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Spotlight Report – Emerging themes in our fund markets

November 2020

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Introduction

One of the few things we've been able to be sure of this year is to expect the unexpected. This is certainly true of the global funds market which has, against a number of odds, emerged from the first wave of the COVID-19 pandemic in a broadly positive position.

Despite incalculable global costs in terms of re-skilling people to enable remote working, providing the infrastructure to allow that to happen, and the additional support needed to prioritise the wellbeing of workforces across the world, investment business has continued to thrive with relationships being nurtured virtually and GPs pivoting to grasp the advantages of economic, political and regulatory change.

Aside from COVID-19, Brexit lingers as a significant force impacting the global funds market, particularly the EU. The offshore jurisdictions which are indirectly going to be affected continue to work to reduce any detrimental consequences for the sector.

As a leading legal and governance services firm, with a presence in the key offshore jurisdictions, we are able to put the spotlight on the global funds industry offshore. Partners across Mourant's six global centres have highlighted some of the trends they believe will continue as we look towards 2021.

In this Spotlight Report we examine these trends, emerging themes and key developments that have occurred during 2020, providing an overview of the global offshore funds market.

Cayman Islands Developments

Cayman Islands removal from EU Blacklist

With the Cayman Islands being removed from the EU blacklist of non-co-operative jurisdictions in October 2020, there is a positivity around the final quarter of 2020 in the Caribbean compared to the beginning of the year, when the blacklisting was announced on the eve of the onset of the COVID-19 pandemic.

The decision to blacklist Cayman came about as a result of legislative changes coming into force a few days too late to be considered at an EU Code of Conduct Group meeting in February. That decision was overturned at the first opportunity, with Cayman being removed from the blacklist following the next Group meeting, which was held in October.

This decision to remove Cayman from the blacklist underlined its committed engagement with the EU to meet its technical objectives. More than 12,300 private funds were registered with the Cayman Islands Monetary Authority (CIMA) this year.

While working towards removal from the EU blacklist, the Cayman Islands continued implementing numerous legislative and regulatory changes aimed at bolstering its respected anti-money laundering and funds regulatory frameworks, including a regime requiring economic substance for certain key activities carried on within the Cayman Islands. Another key amendment recently introduced in Cayman affects the companies register.

The Companies (Amendment) (No.2) Law, 2020 and the Limited Liability Companies (Amendment) (No.2) Law 2020 (the Amendment Laws) mean the Cayman Islands Registrar must maintain additional information on firms listed, including the amount of capital a company has, the names and addresses of its subscribers and the location of its registered office.

While these changes currently only apply to companies and LLCs formed and registered in the Cayman Islands, they will in future extend to limited liability partnerships.

CIMA also recently amended its rules on segregation of assets for both mutual funds and private funds. This has clarified aspects of previous versions of these rules which had led to confusion within the industry. The various amendments, which were made in May, July and September 2020 seek to clarify conditions over appointing service providers, segregating a fund's portfolio and appointing custodians.

Channel Island Developments

There is much that could be said about the impact of the COVID-19 pandemic on the alternative funds sector globally, but two trends in particular were accentuated by the arrival of the pandemic.

The first was the bifurcation in the market between sponsors with a strong track record and an established investor base ready to invest in their next fund, and sponsors without either of those advantages. The second was the focus on sustainable finance and environmental, social and governance (ESG) factors in investment.

Fund raising

A positive impact of the pandemic for larger sponsors with an existing track record was their ability to close very large funds at a much quicker pace than usual, with the press reporting, for example, that CVC Capital Partners closed its latest European-focused buyout fund during the pandemic with commitments over EUR21 billion.

The Mourant funds team in Jersey advised world-leading private investment house and longstanding client, Ardian, on its eighth-generation secondaries fund in 2020. The platform has attracted USD19 billion of commitments from investors globally. The Mourant funds team in Guernsey has also been involved in a number of billion-US dollar closings, including iCON Infrastructure Partners V which closed at USD1.9 billion in March 2020 only three months after commencing fundraising and Hg on their latest fundraisings totalling USD11 billion across three vehicles. The multiple fundraisings include Hg Genesis 9 €4.4 billion, Hg Mercury 3 €1.3 billion and Hg Saturn 2 USD4.85 billion – all three funds hitting their hard-caps.

The COVID-19-induced lockdown had a more significant impact on fundraising by managers who were newer to the market, who found it difficult to arrange face-to-face meetings and facilitate the investor due diligence necessary for their fundraising. However, the cost effective and user-friendly fund regimes available to newer managers in the Channel Islands (particularly the JPF regime in Jersey and the PIF regime in Guernsey) have proven to offer a stable funds environment for managers looking to raise funds. We continue to see a steady pipeline of smaller funds, including from first-time sponsors, coming to the market with success, often in niche and opportunistic areas.

ESG-focused funds

The focus on ESG factors has manifested itself in various ways with private equity funds (including funds managed from the Channel Islands), supporting and giving back to the communities through their portfolio companies as well as investing in portfolio companies with a sustainability focus.

Jersey is home to a number of sustainable or ESG-focused funds, particularly low carbon and renewable energy funds, and is also in the process of developing its own sustainable finance strategy, as well as carbon-neutral strategy, for Jersey as a whole.

Guernsey has also seen continued investor interest in ESG funds, as witnessed by the successful USD1 billion fundraise for the Generation IM Sustainable Solutions Fund III. Arguably, investment in PE is more aligned to ESG due to the longer holding periods and control over investments than one might find in shorter investment horizon fund styles. We expect this trend to be accelerated by COVID-19.

The Guernsey Green Fund, launched in 2018, has continued to attract interest offering a platform for various green initiatives. Investors in a Guernsey Green Fund are able to rely on the Guernsey Green Fund designation, provided through compliance with the Guernsey Green Fund Rules, to represent a scheme that meets strict eligibility criteria of green investing and has the objective of a net positive outcome on the planet's environment. Guernsey continues to see growth in this area, with green funds holding a total net asset value of in the region of USD 4billion within the total for Guernsey funds by the end of Q1 2020.

LP & LLC developments in Jersey

A number of regulations amended in Jersey during 2020 have sought to make business dealings easier, with new Continuance Regulations in particular now expressly permitting non-Jersey limited partnerships without legal personality to migrate to Jersey and to continue as Jersey limited partnerships under the Limited Partnerships (Jersey) Law 1994. If a migrating limited partnership meets the eligibility criteria, the Jersey Financial Services Commission will issue a certificate of continuance to the partnership. This certificate is considered to be conclusive evidence that the migrating partnership has continued as a limited partnership within Jersey from the date in the certificate.

Jersey is also working towards introducing an equivalent to the US/Cayman-style limited liability company (LLC) from December 2020.

In-keeping with its strategy of embracing developing international standards around AML and CFT a new registry law in Jersey will also firm-up the information which needs to be kept on 'significant persons' in Jersey. "Significant persons" for this purpose are those persons occupying roles equivalent to a director or officer of a company and include, in addition to company directors and officers, the general partners of separate limited partnerships and incorporated limited partnerships, managers of limited liability partnerships or LLCs and council members of foundations.

Guernsey has also introduced continuance legislation for LPs, to provide express statutory route for migration of LPs in and out of Guernsey.

Overcoming challenges triggered by COVID-19

The spread of COVID-19 and the subsequent containment measures, including quarantine, lockdown and travel restrictions, have created an unprecedented set of challenges globally. As a result, our fund clients have been faced with a number of potential obstacles to closing transactions and conducting business generally during these disrupted times. However, by taking some simple practical measures, they have been able to successfully mitigate the impact on their transactions and working practices and very much continue "business as usual".

A key benefit of Guernsey law has been the flexibility, subject to a company's constitutional documents and any economic substance requirements (if applicable), of having no restrictions on where a meeting of the board or shareholders can be held. Where it has not been possible to conduct meetings by telephone or video conference, for example, in circumstances where constitutional documents require a majority of directors to physically attend a board meeting in Guernsey to form the necessary quorum, it has been necessary to consider alternative solutions, such as:

- appointing more directors locally;
- making arrangements to appoint local directors as alternatives; or
- passing written director resolutions executed in counterpart (and by electronic signature).

For shareholder meetings, subject to constitutional documents, the ability for shareholders of Guernsey companies to pass written resolutions or to appoint a local proxy or a corporate representative has been of assistance to those unable to travel, attend or vote at a shareholder meeting convened in Guernsey.

The ability to use electronic signatures in Guernsey has played a significant role in enabling businesses to operate as normal while the GFSC, mindful of impending deadlines for submission of financial returns and the operational issues being faced by many businesses including licensees, immediately made a number of adjustments to its requirements in order to accommodate the changing working environment. These adjustments included extending submission deadlines and allowing returns requiring auditing in the usual course to be submitted in unaudited form without special concession, with the audited versions to be provided at the end of October 2020 at the earliest. This pragmatic approach was welcomed by the industry and the GFSC subsequently commended the resilience of Guernsey's finance sector including the widespread ability to work from home effectively, noting that by the end of May 2020, approximately half of all returns had been received in line with the original reporting deadlines. Jersey's funds industry also was, and remains, well placed to deal with many of the issues presented by COVID-19. For example, electronic signatures have been recognised in Jersey as legal, valid and binding for some time and this position was confirmed by recent, helpful clarifications to the Electronic Communications (Jersey) Law 2000

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