



# ICLG

The International Comparative Legal Guide to:

## **Alternative Investment Funds 2017**

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A practical cross-border insight into Alternative Investment Funds work

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# Bermuda

Jonathan Betts



Ariane West



Taylor's (in Association with Walkers)

## 1 Regulatory Framework

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

The establishment and operation of investment funds in Bermuda (“investment funds” or “funds”) is governed by:

- the Companies Act 1981 (the “Companies Act”);
- the Investment Funds Act 2006 (the “IFA”);
- the Fund Prospectus Rules 2007 (the “Fund Prospectus Rules”); and
- the Fund Rules 2007 (collectively with the Fund Prospectus Rules, the “Fund Rules”).

The Bermuda Monetary Authority (the “BMA”) is the principal body responsible for the regulation of investment funds, including those listed on the Bermuda Stock Exchange.

Investment funds in Bermuda may be structured and organised under Bermuda law in the following ways:

- (i) a company registered under the Companies Act and stated to be a mutual fund (“mutual fund company”);
- (ii) an investment company that is a closed-ended fund (“Closed-Ended Fund”);
- (iii) a unit trust scheme; and
- (iv) a limited partnership.

An investment fund is defined in the IFA to include any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income. The IFA only applies to those arrangements where investors are entitled to have their shares/units/interests redeemed in accordance with the fund’s constitution and prospectus at a price determined in accordance with such constitution and prospectus. The IFA therefore does not apply to Closed-Ended Funds, being funds whose investors do not have redemption rights.

Mutual fund companies, unit trust funds and partnerships funds in Bermuda (collectively “Open-Ended Funds”) are all governed by the IFA and the Fund Rules. The IFA and the Fund Rules are not applicable to Closed-Ended Funds.

### 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 (the “IBA”) governs the regulation of investment business in Bermuda. Managers and advisors can be organised anywhere and act as managers and advisors to all forms of funds. There is no requirement for a manager or adviser to be licensed in Bermuda unless they have physical premises and employees in Bermuda. All managers and advisors of authorised and exempt funds (as described below), however, will be required to act in accordance with the IFA in all dealings concerning the fund. The BMA will evaluate whether the manager is a fit and proper person and will take into account the manager’s experience and expertise in relation to the fund.

For managers domiciled in Bermuda, there are exemptions available from the licensing regime if they fall within the scope of the Investment Business (Exemptions) Order 2004 (the “Exemption Order”) further described below.

Investment business services are very broadly defined and include dealing in investments, arranging deals in investments, managing investments, providing investment advice and safeguarding and administering investments. To be deemed to be carrying on investment business “in or from” Bermuda, a person must carry on investment business from a place of business maintained by such person in Bermuda with employees. Therefore, unless the manager maintains an office in Bermuda with employees or has an arrangement that the Minister of Finance by order determines will constitute the carrying on of business in Bermuda, the IBA will not apply.

Under the Exemption Order, if a person (not being a market intermediary) carries on investment business with persons in the categories listed below, it is exempt from the requirement to obtain a licence under the IBA if it provides investment services exclusively to:

- (i) a high-income private investor: an individual who has had a personal income in the last two years in excess of US\$200,000 in each of the two years preceding the current year or has had a joint income with that person’s spouse in excess of US\$300,000 in each of those years, and has a reasonable expectation of reaching the same income in the current year; current year meaning the year in which he or she purchases an investment;
- (ii) a high-net-worth private investor: an individual whose net worth or joint net worth with that person’s spouse in the year in which he or she purchases an investment exceeds US\$1 million; ‘net worth’ meaning the excess of total assets at fair market value over total liabilities;

- (iii) a sophisticated private investor: an individual who has such knowledge of, and experience in, financial and business matters as would enable him or her to properly evaluate the merits and risks of a prospective purchase of an investment, and who, in respect of each investment transaction, deals in amounts of not less than US\$100,000;
- (iv) collective investment schemes approved by the BMA under the IFA (or any provision of law amending or replacing the IFA);
- (v) bodies corporate, each of which has total assets of not less than US\$5 million where such assets are held solely by the body corporate, or held partly by the body corporate and partly by one or more members of a group of which it is a member;
- (vi) unincorporated associations, partnerships or trusts, each of which has total assets of not less than US\$5 million where such assets are held solely by such association, partnership or trust or held partly by it and partly by one or more members of a group of which it is a member;
- (vii) bodies corporate, all of whose shareholders fall within one or more of the categories of this list, except category (iv);
- (viii) partnerships, all of whose members fall within one or more of the categories of this list, except category (iv); or
- (ix) trusts, all of whose beneficiaries fall within one or more of the categories of this list, except category (iv).

A market intermediary is defined as “a person who engages or holds himself out as engaging in the business of dealing in investments as principal or agent on an investment exchange”.

Fund administrators are required to obtain a licence under the IFA to carry on the business of a fund administrator in or from Bermuda.

Incentives are currently being offered by the Bermuda Government to attract asset managers to domicile in Bermuda, such as:

- new business work permits: new companies to Bermuda will receive up to five work permits for senior positions;
- no term limits (that is, restrictions on the length of time an employee may stay in Bermuda);
- reduced fees on the purchase of qualified property for expatriates;
- key executive exemptions from work permit requirements and the opportunity for these individuals to eventually receive long-term residency for themselves, their spouse and their children; and
- payroll tax holidays for employers who hire Bermudians to new positions.

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

Whether a fund is required to be authorised or regulated will depend on whether the fund is structured as:

- a Closed-Ended Fund; or
- an Open-Ended Fund,
  - if the fund is an Open-Ended Fund, whether it will be structured as:
    - (i) an authorised fund, classified as:
      - an institutional fund;
      - an administered fund;
      - a specified jurisdiction fund; or
      - a standard fund,
    - (ii) an exempt fund; or
    - (iii) an excluded fund.

### Open-Ended Funds

Open-Ended Funds fall under the domain of the IFA. The IFA and the Fund Rules establish and maintain the standards and the criteria applicable to the establishment and operation of the Open-Ended Funds, with a view of protecting investors. The IFA requires that Open-Ended Funds, which do not qualify for exemption or exclusion from authorisation, are classified by the BMA as (i) an institutional fund, (ii) an administered fund, (iii) a specified jurisdiction fund, or (iv) a standard fund.

### Authorised Funds

A. *Institutional funds.* These funds are open only to qualified participants or each participant must invest a minimum of US\$100,000. The funds must have both:

- an investment manager, fund administrator, registrar, auditor, custodian or prime broker, who may be based anywhere; and
- a service provider, director or secretary with a link to Bermuda.

A qualified participant is defined in the IFA as:

- (i) a high-income private investor – 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;
  - (ii) a high-net-worth private investor – 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;
  - (iii) a sophisticated private investor – 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;
  - (iv) 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;
  - (v) an unincorporated association, partnership or trust 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;
  - (vi) a body corporate whose members fall within one or more of the above;
  - (vii) a partnership whose members fall within one or more of the above; and
  - (viii) a trust whose beneficiaries fall within one or more of the above.
- B. *Administered funds.* These funds require each participant to invest a minimum of US\$50,000 or be listed on a stock exchange that is recognised by the BMA. The funds must have both:
- an investment manager, registrar, auditor, custodian or prime broker, who may be based anywhere; and
  - an administrator licensed under the IFA.
- C. *Specified jurisdiction funds.* These funds are available if both:
- the Minister 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; and

- the fund satisfies the requirements set out in the fund rules made by the BMA relating to that class of fund and that jurisdiction.
- D. *Standard funds.* These funds are those that do not fall within any other class of fund. There is no minimum investment or investor qualification test but it must both:
- have an investment manager, registrar and auditor, all of which can be located anywhere; and
  - have a Bermuda-based administrator or custodian.

#### Exempt Funds

Class A Exempt Funds and Class B Exempt Funds are exempt from authorisation under the IFA:

- A. *Class A Exempt Funds.* These funds do not require approval from the BMA. To be eligible for Class A Exempt Fund status, the Open-Ended Fund must:
- only be open to qualified participants (high-income, high-net-worth, sophisticated private investors or institutional investors);
  - have appointed an investment manager who:
    - (i) is licensed under the IBA;
    - (ii) is authorised or licensed by a foreign regulator recognised by the BMA (currently only the US and the EU); or
    - (iii) for the purpose of the IFA, is carrying on business in or from Bermuda or in a jurisdiction recognised by the BMA, is a person who has gross assets under management of not less than US\$100 million or is a member of an investment management group that has consolidated gross assets under management of not less than US\$100 million;
  - have appointed an officer, trustee or representative resident in Bermuda who has authority to access the books and records of the fund;
  - have appointed the following persons to provide services to the fund: a fund administrator; a registrar; an auditor; and a custodian or prime broker; and
  - prepare financial statements in accordance with any of the following standards: International Financial Reporting Standards (“IFRS”); the Generally Accepted Accounting Principles (“GAAP”) in Bermuda, Canada, the UK or the US; or any other GAAP that the BMA may recognise.

If the Open-Ended Fund does not qualify for Class A Exempt Fund status, it can submit an application for Class B Exempt Fund status.

- B. *Class B Exempt Funds.* These are Open-Ended Funds that must:
- only be open to qualified participants (high-income, high-net-worth, sophisticated private investors or institutional investors);
  - have appointed an officer, trustee or representative resident in Bermuda who has authority to access the books and records of the fund;
  - have appointed the following persons to provide services to the fund: an investment manager; a fund administrator; a registrar; an auditor; and a custodian or prime broker. These persons must be, in the BMA’s view, fit and proper (BMA may on application waive any of the above requirements if it is satisfied that appropriate arrangements are in place to safeguard the interest of investors); and
  - prepare financial statements in accordance with any of the following standards: IFRS; GAAP in Bermuda, Canada, the UK or the US; or any other GAAP that the BMA may recognise.

#### Excluded Funds

Excluded Funds are excluded from registration and the provisions of the IFA. An excluded fund is an open-ended “private fund” in which the number of participants does not exceed 20 persons and the investment fund does not promote itself by communicating an invitation or inducement to the public generally. No consent is required from the BMA for such a fund. Excluded funds must serve notice on the BMA of the fact that the fund is a private fund and therefore qualifies for exclusion as soon as practicable after the establishment of the fund.

#### **Closed-Ended Funds**

Closed-Ended Funds are structured as investment companies. The incorporation of Closed-Ended Funds in Bermuda is governed by the Companies Act and is subject to the approval of the Registrar of Companies (the “Registrar”) and the BMA. The Registrar and the BMA have discretion to refuse to permit the incorporation or the formation if the proposed beneficial owners are persons that the BMA considers undesirable.

Closed-Ended Funds offering shares to the public are subject to the prospectus provisions of the Companies Act.

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#### **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?**

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Yes. Whereas Open-Ended Funds are regulated by the IFA as detailed in question 1.3, the IFA does not regulate Closed-Ended Funds. The establishment of a Closed-Ended Fund is governed by the Companies Act. Closed-Ended Funds offering shares to the public are subject to the prospectus provisions of the Companies Act. As the IFA does not apply:

- there are no IFA fees or reporting requirements;
- there are no prescribed service providers; and
- there is no requirement for a prospectus or offering document unless the offer is being made to the public as defined in the Companies Act.

The incorporation of Closed-Ended Funds in Bermuda is subject to the approval of the Registrar and the BMA. The Registrar and the BMA have discretion to refuse to permit the incorporation or the formation if the proposed beneficial owners are persons that the BMA considers undesirable.

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#### **1.5 What does the authorisation process involve?**

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The authorisation process, as detailed below, will depend on the classification of the fund:

- Excluded Funds – a notice is served on the BMA confirming that the fund is a private fund and qualifies for exclusion as soon as practicable after the establishment of the investment fund. Once notification is filed, exclusion is automatically granted.
- Class A Exempt Funds – a certification is submitted to the BMA confirming that the investment fund meets the requirements for exemption prior to commencement of the fund’s business (including a copy of the fund’s prospectus). Once notification is filed, exemption is automatically granted.
- Class B Exempt Funds – an application is submitted to the BMA for exemption (including a copy of the fund’s prospectus). Exemption is granted within 10 days if the fund meets the requirements.

After the appropriate filings detailed above, Excluded Funds, Class A Exempt Funds and Class B Exempt Funds are required, under the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008, to register with the BMA as a Non-Licensed Person.

- Authorised Funds – an application is submitted to the BMA, including (a) the corporate name and registered or principal office of each service provider, (b) a certificate signed by the operator confirming the fund complies (or will comply) with section 14 of the IFA, and (c) a copy of the fund's prospectus containing all the information required by the prospectus rules as the BMA may reasonably require for considering the application. Authorisation is granted within 5–7 days if the investment fund meets the requirements.

Closed-Ended Funds are not authorised or licensed but are required to comply with the provisions of the Companies Act.

#### 1.6 Are there local residence or other local qualification requirements?

Bermuda investment funds must have:

- either a director, trustee, officer or resident representative who is ordinarily resident in Bermuda, and who has access to the books and records of the investment fund; and
- a registered office in Bermuda with certain records relating to the investment fund.

#### 1.7 What service providers are required?

See question 1.3 with respect to each type of fund and the service providers required.

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

To date, Bermuda has 91 treaty partners around the world, has signed 41 bilateral tax information exchange agreements (TIEAs) and has 87 co-signatories under the multi-lateral Convention on Mutual Administrative Assistance in Tax Matters.

## 2 Fund Structures

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

As noted in question 1.1, investment funds in Bermuda may be structured and organised under Bermuda law in four different ways:

- (a) mutual fund companies – a mutual fund company is a company limited by shares and incorporated with mutual fund objects for the purpose of investing the moneys of its members for their mutual benefit and with both the company and the members having the power to redeem or purchase for cancellation its shares without reducing its authorised share capital and stating in its memorandum that it is a mutual fund. The formation and operation of mutual fund companies is governed by the Companies Act, as amended, and the IFA;
- (b) investment fund companies – an investment fund company is a company limited by shares and incorporated without mutual fund objects, where investors do not have the right to demand redemption of their shares. The formation and operation of investment companies is governed by the Companies Act. The IFA is not applicable;

- (c) unit trusts – a unit trust fund is a fund under which the property is held on trust for participants. The formation and operation of unit trust funds is governed by the trust deed by which it is established and the IFA; and
- (d) partnership funds – a partnership fund is a fund under which the participants contribute funds to the partnership to be held on behalf of participating partners of the partnership. The funds are managed by the manager for the benefit of the participants. The formation and operation of partnership funds is governed by the Limited Partnership Act 1883, the Exempted Partnerships Act 1992, the IFA and the applicable partnership agreement.

### 2.2 Please describe the limited liability of investors.

An investor in a limited liability investment fund is liable in the amount of any unpaid capital on the investor's shares. An investor in limited partnership funds is liable to the amount of its capital contribution to the fund.

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

Managers and advisers of investments funds are primarily structured as companies or limited partnerships established in Bermuda or in other jurisdictions.

### 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?

Any restrictions on redemptions of investment funds would be imposed by the investment fund and provided for in its bye-laws and prospectus.

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

There is no legislative approval required for the transfer of investors' interests (non-voting) in investment funds. Any transfer of interests in the fund with voting rights requires an application to the BMA unless the fund is classified under the IFA and therefore has had a general permission granted pursuant to the Notice to the Public of June 2005 under the Exchange Control Act 1972 and the Regulations thereunder.

## 3 Marketing

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

The Companies Act, the IFA and the IBA govern the production and offering of marketing materials.

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

The IFA provides that the prospectus is required to disclose facts which would be considered material to a prospective investor, such as:

- (a) the name of the fund and the address of its registered or principal office in Bermuda;

- (b) a statement as to whether the fund is registered or licensed, in any jurisdiction or with any supervisory or regulatory authority, outside Bermuda;
- (c) the date of incorporation or establishment of the fund (indicating whether the duration is limited);
- (d) where applicable, an indication of stock exchanges or markets where the securities are, or are to be, listed or dealt in;
- (e) the names, address, 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;
- (f) a description of the fund's investment objectives, including its financial objectives, investment policy and any limitations on that investment policy and an indication of any techniques and instruments, and any borrowing power;
- (g) a description of the investment fund's material risks including, in relation to a mutual fund company registered under section 6 of the Segregated Accounts Companies Act 2000 or a unit trust fund operating segregated accounts, a statement on any potential risks associated with the operation of segregated accounts;
- (h) details of the capital of the fund including, where applicable, any existing initial or founder capital;
- (i) details of the principal rights and restrictions attaching to the units, including with respect to currency, voting rights, circumstances of winding up or dissolution, certificates, entry in registers and other similar details;
- (j) a description of the intentions with respect to the declaration of dividends or distribution of profits;
- (k) the procedures and conditions for the redemption and sale of units and the circumstances in which such redemption may be suspended;
- (l) the procedures and conditions for the issue of units;
- (m) a description of the bases for the determination of the issue and redemption prices (including the frequency of dealings) and an indication of the places where information as to the prices may be obtained;
- (n) a description of the basis and frequency of valuation of the fund's assets;
- (o) particulars of any material provisions of any contact engaging the services of any and all directors, trustees, partners, service providers, and any other third parties receiving or likely to receive fees from the fund;
- (p) a description of the potential conflicts of interest between the fund, its directors, trustees, partners, and its service providers;
- (q) the date of the financial year end of the fund;
- (r) information on the nature and frequency of financial reports to be distributed to participants;
- (s) a statement of the place where copies of the constitution and any annual or periodic report may be inspected and obtained;
- (t) particulars relating to the main business activity of the custodian and any co-custodian; and
- (u) particulars of the experience of investment managers.
- (c) the minimum subscription which, in the opinion of the promoters, directors or provisional directors, must be raised;
- (d) any rights or restrictions on the shares that are being offered;
- (e) all commissions payable on the sale of the shares referred to in the prospectus and the net amount receivable by the company in respect of the sale;
- (f) the name and address of any person who owns five per cent or more of the shares of the company: provided that this paragraph shall not apply to an exempted company or a permit company;
- (g) any shareholding in the company of an officer of the company;
- (h) financial statements of the company prepared in such manner and containing such information as may be required by rules made under the Companies Act;
- (i) a report or statement by the auditor of the company prepared in such manner and containing such information as shall be required by rules made under the Act; and
- (j) the date and time of the opening and closing of subscriptions lists.

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

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At the incorporation or formation stage of a fund, the legal documents which are required to be filed with the Registrar are:

- for mutual fund companies and investment companies – a memorandum of association, a notice of registered office and an annual declaration; and
- for limited partnerships – a certificate of limited partnership, a certificate of exempted partnership and a notice of registered office.

Thereafter, companies that offer shares to the public are required to publish a prospectus and file the same with the Registrar (unless they fall within any of the circumstances for which it is not necessary under the Companies Act).

The IFA contains further filings requirements for Open-Ended Funds with the BMA at authorisation. See question 1.5.

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### 3.4 What restrictions are there on marketing Alternative Investment Funds?

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Any person marketing funds in Bermuda is subject to the provisions of the Companies Act. There are no laws in Bermuda that restrict the marketing of shares of a foreign fund in Bermuda. However, there is a general prohibition against exempted and overseas companies "carrying on business in Bermuda" under the provisions of the Companies Act and the IBA, which restricts the marketing of shares of a foreign fund in Bermuda by an exempted Bermuda company owned by non-Bermudians or an overseas company. However, there are limited means through which the marketing of a foreign fund in Bermuda can be achieved. Where the shares are offered in Bermuda on a private basis by a foreign fund that does not have a place of business in Bermuda, that foreign fund is not required to obtain a licence under the Companies Act, provided the foreign fund does not market or travel to Bermuda. While there is a "travelling salesman" exception, which permits limited marketing in Bermuda, reliance on this exception is not advisable as even limited contact in Bermuda may be considered to be carrying on business in Bermuda and inadvertently violate the IBA.

It is not easy to be specific as to the permitted marketing activities of a foreign fund, and in many cases the issue will turn on the facts and circumstances. Examples of activities that should be permitted (depending on the circumstances) include external marketing,

The Fund Rules also contain disclaimers in favour of the BMA.

The Companies Act provides that companies that are offering shares to the public are required to publish and file a prospectus with the Registrar (unless they fall within any of the circumstances where it is not necessary to publish and file a prospectus under the Companies Act). The prospectus should contain information showing:

- (a) the names, descriptions and addresses of the promoters, officers or proposed officers;
- (b) the business or proposed business of the company;

unsolicited requests, Bermuda Stock Exchange (“BSX”) listing, permit funds, internet marketing, local brokers and foreign funds with a permit to carry on business in Bermuda.

Due to an exemption available under the Companies Act, a Bermuda fund is exempted from the prohibition on marketing its shares in Bermuda.

### 3.5 Can Alternative Investment Funds be marketed to retail investors?

Standard funds or investment companies (as detailed above in questions 1.1 and 1.3) can be marketed to retail investors.

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

See question 1.3 above. Due diligence must also be carried out on prospective investors. This task is normally delegated to the administrator.

### 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?

Except as discussed in question 3.4, there are no restrictions.

### 3.9 Are there any restrictions on the participation in Alternative Investments Funds by particular types of investors, such as financial institutions (whether as sponsors or investors)?

There have been no restrictions imposed.

## 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 on the types of activities that can be performed by investment funds, subject to the fund not engaging in activity which is:

- (i) prohibited under the Companies Act;
- (ii) not otherwise illegal or in breach of public policy;
- (iii) outside the powers of the fund’s memorandum of association, bye-laws and prospectus; and
- (iv) not compliant with the requirements of the IFA.

### 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?

Any limitations would form part of the investment fund’s memorandum of association, bye-laws and/or prospectus.

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

Any restrictions would form part of the investment fund’s memorandum of association, bye-laws and/or prospectus.

## 5 Disclosure of Information

### 5.1 What public disclosure must the Alternative Investment Fund make?

At the Registrar:

- the certificate of incorporation and memorandum of association;
- the address of the registered office;
- any prospectus or offer document required to be filed pursuant to the Companies Act; and
- certain other filings required pursuant to the Companies Act.

At the Registered Office:

- details of directors and officers. The register of directors and officers is open for inspection during business hours; and
- register of members\*. The register of members is open for inspection by the members only in respect of its shareholding in the fund.

(\*Only in respect of authorised funds.)

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

Exempt funds must:

- file a certificate with the BMA annually (before 30 June) certifying that the fund satisfies the requirements for exemption and will continue to satisfy them, and also file both:
  - (i) a statement of any material changes to its prospectus; and
  - (ii) a copy of its audited financial statements for the preceding year.

Institutional and administered funds must:

- file a report to the BMA on its operations on a quarterly basis, including information on the fund’s price per share, or unit, net asset value and amounts subscribed and redeemed during the quarter;
- submit to the BMA, within six months of the financial year end, a statement confirming that the fund has at all times during the preceding financial year been in compliance with the provisions of the IFA, as well as applicable fund and prospectus rules, or setting out the particulars of any breach; and
- prepare annual financial statements audited by an auditor that is acceptable to the BMA.

Standard funds must:

- file a report to the BMA on its operations on a monthly basis, including information on a fund’s price per share (or unit), net asset value and amounts subscribed and redeemed during the month;
- submit to the BMA, within six months of the financial year end, a statement confirming that the fund has at all times during the preceding financial year been in compliance with the provisions of the IFA, as well as applicable fund and prospectus rules, or setting out the particulars of any breach; and

- prepare annual financial statements audited by an auditor that is acceptable to the BMA.

Specified jurisdiction funds must:

- submit to the BMA, within six months of the financial year end, a statement confirming that the fund has at all times during the preceding financial year been in compliance with the provisions of the IFA, as well as applicable fund and prospectus rules, or setting out the particulars of any breach; and
- prepare annual financial statements audited by an auditor that is acceptable to the BMA.

A Closed-Ended Fund must file an annual return with the Registrar each year confirming its amount of assessable capital.

### 5.3 Is the use of side letters restricted?

There are no restrictions on the use of side letters but the ability for the investment fund to enter into side letters must be disclosed in the prospectus. The terms of the side letters must not contravene any of the provisions in the bye-laws or prospectus.

## 6 Taxation

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

Bermuda is fiscally neutral. There are no corporation, profits, or capital gains taxes payable in Bermuda by an investment fund or its investors. After incorporation the investment fund may apply for, and is likely to receive, an undertaking from Government that in the event of any such taxes being imposed by Bermuda in the future, those taxes shall not apply to the fund until 31 March 2035 (the “Tax Assurance Certificate”).

### 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?

There are no establishment or transfer taxes payable in Bermuda.

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

See question 6.1. There are no taxes payable in Bermuda in relation to such investors.

### 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?

Upon the incorporation of an investment fund company as noted in question 6.1, an application should be submitted for a Tax Assurance Certificate to the Registrar. This certificate, once granted, confirms that in the event Bermuda enacts legislation imposing tax computed

on profits, income, any capital assets, gain or appreciation, or any tax in the nature of estate duty or inheritance, such tax will not apply to such fund or any of its operations, securities, debentures, or other obligations until 31 March 2035.

### 6.6 What steps have been or are being taken to implement the US Foreign Account and Tax Compliance Act 2010 (FATCA) and other similar information reporting regimes such as the Common Reporting Standard?

Bermuda is committed to being an integral part of the global financial services sector and has reacted quickly to FATCA. Bermuda negotiated a Model II Inter-Governmental Agreement (“IGA”) with the US Government and has also signed a similar Model II IGA with the United Kingdom. Bermuda also passed amendments to its legislation in July 2015 to adopt the OECD’s Standard for Automatic Exchange of Financial Account Information (or Common Reporting Standard (“CRS”). CRS came into effect in Bermuda on 1 January 2016.

### 6.7 Are there any other material tax issues?

The stamp duties regime applies to Bermudian residents and local companies (owned and controlled by Bermudians 60/40). It does not apply to non-residents, exempted companies or exempted partnerships.

### 6.8 What steps are being taken to implement the OECD's Action Plan on Base Erosion and Profit-Shifting (BEPS), in particular Actions 6 and 7, insofar as they affect Alternative Investment Funds' operations?

Bermuda continues to work on next steps for OECD standards for Base Erosion and Profit-Shifting (BEPS) compliance. In 2016, Bermuda became a signatory to the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports, which puts in place an automatic exchange framework for exchanging country-by-country reports. It is anticipated that the first exchanges will start in 2017–2018 in respect of 2016 information.

## 7 Reforms

### 7.1 What reforms (if any) are proposed?

The Bermuda Government continues to consider various initiatives as it is committed to working closely with the private sector and the BMA to further develop Bermuda’s fund industry. The aim is to create an environment which is favourable for the quick, cost-effective and efficient establishment of investment enterprises to strengthen Bermuda’s position in the international funds market.

This collaborative effort is demonstrated by recent amendments to Bermuda’s partnership legislation that came into effect in December 2015 to provide for greater flexibility in how partnerships conduct business in Bermuda, with a view to strengthening the appeal of Bermuda partnerships for use in private equity fund structures.

The changes included, among other things:

- **safe harbour provisions:** an extension of the list of “safe harbour” activities that a limited partner can carry out without taking part in the management of a limited partnership (and, therefore, without losing its limited liability status);
- **duty of good faith:** providing that a general partner shall at all times act in good faith and in the interests of the limited partnership (unless there is an express provision in the

partnership agreement to the contrary) and that a limited partner does not owe any fiduciary duties to the limited partnership or to any other partner when exercising its rights or performing its obligations under the partnership agreement; and

- **board and committee members:** permitting members of boards and/or committees of a limited partnership to have the benefit of provisions expressly contained in the partnership agreement in favour of such members (even if they are not party to the partnership agreement) so that, for example,

those members will now have the benefit of indemnity and exculpation clauses expressly contained in the partnership agreement.

In addition, a new LLC Act was introduced in October 2016 enabling the formation of limited liability companies (“LLCs”). LLCs are hybrid entities commonly used in the US for private-equity funds and other asset-management structures. The Bermuda legislation is closely modelled on Delaware law so will be very familiar to US fund managers and legal counsel.



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Jonathan Betts is a Partner and head of the corporate and finance practice at Taylors, a full-service law firm which works in exclusive association with Walkers and provides advice on all aspects of Bermuda law.

He advises Bermuda-based and international clients on a broad range of corporate matters, focusing primarily on mergers and acquisitions, private equity and banking and finance transactions. He also advises in relation to the formation of investment funds and insurance matters.

Jonathan has over 20 years of legal experience, having commenced his career in London with leading City law firms Clifford Chance and SJ Berwin and then practised in Bermuda since 2004.

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Ariane advises Bermuda-based and international clients on a range of corporate and transactional matters, with a focus on structured risk products, including insurance-linked securities and catastrophe bonds, private equity and investment funds.

Prior to returning to Bermuda, Ariane was a Vice President at Goldman Sachs in New York and a member of the bank's Structured Products Trading Group, where she worked on all aspects of the development, structuring, marketing and distribution of collateralised debt and loan obligations, special investment vehicles, bespoke structured trades and derivative products.

Ariane began her career as a lawyer with Clifford Chance, where she was a member of the Financial Products Group. Before joining Taylors, Ariane was senior counsel at a Bermuda-based law firm, where she advised international clients, including major private equity funds and investment managers, on all aspects of their Bermuda domiciled entities and investments.



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With a staff drawn from top international law firms, Taylors provides first-class, commercially-focused advice that is attuned to our clients' requirements and facilitates their business.

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