is currently approximately US\$1,220. An ELP will be required to file with the Registrar a return on or before 31 January in every year and pay to the Registrar a fee, currently approximately US\$2,500.

For an exempted company the registration fee will depend on the level of the authorised share capital of the company. An exempted company that falls within the lowest possible band of authorised share capital will have to pay a current incorporation fee of approximately US\$732. Similarly, an exempted company must file an annual return in January of each year and pay a fee to the Registrar, currently approximately US\$854 for the lowest band of authorised share capital.

At the formation stage for a PE Fund the only service provider that it is necessary to engage is a Cayman Islands legal counsel and a registered office service provider. Most law firms have an affiliated management company that can provide registered office services.

There are no material minimum capital requirements prescribed by Cayman Islands law.

As further discussed in question 10, if the equity interests of the PE Fund are redeemable at the option of the investor it may be required to be registered as a 'mutual fund' pursuant to the Cayman Islands Mutual Funds Law (2013 Revision).

3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?

There is no requirement under Cayman Islands law for a PE Fund (whether structured as an ELP or as an exempted company) to have a Cayman Islands-based custodian or administrator.

The ELP is required to maintain a registered office in the Cayman Islands.

The general partner of the ELP is responsible for maintaining (or causing to be maintained) a register of security interests granted with respect to a partnership interest or part thereof indicating, among other things, the identity of the grantor and grantee, the partnership interest subject to the security interest and the date notice of the interest was served on the ELP.

The general partner is responsible for maintaining (or causing to be maintained) in the country or territory that the general partner may determine (including outside the Cayman Islands) a register of limited partners which shall contain the name and address of each person who is a limited partner of the ELP, the date on which a person became a limited partner and the date on which a person ceased to be a limited partner, and the register shall be updated within twenty-one days of the date of any change in the particulars therein. The general partner shall also be responsible for maintaining (or causing to be maintained) at the registered office of the ELP a record of the address at which the Register of Limited Partners is maintained.

The general partner is also required to maintain (or cause to be maintained) in any country or territory that the general partner may determine, a record of the amount and date of the capital contributions of each limited partner and the amount and date of any payment representing a return of the whole or any part of the capital contribution of any limited partner; such record shall also be updated within twenty-one days of the date of any change in the particulars therein.

An exempted company is also required to maintain a registered office in the Cayman Islands, a Register of Mortgages and Charges, a Register of Directors and Officers and the Register of Members. The latter need not be maintained locally in the Cayman Islands.

4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

The Register of Limited Partners (and address of where it is maintained) of an ELP is not open to public inspection, but instead is required to be open for inspection during all usual business hours by all partners or by any other person with the consent of the general partner. The record of contributions is only open to inspection by a person with the consent of the general partner. A copy of the Section 9 Statement and any amendments made to it is publicly available for inspection upon payment of a fee to the Registrar.

Under the Companies Law, the Register of Members and the Register of Directors of an exempted company are not open to public inspection and are private documents. However, shareholders of the exempted company are entitled to see their own details in the Register of Members. An exempted company is required to keep at its registered office a Register of Mortgages and Charges specifically affecting property of the exempted company. The Register of Mortgages and Charges is required to be open to inspection by any creditor or member of the exempted company at all reasonable times. The only publicly available information in respect of an exempted company is its name, company number, date of incorporation, registered office, the type of company (eg, exempted, special economic zone, segregated portfolio company) and whether the company is active or has been dissolved or is inactive, which can be accessed via the website of the General Registry of the Cayman Islands.

5 Limited liability for third-party investors

In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

As mentioned in question 1, the limited liability of the limited partners of an ELP (who would be the third party investors in a PE Fund) may be lost if the relevant limited partner takes part in the management or operation of the ELP. The following is a non-exhaustive list of activities that a limited partner can undertake without risking loss of its limited liability status:

- holding an office or interest in, or having a contractual relationship with, a general partner of the ELP, or being a contractor for or an agent or employee of the ELP or of a general partner of the ELP or acting as a director, officer or shareholder of a corporate general partner;

- consulting with and advising a general partner or consenting or withholding consent to any action proposed, in the manner contemplated by the partnership agreement, with respect to the business of the ELP;
- investigating, reviewing, approving or being advised as to the accounts or business affairs of the ELP or exercising any right conferred by the ELP Law;
- acting as surety or guarantor for the ELP either generally or in respect of specific obligations;
- approving or disapproving an amendment to the partnership agreement;
- calling, requesting, attending or participating in any meeting of the partners of the ELP;
- taking any action that results in the winding up or the dissolution of the ELP;
- taking any action required or permitted in the partnership agreement or by law to bring, pursue, settle or terminate any action or proceedings brought in circumstances where the general partner(s) has authority to do so but refuse, without good cause, to institute such proceedings;
- appointing a person to serve on a board or committee of the ELP, a general partner or a limited partner or removing such person;
- serving on any board or committee of the exempted limited partnership, a general partner, the limited partners or the partners, or by appointing, electing or otherwise participating in the choice of a representative or any other person to serve on any board or committee, or by acting as a member of any board or committee either directly or by or through any representative or other person, including giving advice or consenting, or refusing to consent, to any action proposed by the general partner on behalf of the ELP and exercising any powers or authorities or performing any obligations as a member of that board or committee in the manner contemplated by the partnership agreement;
- serving on the board of directors or a committee of, consulting with or advising or being an officer, director, shareholder, partner, member, manager, trustee, agent or employee of, or by being a fiduciary or contractor for, any person in which the ELP has an interest or any person providing management, consultation, custody or other services or other products for, to or on behalf of, or otherwise having a business or other relationship with, the ELP or a general partner of the ELP; and
- voting as a limited partner on certain matters in relation to the ELP, for example its dissolution and winding up; the purchase, sale or transfer of assets; the incurrence or renewal of indebtedness; change in the nature of business; the admission, removal or withdrawal of a general or limited partner; or transactions in which one or more general partners have an actual or potential conflict of interest with one or more limited partners.

If a limited partner loses its limited liability status, it will be liable in the event of the insolvency of the ELP for all debts and obligations of the ELP incurred during the period that the limited partner participated in the conduct of the business of the ELP as though the limited partner was, for such period, a general partner of the ELP, provided that the limited partner shall be rendered liable only to a person who transacts business with the ELP during such period with actual knowledge of such participation and who then reasonably believed the relevant limited partner to be a general partner of the ELP.

In addition, if a limited partner receives a payment representing a return of any part of his contribution or is released from any outstanding obligation in respect of his commitment and at the time that the payment was made or the release effected the ELP is insolvent including where the payment or release causes the insolvency or the limited partner has actual knowledge of the insolvency of the exempted limited partnership, then for a period of six months commencing on the date of that payment or release but not thereafter, the limited partner shall be liable to the ELP for the amount of the payment or the due performance of the released obligation in respect of his commitment in each case to the extent that the repayment or performance of the released obligation is necessary to discharge a debt or obligation of the ELP incurred during the period that the contribution or commitment represented an asset of the ELP.

Unlike the ELP, an exempted company is regarded as having separate legal personality, and being an entity distinct from its shareholders. The limited liability status of shareholders of an exempted company will generally be respected. Similarly to a number of other jurisdictions, including under English law, there may be certain circumstances where a Cayman

Islands court might disregard the fundamental principle that a company is a separate legal person from its shareholders and that their respective assets and liabilities are distinct. Such unusual circumstances may include where the company is deemed to be a 'sham' or considered by the courts to be used as a tool for fraud or other criminality.

6 Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

The general partner of the ELP is responsible under the ELP Law for the management of an ELP. In the context of a PE Fund, a substantial part of this responsibility is delegated pursuant to the terms of an investment management agreement to the PE Fund's investment manager. It is usually the general partner (unless otherwise delegated) that enters into contracts, deeds, instruments or other documents on behalf of the ELP. In conducting the business of the ELP, the general partner has a fiduciary duty under section 19(1) of the ELP Law to act at all times in good faith and, subject to the express terms of the partnership agreement to the contrary, in the interests of the ELP. The duty to act in the interests of the ELP can therefore be modified by the terms of the partnership agreement provided always that the general partner acts in good faith. Even where the general partner has delegated certain of its responsibilities to the PE Fund's investment manager, it remains subject to this duty and therefore must retain supervisory oversight of the responsibilities delegated to the PE Fund's investment manager.

The duties owed by the PE Fund's investment manager will be set out in the investment management agreement between the investment manager and the ELP and may be modified in the manner set forth in the investment management agreement.

In the context of a PE Fund that is structured as an exempted company, the management of the entity is vested in the directors. The duties and liabilities of directors of such company will be governed by the Companies Law as supplemented by Cayman Islands case law and English common law insofar as English common law has not been amended by statutory provisions in the Cayman Islands. English case law is considered as persuasive in the courts of the Cayman Islands to the extent that there is no Cayman Islands case law to the contrary. A substantial proportion of the duties and responsibilities of directors of the PE Fund (structured as an exempted company) are normally delegated to the investment manager of the PE Fund under the terms of the Investment Management Agreement.

Directors of an exempted company owe a number of fiduciary duties to the company. The fiduciary duties include:

- the duty to act in accordance with the constitution of the company (that is, the memorandum of association and articles of association);
- the duty to act in good faith in the best interests of the company; and
- the duty to act for a proper purpose.

The directors of an exempted company are also subject to the common law duty to undertake their functions as directors with due care, diligence and skill.

The constitutional documents of a Cayman Islands PE Fund will usually contain indemnification provisions in favour of the general partner in the context of an ELP, or directors in the context of an exempted company and their respective affiliates for all liabilities, loss, damage, cost or expense, in the absence or fraud, wilful neglect or negligence (or other behaviour, such as dishonesty or gross negligence).

In the context of an exempted company, under the Companies Law, directors could also face criminal sanctions for criminal offences, including:

- fraud committed in the 12-month period prior to a winding up of the PE Fund;
- misconduct in the course of winding up of the PE Fund; and
- making material omissions in statements relating to the company's affairs in the course of a winding up.

The Cayman Islands Monetary Authority (CIMA) has issued a Statement of Guidance for Regulated Mutual Funds (the Statement), in which it sets out CIMA's expectations regarding the corporate governance regime of regulated mutual funds. In essence, CIMA expects the oversight, direction

and management of a regulated mutual fund to be conducted in a fit and proper manner. Accordingly, the purpose of the Statement is to provide the governing body of a regulated mutual fund (Governing Body) and its operators (Operators) with guidance on the minimum expectations for the sound and prudent governance of the regulated mutual fund.

The Statement provides guidance for the Governing Body on matters such as: monitoring of a funds compliance with applicable laws, regulations and rules; oversight and supervision of the service providers to the funds; frequency of Governing Body meetings and service provider representation at such meetings; reporting by the investment manager and service providers; and identification and recording of conflicts of interest. The Statement also provides a non-exhaustive list of duties that CIMA considers applicable to an Operator for example: ensuring it has capacity to apply its mind to oversee and supervise each regulated fund of which it is an operator; and ensuring the roles and responsibilities of all service providers are clearly defined, understood and are being adequately performed.

7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

Gross negligence (as opposed to 'negligence') is not a fully recognised legal term under Cayman Islands law. However, gross negligence is often referred to in the constitutional document or agreements of a PE Fund, but is usually defined either by reference to the laws of a jurisdiction that recognises gross negligence (eg, the State of Delaware in the United States) or is specifically defined in the relevant document.

8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

Most of the special issues or requirements particular to PE Funds structured as limited partnerships are governed by the terms of the partnership agreement and normally the partnership agreement will contain provisions stating that:

- a limited partner may only transfer its partnership interests subject to the express terms of such agreement;
- the general partner may appoint or remove the investment manager of the PE Fund; and
- advisory committees may be created (which are internal bodies that consent to, or approve of, certain actions by the general partner), the members of which can include limited partners. Limited partners who are members of these committees should read the terms of these advisory committees carefully to ensure that actions taken via an advisory committee are not deemed to be managing the affairs of the ELP and thereby risk losing their limited liability status.

Any limited partnership established under the laws of a jurisdiction other than the Cayman Islands may (provided that the laws of the foreign jurisdiction where it is organised permit or do not prohibit such a transfer), at any time upon effecting such amendments to the partnership agreement as shall be necessary to comply with the ELP Law and upon filing the required documents, be registered under the ELP Law, transfer by continuation to the Cayman Islands and, with effect from the date of the Certificate of Registration issued by the Registrar, would then be governed as an ELP in accordance with the ELP Law.

Where a limited partnership seeks to migrate to the Cayman Islands, with effect from the date indicated on the Certificate of Registration issued by the Registrar, the ELP and the partnership interests of its partners and their rights and liabilities, as against any person who is not a partner, shall cease to be governed by the laws of the jurisdiction from which it has migrated, save in respect of any act or omission occurring before such date that shall continue to be governed by such law or the laws of such other jurisdiction. Provided always that such registration of the migrated limited partnership in the Cayman Islands as an ELP shall not operate to:

- create a new legal entity;

- affect the property previously acquired by or on behalf of the ELP;
- affect any act or thing done prior to such registration or the rights, powers, authorities, functions or obligations of the ELP, any partner or any other person prior thereto; or
- render defective any legal proceedings by or against the ELP or any partner or any other person, and any legal proceedings that could have been continued or commenced by or against the ELP or any partner or any other person before its registration hereunder may, notwithstanding such registration, be continued or commenced after such registration and in respect of which such law or the laws of such other jurisdiction shall be of application.

The partnership agreement is typically modified to reflect requirements of the ELP Law.

A qualified transferring foreign company incorporated under the laws of a jurisdiction outside the Cayman Islands may continue by way of transfer into the Cayman Islands, provided that the laws of the foreign jurisdiction where it is incorporated permit or do not prohibit such a transfer. Such transfer by way of continuation does not create a new company or other new legal entity. The transferring foreign company is effectively taken from the foreign jurisdiction and re-domiciled in the Cayman Islands as the same legal entity, but now governed by Cayman Islands law rather than the law of the foreign jurisdiction.

9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

Under Cayman Islands law, there are no statutory or regulatory consequences in this regard except that, to the extent that such bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor necessitates, in the case of an ELP, a change of general partner of the ELP, a successor general partner should be appointed and the Registrar should be notified of the change in general partner. In the unlikely event that the PE Fund is registered with CIMA, CIMA should be notified of the change in sponsor or a change of the PE Fund's investment manager. The terms of the limited partnership agreement of the PE Fund and the Memorandum and Articles of Association of the PE Fund (where it is structured as an exempted company) will typically assist in determining the consequences of the sponsor of the PE Fund being faced with bankruptcy, insolvency, change of control, or restructuring.

Regulation, licensing and registration

10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?

The principal regulatory body in the Cayman Islands for investment funds and investment managers is CIMA. PE funds are typically structured to be exempt from the application of the Mutual Funds Law and therefore are not required to register with CIMA because the investor's partnership interests or shares are not redeemable or repurchasable at the investor's option and therefore do not fall within the Mutual Funds Law definition of 'equity interests'.

A CIMA-registered PE Fund (ie, one where the partnership interests or shares are redeemable at the option of the investor and has more than 15 investors) is required to prepare and submit annual audited financial statements to CIMA. CIMA may require such information or such explanation in respect of the PE Fund as it may wish to carry out its duties under the Mutual Funds Law. A CIMA-registered PE Fund must give CIMA access to or provide at any reasonable time all records relating to the PE Fund. The Mutual Funds Law provides for substantial fines for failure to comply with any such requests by CIMA and CIMA may apply to the court to have the PE Fund wound up.

Unless exemptions apply, an investment manager of a PE Fund is required to obtain a licence under the Securities Investment Business Law (2011 Revision) (SIBL) (see question 12).

11 Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

A PE Fund may be required to register with CIMA under the circumstances outlined in question 10. A PE Fund is prohibited from doing business with the public of the Cayman Islands (other than so far as may be necessary for the carrying on of its business outside of the Cayman Islands).

The Cayman Islands' Director Registration and Licensing Law, 2014 requires all directors, whether resident in the Cayman Islands or non-resident, of regulated mutual funds and companies which maintain a registration as an excluded person pursuant to the SIBL to register with CIMA. Persons who hold more than 20 of such directorships will need to be licensed by CIMA and will be subject to enhanced regulatory requirements. Corporate directors, irrespective of directorship numbers held, will also need to be licensed by CIMA. Therefore all directors of CIMA-registered PE funds and their Cayman Islands management companies (holding the SIBL exemption – see question 12) will have to be registered with CIMA. A fee is payable upon application for registration or licensing. In addition, each such director will be required to make an annual filing each year with CIMA together with the payment of a fee, and if there are any changes to the information supplied to CIMA on registration or in any subsequent annual filing, the director concerned will be required to inform CIMA within 21 days of the change.

12 Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

Investment managers that are vehicles incorporated or registered in the Cayman Islands, or any person or entity incorporated anywhere else in the world but with an established place of business in the Cayman Islands through which securities investment business is carried on, will be governed by the provisions of the SIBL and its licensing requirements. The following is a non-exhaustive list of persons that may be registered as an 'excluded person':

- one of a group of companies carrying on securities investment business exclusively for one or more members of its group;
- a person carrying on a securities investment business exclusively for:
 - a sophisticated person (as defined in the SIBL);
 - a high-net-worth person (as defined in the SIBL); or
- a person who is regulated in respect of such securities investment business by a recognised overseas regulatory authority.

In order to register, such excluded person must:

- complete and submit to CIMA the Annual Declaration Form for Excluded Persons; and
- submit the annual fee of approximately US\$6,000.

Normally, PE Fund managers are able to qualify for registration as an excluded person under SIBL.

As mentioned in question 11, directors of an 'excluded person' which is a company must also register with CIMA.

13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

If the PE Fund's investment manager is registered as an excluded person under the SIBL, as mentioned in questions 11 and 12, the directors of an investment manager which is a company must be registered with CIMA or where the director holds 20 or more directorships of mutual funds or excluded persons, licensed by CIMA. Where the SIBL does not apply to an investment manager, there will be no qualifications or licensing

requirements required under Cayman Islands law for the PE Fund manager and its principals or directors.

14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund’s manager or investment adviser or their employees.

There are currently no such Cayman Islands rules or policies applicable to PE Funds.

15 Use of intermediaries and lobbyist registration

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund’s manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund’s investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

There are currently no such Cayman Islands rules or policies applicable to PE Funds.

16 Bank participation

Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

There are currently no such legal or regulatory developments in the Cayman Islands applicable to PE Funds.

Taxation

17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Under current Cayman Islands law there are no Cayman Islands taxes on income or gains of the PE Fund or on gains on dispositions of shares or partnership interests, and distributions made by a PE Fund will not be subject to withholding tax in the Cayman Islands.

As an ELP, a PE Fund has the ability to apply for and could expect to obtain an undertaking from the governor-in-council of the Cayman Islands (the governor) pursuant to the provisions of the Tax Concessions Law that for a period of 50 years from the date of exemption no law enacted in the Cayman Islands imposing any tax to be levied on profits or income or gains shall apply to it or its operations, and that any such tax or any tax in the nature of estate, duty or inheritance tax shall not be payable on the partnership interests, debentures or other obligations of the PE Fund or by way of the withholding in whole or in part of any payment of divided or other distribution of income or capital by the PE Fund to its partners or payments of principal or interest or other sums due under a debenture or other obligation of the PE Fund. If the PE Fund is structured as an exempted company, it can also apply to the governor for an exemption for a period of 20 years.

18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

No, see question 17.

19 Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

No, see question 17.

20 Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

There are currently no significant organisational taxes in the Cayman Islands. However, there are registration and annual maintenance fees payable to the government of the Cayman Islands in connection with the registration or incorporation of a PE Fund in the Cayman Islands, as described above.

21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund’s sponsor.

Currently, none. See question 17.

22 Tax treaties

Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

In November 2001, the Cayman Islands entered into a tax information exchange agreement with the United States. The agreement provides for exchange of information, upon request, for criminal tax evasion and civil and administrative tax matters relating to US federal income tax. It provides for confidential treatment of information exchanged and, in accordance with US law, any such information may not be disclosed to any third party. It applies to criminal tax matters for taxable periods commencing 1 January 2004, and to all other tax matters for taxable periods commencing 1 January 2006.

As of 1 July 2005, the EU Savings Directive (2003/48/EC) (EUSD) became effective. The EUSD requires withholding of tax or exchange of tax information on interest paid to EU-resident individuals and certain EU intermediary entities in certain limited circumstances. Distributions made by a PE Fund or income derived from the sale or redemption of the shares should generally not be subject to the EUSD withholding tax or exchange of information. However, if an investor in a PE Fund were to hold its shares through a professional nominee that is based in an EU member state, it is possible that the EUSD may apply to distributions made by the PE Fund to the investor or to the income derived by the investor from the sale or redemption of the shares in the PE Fund. Whether the EUSD would apply in any given case would depend upon the circumstances surrounding the relevant investor and the manner in which the EUSD has been implemented in the relevant EU member state.

The Cayman Islands has signed over 30 Tax Information Exchange Agreements (TIEAs) with other countries, including most EU member states (Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Malta, the Netherlands, Norway, Poland, Portugal, Sweden, the UK), the United States, China, Argentina, Australia, Canada, India, Japan, the Seychelles and Mexico and as a result is on the Organisation for Economic Co-operation and Development ‘white list’ of jurisdictions that have substantially implemented international tax standards. Essentially, TIEAs are bilateral agreements under which jurisdictions agree to cooperate in tax matters through the exchange of information.

Most recently, the Cayman Islands has signed an automatic tax information sharing agreement with the UK, whereby financial information on the UK taxpayers with accounts in the Cayman Islands will now be automatically provided to HM Revenue & Customs in the UK and it has also signed an agreement with the US that paves the way for automatic exchange of tax information under US FATCA. The Cayman Islands also signed a new TIEA, which replaces the original TIEA signed in 2001 referred to above.

The Cayman Islands has now signed up to a multilateral competent authority agreement pursuant to the Convention on Mutual Administrative Assistance in Tax Matters whereby members will automatically exchange

Update and trends

ELP Law

A revised ELP Law came into force on 2 July 2014 with the principal purpose of enhancing the Cayman Islands' partnership formation framework by providing much more contractual flexibility and to help align the drafting of a Cayman Islands partnership agreement with that of an onshore partnership in, for example, Delaware in the United States.

Some of the key changes included:

- *Duty of the general partner* – the general duty of the general partner to act in the interests of the exempted limited partnership is now capable of being amended in the partnership agreement, provided that the general partner must at all times act in good faith. This enables an ELP, for example, to allow a general partner to deal with competing interests, for example, those of limited partners and service providers in relation to fees.
- *Limited liability of limited partners* – the 'safe harbours' have been extended to clarify that a limited partner will not lose its limited liability solely as a result of serving as, or appointing, members of boards and committees (including advisory committees, which themselves are given statutory status under the revised Law) of the ELP. Also, a limited partner shall not cease to have the benefit of limited liability by reason only of the ELP ceasing to have a qualifying general partner. In addition, it has been made clear that where a partner has received a return of his capital contributions within six months before insolvency of the ELP, the partner will only be required to return such payment where the partner has actual knowledge of such insolvency at the time the payment was made.
- *Foreign limited partnerships* – foreign limited partnerships registered in the Cayman Islands will now be able to act as general partners of an ELP, whereas previously only foreign registered companies could so act. This change provides greater flexibility in the structuring of the funds and may provide tax advantages to general partners based in certain jurisdictions.
- *Re-domiciliation and termination* – an ELP has the ability to transfer out of the Cayman Islands by way of continuation to another jurisdiction, and the Law introduces a short-form strike off mechanism for ELPs (in each case equivalent to the procedure which already exists for Cayman Islands companies).
- *Advisory committees* – it is clear that a member of any such committees will
 - not owe fiduciary duties to the ELP or the partners; and
 - be subject to the terms of the partnership and benefit from the indemnity provisions in the partnership agreement notwithstanding that such member may not be a party to it.
 Incidentally, the Cayman Islands has brought into force the Contracts (Rights of Third Parties) Law, 2014 which enables persons to enforce rights granted to them in agreements to which they are not party.
- *Security* – an ELP shall be able to create a floating charge over the assets of an ELP and the revised Law confirms that the property of the ELP which is charged includes any right to make capital calls, and receive the proceeds thereof, from the partners.

The revised ELP law will enhance the attractiveness of the Cayman Islands for the formation, regulation and operation of PE Funds and therefore enable the Cayman Islands to continue as a jurisdiction of choice for many PE Funds.

Exempted Limited Liability Company

Draft legislation relating to the creation of an Exempted Limited Liability Company (ELLC) continues to make progress and it is anticipated that ELLCs will, in the near future, be available as an alternative legal form of vehicle for the formation of PE funds in the Cayman Islands.

A Cayman Islands ELLC would be similar in many respects to Delaware Limited Liability Company – an entity having separate legal personality (like a Cayman Islands exempted company), but with certain features of a Cayman Islands ELP (in the sense that such a company would not be limited by shares or by guarantee, but rather by reference to members' capital accounts and capital commitments, with freedom of contract amongst the members as to determining the internal workings of the company). At present, the Cayman Islands are

not able to offer a vehicle more closely aligned with a Delaware Limited Liability Company, and US fund promoters often ask whether the Cayman Islands could provide such a vehicle.

Some advantages of an ELLC would be to allow for simplified fund administration (ie, easier tracking or calculating the value of a member's investment in the ELLC), more flexible corporate governance concepts and possibly a closer matching of the legal framework applicable between the 'onshore' and 'offshore' investors (eg, where there are parallel 'onshore' and 'offshore' funds in a structure). Given the position of the Cayman Islands as a leading jurisdiction for private equity fund formation, and that US counsel and US fund promoters have actively been asking for an ELLC solution in the Cayman Islands, we believe that such a vehicle would be attractive to the US funds industry and would enhance Cayman's position in the fund formation market. Indeed, such a vehicle might be viewed as a premium product.

Alternative Investment Fund Managers Directive

While the European Alternative Investment Fund Managers Directive (the Directive) came into force in the European Union (EU) and adhering member states of the European Economic Area (EEA) on 22 July 2013, it may apply to managers of Cayman Islands private equity funds who market to investors in the EEA or perform risk management or portfolio management functions from within the EEA. By way of example, assuming a structure with an Irish (or EU) feeder alternative investment fund with a Cayman (or non-EU) master alternative investment fund then, in the present legislative environment, the feeder fund would not be able to benefit from the EU passport (and the less stringent legislative regime that results) under the Directive. A feeder fund only has access to the EU passport if the master fund has the ability to obtain an EU passport itself. At present, it is not possible for a non-EU fund to obtain an EU passport itself although this is likely to change during 2015 when a decision will be made as to whether or not to expand the passporting regime to include non-EU jurisdictions.

Accordingly, the most likely impact of the Directive for a manager based in the US or Cayman Islands for most of 2015 is the status quo, that is the ability to privately place in the EU, subject to local law, until at least 2018 but with additional disclosure and reporting obligations, the ability to reverse solicit EU investors and the ability to run managed accounts for single EU investors. However, if the intention of a fund is to maximise the EU distribution capability and obtain a passport, then, at present, the most effective means of achieving this would be to establish a parallel EU Directive-compliant structure in, say, Ireland, in order to target EU investors, rather than having an EU feeder fund for a non-EU master fund. Accordingly, the use of parallel structures may well increase during 2015 until there is some certainty as to the whether or not the passporting regime will be expanded to include the Cayman Islands.

FATCA

On 4 July 2014, the Tax Information Authority (Amendment) (No. 2) Law, 2014, the Tax Information Authority (International Tax Compliance) (United Kingdom) Regulations, 2014, and the Tax Information Authority (International Tax Compliance) (United States) Regulations, 2014 (together the FATCA Regulations) were gazetted and became effective. The FATCA Regulations provide the legal obligations of Cayman Islands Financial Institutions in relation to US and UK Foreign Account Tax Compliance Act as a matter of Cayman Islands law. The FATCA Regulations also permit the Cayman Islands government to exchange tax information automatically under the inter-governmental agreements with the UK and the US without violating Cayman law.

The FATCA Regulations apply to all Cayman Islands Financial Institutions (CFIs). Some action will be required of certain CFIs. The extent of that action will depend on a number of factors including the identity of account holders and the value and nature of the account.

We expect that many of the sponsors of PE Funds will outsource to administrators the reporting requirements imposed on them by the increased regulation and rely on the administrators to ensure full due diligence is conducted with respect to the investors in their funds. In any event, managers should remain vigilant in their compliance with the FATCA Regulations as we expect that other countries may also seek to mirror such arrangements during 2015 which may well increase the administrative burden on funds based in the Cayman Islands.

information about bank accounts held by taxpayers from their jurisdictions. The competent authority agreement implements the standard for automatic exchange, specifying the details of what information will be exchanged and when. While the agreement is multilateral, the actual exchanges are bilateral. The first such information exchange date for the Cayman Islands is September 2017.

23 Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

Currently, none. See question 17.

Selling restrictions and investors generally

24 Legal and regulatory restrictions

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

A Cayman Islands PE Fund is not allowed to carry on business with the public of the Cayman Islands other than so far as may be necessary for the carrying on of the business of the PE Fund outside of the Cayman Islands. As such, Cayman Islands PE Funds are prohibited from offering shares to the public in the Cayman Islands (in the case of an exempted company) unless such shares are listed on the Cayman Islands Stock Exchange.

'Public', for these purposes, does not include a sophisticated person, a high net worth person, a company, partnership or trust of which the shareholders, unit holders or limited partners are each a sophisticated person, a high net worth person any exempted or ordinary non-resident company registered under the Companies Law or a foreign company registered pursuant to Part IX of the Companies Law or any such company acting as general partner of a partnership registered pursuant to the provisions of the ELP Law or any director or officer of the same acting in such capacity or the Trustee of any trust registered or capable of registering pursuant to the provisions of the Trusts Law (as revised).

25 Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

There are currently no other Cayman Islands restrictions to describe.

26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

There are no filings or notifications required as regards investors in an exempted company or an ELP. However, as noted above, the general partner must maintain a Register of Limited Partners that is open to inspection by all partners of an ELP or by any other person with the consent of the general partner of the relevant ELP. In addition, the general partner must file a statement with the Registrar of Exempted Limited Partnerships where there has been a change in any of the information provided under the section 9 registration filing described in question 2.

In the unlikely event that the PE Fund is to be CIMA-registered, in order to effect the required registration, the PE Fund is required to provide CIMA with a summary of the terms of the offering for each class of equity interests and to provide details of the various service providers of the PE Fund along with a copy of its offering document. The PE Fund must notify CIMA of any changes in the details of the summary of the terms of the offering and any change in the PE Fund's service providers as filed on initial registration with CIMA and supply copies of any supplements to, or revision of, the offering document.

The directors of a CIMA-registered PE Fund or manager holding a SIBL exemption will be required to make an annual filing together with the payment of a fee, and If there is any change to the information previously provided, the director must inform CIMA of the change within 21 days of the change.

The PE Fund usually will require evidence identifying the branch or office of the bank from which subscription monies are being remitted or have been transferred, to verify that the account is in the name of the subscriber and retain a written record of such details. Normally the PE Fund and its general partner (or directors if it is an exempted company) reserve the right to request such information as is necessary to verify the identity of a subscriber. Any failure or delay by a subscriber to produce any information required for verification purposes could result in the PE Fund refusing to accept the subscription application and the subscription monies relating thereto.

If any person who is resident in the Cayman Islands (including the general partner or a director) has a suspicion that a payment to the PE Fund (by way of subscription or otherwise) contains the proceeds of criminal conduct, that person is required to report such suspicion pursuant to the Proceeds of Crime Law, 2008.

27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

Usually, the person offering interests in a PE Fund will be the investment manager or sponsor of the Fund and, unless such person is domiciled in the Cayman Islands or carries on business in the Cayman Islands, there will be no requirement for that person to obtain licences or registration in the Cayman Islands.

28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

The PE Fund will be subject to the provisions of the Cayman Islands Money Laundering Regulations and Proceeds of Crime Law of the Cayman Islands. To comply with these regulations and laws aimed at the prevention of money laundering and terrorist financing, the PE Fund typically requires prospective investors to provide evidence to verify their identity. The general partner of the PE Fund where it is structured as an ELP or the board of directors where it is structured as an exempted company usually reserve the right to request such information as it considers necessary to verify the identity of a prospective investor.

The Foreign Account Tax Compliance Act (FATCA) was introduced by the United States in 2010 as part of the Hiring Incentives to Restore Employment (HIRE) Act with the purpose of reducing tax evasion by its citizens. The Cayman Islands has entered into a Model 1B IGA with the US and implemented certain local laws, which require financial institutions in the Cayman Islands to report information on financial accounts held by their US customers to the Cayman Islands Tax Information Authority (TIA). The Cayman Islands and the United Kingdom have also signed an Agreement to Improve International Tax Compliance based on the US Model 1 IGA under which financial institutions in the Cayman Islands will be required to report information on financial accounts held by their UK customers to the TIA.

As Cayman Islands-based PE funds will typically be considered financial institutions, they will be required to undertake due diligence on their investors to identify whether they are US or UK specified persons (for FATCA purposes) and disclose certain information to the TIA.

Exchange listing**29 Listing**

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

It is possible for a PE Fund established as either an ELP or an exempted company to apply for a listing on the Cayman Islands Stock Exchange (CSX), but it would be unusual for a PE Fund to do so. The principal advantage of obtaining a listing is that the PE Fund's securities would be listed on a recognised exchange, which some institutional investors may require. However, the main disadvantage would be that it would add another layer of expense and formation procedures, which may not be necessary in order to facilitate a private equity transaction. The CSX listing rules are available online at www.csx.com.ky and the principal initial and ongoing requirements for listing are set out in chapter 9 of the CSX listing rules.

30 Restriction on transfers of interests

To what extent can a listed fund restrict transfers of its interests?

Chapter 9 of the CSX listing rules provides that securities must be freely transferable, but certain transfer restrictions are allowed if they are adequately disclosed and approved by CSX, such as where transfer restrictions are required in order to avoid breaching the securities laws of any relevant jurisdictions.

Participation in private equity transactions**31 Legal and regulatory restrictions**

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

There are currently no such restrictions under Cayman Islands law.

32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

Other than the fiduciary duty of the general partner of an ELP to act in good faith and, subject to the express terms of the partnership agreement to the contrary, in the interests of the ELP, and the fiduciary duties of the directors of an exempted company, there are currently no specific legal or regulatory issues under Cayman Islands law that affect compensation and profit-sharing arrangements of a PE Fund. The structuring of such arrangements in a Cayman Islands PE Fund is usually driven by the legal or regulatory requirements of certain onshore jurisdictions.

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