

UPDATE

Cayman data protection: A practical update for funds

The Data Protection Law, 2017 (DPL) will take effect on 30 September 2019. This is a summary of the key steps towards compliance being taken by funds in practice.

How does the DPL apply to funds?

The DPL applies to **data controllers**, namely persons who (whether alone or jointly with others) determine the purposes, conditions and manner in which personal data are to be processed¹. **Personal data** means data relating to a living, individual person from which that person can be identified, and includes personal information such as names, physical address, email address or other online identifiers, date of birth and financial information.

Cayman funds typically require investors to provide personal information relating to that investor (or its directors, members and beneficial owners) to the fund or its service provider(s). That personal data is used to comply with their statutory and regulatory obligations (ie, to populate investor registers and to conduct anti-money laundering due diligence), to communicate with investors, make distributions or other payments and to meet ongoing obligations such as AEOI reporting.

Cayman fund managers are also likely to have access to and utilise the personal data of underlying investors of their fund clients and, if so, be a data processor under the DPL. Non-Cayman Islands fund managers will be data controllers under the DPL if personal data is processed on their behalf in the Cayman Islands which, in practice, is relatively unusual though not unheard of. It is more likely that onshore fund managers will be processing personal data on behalf of the Cayman fund, or data controller, and so fall within the category of "data processor" under the DPL (see [Updates to service level agreements](#) below).

What does the DPL mean in practice?

The key actions being taken by funds in the run-up to 30 September 2019 are summarised below.

1. Privacy notice – adopt or update

Data controllers are required by the DPL to communicate certain privacy information to individuals as soon as reasonably practicable. In the funds context, this information is usually disseminated to investors via a privacy notice annexed to the offering or subscription documents.

If your fund already has a privacy notice, it will likely need some updating to comply with the requirements of the DPL. The amendments required to a privacy notice which is GDPR²-compliant can be expected to be minimal.

¹ **Processing** is defined very broadly under the DPL and will include obtaining, organizing, using and erasing personal data, as well as disclosing personal data to other persons, such as service providers.

² The European Union's General Data Protection Regulation (Regulation 2016/679).

2. Updates to offering documents

Most funds are electing to include brief disclosure in their offering documents relating to the enactment and commencement of the DPL. This is useful in the context of active funds which will have existing investors on 30 September, when the DPL takes effect, as that language – together with the privacy notice – seeks (amongst other things) to make those existing investors aware of the updated privacy notice and their role in passing that privacy notice to any third parties whose personal data was provided by them to the fund.

3. Updates to subscription documents

For new and active funds, additional DPL representations/agreements are being built into the standard subscription documents. Those clauses provide the fund with comfort that each incoming investor has received and read the privacy notice and understands how the fund will process that investor's personal data. These clauses also require an investor which has provided the fund with personal data relating to third parties, to make those third parties aware of the fund's privacy notice. Additional provisions may also be included where, for example, investor consent is sought for specific processing actions by or on behalf of the fund³.

4. Updates to service level agreements

As a data controller, a fund is responsible for ensuring that the data protection principles set out in the DPL are adhered to by service providers who process data on the fund's behalf (**data processors**). The fundamental data processors in the funds context are the administrator and fund manager who will, depending upon the specific structure, generally use investor personal data to comply with AML obligations, for FATCA/CRS reporting, processing investments, investor communication and reporting and for legitimate record keeping purposes. However, a particular fund structure may be substantially more complex than this, and the fund's contractual relationship with all service providers or potential data processors should be assessed and updated as required.

Funds should amend or supplement their service agreements to ensure that a third party service provider or data processor only acts in accordance with instructions of the data controller and to safeguard the security of the personal data during processing. As with AML functions outsourced by a fund, the use of sub-contractors by the fund's service providers should also be monitored and, where such sub-contractor may process personal data, strictly controlled in the relevant service level agreement.

5. Investor communication

It may not be convenient for a fund to update its offering and subscription documentation as described above, especially where the fund is closed. A more practical alternative may be for the fund to notify investors of its updated privacy notice (and provide easy access to that document through a link to the fund's investor portal or website) via a separate investor communication, whether scheduled or not. However, the fund must be proactive in providing the requisite privacy information to individuals⁴.

Additional considerations

This Update is not an exhaustive checklist of the ways in which funds will be impacted by the DPL. Funds and fund managers should be aware that these are the key steps being taken in practice however, behind the scenes, further action is required to ensure familiarity and compliance with the DPL's requirements. In particular, whilst the DPL does not mandate the adoption of data protection policies or the appointment of

³ For example, specific consent would likely be required where there is processing of sensitive personal data (which includes data relating to the political, religious, ethnic and sexual orientation of an individual), or where personal data is to be processed for new purposes not disclosed in an original privacy notice.

⁴ "Data Protection Law 2017 – Guide for Data Controllers" published by the Office of the Cayman Islands Ombudsman for more information as to when and how privacy information should be provided to individuals. Please see our [GDPR and Data Protection Information Hub](#).

a data protection officer, fund managers and directors need to understand the flow of personal data within their structures to enable them to identify the actions required at each level to meet those requirements. Fund managers and directors will also need to be aware of the rights of the underlying data subjects, what their obligations are in relation to data access requests and data breaches (whether at data processor level or otherwise) and the consequences of non-compliance.

How can Mourant help?

For more information and resources on the DPL, including the Ombudsman's Guide for Data Controllers, please see our [GDPR and Data Protection Information Hub](#).

Mourant can assist in providing further guidance on any aspect of the DPL, in the review and updating of fund documentation and contractual arrangements and in drafting board papers and internal data protection policies and procedures.

Please get in touch with your usual contact with any questions. Alternatively, please contact one of our global regulatory specialists, whose contact details can be found on the [GDPR and Data Protection Information Hub](#).

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