



ICLG

The International Comparative Legal Guide to:

Alternative Investment Funds 2014

2nd Edition

A practical cross-border insight into Alternative Investment Funds work

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Bermuda

Peter D. A. Martin



Jeremy Leese



MJM Limited

1 Regulatory Framework

1.1 What legislation governs the establishment and operation of Alternative Investment Funds?

The Investment Funds Act 2006, as amended (the “**Investment Funds Act**” or “**IFA**”) governs the establishment and operation of “investment funds” or “funds” in Bermuda. In late 2013 Bermuda enacted the Investment Funds Amendment Act 2013 (the “**Amendment Act**”) which provides the Bermuda Monetary Authority (“**BMA**”) with an enhanced set of enforcement powers and associated procedures and also introduced the new categories of “regulation only” Class A and Class B exempt funds.

Also relevant are the Fund Prospectus Rules 2007 (the “**Fund Prospectus Rules**”), the Companies Act 1981, as amended (the “**Companies Act**”) and Bermuda’s anti-money laundering and anti-terrorist financing legislation (“**AML/ATF regime**”).

1.2 Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

The Investment Business Act 2003, as amended (the “**Investment Business Act**” or “**IBA**”) is the principal statute for regulating investment business in Bermuda and provides a licensing regime for any person engaging in investment business, either in or from Bermuda (unless otherwise exempted or excluded). If, depending on the investment activities and the general make-up of a fund’s clients, an investment manager or adviser wishes to take advantage of an exemption from licensing provided by the Investment Business (Exemptions) Order 2004, it must file an exemption notification with the Bermuda Monetary Authority (“**BMA**”). Established under the Bermuda Monetary Authority Act 1969, the BMA is Bermuda’s integrated financial services regulator, having responsibility for the funds sector as well as the banking and insurance sectors and the Bermuda Stock Exchange.

Investment managers and investment advisers who do not carry out their business in or from Bermuda are not required to be licensed in Bermuda, but must be approved by the BMA (as being fit and proper to act as such) as part of a fund’s application for authorisation or for exempted fund status under the Investment Funds Act.

1.3 Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

The Investment Funds Act prohibits anyone from operating a fund that is a unit trust fund, a mutual fund company or a partnership fund unless:

- (a) the fund, on application to the BMA, has been authorised under the IFA (an “**authorised fund**”) or has been exempted from the requirement of authorisation (an “**exempted fund**”); or
- (b) the fund is a private fund (which is an “**excluded fund**” for purposes of the IFA).

A fund is a “private fund” if the number of participants does not exceed 20 persons and if the fund does not promote itself by communicating an invitation or inducement to the public generally. An operator of a private fund shall serve on the BMA a notice in writing of the fact that the private fund qualifies for exclusion under the IFA, as soon as practicable after the establishment of the private fund.

The BMA may, on application, register a fund as an exempted fund if the fund is only open to “qualified participants”, the fund administrator (which is not required to be located in Bermuda) is recognised by the BMA, the fund has appointed an investment manager, a registrar, a custodian or prime broker (subject to waiver on application to the BMA) and an auditor, and the fund has an officer, trustee or representative resident in Bermuda with access to the fund’s books and records. The BMA must be satisfied that the operator of the fund and its service providers are fit and proper persons to act as such.

Under Bermuda’s AML/ATF regime, the BMA will enter an authorised fund as a *licensed* fund in the register of “AML/ATF regulated financial institutions”. This definition includes a person who carries on “investment business” within the meaning of the IBA who is the operator of an “investment fund” within the meaning of the IFA. If falling within the definition, an excluded fund or exempted fund must apply to the BMA to be included in the register as a *non-licensed* AML/ATF regulated financial institution. The BMA is required to publish the register from time to time.

1.4 Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds) and if so how?

The Investment Funds Act only applies to open-ended funds as the IFA defines an “investment fund” or “fund” to which it applies as,

among other characteristics, including the right of participants “to have their units redeemed in accordance with the fund’s constitution and prospectus at a price determined in accordance with such constitution and prospectus”. Investors in closed-ended funds have no such redemption right; hence the popularity of the limited partnership structure for such funds. No liquidity requirements are specified for open-ended funds.

Bermuda offers a fast track process for Class A Exempt Funds that requires no approval from the BMA. To be eligible for a Class A Exempt Fund, a fund must:

- (a) only be open to qualified participants (as defined below);
- (b) have an investment manager who:
 - (i) is licensed under the Investment Business Act 2003; or
 - (ii) is authorised or licensed by a foreign regulator recognised by the BMA (e.g. the SEC); or
 - (iii) is carrying on business in or from Bermuda or a jurisdiction recognised by the BMA and who has gross assets under management in excess of \$100 million or is a member of an investment management group that has consolidated gross assets under management of not less than \$100 million;
- (c) appoint an officer, trustee, or representative that is resident in Bermuda and has access to the books and records of the fund;
- (d) appoint an auditor, fund administrator, registrar and a custodian or prime broker; and
- (e) prepare financial statements in accordance with IFRS or GAAP.

A **qualified participant** is:

- (a) an individual who has had a personal income in excess of \$200,000 in each of the two years preceding the current year or has a joint income with that person’s spouse in excess of \$300,000 in each of those years, and has a reasonable expectation of reaching the same level of income in the current year (meaning the year in which he purchases an investment);
- (b) an individual whose net worth or joint net worth with that person’s spouse in the year in which he purchases an investment exceeds \$1,000,000;
- (c) an individual who has such knowledge of, and experience in, financial and business matters as would enable him to properly evaluate the merits and risks of a prospective purchase of investments;
- (d) a body corporate which has total assets of not less than \$5 million held either solely by the body corporate or partly by the body corporate and partly by one or more members of the same group of which it is a member;
- (e) an unincorporated association, partnership or trust, each of which has total assets of not less than \$5 million held either solely by such association, partnership or trust or partly by it and partly by one or more members of the same group of which it is a member;
- (f) a body corporate whose shareholders fall within one or more of paragraphs (a) to (h);
- (g) a partnership whose members fall within one or more of paragraphs (a) to (h); and
- (h) a trust whose beneficiaries fall within one or more of paragraphs (a) to (h).

If a fund does not qualify for Class A Exempt Fund status, it can make an application to be a Class B Exempt Fund. To qualify as a Class B Exempt Fund, a fund must:

- (a) only be open to qualified participants;
- (b) have an officer, trustee, or representative that is resident in Bermuda and has access to the books and records of the fund;

- (c) appoint an auditor, investment manager, fund administrator, registrar and a custodian or prime broker who are fit and proper to perform the respective functions of their office; and
- (d) prepare financial statements in accordance with IFRS or GAAP.

In addition to the exempted status, the BMA may authorise funds in the following classes:

- (a) institutional fund;
- (b) administered fund;
- (c) specified jurisdiction fund; or
- (d) standard fund.

An institutional fund is one that, pursuant to its constitution and prospectus:

- (i) is only open to “qualified participants” (as defined above); or
- (ii) requires each participant to invest a minimum amount of \$100,000; and has an officer, trustee or representative resident in Bermuda who is a person with access to the fund’s books and records.

An administered fund is one that:

- (i) has an administrator licensed under the IFA and requires, pursuant to its constitution and prospectus, that participants invest a minimum amount of \$50,000; or
- (ii) is listed on a stock exchange recognised by the BMA.

A fund is a specified jurisdiction fund if:

- (i) the Minister of Finance by Order recognises the jurisdiction, outside Bermuda, in which the fund operates and a particular law, or particular set of laws, of such jurisdiction as applicable to such fund; and
- (ii) the fund satisfies the requirements set out in the fund rules made by the BMA relating to that class of fund and that jurisdiction.

In 2011, the Minister recognised Japan for specified jurisdiction funds. A fund is a standard fund if it does not fall within any other class of fund. As it is not restricted to “qualified participants” and may include retail investors, a standard fund is subject to more comprehensive regulation and supervision by the BMA.

1.5 What does the authorisation process involve?

To secure exempted fund status, on or before the date of commencement of business, the operator of a Class A Exempt Fund must certify to the BMA via its electronic filing system (“ERICA”) that it meets the requirements for Class A exemption. At the time of filing of the certificate, the operator must also file a copy of the fund’s prospectus. Upon filing the exemption notification, the Class A Exempt Fund can immediately launch.

A fund that qualifies for Class B exemption must apply to the BMA via ERICA. The application is accompanied by the fund’s prospectus. Once the application and the prospectus have been submitted, the fund will be notified of the outcome of its application within ten days of the application date.

The application for the authorisation of a fund must be made to the BMA by or on behalf of the fund’s operator or proposed operator after: (a) the fund’s name has been reserved with the Registrar of Companies; (b) the BMA has vetted the proposed beneficial owners of the management shares of the fund if the fund is to be an exempted company (or the beneficial owners of the proposed general partner, if the fund is to be an exempted limited partnership); (c) pre-incorporation (or pre-registration) documents for the fund have been filed with the Registrar of Companies; and

(d) the BMA has provided “no objection” confirmation to the Registrar of Companies and the Registrar of Companies has approved the application for incorporation or registration, as applicable.

The application for authorisation of the fund must: (a) state the corporate or partnership name and registered or principal office of each service provider for the fund; (b) be accompanied with a certificate signed by the operator to the effect that the fund complies, or will on authorisation comply, with section 14 of the IFA (summarised below); (c) contain or be accompanied with such other information as the BMA may reasonably require for the purpose of determining the application; and (d) be accompanied by an application fee.

Once the BMA is satisfied that the fund complies (or will on authorisation comply) with the requirements of section 14, the BMA may grant the application for the fund to be authorised in the appropriate class. The BMA enters in a register maintained by it the particulars of each authorisation (and each exemption) granted under the IFA.

The section 14 requirements include preparation of audited annual financial statements, appointment of an investment manager, auditor, fund administrator and custodian and compliance with the requirements of the IFA and Fund Prospectus Rules. The BMA must also be satisfied that the operator of the fund, its directors, officers and service providers are fit and proper persons to act as such, that the auditor is independent of the operator of the fund and its service providers, and that the custodian is independent of the operator and (i) in the case of a mutual fund company, of the persons appointed as directors of the company, and (ii) in the case of a partnership fund, of the partners. No capital requirements are specified for authorised funds.

A fund that is an exempted company proposing to offer shares to the public will seek from the BMA its consent to the issue of the shares and their subsequent transferability without the need for further BMA consent.

1.6 Are there local residence or other local qualification requirements?

An “institutional fund” under the IFA must have a director, officer, trustee or representative resident in Bermuda who is a person with access to the fund’s books and records.

If the fund is an exempted company under the Companies Act, it must have a registered office in Bermuda and at least one director (other than an alternate director) who is ordinarily resident in Bermuda or a secretary or resident representative that or who is ordinarily resident in Bermuda.

Where an exempted company has a resident representative, the resident representative shall maintain at its or his office certain records required by the Companies Act to be kept in Bermuda.

If the fund is an exempted partnership, the Exempted Partnerships Act requires that the fund have a registered office in Bermuda and that it appoint and at all times maintain in Bermuda a resident representative with access to the fund’s books and records.

1.7 What service providers are required?

An authorised fund is required to appoint an investment manager, auditor, fund administrator and custodian meeting the requirements of the IFA (see question 1.5).

1.8 What co-operation or information sharing agreements have been entered into with other governments or regulators?

As Bermuda does not levy any income or capital gains taxes, it has no tax treaties in place with other countries in relation to double-taxation or for the withholding of tax for foreign tax authorities. Bermuda has, however, entered into tax information exchange agreements (“TIEAs”) with 38 countries (16 of which are G20 members).

2 Fund Structures

2.1 What are the principal legal structures used for Alternative Investment Funds?

The principal legal structures are the mutual fund company, incorporated under the Companies Act or by private Act, and the limited partnership. Some funds are unit trusts.

This chapter focuses on exempted companies incorporated under the Companies Act and exempted limited partnerships, registered under the Limited Partnership Act 1883, as amended (the “**Limited Partnership Act**”) and the Exempted Partnerships Act 1992, as amended (the “**Exempted Partnerships Act**”), in each case not qualifying as a local enterprise as to ownership and/or control.

Any fund incorporated under the Companies Act may, if it is engaged in insurance business (and, if it is not so engaged, with the approval of the Minister of Finance), apply to be registered as a segregated accounts company under the Segregated Accounts Companies Act 2000. This would enable the fund to create different classes of shares, each linked to a segregated portfolio of assets and related liabilities, ring-fencing those assets and liabilities from the assets and liabilities linked to the other classes of shares and from the fund’s general assets and general liabilities.

An exempted limited partnership may be of a fixed or unlimited duration and may elect at the time of its registration to have independent legal personality.

2.2 Please describe the limited liability of investors.

If the fund is a company limited by shares, the liability of any investor is limited to the amount, if any, remaining unpaid on that investor’s shares (funds normally do not issue shares unless they have been fully paid).

If the fund is a limited partnership, the liability of any investor (a limited partner) is limited to the capital contribution made or committed to be made by such investor (subject to the caveat that a limited partner risks losing such limited liability if it participates in management of the partnership). Also, where in violation of the Limited Partnership Act a limited partner is permitted to withdraw all or part of its capital contribution or receives a return of all or part of such contribution, the limited partner will be liable for the amount so released or paid (plus interest) to the partnership (or, if the partnership is dissolved, to its creditors) for a period of six years. The violation generally occurs where a general partner, at the time of allowing such release or payment, had reasonable grounds for believing that the partnership, after such release or payment, would be unable to pay its liabilities as they became due.

2.3 What are the principal legal structures used for managers and advisers of Alternative Investment Funds?

Investment managers and advisers are principally companies or

limited partnerships (in each case, whether formed and registered in Bermuda or elsewhere).

2.4 Are there any limits on the manager's ability to restrict redemptions in open-ended funds or transfers in open-ended or closed-ended funds?

Subject to any representations and covenants in the fund's prospectus, any restrictions contained in the fund's constitution and the manager's fiduciary duty to act in good faith, there are no limits.

2.5 Are there any legislative restrictions on transfers of investors' interests in Alternative Investment Funds?

In the case of an exempted company or an exempted limited partnership, there are no legislative restrictions on transfers of non-management shares or a limited partner's interest, respectively, as long as the transfer is made in accordance with the fund's constitution and Bermuda's AML/ATF regime and subject to the prohibition under the Companies Act on (a) the transfer of shares in a company after its winding-up has commenced, or (b) the redemption of shares in a mutual fund company or the purchase of such shares by another mutual fund company unless such shares are fully paid. Any transfer of management shares in an exempted company, or a general partner's interest in an exempted limited partnership, would be subject to the prior approval of the BMA.

3 Marketing

3.1 What legislation governs the production and offering of marketing materials?

Recent statutory amendments, introduced by the Companies Amendment Act 2013, mean that Bermuda companies listed on appointed stock exchanges are no longer required to file prospectuses in Bermuda.

Previously, a Bermuda company listed on an appointed stock exchange (which covers many of the world's major stock exchanges) had to file with the Registrar of Companies in Bermuda a copy, signed by or on behalf of all directors of the company, of any prospectus that had to be filed under the rules of the relevant regulator in such jurisdiction. The legislation now in effect abolishes the requirement to also file such prospectus in Bermuda.

Furthermore, where the rules of the stock exchange (or of the relevant regulator in such jurisdiction) do not require publication and filing of a prospectus at all, there is no requirement to file anything in Bermuda either.

However, if a Bermuda company is offering shares to the public, but it is not listed on an appointed stock exchange, then the prospectus requirements set out in the Companies Act still apply to it. Unless the Minister of Finance, on application, directs otherwise and subject to certain exceptions, no such company incorporated under the Companies Act shall offer shares (or units in a unit trust) to the public unless prior to such offer it publishes a prospectus meeting the disclosure requirements of the Companies Act. A copy of the prospectus must be filed with the Registrar of Companies. Where such a company incorporated under the Companies Act continuously over a period offers shares (or units in a unit trust) to the public and any of the particulars in a prospectus issued by the company ceases to be accurate in a material respect during that period, the company must publish supplementary particulars disclosing the material changes and file a copy of the supplementary particulars with the Registrar of Companies.

Under the Fund Prospectus Rules, every fund authorised under the Investment Funds Act shall prepare a prospectus complying with such Rules. The prospectus must be filed with, and approved by, the BMA and made available free of charge to prospective investors.

3.2 What are the key content requirements for marketing materials, whether due to legal requirements or customary practice?

No legislation prescribes the contents of marketing materials other than, in respect of a prospectus, the Companies Act and the Fund Prospectus Rules (see question 3.1).

The prospectus must disclose facts material to a prospective investor and the statements made in it must be true and not misleading. Key contents for a prospectus include: (a) the duration of the fund – whether limited or not; (b) where applicable, any stock exchange or market where the securities offered are to be listed or quoted; (c) the names, addresses and other relevant particulars of directors, officers, resident representatives, auditors, fund administrators, custodians, registrars, promoters, legal advisers, investment managers, and other persons having significant involvement in the affairs of the fund; (d) the fund's investment objectives and borrowing powers; (e) the fund's material risks, including in relation to a mutual fund company registered under the Segregated Accounts Companies Act or a unit trust operating segregated accounts, a statement on any potential risks associated with the operation of segregated accounts; (f) details of the capital of the fund; (g) details of the principal rights and restrictions attaching to the securities offered; (h) dividend policy; (i) the procedures and conditions for the issue of the securities offered and for the redemption and sale of the securities offered; (j) the basis for determination of issue and redemption prices; (k) the basis and frequency of valuation of the fund's assets; (l) the material provisions of any contract engaging the services of directors, trustees, partners, service providers and any other third parties receiving or likely to receive fees from the fund; (m) potential conflicts of interest; and (n) experience of investment managers.

The Prospectus Fund Rules also prescribe the text of a disclaimer in favour of the BMA to be included in each prospectus and a disclaimer to be included in the prospectus of an institutional or administered fund.

During the offering period, a fund's prospectus and the material contracts listed in it must be made available to potential investors for inspection.

3.3 Do the marketing or legal documents need to be registered with or approved by the local regulator?

No marketing documents need to be registered with or approved by the BMA or the Registrar of Companies, except for a prospectus and supplementary particulars to any prospectus (see questions 3.1 and 3.2). The filings with the BMA are typically made by a Bermuda law firm.

If the fund is an exempted company incorporated under the Companies Act, it is required to file with the Registrar of Companies under that Act its memorandum of association and a notice of its registered office.

A fund that is an exempted limited partnership is required to file with the Registrar of Companies a certificate of limited partnership under the Limited Partnership Act and a certificate of exempted partnership under the Exempted Partnerships Act.

3.4 What restrictions are there on marketing Alternative Investment Funds?

No restrictions are imposed as long as the person marketing a fund is not conducting an “investment activity” specified in the Investment Business Act in or from Bermuda, provided that any dealings by a fund in its own shares, units or partnership interests do not amount to “investment activity” requiring licensing under the IBA.

The following marketing activities, carried out by a person in or from Bermuda (and whether as principal or agent), would attract the licensing obligations under the IBA: making unsolicited calls or otherwise engaging in marketing activities from a place of business maintained by that person in Bermuda (which, in the case of an individual who is a sole trader means carrying on the activity from premises that he occupies for that purpose and, in any other case, means carrying on investment business from premises it occupies for that purpose, at which it employs staff and pays salaries and other expenses in connection with that business).

If a non-Bermudian enters Bermuda for the purpose of conducting marketing activities in Bermuda without a work permit allowing such activities, restrictions under Bermuda’s immigration laws may also apply.

In addition, if a fund is to remain a “private fund” (see question 1.3) then the fund cannot be promoted by communicating an invitation or inducement to the public generally.

The BMA announced, on 30 May 2013, that it had signed a cooperation agreement with the supervisory authorities in relevant European Union (“EU”) Member States under the Alternative Investment Fund Managers Directive (“AIFMD”) which has been implemented across Europe since 22 July 2013. Bermuda is considered a “third country” under the AIFMD and the BMA has announced that Bermuda can satisfy the core conditions that are relevant to third countries under the AIFMD.

This development is relevant to any EU manager of a fund domiciled in Bermuda and to any fund manager domiciled in Bermuda who manages a fund domiciled in the EU or a fund domiciled in Bermuda that is marketed in the EU. If Bermuda complies with the requirements of the AIFMD, such managers and funds will be able to market the funds in EU Member States under such states’ private placement requirements until the passporting regime under the AIFMD is extended to third countries (likely in 2015).

3.5 Can Alternative Investment Funds be marketed to retail investors?

Yes, subject to the restrictions referred to in question 3.4. With reference to question 1.4, the fund will likely need to be authorised as a standard fund if it is to be marketed to retail investors.

3.6 What qualification requirements must be carried out in relation to prospective investors?

If a fund is to be authorised as an institutional fund (see question 1.4), it is only open to “qualified participants” (as defined in question 1.4 above). The operator of a fund must ensure that the proposed investors meet the definition set out in the Investment Funds Act, usually handled by including in the subscription documents a questionnaire to be answered by the prospective investor.

In addition, the operator of a fund must carry out client due diligence as prescribed under Bermuda’s AML/ATF regime.

3.7 Are there additional restrictions on marketing to public bodies such as government pension funds?

There are no additional restrictions.

3.8 Are there any restrictions on the use of intermediaries to assist in the fundraising process?

There are no restrictions as long as any intermediary assisting in the fundraising process observes any applicable licensing requirements of the Investment Business Act. A prospectus filed under the Prospectus Fund Rules must disclose particulars of any material provisions of any contract engaging the services of any third party receiving or likely to receive fees from the fund. Any prospectus filed under the Companies Act must disclose all commissions payable on the sale of the shares offered.

3.9 Are there any restrictions on the participation by financial institutions in Alternative Investment Funds (whether as sponsors or investors) arising from the 2008 financial crisis?

Bermuda has imposed no such restrictions arising from the 2008 financial crisis.

4 Investments

4.1 Are there any restrictions on the types of activities that can be performed by Alternative Investment Funds?

There are no restrictions as long as the activity is not one that only a local company is permitted to engage in or an activity that is a prohibited activity or a restricted activity under the Companies Act and as long as the activity is not otherwise illegal or in breach of public policy, is within the powers of the fund under its constitution, and meets the conditions of its authorisation or exemption under the Investment Funds Act.

4.2 Are there any limitations on the types of investments that can be included in an Alternative Investment Fund’s portfolio whether for diversification reasons or otherwise?

Subject to any representations or covenants made in a fund’s prospectus, no limitations are imposed, as long as the investment falls within the powers of the fund under its constitution and is not of a type that only a local company is permitted to make or that is otherwise illegal or against public policy.

4.3 Are there any restrictions on borrowing by the Alternative Investment Fund?

Subject to the representations and covenants contained in the fund’s prospectus, there are no restrictions as long as the borrowing is authorised by the fund’s constitution.

5 Disclosure of Information

5.1 What public disclosure must the Alternative Investment Fund make?

A company incorporated under the Companies Act must file with

the Registrar of Companies its memorandum of association and notice of its registered office.

An exempted limited partnership must file with the Registrar of Companies and with the BMA its certificate of limited partnership and certificate of exempted partnership.

For disclosure of a prospectus, see question 3.1.

During the offering period, prospective investors are entitled to inspect the fund's material contracts listed in its prospectus.

If shares or units of the fund are listed on any stock exchange or quoted on any quotation system, the fund must also comply with the listing and continuous disclosure requirements of that exchange or system.

Identities of investors in a fund (other than holders of management shares or a general partner's interest) are not disclosed to the public except to the extent they are identified in a fund's prospectus. Accounts of a fund are not made public except to the extent financial statements are included in a fund's prospectus.

5.2 What are the reporting requirements in relation to Alternative Investment Funds?

Under the Investment Funds Act, an authorised fund must file with the BMA within six months after its financial year end a statement of compliance confirming that the fund has, at all times during the preceding financial year, been in compliance with the provisions of the IFA, fund rules and prospectus rules applicable to it (and a statement setting out the particulars of the breach in the event that the fund has not been in such compliance).

The operator of an exempted fund is required to file with the BMA annually before 31 March an exemption certificate confirming that the fund continues to qualify for exemption.

An exempted company or an exempted partnership registered must file with the Registrar of Companies annually before 31 January a declaration in prescribed form with an annual fee.

The IFA requires an authorised fund to file with the BMA notice of certain proposed changes, such as a material change in the fund's prospectus or replacement of a service provider, director or general partner. Some of the changes require the prior approval of the BMA.

Where a service provider becomes aware that the assets of an authorised fund have not been invested materially in accordance with its prospectus or that the general management of an authorised fund is not materially in accordance with the fund's constitution, that service provider is required to notify the BMA of its occurrence and the applicable circumstance and to make a report in writing of such event to the operator. Such report shall be included in the fund's next annual report and next periodic report if such periodic report is to be distributed before the annual report.

Additional reporting requirements may be applicable in specific circumstances under Bermuda's AML/ATF regime.

5.3 Is the use of side letters restricted?

There is no legislative or regulatory restriction on the use of side letters aside from the requirement that a prospectus set out facts material to a prospective investor and the statements made in it be true and not misleading. Care should be taken that any side letter fall within a fund's powers and be authorised by board of directors, general partner or trustee of the fund, as applicable, and that the side letter not be in breach of the fund's constitution or inconsistent with the representations and covenants made in the fund's prospectus. Case law on side letters illustrates pitfalls to be avoided.

6 Taxation

6.1 What is the tax treatment of the principal forms of Alternative Investment Funds?

There is currently no Bermuda income, corporation or profits tax, withholding tax, capital gains tax or capital transfer tax payable by any fund that is an exempted company.

An exempted limited partnership is not taxed in Bermuda; it is a flow-through entity with all profits and losses flowing directly to the individual partners who are taxed in accordance with the laws of their country of domicile (or in some instances, citizenship).

6.2 What is the tax treatment of the principal forms of investment manager/adviser?

See question 6.1.

6.3 Are there any establishment or transfer taxes levied in connection with an investor's participation in an Alternative Investment Fund or the transfer of the investor's interest?

Bermuda's government levies no establishment or transfer taxes in connection with an investor's participation or the transfer of the investor's interest in the fund.

6.4 What is the tax treatment of (a) resident and (b) non-resident investors in Alternative Investment Funds?

Currently, no Bermuda income, corporation or profits tax, withholding tax, capital gains tax, capital transfer tax or estate duty or inheritance tax is payable by non-residents of Bermuda in respect of capital gains realised on the disposition of securities in a fund or distributions received from a fund with respect to such securities.

At present, Bermuda residents are not subject to any taxes in respect of capital gains realised on the disposition of their securities or distributions they receive from a fund.

6.5 Is it necessary or advisable to obtain a tax ruling from the tax or regulatory authorities prior to establishing an Alternative Investment Fund?

An advance tax ruling is not necessary or advisable. However, if the fund is an exempted company, the customary practice is to request a written tax assurance from the Registrar of Companies (acting on behalf of the Minister of Finance) at the time of incorporation, confirming that in the event Bermuda enacts legislation imposing tax computed on profits, income, any capital asset, gain or appreciation, or any tax in the nature of estate duty or inheritance, such tax shall not apply to the fund or any of its operations or securities, debentures or other obligations until 31 March 2035. The assurance is not to be construed as preventing the application of any tax or duty to persons ordinarily resident in Bermuda or the application of any tax payable in accordance with the provisions of the Land Tax Act 1967. The assurance does not exempt a fund from paying import duty on goods imported into Bermuda. In addition, all entities employing individuals in Bermuda are required to pay a payroll tax.

6.6. What steps are being taken to implement the US Foreign Account and Tax Compliance Act (FATCA)?

On 19 December 2013, Bermuda and the United States signed an Intergovernmental Agreement (“IGA”) to improve international tax compliance with respect to FATCA. The agreement is based on the Model 2 IGA, which requires foreign financial institutions (“FFIs”) to report information directly to the Inland Revenue Service in the US (“IRS”). Under such IGA, FFIs will need to register with the IRS, and certain FFIs will sign a version of the FFI agreement modified to reflect the IGA.

6.7 Are there any other material tax issues?

While Bermuda has a stamp duty regime, this applies mostly to Bermudian residents and local companies.



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Peter Martin has been practising corporate and commercial law for more than 25 years and is director of the firm’s corporate group. Peter’s practice focuses on corporate transactions, mergers and acquisitions and finance. In 2010, he was the winner of the International Law Office Client Choice Award for “General Corporate” and is ranked as a leading practitioner in Corporate and Finance by *Chambers Global* and *PLC, Which Lawyer?* Peter’s recent publications include the Bermuda chapter in *Getting the Deal Through – Mergers and Acquisitions*, “Majority Rule and Minority Rights” in *Offshore Commercial Law in Bermuda* by Ian R.C. Kawaley (2012) and the Bermuda chapter in *PLC Finance Multijurisdictional Guide 2013*.

7 Reforms

7.1 What reforms (if any) are proposed?

Bermuda’s government is considering various initiatives to make the Island more welcoming to investment managers and other businesses it wishes to attract from abroad.

Cautionary Statement

This chapter is not intended to be exhaustive or to constitute legal advice.



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Jeremy’s practice focuses on corporate finance, mergers and acquisitions, corporate reorganisations and restructurings, banking and international real estate finance, structured finance, as well as regulatory and legislative compliance.

As a result of his extensive experience, Jeremy has been recognised by the PLC M&A Handbook as a leader in BVI M&A and structured finance transactions.

After qualification with a magic circle firm in the UK, Jeremy practised corporate law in the UK for four years before moving in 1999 to one of the leading offshore law firms and working in their Bermuda, Hong Kong, Jersey and British Virgin Islands offices. After a spell heading the Corporate & Commercial team at a firm in Anguilla, Jeremy returned to Bermuda as a senior associate with MJM in August 2012.

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Jeremy was admitted as a solicitor of the Supreme Court of England and Wales (now non-practising) in 1995, and called to the Bermuda Bar 2003. He was also admitted as a solicitor of the Eastern Caribbean Supreme Court (BVI Circuit) in 2008, and as a solicitor of the Eastern Caribbean Supreme Court (Anguilla Circuit) in 2011.



BARRISTERS & ATTORNEYS

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