



CAREY OLSEN

## Cayman Islands corporate and finance update – July 2024

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### Amendments to the Cayman Islands beneficial ownership regime

Following the Beneficial Ownership Transparency Bill, 2023 published in August 2023, the Parliament of the Cayman Islands passed the Beneficial Ownership Transparency Act, 2023 (“**Act**”), on 23 November 2023. The Act introduces a range of changes to the current Beneficial Ownership Regime (“**Regime**”) and enhances the jurisdiction’s current beneficial ownership regime to ensure compliance with the recommendations of the Financial Action Task Force. The Act demonstrates the Cayman Islands’ continuous efforts in adopting the changing international standards for anti-money laundering and countering terrorist financing. It is expected that the Act will be implemented in phases throughout the remainder of 2024.

With regard to next steps, the Ministry of Financial Services and Commerce in the Cayman Islands is currently preparing the Beneficial Ownership Transparency Regulations (“**Regulations**”), and corresponding guidance (“**Guidance**”). It is anticipated that these will be released in the coming months. Until the Act and Regulations are commenced, the existing Regime remains in effect.

A summary of the key changes introduced in the Act is outlined below.

### Key changes to the regime:

#### Consolidated regime

The current Regime is contained in several pieces of legislation and regulations. The Act consolidates these separate pieces of legislation into one comprehensive framework (including the corresponding regulations and guidance notes).

#### Expanded scope to include partnerships

The existing Regime applies to Cayman Islands companies, including any type of ordinary company, exempted company or limited liability company, as well as limited liability partnerships. However, the Act expands this coverage such that Cayman Islands exempted limited partnerships and limited partnerships will also be subject to the Regime and potentially required to maintain beneficial ownership registers.

#### Removal of exemptions

As the Act is gradually implemented, a number of exemptions available under the current regime will be removed, meaning several categories of currently exempt entities will be required to maintain a beneficial ownership register.

Under the Act, the only in-scope entities that will not be required to maintain a beneficial ownership register are:

- entities, or subsidiaries of entities, listed on an approved stock exchange; and
- entities licensed under Cayman Islands regulatory law.

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A fund registered under the Private Funds Act or Mutual Funds Act will not be exempt under the Act, however, an alternate route of compliance will be available. Instead of providing the details of its beneficial owners, a registered fund will be required to nominate a licensed administrator or other regulated person in the Cayman Islands that will be responsible for providing beneficial ownership information to the competent authority within 24 hours (or such other time required by the competent authority) of any request.

All other exemptions under the current regime will be removed.

#### Access to beneficial ownership details

Information submitted under the Regime is kept on a centralised electronic platform which is not publicly available but is accessible by the Cayman Islands Registrar of Companies on behalf of itself or certain regulatory bodies. Consistent with a commitment made by the Cayman Islands government in 2019 to have a public register of beneficial ownership by December 2023, the Act includes a clause that would enable Cabinet to make regulations providing for public access.

However, public access can only be implemented if and when further regulations are proposed by Cabinet and affirmed by a resolution of Parliament. A European Court of Justice judgment in November 2022 ruled that unfettered public access to beneficial ownership registries in the EU was a disproportionate interference with privacy and data protection rights. Issues raised by this judgment are reflected in the Act which does not allow for public access unless and until further regulations are proposed and affirmed, and no such regulations are anticipated until further analysis and consultation with the UK government is completed.

#### Details of beneficial owners

In addition to the information currently required to be provided with respect to each beneficial owner, the nationality of each individual beneficial owner and the nature of each beneficial owner's ownership or exercise of control will be required under the Act.

Additionally, the definition of a 'beneficial owner' will be amended under the Act in order to more closely align with that under Cayman Islands' Anti-Money Laundering Regulations ("**AML Regulations**"), which is intended to improve consistency across these regimes. However, the percentage of ownership or control applicable to be considered a beneficial owner will remain at 25% or more (whereas the threshold under the AML Regulations is 10% or more).

## Winding up Cayman Segregated Portfolio Company for the insolvency of a SP

### The case, the context and the question

- In the recent Cayman Islands case *In the matter of Holt Fund SPC-FSD 309 of 2023 (IKJ)* ("**Holt**"), the Grand Court considered the issue of whether a Cayman Islands segregated portfolio company ("**SPC**") could be wound up based on the insolvency of one or more of its segregated portfolios.
- The context was an unopposed application to appoint restructuring officers in respect of two segregated portfolios of an SPC. One requirement for appointing restructuring officers under the Companies Act is that the company must be, or be likely to become, unable to pay its debts (i.e. insolvent).
- The question was whether the assets and liabilities of segregated portfolios should be taken into account to determine if the SPC as a whole could be considered insolvent, or if an SPC's insolvency was referable only to its general assets.

### The Court's reasoning

- The Court first acknowledged the distinction between the Cayman Islands Companies Act and the law in Bermuda – in Bermuda the test for insolvency is specifically limited to the general assets of an SPC.
- The Court then considered previous authorities and determined they supported the notion that "insolvency of one or more [segregated portfolios] could be attributed to an SPC for the purposes of exercising the Court's winding-up jurisdiction".
- Ultimately, the Court was satisfied that "for the purposes of what was after all an unopposed application" it had jurisdiction to wind-up an SPC based on the insolvency of one or more of its segregated portfolios.

### Key takeaways

- The Court in *Holt* made a point to narrow its decision to the circumstances of this unopposed case.
- Notwithstanding the decision, operators of SPC structures can take some comfort that *Holt* did not threaten the statutory ring-fencing of segregated portfolios to the extent that, on an SPC's winding up, a creditor only has recourse to the assets of the segregated portfolio(s) it contracted with.
- *Holt* highlights the importance of including "non-petition" clauses in agreements entered into on behalf of a segregated portfolio, in order to add a contractual safeguard against a creditor of one SP petitioning to wind-up an SPC structure on the grounds of the insolvency of that SP.

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## Proposed amendments to the Virtual Asset (Service Providers) Act 2024 Revision (the “VASP Act”)

On 13 February 2024, the Ministry of Financial Services and Commerce (“**Ministry**”) released a consultation note and amendment bill (“**Bill**”) to the VASP Act along with proposed regulations and a consultation paper requesting feedback from the public on the proposed changes to the legislation.

The VASP Act relates to the licensing of virtual asset trading platforms and virtual asset custodians<sup>1</sup> (“**Licensing Regime**”). Though the Licensing Regime is not yet in force, it will seek to ensure that virtual asset service providers (“**VASPs**”) are offering these services in a safe and well-regulated manner.

Taking an innovative approach, the Ministry invited public feedback via Github ([here](#)) or email to [dfslegislation@gov.ky](mailto:dfslegislation@gov.ky).

Proposed revisions and a summary of the responses to the consultation are set out below and the consultation is now closed. Watch this space for our further update on the final form of these amendments when they have been published.

### Key provisions of the Bill:

- **Requirement for a minimum of two directors** for VASPs, aligning with other regulatory laws in the Cayman Islands such as the Securities Investment Business Act (“**SIBA**”);
- **Lapse or revocation of approval of new directors or senior officers** – whereby approvals (a) will lapse if the senior officer, trustee or the anti-money laundering compliance officer becomes bankrupt or is convicted of an offence involving dishonesty; and (b) may be revoked by the Authority where the Authority has sufficient cause to believe that the senior officer, trustee or the anti-money laundering compliance officer is no longer able to perform the functions required by the appointment;
- **Amended definition of ‘Operator’** to bring added clarity, particularly where virtual asset trading platforms do not clearly have an identifiable manager of the platform, by including the entity or group which provides services offered by the virtual asset trading platform to the users of the platform;
- **Addition of definition of ‘Convertible Virtual Asset’** as ‘a virtual asset which may be accepted, exchanged or transferred in exchange for another virtual asset or fiat currency by way of any type of programme, feature of the virtual asset or third-party intermediary’;

- **Simplified fee structure** from the current fee structure (which requires CIMA to assess a registration fee payable by new VASP applicants and where fees are not known prior to application approval), by removing the fee assessment requirement and replacing it with new licensing fees;
- **Removal of obsolete provisions in sections 22 and 23** which instead will be addressed in further rules and guidance from CIMA;
- **Revision of the term “existing licensee”** to “supervised person”, for greater clarity; and
- **Clarification of provisions relating to the audit of a licensee’s accounts** and to bring them in line with other regulatory laws.

### Summary of responses to consultation

On 3 April 2024, XReg Consulting SEZC, the Cayman Islands Virtual Assets Society and the Blockchain Association of the Cayman Islands submitted a joint letter in response to the Ministry’s request for feedback (the “**Letter**”).<sup>2</sup> Their responses focused on the issues of virtual asset issuances and the use of virtual asset derivatives in the Cayman Islands, including recommendations:

- to remove virtual asset issuances from the scope of the VASP Act rather to amend the VASP Act to require due diligence on directors, beneficial owners and to introduce notification requirements when a virtual asset issuance has occurred;
- to exclude tokenised securities from the VASP Act and to instead treat tokenised securities as securities under SIBA; and
- to bring virtual asset trading platforms that offer virtual asset derivatives exclusively within the scope of the VASP Act. This would remove the requirement for such platforms to register under SIBA and will bring added clarity as to whether dual registration or exemption under both the VASP Act and SIBA is required.

### Aircraft repossession – using a Cayman Islands trust to hold the aircraft

Cayman Islands charitable and STAR trusts offer flexible “work-out” ownership structures in which repossessed aircraft can be held during the “work-out” period. We have assisted clients to reach positive outcomes with the sale of aircraft held in such structures and in our full briefing we highlight some considerations to take into account when terminating the structure following the sale. Please read our full briefing here: [Carey Olsen Aviation Bulletin 2023/2024: Aircraft repossession – using a Cayman Islands trust to hold the aircraft](#)

<sup>1</sup> Both “virtual asset trading platform” and “virtual asset custodian” are defined in the VASP Act.

<sup>2</sup> 66169024f85342f7a1db9964\_XReg Consultation Response Letter – Cayman Islands VASP Act.pdf ([website-files.com](https://www.careyolsen.com/files/66169024f85342f7a1db9964_XReg%20Consultation%20Response%20Letter%20-%20Cayman%20Islands%20VASP%20Act.pdf))

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