

Fund Finance Friday



List'en Up – Cayman and the EU AML List – A Lender Update

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As avid LinkedIn users will no doubt be aware, the EU's focus on lists of various types continues and the Cayman Islands looks set to be added to the EU's list of "high risk countries" for anti-money laundering at the end of February (the "EU AML List").

We have set out below the background to this and some high-level thoughts on its effects but, if you are sitting at your desk this Friday simply counting the days to Miami and wondering if this matters to you, the short answer is that it should not have any material impact on the fund finance sector (either on a lender's ability to accept Cayman entities as credit parties in deal structures or on the ability of sponsors to utilize Cayman vehicles).

I recall something about a listing two years ago – is this the same as the last one?

In February 2020 (right about the time many readers were on the terrace at the Fontainebleau living life like it was 2019!), the EU included the Cayman Islands on its Annex 1 list of "non-cooperative jurisdictions for tax purposes" – the so-called "EU Tax black list." On that occasion, the listing was due to a number of technical points and timing delays in the introduction of new legislation in the Cayman Islands and, while the listing had no effect on "real world" transactions, it was of course a welcome development when the Cayman Islands was removed from the EU Tax black list on 6 October 2020. This remains the position, and the Cayman Islands is considered by the EU to be a fully cooperative jurisdiction for tax purposes.

So what's different here? What does this list concern?

In February 2021 the Financial Action Task Force ("FATF") added Cayman to their increased monitoring or "Grey" list (this time because 3 of 63 actions on a list of recommendations by FATF were not yet complete). Despite the fact that in October 2021 the Cayman Islands was deemed by FATF to be compliant or largely compliant with all of the 40 FATF Recommendations to prevent money laundering and terrorist financing, the Cayman Islands currently remains on this "Grey" list whilst it addresses the remaining action points and, due to the timing in the FATF process to review the "Grey" list, we understand the earliest opportunity for Cayman's removal will be October 2022.

Once a jurisdiction has been added to the FATF "Grey" list, it has historically been automatically added to the EU AML List. Although it's not expected that the Cayman Islands will remain on the FATF "Grey" list for much longer, the EU has decided to follow its precedent and proceed to add Cayman to the EU AML List as a formality given its "Grey" listing by FATF. Unless the European Parliament or the EU Counsel objects to the proposals, it is anticipated that the addition of the Cayman Islands to the EU AML List will come into force in late February or early March. If there are delays or an eleventh hour reprieve we'll be sure to send everyone another update!

Does this EU AML List have any impact on fund finance deals?

In short: no. It will have no material impact for either lenders or borrowers and, despite some predictable negative press coverage directed at the Cayman Islands in the coming weeks, the issue will be irrelevant on a day-to-day basis for market participants in the fund finance sector. We do not anticipate any required changes to transaction documents to address the point.

One point of note for Lenders which are subject to EU AML regimes is that they would, once the listing is in effect, be required to apply enhanced due diligence to Cayman Islands counter-parties. Our understanding, however, is that this level of diligence would not materially differ from what they already would apply to Cayman vehicles as a result of Cayman being on the FATF “Grey” list, or that in fact a number of lenders have always required this level of diligence in respect of Cayman vehicles. On the sponsor side, our understanding is that the addition of Cayman to the EU AML List does not at present trigger any issues for the ability of EU investors to invest in Cayman Islands funds.

Conclusion: So it’s all okay and I can go back to day-dreaming about the Miami weather?

Yes – or wondering if Tom Brady may come out of retirement and play for the Panthers next year! As with the last EU “listing,” the addition of Cayman to the EU AML List originates from technical issues that the Cayman Islands Government is already addressing (or has already addressed). We do not anticipate that Cayman’s inclusion on the EU AML List will continue for a material period of time, and, in the interim, fund finance transactions will be able to continue unaffected by this point.