# The Private Equity Review

Fifth Edition

Editor
Stephen L Ritchie

Law Business Research

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# The Private Equity Review

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# EDITOR'S PREFACE

The fifth edition of *The Private Equity Review* comes on the heels of a solid but at times uneven 2015 for private equity. Deal activity and fundraising were strong in North America, Europe and Asia, but the year ended with uncertainty in the face of declining growth in China, Brazil and other developing and emerging markets, increased volatility in commodity, stock, currency and other financial markets, and deflation concerns in developed countries. Nevertheless, we expect private equity will continue to play an important role in global financial markets, not only in North America and western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. As large global private equity powerhouses extend their reach into new markets, home-grown private equity firms, many of whose principals learned the business working for those industry leaders, have sprung up in many jurisdictions to compete using their local know-how.

As the industry continues to become more geographically diverse, private equity professionals need guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 29 different countries, with observations and advice on private equity deal-making and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

While no one can predict exactly how private equity will fare in 2016, it can confidently be said that it will continue to play an important role in the global economy. Private equity by its very nature continually seeks out new, profitable investment opportunities, so its further expansion into growing emerging markets is also inevitable. It remains to be seen how local markets and policymakers respond.

I want to thank everyone who contributed their time and labour to making this fifth edition of *The Private Equity Review* possible. Each of them is a leader in his or her respective market, so I appreciate that they have used their valuable and scarce time to share their expertise.

**Stephen L Ritchie**
Kirkland & Ellis LLP
Chicago, Illinois
March 2016

# Chapter 5

# CAYMAN ISLANDS

*Nicholas Butcher and Iain McMurdo*[1]

## I GENERAL OVERVIEW

The Cayman Islands (Cayman) are home to a well-established and ever-growing domicile for private equity funds. This can be seen in the statistics issued by the Cayman Islands Registrar of Partnerships. While a Cayman private equity fund can be established as a company, or indeed a trust, the overwhelming majority of Cayman private equity funds are set up as partnerships to mirror the preferred domestic vehicle of choice, in particular, by US managers and sponsors. Specifically, for reasons that are set out later, private equity funds are typically established as exempted limited partnerships (ELPs) in Cayman.[2] At the end of 2015, there was a total of 17,896 ELPs registered in Cayman. This is approaching triple the 2006 number of 6,468. The years since the 2008 financial crisis have seen a consistent increase in the number of annual partnership registrations. In 2015 the figure stood at 3,370 compared with 2,893 in 2014, 2,368 in 2013, 2,037 in 2012, 1,897 in 2011 and 1,543 in 2010.

The reason Cayman has such a well-developed market for private equity funds is a result of its ability to complement onshore fund structures, specifically Delaware partnerships. While founded on Cayman common law principles, which in turn are derived from English law, the Cayman Islands Exempted Limited Partnership Law (first enacted in 1991) was drafted to provide symmetry with the corresponding Delaware statute. It has subsequently been amended, but always with a view to dovetailing with the US market. This policy was, and is, simple in design: it was intended, within the confines of Cayman law, to enable a manager's offshore fund to operate and be governed

1 Nicholas Butcher and Iain McMurdo are partners at Maples and Calder.

2 As the overwhelming majority of Cayman private equity funds are ELPs, in this chapter we describe the law and practice applicable to ELPs, except where it is also helpful to refer to other structures.

consistently with its domestic offering. Add to this the fact that while English law is technically not binding on a Cayman court, it is persuasive to it; the Cayman legal environment is at once both familiar and robust. Following a detailed consultation, the law received a comprehensive review and overhaul in 2014 resulting in a new statute, the Exempted Limited Partnership Law, 2014 (the ELP Law). The ELP Law did not make fundamental alterations to the nature, formation or operation of ELPs, but was intended to promote freedom of contract and simplify transactions undertaken by ELPs.

The statute is not, of course, the only reason for Cayman's success. The country provides a tax-neutral environment for fundraising, as under current Cayman law, provided its business is undertaken outside Cayman, no taxes or duties, either directly or by way of withholding, will be levied in Cayman on the trading activities or results of a Cayman-domiciled private equity fund. The combination of practical laws and low fiscal costs has secured the country's status as a popular and flexible domicile.

This has led to an interesting characteristic of the Cayman funds market: the vast majority of Cayman private equity funds are established by managers who are not themselves resident in the jurisdiction. The Cayman market facilitates the trading activities of the onshore funds industry, and in this sense the trends we see in Cayman are very much a coefficient of the trends experienced or developed in the United States, Europe, Asia and other major markets. The flexibility of Cayman law allows the manager or sponsor to replicate or accommodate deal terms driven by onshore factors and requirements.

If Cayman does not make the market trends, it certainly mirrors them. The lead-in time for deals appears to be currently increasing and, in some cases, lasts for many months. Increased investor expectation for transparency is reflected in a higher prevalence of side letters along with requests for valid and binding legal opinions – five years ago it was unusual to issue an enforceability opinion with respect to a side letter; now 20 or 30 opinions might be issued on a single closing.

Successful managers are still able to raise significant funds using Cayman structures. Even allowing for the fact that not every Cayman ELP is formed to serve as the investment vehicle for a private equity fund, transactions in the jurisdiction in 2015 remained robust, with funds raised ranging between a few million to several billion US dollars, spanning a wide range of investment strategies and geographic focus.

## II LEGAL FRAMEWORK FOR FUNDRAISING

Unlike open-ended mutual funds, closed-ended Cayman private equity funds are typically not required to register with the Cayman financial regulator, the Cayman Islands Monetary Authority (CIMA). (By closed-ended, we mean that investors are not entitled to voluntarily purchase or redeem their equity interests prior to the termination of the fund.) This distinction is created by the Mutual Funds Law (2015 Revision), which only requires registration where investors can withdraw at their own option. As it is a common characteristic of a private equity fund to lock up capital for the life of the fund, such funds are closed-ended for the purposes of the law. As such, the legal environment for the fundraising and ongoing investment activities of a Cayman ELP

private equity fund is dictated by the contractual relationship established by, and the disclosures set out in, the offering memorandum, subscription agreement and any other ancillary agreement (most notably side letters), and the ELP Law.

As already noted, the usual legal form of a Cayman private equity fund is an ELP formed under the ELP Law. While a private equity fund can be, and sometimes is, structured as a company or trust, the ELP model has two advantages: it allows US managers in particular to use the same vehicle as they do for their domestic offering while preserving freedom of contract through the limited partnership agreement (LPA), and at the same time avoiding the constraints of the maintenance of capital doctrine that applies to a Cayman company.

Maintenance of capital is the price of limited liability for a company. In general terms, it means that the issued capital of a company cannot be reduced or simply returned to investors. The original intention under English law was to enable a concerned investor to carry out a due diligence exercise, based on the enquiry of the company or inspection of public records, to ascertain the capitalisation of a company. That investor could then form its own view as to whether to invest based on the strength of the covenant implied by the size of the company's share capital. The argument followed that this was an important creditor protection as, given limited liability and separate legal personality, a creditor could in the usual course of events only claim against the company, not its shareholders or directors. It therefore followed that the capital needed to be preserved or maintained so that it would be available to satisfy claims. Accordingly, rules, both statutory and common law, grew up to maintain capital, and these are still reflected in modern Cayman company law. For example, a Cayman company cannot reduce its share capital without a court order, special rules apply to the purchase or redemption of its own shares and pure capital (i.e., capital representing the par, or nominal, value of a company's shares) cannot ordinarily be distributed to shareholders.[3]

None of these requirements apply to an ELP, as there is no equivalent of the corporate maintenance of capital doctrine under Cayman partnership law. This is because the general partner (GP) of an ELP has unlimited liability for all the debts and obligations of the partnership to the extent that its assets are inadequate.[4] Conversely, the limited partners (LPs), as the name implies, are not so liable (subject to two important exceptions noted below).[5] This gives investors – the LPs in a Cayman private equity fund formed as an ELP – the best of both worlds: limited liability, but with almost unfettered ability to receive a return of capital in any situation subject only to the terms of the LPA underpinning the ELP.

An ELP is in fact a collection of contractual rights and obligations expressed through the terms of the LPA, which operates under agency principles through the GP and which has a limited liability wrapper for its LPs courtesy of the ELP Law. As the GP both acts for the ELP and has unlimited liability, there are qualifying criteria: at least one GP must be a Cayman company, another Cayman ELP or a natural person resident in

3 See, for example, Sections 14 to 19 and Section 37 of the Companies Law (2013 Revision).

4 Section 4(2) of the ELP Law.

5 Ibid.

Cayman. It can also be an overseas company, including for these purposes a Delaware LLC, which registers in Cayman as a foreign company.[6] This is short of a migration of the foreign company to Cayman and there is no reincorporation in Cayman, but a registered office is required along with submission of an annual return and, as discussed later, it can then fall subject to certain Cayman laws. Since the overhaul of the ELP Law in 2014, overseas partnerships can also register in Cayman in order to qualify as the GP of an ELP. There appears to be no overall preference for choice of qualification, although, in the majority of cases, either a Cayman company or a foreign-registered company will be used.[7]

There are no qualifying criteria for LPs; however, an LP is subject to certain statutory restrictions, again being the price for limited liability. Specifically, an LP is passive. In fact, it is prohibited under the ELP Law from taking part in the conduct of the business of the ELP, and the law requires that all contracts, agreements and the like are entered into by the GP on behalf of the ELP.[8]

This leads on to the first of the exceptions to limited liability noted above: in summary, an LP who takes part in the conduct of the business of the ELP can lose limited liability with respect to a third party who deals with that ELP and who reasonably believes such LP to be a GP.[9] However, all is not lost for an LP who wants to exert internal control on the activities of the partnership, as the ELP Law sets out a series of 'safe harbours', which are deemed not to amount to taking part in the conduct of the business. Probably the most helpful of these is as follows:

> *[...] 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 exempted limited partnership.*

This is because this is usually sufficient to enable an LP to participate in an advisory committee of the partnership without concern that it could lose limited liability. This is a potential area for tension for an LP who wants to exert control over a GP, and therefore by extension the ELP itself. We advise that the golden rule for an 'active passive' LP is first, only to participate internally within the partnership, and dealing only with other partners and never with third parties; and second, to have those internal controls expressly documented in the LPA so as far as possible to come within the letter of the safe harbour set out above.

6 Section 4(4) of the ELP Law.

7 We should note for completeness that for onshore reasons it is common to see a mezzanine ELP used as the immediate GP to the private equity fund itself, but that mezzanine ELP will itself need a GP, which in turn will typically be one of the corporate models described.

8 Section 14(2) of the ELP Law.

9 Section 20(1) of the ELP Law.

The second exemption to limited liability is clawback on insolvency: if an LP receives a capital – not a profit – distribution and the ELP is insolvent on a cash-flow test at the time the payment is made and the LP has actual knowledge of the insolvency, then that LP can become liable to return the distribution together with interest.[10]

In short, to complete the description of the legal form of an ELP, the partnership does not have separate legal personality: it contracts through the GP, and property vested into the partnership or expressed to be held in its own name is in fact held by the GP. Legal actions would be initiated by the GP on behalf of the partnership. Finally, subject to the terms of the LPA, an ELP can have perpetual succession.

In terms of the fundraising itself, Cayman has a disclosure-based legal system; there are no prescribed rules for the content of an offering memorandum for a closed-ended private equity fund. However, whatever is or is not said may potentially be actionable. In addition to a contractual claim under the contracts constituted by the offering memorandum, the subscription agreement and any ancillary agreement (such as a side letter), liability could also arise under principles of negligent or fraudulent misrepresentation, while the Contracts Law (1996 Revision) could apply with respect to pre-contractual misrepresentation. To complete the line-up of civil claims, an action for deceit could also arise under tort laws. Finally, in the case of criminal deception, the Penal Code (2013 Revision) could apply.[11]

All of this means that the role of adequate disclosure to mitigate the liability of the ELP (along with possibly its GP and promoters), as well as to explain the investment terms, strategy and risk factors, is crucial. If an investor (i.e., an LP in the context of an ELP) can show reliance on a disclosure in the offering memorandum and breach of that disclosure that has resulted in damage, then a claim could ensue. This applies equally to the adequacy of risk factors, for example, as it does to more readily apparent contractual terms such as a statement as to the quantum of fees to be charged by the GP or sponsor.

Specific Cayman disclosures that might be expected, in addition to the investment narrative, terms and risk factors, include the legal form (and especially that the fund, if an ELP, does not have separate legal personality) and the exceptions to limited liability described above. Also typically included would be a statement with respect to tax treatment, transmission of investor information under regulatory laws (see Section III, *infra*) and a statement that the ELP is only authorised to carry on business outside the Cayman Islands. This latter point is significant to the parameters for the solicitation of investors in Cayman.

While a Cayman company is not allowed, under the Companies Law, to offer its securities for sale to the public unless those securities are listed on the Cayman Islands Stock Exchange,[12] there is no equivalent for an ELP; however, as shall be seen, an ELP is expressly prohibited from transacting business with the public in the Cayman Islands.

10 Section 34 of the ELP Law.

11 Penal Code (2013 Revision), Sections 247, 248 and 257.

12 Section 175 of the Companies Law (2013 Revision).

In fact, this is what 'exempted' in the legal description of an ELP signifies, as only an exempted limited partnership is entitled to apply for the tax exemption certificate described in Section III, *infra*.[13]

Although there are no equivalents to securities registration statements or investment promotions in Cayman, the legal requirement that the business of an exempted company or partnership must be undertaken outside Cayman means that it cannot generally deal with the public in Cayman (unless, in the case of a company, its securities are first listed on the local exchange). In practice, this means that the investors in a Cayman private equity fund will either be resident overseas or will be other Cayman-exempted entities. One Cayman-exempted vehicle can deal with another, as ultimately their respective businesses are carried out outside rather than within Cayman. As the vast majority of Cayman funds are established with exempted status, the restriction does not usually create an issue in practice; however, occasionally a fund will want to take in a Cayman-resident, non-exempt investor. Whether it can lawfully do so will depend on whether the fund has made an offer to the public in Cayman such that it is carrying out business with the public in Cayman.[14]

While specific advice must be sought prior to making an offer in the Cayman Islands, we can extract the following general principles:

*a* marketing materials can be sent to a limited number of pre-selected investors;

*b* marketing visits should be made on a one-off basis and should be specific to a limited number of pre-selected investors (unless made on a reverse-enquiry basis);

*c* local immigration and licensing requirements may apply;

*d* the fund can be marketed via a website or other electronic means by the sponsor to the extent that the website is not provided through an internet or electronic service provider (e.g., from a server) in the Cayman Islands;

*e* unsolicited calls from investors can be responded to, but the making of calls by the sponsor could trigger the public business test;

*f* there are no express requirements for the content of marketing materials and, subject to the public offer prohibition, no prescribed minimum or maximum number of offerees; and

*g* it is advisable that the following jurisdiction-specific statement is included in any offering memorandum or equivalent – 'No offer or invitation to subscribe for [partnership interests] can be made or is made hereby to the public in the Cayman Islands.'

As previously noted, in the vast majority of cases the sponsor or manager of a Cayman private equity fund will be based onshore, and the fiduciary or other obligations of that sponsor or manager may in part be governed by laws of its own jurisdiction and also the laws of the jurisdiction in which the offer is made; however, the liability, if

13 Section 38 of the ELP Law.

14 Note that pursuant to Section 183 of the Companies Law (2013 revision), an overseas company selling securities from the Cayman Islands will first need to register as a foreign company under the Companies Law.

any, of the sponsor or manager will also be governed by the nature of the contractual arrangements it has with the fund, the scope of its services and obligations, and the extent of any limitation of liability and indemnification. Common carve-outs for exculpation provisions in the context of a Cayman investment fund are fraud, wilful default and gross negligence. It is worth noting that Cayman does not have a settled definition of gross negligence, and it is therefore usual to see either an express definition or an import of a standard by reference to other laws, usually, in the context of the US market, those of Delaware or New York.

No discussion of fiduciary duties and liability would be complete without referencing the standard for the GP itself. The ELP Law contains a statutory standard that cannot be contracted out of: the GP is required to act at all times in good faith and, subject to the LPA, in the interests of the partnership.[15] There is no statutory standard of fair dealing. While the good faith duty is fixed by statute, the actions of the GP can be subject to contractual limitation of liability and indemnification provisions, although care must be taken to ensure these do not infringe either public policy or common law principles with respect to fiduciary exculpation.

## III REGULATORY DEVELOPMENTS

As noted above, closed-ended Cayman private equity funds are generally not required to register with CIMA. Care needs to be taken when drafting withdrawal provisions for an investor for regulatory reasons in an otherwise closed-ended fund, for example, where an LP wishes to exit for ERISA[16] purposes. This is because the Mutual Funds Law does not exempt voluntary withdrawal in any circumstance. In practice, this is dealt with by turning the withdrawal 'entitlement' from one of right in the hands of the investor into one of compulsion in the hands of the GP.

An investment manager or sponsor domiciled or registered in Cayman as a foreign company, and carrying on investment management or advice, will be subject to Cayman's Securities Investment Business Law (2015 Revision) (SIBL). This requires that a manager or adviser either be licensed by CIMA or register with CIMA as an excluded person. Registration as an excluded person does not imply regulation by CIMA, and such registration is possible where the person to whom the services are provided (i.e., the private equity fund itself) is either a sophisticated person within the definitions set out in the SIBL, or is a high net worth person (HNW). As most private equity funds are institutional, the latter test is usually relied upon as this sets the threshold for HNWs at US$5 million in total (as opposed to net) assets.[17] The typical Cayman Islands private equity fund will easily reach this benchmark. Registration as an excluded person is achieved by filing a form on an annual basis that gives certain prescribed details with respect to the manager and payment of a fee of approximately US$6,000.

15 Section 19 of the ELP Law.

16 The US Employee Retirement Income Security Act of 1974.

17 Section 2 of the Securities Investment Business Law (2015 Revision). Note that a different definition applies to an HNW natural person.

Registration under the SIBL will also bring the manager within the scope of Cayman's robust and detailed anti-money laundering regime, and the manager will need to meet the client identification and reporting requirements prescribed by the Money Laundering Regulations (2015 Revision).

Of course, it is often the case that the GP will provide investment management or advice services to the ELP fund; however, the GP will typically be exempted from registration, provided it is not separately remunerated for its services other than in its capacity as GP under the LPA and does not otherwise hold itself out as providing such services generally.[18] If it does, then it may be required to register as an excluded person.

The private equity fund itself will also be subject to certain reporting requirements: if any person resident in Cayman knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in criminal conduct or is involved with terrorism or terrorist property, and the information for that knowledge or suspicion came to their attention in the course of business in the regulated sector, or other trade, profession, business or employment, the person will be required to report such knowledge or suspicion to the Financial Reporting Authority of the Cayman Islands, pursuant to the Proceeds of Crime Law (2014 Revision) of the Cayman Islands, if the disclosure relates to criminal conduct or money laundering, or a police officer of the rank of constable or higher; or the Financial Reporting Authority, pursuant to the Terrorism Law (2015 Revision) of the Cayman Islands, if the disclosure relates to involvement with terrorism or terrorist financing and property. Such a report shall not be treated as a breach of confidence or of any restriction upon the disclosure of information imposed by any enactment or otherwise.

As previously noted, invariably a private equity fund will be structured as an exempted vehicle in Cayman, meaning that it cannot do business with the public in Cayman. In the context of an ELP, this means that in return for a fee of approximately US$1,800, it can apply to the government for, and expect to receive, a tax exemption certificate (TEC). The TEC will confirm that no law subsequently enacted in Cayman imposing any tax to be levied on profits or income or gains or appreciations shall apply to that ELP, or to any of its partners, in respect of the operations or assets of that ELP or the partnership interests of its partners. The TEC will also usually confirm that any such taxes and any tax in the nature of estate duty or inheritance tax shall not be payable in respect of the obligations of the ELP or the interests of its partners.[19]

Currently, the TEC has insurance value only, as under current Cayman law there are no taxes levied in Cayman, which would be applicable to an exempted private equity fund. Naturally, investors in the fund will be taxed at applicable local rates when proceeds are repatriated to their own jurisdiction, but there is no first-instance charge to tax in Cayman; however, virtually all funds apply for a TEC.

As will be apparent from the foregoing, there have been no relevant changes in Cayman tax law over the past year, and none are currently expected. Similarly, the Cayman regulatory regime has been very stable over the past year with no material changes in the

18 Ibid; Paragraph 6, schedule 4.

19 Section 38 of the ELP Law.

context of a closed-ended private equity fund. Finally, it is worth noting that Cayman legislated away the unhelpful decision in the English case of *Mercury*[20] through changes to the Companies Law. In summary, the judgment in *Mercury* appeared to require physical rather than electronic closings, which would create obvious impracticalities in the context of modern multi-jurisdictional transactions. The changes to the law effectively allow the contractual parties to determine how agreements will be deemed executed.

As noted above, the ELP Law was revised in 2014. Principal amendments included:

*a* enabling the LPA to confirm to whom the GP's good faith duty is owed in given circumstances;

*b* confirming that, subject to the LPA, LPs do not owe fiduciary duties;

*c* simplifying the mechanics for admissions of new LPs and transfers of partnership interests; and

*d* introducing a short-form dissolution procedure.

Again in 2014, Cayman introduced for the first time the Contracts (Rights of Third Parties) Law, a brand new law that confers on third parties, via an opt-in requirement, a right of enforcement even if they are not a party to an agreement if the actual contacting parties intend to give that right. In the context of an LPA, this means that third-party rights under an indemnity provision, for example, can be enforced by that third party even though it is not a signatory to the LPA.

Revisions to the ELP Law were introduced in early 2013 to authorise the holding of the register of limited partnership interests otherwise than at the registered office, provided that on request from the Tax Information Authority of the Cayman Islands, details must be made available at the registered office.[21]

The European Alternative Investment Fund Managers Directive (Directive) came into force in the EU and for adhering Member States of the EEA from 22 July 2013 and, subject to limited exceptions, will apply to alternative investment fund managers (AIFMs) of Cayman private equity funds. A number of factors need to be taken into account to determine who is the AIFM, including the performance of portfolio and risk management, and the delegation (if any) of those functions. However, in general the AIFM will be the GP or delegate investment adviser of the GP. The obligations imposed by the Directive vary depending on the location of the AIFM, but it should be noted that it applies equally to non-EEA-based AIFMs marketing Cayman Islands private equity funds to investors in the EEA and to EEA-based AIFMs who perform risk management or portfolio management functions for Cayman Islands funds even if they are not marketing. One requirement of the Directive with respect to marketing Cayman alternative investment funds into the EEA is for relevant cooperation agreements to be entered into between CIMA and the EU Member State in which the fund will be

20 *R (on the application of Mercury Tax Group Ltd) v. HM Revenue & Customs* [2008] EWHC 2721.

21 Section 29 of the ELP Law.

marketed. CIMA has now signed cooperation agreements with the majority of EU Member States. In addition to cooperation agreements, AIFMs will also have to comply with reporting, disclosure and asset stripping and EU private equity rules.[22]

While a detailed analysis of the Directive is beyond the scope of this chapter, marketing activities may be exempted temporarily under transitional rules, or permanently if reverse solicitation rules apply, the fund has a single investor only or if the AIFM manages closed-ended unleveraged assets of less than €500 million. AIFMs will need to consider carefully the application of the Directive to such funds before any marketing or management activities are undertaken in the EEA. At the time of writing, the European Securities and Markets Authority (ESMA) is assessing whether it should recommend extending the Directive's marketing passport to Cayman Islands private equity funds. Currently, only EEA-domiciled funds have access to this marketing passport, while Cayman Islands funds are marketed pursuant to the relevant EEA Member State's private placement regime. The private placement regimes allow Cayman Islands funds to be marketed in the vast majority of EEA Member States; however, the passport (if granted) would further enhance distribution options. ESMA is scheduled to make its recommendation by 30 June 2016.

Cayman private equity funds will ordinarily be 'financial institutions' for the purposes of the Foreign Account Tax Compliance Act of the United States (US FATCA). The UK equivalent, UK FATCA, will also be relevant, and Cayman has signed a Model 1 Inter-Governmental Agreement with both the United States and the United Kingdom (IGAs). While the effect of the IGAs and supporting regulations published by Cayman in 2014 are to simplify compliance by Cayman private equity funds with those FATCA regimes, Global Intermediary Identification Number registration may be required in the case of US FATCA, and both impose reporting and due diligence obligations.

The Cayman Islands is also an early adopter of the OECD Common Reporting Standard (CRS). Regulations implementing CRS were passed in October 2015 with reports due by 31 May 2017 for the 2016 reporting year.

## IV OUTLOOK

It is fair to say that in the first decade of this century we have witnessed a rise in the formation of successor leveraged buyout funds with investment periods becoming shorter as sponsors successfully deployed capital in acquisitions. Since the worldwide financial credit crisis, investment periods are moving back to a more traditional cycle of four to five years. In addition, managers have been seeking to use follow-on investment and recycling provisions to their fullest extent with a view to timing the market on the launch of their next fund. Fundraising (both in terms of fund size and speed to market) has moved back towards historical trends equivalent to 2000 to 2003, but nevertheless managers successfully launch funds, and the Cayman Islands continues to be the favoured jurisdiction for fund managers.

22 See Articles 22 to 24 and 26 to 30 of the Directive for further details on the reporting, disclosure and asset-stripping rules.

The ELP continues to be the favoured vehicle for private equity funds, and 2015 witnessed a record year for the jurisdiction with respect to the number of partnerships formed (3,370 in total). This exceeds the numbers formed in any other year, including the banner years of 2007, 2008 and 2014 respectively, and augurs well for the future resurgence of private equity fund formation in the Cayman Islands. There is strong interest from the US and Europe – traditionally significant markets for Cayman – but also increasing interest from Latin America (especially Brazil) and Asia (notably China, Korea and Japan). We expect a new generation of sponsor to emerge and look to Cayman as a result of Dodd-Frank's Volcker Rule as the banks spin out their proprietary trading desks.

Notwithstanding the introduction of regulation of private equity managers in the US and the EU, the Cayman Islands regulatory regime is not expected to change materially, meaning that the tried and tested, flexible and cost-efficient environment for private equity structures in Cayman will continue. That said, the Cayman Islands has responded to the increased regulation of the private equity industry across the world. There has been, and will continue to be, consequential changes resulting from the US FATCA and the equivalent UK FATCA with increased reporting requirements being imposed on the Cayman Islands funds with respect to the US FATCA. Following the signing of the inter-governmental agreement (IGA), the Cayman Islands is now dealing with the onward reporting requirements under the US FATCA. We expect many sponsors 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 of their funds. Likewise, the UK IGA, signed by the Cayman Islands and the UK on 5 November 2013, compels Cayman Islands foreign institutions, *inter alia*, to report information annually to the Cayman Islands Tax Information Authority on financial accounts that are held by UK persons. Finally, steps to establish the legislative and operational framework to implement the CRS are well under way.[23]

It is a characteristic of the Cayman funds industry, since its first inception, that the country has been able to marry robust laws with a pragmatic commercial approach to business. We expect 2016 will be a busy year for the Cayman Islands legislature and that Cayman will continue to refine its laws to ensure it maintains its preferred status among private equity sponsors around the world.

As the Cayman Islands continues to respond and adapt to regulatory changes around the world and improve the laws relating to the investment vehicles preferred by sponsors and investors alike, we expect the next few years will witness a significant growth in the jurisdiction's share of the private equity and venture capital fund formation market.

23 The Cayman Tax Information Authority issued a revised version of the Guidance Notes to include UK FATCA in addition to US FATCA.

# Appendix 1

# ABOUT THE AUTHORS

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Nicholas Butcher is managing partner of Maples and Calder's Dublin office. He advises on all aspects of investment funds and specialises in both hedge fund and private equity transactions. Nicholas has extensive experience of corporate, partnership and trust structures (including Japan-focused retail funds) and also advises with respect to securities investment business law as well as listings on the Cayman Islands and other worldwide exchanges.

Nicholas joined Maples and Calder in 2004. He was previously a partner with Hammonds (now Squire Patton Boggs) in London, specialising in mergers and acquisitions as well as public company corporate finance and, prior to that, for Speechly Bircham in London.

Nicholas has been recognised as a leading lawyer in *IFLR1000*, as a rated practitioner by the *Legal 500*, a leading practitioner in *Who's Who Legal: Private Funds* and has been ranked as a notable practitioner by *Chambers Global*.

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Iain McMurdo is a partner in the investment funds group and global head of the private equity group of Maples and Calder, and is based in the Cayman Islands. He specialises in the formation of private equity funds and advising on their resulting downstream transactions. He also works extensively with hedge fund managers and their onshore counsel advising on the structuring and ongoing maintenance of hedge funds. Iain represents large financial institutions and investment managers, including well-known sponsors of private equity and hedge funds, as well as boutique and start-up investment managers.

Iain joined Maples and Calder in 2008. He was previously a partner at another international law firm in the Cayman Islands and, prior to that, worked for Freshfields in London specialising in takeovers and mergers.

*Who's Who Legal* has ranked Iain as one of the Most Highly Regarded Individual Offshore Lawyers in private funds and he was recognised as *Who's Who Legal*'s 2015 Lawyer of the Year (Private Funds). Iain has been featured in *Latin Lawyer 250*, and recognised as a leading lawyer in *Legal 500*, *IFLR1000* and the Legal Media Group *Guides to the World's Leading Lawyers*. He has also been ranked in Band 1 as a notable practitioner by *Chambers Global*.

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