

Alert

Proposed Addition of the Cayman Islands to the EU’s High Risk Third Countries List (the “EU AML List”)

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On 7 January 2022, the European Commission adopted a delegated regulation (the “Regulation”) proposing revision of its EU AML List to add nine countries, including the Cayman Islands.

The EU AML List is the EU’s list of jurisdictions which are considered by the EU to have strategic deficiencies in their anti-money laundering / counter terrorist financing (AML/ CFT) regimes so as to pose significant threats to the EU’s financial system. There was a 30-day scrutiny period within which the Council of the EU or the EU Parliament was permitted to object to this proposed revision of the EU AML List, failing which the revised EU AML List will be effective 20 days after the Regulation is published in the Official Journal of the EU.

Background

In February 2021 the Financial Action Task Force (FATF) added the Cayman Islands to its list of jurisdictions under “increased monitoring” in the area of AML/ CFT (the “FATF List”). This listing occurred despite Cayman being considered as compliant or largely compliant in respect to 39 of the FATF’s 40 Recommendations and having completed 60 out of 63 FATF Recommended Actions. The Cayman Islands is now compliant or largely compliant with all of the FATF’s 40 Recommendations and is continuing to address strategic deficiencies in only two remaining “Recommended Actions” relating to (i) having effective sanctions for non-compliance with beneficial ownership requirements; and (ii) demonstrating effective prosecution of money laundering cases. It is these two areas which have been used as justifying the Cayman Islands’ addition to the EU AML List.

Implications on Effectiveness of Revised EU AML List

Due Diligence

If and when added to the EU AML List, any entity subject to EU AML/ CFT laws will be required to apply enhanced due diligence and monitoring processes (which vary amongst the various EU Member States) in respect of all Cayman Islands entities and persons in connection with relevant financial business. It should be noted that many EU jurisdictions already commenced applying enhanced due diligence requirements in respect of the Cayman Islands after it was added to the FATF List, thus being added to the EU AML List may not have any material additional effect on due diligence requirements.

Securitisation Vehicles

The EU Securitisation Regulations prohibit the establishment of securitisation special purpose vehicles (“SPVs”) established in non-EU jurisdictions that are included on the EU AML List. Accordingly, advice should be taken before establishment of any new SPVs and/or in respect of investments in SPVs.

Marketing of Investment Funds

The inclusion of the Cayman Islands in the EU AML List will not prevent Cayman Islands investment funds from being marketed in the EU under national private placement rules. However, there were amendments proposed to the Alternative Investment Fund Managers’ Directive (AIFMD) in November 2021 which, if they come into effect as drafted, would prevent a Cayman Islands alternative investment fund from being marketed into the EU under the national private placement regimes if the Cayman Islands is still on the EU AML List. The AIFMD proposals are not expected to take effect until 2024 and may be impacted by other changes to EU AML laws before that time.

Feedback from the FATF's October 2021 plenary indicated the FATF considers the Cayman Islands has made positive progress in its efforts to be removed from the FATF List. On 12 January 2022, the Cayman Islands Ministry of Financial Services & Commerce ("MFSC") acknowledged the EU's adoption of the Regulation and the potential addition of the Cayman Islands to the EU AML List. MFSC has also expressed its continued commitment to a dialogue with EU officials and to implement all necessary regime enhancements to facilitate the removal of the Cayman Islands from the FATF List.

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