



# CORPORATE GOVERNANCE FOR MUTUAL FUNDS AND PRIVATE FUNDS

Friday April 19th, 2024

In 2023, the Cayman Islands Monetary Authority (“CIMA”) issued an updated Statement of Guidance – corporate governance for mutual funds and private funds (the “SOG”). This client briefing provides an overview of the core elements of the SOG which applies to all funds regulated under the Mutual Funds Act (Revised) and the Private Funds Act (Revised).

The purpose of the SOG is to provide the operators of a regulated mutual fund or a regulated private fund which include directors, general partners or trustees (the “**Operators**”) with guidance on the minimum expectations for the sound and prudent governance of the regulated mutual fund or regulated private fund (collectively referred to as a “**regulated fund**”).

The governance structure of a regulated fund must be appropriate and suitable to enable the effective oversight of the regulated fund. The size, complexity, structure, nature of business and risk profile of the operations of a regulated fund are fundamental factors in determining the adequacy and suitability of its governance framework. Factors determining the size, complexity, structure, nature of business and risk profile of the operations of a regulated fund could include, but are not limited to: assets under management, number of investors, complexity of the structure, nature of investment strategy or nature of the operations.

The main change from the previous guidance on corporate governance is the expanded scope of its application to include private funds. The SOG otherwise remains similar to the previous guidance with increased focus and

requirements from CIMA on certain areas, as follows.

## **Oversight Function of Operators**

Under the SOG, the Operators of a regulated fund have the ultimate responsibility for effectively overseeing and supervising the activities and affairs of the regulated fund. However, CIMA has emphasized that the board should be composed of directors with a diversity of skills, backgrounds, experience and expertise to ensure that there is an overall adequate level of competence at the operator level.

The SOG indicates that CIMA expects Operators to:

1. regularly take steps to satisfy themselves that the regulated fund's service providers are monitoring compliance with applicable acts, regulations and regulatory measures;
2. request appropriate information from such service providers and/or any professional advisors to the regulated fund to enable them to regularly satisfy themselves that the regulated fund is operating in compliance with all applicable acts, regulations and regulatory measures;
3. where required, provide appropriate directions to the regulated fund's service providers to rectify any non-compliance with any applicable acts, regulations and regulatory measures; and
4. require regular reporting from the regulated fund's investment manager and any other service providers to enable the Operators to make informed decisions and adequately oversee and supervise the operations of the regulated fund.

## **Conflicts of Interest**

Operators of a regulated fund should have a written conflict of interest policy commensurate with the size, complexity, structure, nature of business and risk profile of the operations of the business of the regulated fund. Such policy may be set out in the constitutional documents, offering memorandum or marketing documents as applicable.

The SOG highlights the importance of identifying, disclosing, monitoring and managing all conflicts of interest in an appropriate manner ensuring they are documented as applicable. In particular, all conflicts of interest relevant to a meeting during which a matter is being decided or approved should be disclosed and documented in meeting minutes. Further, all conflicts of interest should be disclosed at least on an annual basis.

## **Operator Meetings**

Board meetings should be held at least once per year. Notwithstanding, subject to the size, complexity, structure, nature of business and risk profile of the regulated fund, more frequent meetings may be required to ensure effective oversight. Where necessary, the Operators should request that service providers attend meetings or provide reports. Generally, this may include the investment manager, the administrator and AML officers.

## **Duties of Operators**

The SOG provides guidance on Operators' duties, including that an Operator:

- must exercise independent judgement, always acting in the best interests of the regulated fund (other than where lawfully permitted or required to consider other interests) and taking into consideration the interests of the regulated fund's investors as a whole;
- must make relevant enquiries where issues are raised on matters fully within the scope of the Operators' responsibility and be satisfied that an appropriate and timely course of action is being taken and that all concerns raised and related corrective actions are documented;
- should communicate adequate information to the regulated fund's investors, including any material changes to the regulated fund and should communicate (and evidence communication of) material changes relating to investor rights to the investor(s) in the regulated fund at the time such changes are being made or on an ongoing basis;
- must operate with due skill, care and diligence and must always act

honestly and in good faith;

- must oversee and supervise each regulated fund for which it functions and all matters falling within the scope of its related responsibilities and, before taking on any additional regulated funds, should ensure that it is able to perform its functions and duties in a responsible and effective manner (and in accordance with applicable acts, regulations and regulatory measures);
- upon registration or licensing of a regulated fund with CIMA, and on a continuing basis, should ensure or receive confirmation: (i) that the constitutional documents, offering documents and/or marketing materials (as applicable) of the regulated fund comply with applicable acts, regulations and regulatory measures as issued by CIMA from time to time; and (ii) that the constitutional documents, offering documents and/or marketing materials (as applicable) of the regulated fund clearly describe (a) the investment strategy and conflicts of interest policy of the regulated fund; and (b) the equity and/or investment interests in the regulated fund in all material respects (and contain such other information as is necessary to enable a prospective investor to make an informed decision as to whether or not to subscribe for or purchase an equity and/or investment interest in the regulated fund);
- is responsible for approving the appointment and removal of the regulated fund's service providers and the terms of the contracts with each such service provider; and, where they delegate this authority to another service provider, the Operator nonetheless retains overall responsibility for overseeing any outsourced functions and for ensuring that both investors in the regulated fund and CIMA are notified of any material changes to these appointments;
- retains ultimate responsibility for functions delegated to service providers and should regularly monitor and supervise any such delegated functions;
- should review all material service provider contracts to ensure that any outsourced or delegated roles and responsibilities are clearly defined and that, where appropriate, any such responsibilities are clearly divided as

between each relevant service provider;

- should ensure that the regulated fund's service providers are performing their functions in accordance with the terms of their respective contracts;
- upon registration or licensing of a regulated fund with CIMA, and on a continuing basis, is responsible for regularly assessing the suitability and capability of its service providers;
- should regularly verify or seek confirmation from its service providers that they are acting in accordance with the regulated fund's constitutional documents, offering documents and marketing materials, as applicable;
- should regularly monitor whether the regulated fund's investment manager is performing in accordance with any defined investment criteria, investment strategy and restrictions;
- should, as necessary and at all material times, inform itself of the regulated fund's investment activities, performance and financial position;
- should review and approve the regulated fund's financial results and audited financial statements and regularly monitor the regulated fund's net asset valuation policy and whether the calculation of its net asset value is being calculated in accordance with such net asset valuation policy;
- should ensure that it has sufficient and relevant knowledge and experience to carry out its duties as an Operator of a regulated fund;
- should assess whether it has, together with any other Operator(s) of the regulated fund, sufficient and relevant collective knowledge and experience to perform the duties imposed upon the Operator in relation to the regulated fund.

## **Documentation**

The SOG sets out certain requirements in relation to the documentation and record keeping requirements generally including the requirement for full, accurate and clear written records of meetings and/or determinations which should include (i) the agenda and circulated documents, (ii) a list of attendees present at the meeting and whether that attendance was in person or via telephone or video conference, (iii) the matters considered and decisions

made,(iv) any information requested from and provided by service providers and advisors and (v) a declaration of conflicts of interest.

## **Relations with CIMA**

The SOG highlights that the regulated funds should conduct the regulated fund's affairs with CIMA in a transparent and honest matter, ensuring material matters are disclosed to CIMA (i.e. the regulated fund's ability to continue as a going concern) and any non-compliance with applicable law and regulation. If in doubt whether a matter needs to be brought to CIMA's attention, operators should err on the side of caution and communicate the matter to CIMA.

## **Risk Management**

The Operators should ensure it has a suitable risk management framework in place that meets Cayman's obligations; and that material risks are discussed and assessed at meetings and appropriate action taken as required.

## **How can Bransens help?**

Bransens lawyers have extensive experience advising funds and other regulated entities in the Cayman Islands on corporate governance and compliance matters. If you require advice in relation to a fund's compliance with the corporate governance framework, please contact us at [info@bransens.com](mailto:info@bransens.com) .

*Please note that this briefing is intended to provide a very general overview of the matters to which it relates and is not intended as legal advice and should not be relied upon as such.*