



ICLG

The International Comparative Legal Guide to:

Alternative Investment Funds 2013

1st Edition

A practical cross-border insight into Alternative Investment Funds work

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General Chapters:

1	A New Normal, or the Beginnings of Recovery? – Philip H. Harris & Stephen G. Sims, Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates	1
2	Tax and Regulatory Issues Affecting Hedge Fund Manager Domicile – Sanjay Mehta & Tim Aron, Katten Muchin Rosenman UK LLP	4

Country Question and Answer Chapters:

3	Australia	Johnson Winter & Slattery: Shelley Hemmings & Rod Cox	11
4	Austria	Norbert Wiesinger, Stephan Zinterhof Law Offices: Dr. Norbert Wiesinger & Mag. Stephan Zinterhof	19
5	Bermuda	MJM Limited: Peter D. A. Martin & Cristina Inge Poulus	24
6	British Virgin Islands	Maples and Calder: Tim Clipstone & Ayana Hull	30
7	Canada	McCarthy Tétrault LLP: Sean D. Sadler & Nigel P. J. Johnston	36
8	Cayman Islands	Maples and Calder: Grant Dixon & Sara Galletly	42
9	Denmark	Horten Advokatpartnerselskab: Claus Bennetsen	48
10	England & Wales	Travers Smith LLP: Sam Kay & Jeremy Elmore	54
11	Germany	P+P Pöllath + Partners: Uwe Bärenz & Dr. Jens Steinmüller	60
12	Guernsey	Bedell Cristin: Kate Ovenden	66
13	India	J. Sagar Associates, Advocates and Solicitors: Dina Wadia & Jay Gandhi	73
14	Ireland	Dillon Eustace: Brian Kelliher & Sean Murray	79
15	Italy	CBA Studio Legale e Tributario: Angelo R. Bonissoni & Alessandro Varrenti	86
16	Jersey	Bedell Cristin: Martin Paul	92
17	Liechtenstein	Batliner Gasser Attorneys at Law: Helene Rebholz & Felicitas Bleckenwegner	98
18	Luxembourg	Bonn & Schmitt: Marcus Peter & Aisling Whelan	103
19	Malta	CSB Advocates: Dr. Richard Bernard & Dr. Kurt Hyzler	108
20	Mexico	Jones Day: Silvia Malagón Soberanes & Rodrigo Gómez Ballina	116
21	Netherlands	Van Campen Liem: Maurits Tausk & Marcello Distaso	120
22	Qatar	Simmons & Simmons Middle East LLP: Andrew Wingfield & Elias Matni	126
23	Scotland	Brodies LLP: Andrew Akintewe & Alistair Campbell	132
24	Spain	J&A Garrigues, S.L.P.: Luis de la Peña & Juan Ignacio González	138
25	Switzerland	Lenz & Staehelin: François Rayroux & Patrick Schleiffer	144
26	USA	Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates: Heather Cruz & Aubry Smith	150

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Jersey

Bedell Cristin

Martin Paul



1 Regulatory Framework

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

The primary legislation used by the Jersey Financial Services Commission (the “JFSC”) to regulate Jersey’s Alternative Investment Funds (“funds”) sector is:

- (i) the Collective Investment Funds (Jersey) Law 1988 (the “CIF Law”) (which applies to those funds which fall within a definition of collective investment funds set out in the CIF Law which includes, broadly, all funds which are marketed to more than 50 persons, or are listed on a stock exchange - known as “Certified Funds”); and
- (ii) the Control of Borrowing (Jersey) Order 1958 (the “COBO Order”) (which applies to most other funds).

All funds must comply with the Proceeds of Crime (Jersey) Law 1999 and its subordinate orders, which apply anti-money laundering rules to all financial services business in Jersey.

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

Non-Jersey managers or advisers to Jersey funds are not required to be regulated in Jersey. Jersey-based service providers (including managers or advisers) to Certified Funds must be licensed by the JFSC in respect of fund services business pursuant to the Financial Services (Jersey) Law 1998 (the “FS Law”) and are subject to the JFSC’s codes of practice for funds services business (the “FSB Codes”). With the exception of unregulated funds (see below), Jersey service providers to non-Certified Funds will normally be exempt from registration under the FS Law or from compliance with the FSB Codes.

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

All Certified Funds are issued with a certificate (“Certificate”) by the JFSC and must comply with the requirements of the codes of practice for Certified Funds (the “Certified Funds Codes”). Other than in the case of unregulated funds (which are exempt from JFSC regulation), non-Certified Funds are licensed by the JFSC pursuant to the COBO Order. Whilst there are limited ongoing requirements, the JFSC does retain regulatory oversight and enforcement powers in respect of such funds.

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 primary distinction in Jersey is whether a fund falls within the definition of a collective investment fund under the CIF Law (as noted above this includes, broadly, all funds which are marketed to more than 50 persons, or are listed on a stock exchange) and is thus a Certified Fund. Open-ended funds will ordinarily be classified as Certified Funds and thus be regulated under the CIF Law. Closed-ended funds will ordinarily not be Certified Funds, and will thus be regulated under the COBO Order (but *may* be classified as Certified Funds and thus regulated under the CIF Law).

The various categories of Jersey funds are set out below, from unregulated funds through to those which are more highly regulated.

Funds authorised under the COBO Order (non-Certified Funds)

Unregulated funds

Unregulated funds fall outside the CIF Law by virtue of a statutory exemption contained in the Collective Investment Funds (Unregulated Funds) (Jersey) Order 2008 (the “Unregulated Funds Order”). Unregulated funds are issued with a consent under the COBO Order, but no material regulatory conditions are imposed.

There are two types unregulated fund:

- (i) “Unregulated Eligible Investor Funds”. These are only available to “eligible” investors which, among other things, include those investing not less than US\$1 million in the fund. Such funds may be open or closed-ended; and
- (ii) “Unregulated Exchange-Traded Funds”. These have no investor qualification criteria but must be closed-ended and listed (within 90 days of the establishment of the fund) on one of the recognised exchanges listed in the Unregulated Funds Order.

Private funds

Vehicles formed for the private investment purposes or for a small number of co-investors, not exceeding fifteen in number, are treated as private funds. Such funds are typically closed-ended. Private funds are licensed under the COBO Order, but are subject to little, if any, ongoing regulatory supervision.

Private placement funds

These are closed-ended funds which are marketed through a private placement memorandum made available to no more than 50 potential “professional” or “sophisticated” investors (as defined in the JFSC’s Jersey private placement fund guide (the “PPF Guide”).

The JFSC exercises limited ongoing supervision of private placement funds by means of conditions attaching to the consent which each fund is obliged to obtain from the JFSC under the COBO Order.

Funds authorised under the CIF Law (Certified Funds)

Expert funds

Expert funds are Certified Funds which are subject to lighter regulation than unclassified collective investment funds (see below). An “expert fund” must comply with the Jersey expert fund guide (the “Expert Fund Guide”), which contains some structural requirements, and can only be marketed to “expert” investors (as defined in the Expert Fund Guide to include, *inter alia*, any person who invests at least US\$ 100,000 (or its currency equivalent) in the fund). Expert funds may be open or closed-ended.

Listed funds

Listed funds are also Certified Funds, but similarly are subject to lighter regulation. Listed funds must comply with the Jersey listed fund guide (the “Listed Fund Guide”). A listed fund must be a closed-ended corporate fund, and must be listed on one of the recognised stock exchanges or markets set out in the Listed Fund Guide. There is no restriction on the type of investors who may invest in a listed fund; in other respects the structural requirements are the same as those for expert funds.

Unclassified funds

Certified Funds which do not qualify for lighter regulation on the basis of being expert or listed funds are subject to standard supervision by the JFSC under the CIF Law. Such funds may be open or closed-ended. If open-ended, the fund will also be subject to the JFSC’s guide to open-ended unclassified collective investment funds offered to the general public (the “OCIF Guide”).

1.5 What does the authorisation process involve?

Unregulated funds

Notification of the establishment of the fund to the JFSC is all that is required. However, with the exception of general partners of limited partnerships and trustees of unit trusts, if Jersey-based service providers are appointed who are not already licensed or exempt from the requirement to hold a licence under the FS Law, such service providers will be required to apply for a licence to conduct the particular category of fund services business in relation to the fund.

Private funds

Obtaining regulatory consent for the establishment of private funds is a relatively straightforward process involving the submission of an application letter. Consent pursuant to the COBO Order is usually obtained within a few working days.

Private placement funds

The authorisation process when establishing a private placement fund involves the submission of a written statement from the promoter of the fund and a written certificate by the fund’s administrator, along with a copy of the fund’s draft private placement memorandum. Assuming the application is complete, the JFSC will issue the requisite consent under the COBO Order within three working days.

Expert funds and listed funds

In the case of expert or listed funds, there is a “fast track” regulatory authorisation process. An expert or listed fund application form is submitted to the JFSC, along with the latest draft of the prospectus or other offering document. Provided that the applicant confirms that the fund meets the JFSC’s published guidelines for expert or

listed funds, as appropriate (or, alternatively, confirms that any derogation from the guidelines has been previously agreed with the JFSC), the fund will be authorised within 72 hours of the application being made.

Unclassified funds

The process for establishing an unclassified collective investment fund involves two stages. The first stage is an initial review stage, taking up to ten working days, following which “in principle” consent is obtained. This may take longer where the promoter is not known to the JFSC. The second stage is the “documentary review” stage, at which the draft fund offering document, the draft constitutional documents for the fund and any material contracts (such as the management agreement, administration agreement and investment management agreement) must be submitted together with the application for a Certificate. The JFSC will usually indicate whether the documentation is satisfactory within fifteen working days of submission and the fund certificate will normally be issued within a matter of a few business days thereafter.

1.6 Are there local residence or other local qualification requirements?

Unregulated funds

There is no requirement for a company to appoint Jersey-resident directors or other officers. A limited partnership or unit trust must appoint at least one Jersey general partner or trustee or manager (as appropriate).

Private funds

There are no local residence or other local qualification requirements.

Private placement funds

The company, general partner or trustee (or Jersey manager in the case of some non-Jersey funds) must have two Jersey-resident directors.

Expert funds, listed funds and unclassified funds

The company, general partner or trustee (or Jersey manager in the case of some non-Jersey funds) must have two Jersey-resident directors.

1.7 What service providers are required?

Unregulated funds

A limited partnership or unit trust must appoint at least a Jersey-based general partner or trustee or manager (as appropriate).

Private funds

None.

Private placement funds

A Jersey administrator licensed to conduct fund services business pursuant to the FS Law must be appointed.

Expert funds and listed funds

The investment manager has to be of good standing, established in an OECD Member State or in a jurisdiction with which the JFSC has a memorandum of understanding, and must be regulated in that state or jurisdiction.

The minimum requirements are for a Jersey-based manager/administrator and two Jersey resident directors which will act as the required Jersey-based monitoring functionary to conduct due diligence on the investment manager and monitor its actions on a continuing basis. There must ordinarily be a Jersey-based custodian for open-ended expert funds.

Unclassified funds

The minimum requirements are for a Jersey-based manager/administrator and two Jersey resident directors. There is also a requirement for a Jersey-based trustee and/or custodian for open-ended funds.

Each of a fund's Jersey fund service providers will be required to be licensed under the FS Law to perform the particular category of fund services business it will be providing to the fund and to comply with any conditions contained in its licence and with the FSB Codes.

2 Fund Structures**2.1 What are the principal legal structures used for Alternative Investment Funds?**

Jersey companies (including cell companies), limited partnerships and unit trusts.

2.2 Please describe the limited liability of investors.

The liability of shareholders in a Jersey company limited by shares is limited to the amount, if any, unpaid on the shares held by them. The liability of a limited partner in a limited partnership is generally limited to the amount contributed, or agreed to be contributed, by him to the capital of the partnership. The liability of unit holders in a unit trust is limited to the amount, if any, unpaid in respect of the units held.

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

The structure of managers and advisers will often be influenced by considerations such as limited liability and tax efficiency. Advisers and managers are most commonly structured as companies. Within a classic private equity fund structured as a limited partnership the general partner may be a body corporate, or may itself be a limited partnership with a corporate general partner. LLPs may also be used.

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?

It is common for a fund's constitutional documents and offering document to set out circumstances in which the manager may restrict transfers or redemptions – for example, requirements for minimum holdings, ability to suspend pricing/transfer, ability to refuse to register transfers in certain circumstances, etc. There are no statutory or regulatory limits on such restrictions.

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

In the case of unregulated eligible investor funds, private placement funds and expert funds, any transfer of interest can only be made to a qualifying investor (e.g., "expert" investors, as defined, in the case of expert funds). Unregulated eligible investor funds and expert funds may only be listed on a stock exchange which permits restrictions on transfer to qualifying investors.

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

The legislation governing marketing materials for Certified Funds is the Collective Investment Funds (Certified Funds – Prospectuses) (Jersey) Order 2012 (the "CIF Prospectus Order"). In the case of expert funds and listed funds certain additional disclosure requirements apply.

In relation to closed-ended Certified Funds constituted as companies, the Companies (General Provisions) (Jersey) Order 2002 has historically applied. In respect of future issues of shares the CIF Prospectus Order will apply.

For private funds, there are no prescribed requirements. For each of private placement funds, and unregulated funds, certain specific disclosure requirements apply, but none are unusual or unduly restrictive.

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

The offering document must contain a prominent warning that the fund is unregulated. There are no other requirements as to the contents of the offering document, other than the general principle that investors should have disclosed to them all the information that they would reasonably require and would reasonably expect to have brought fairly to their attention for the purpose of making an informed judgment about the merits and risks of participating in the fund.

Private funds

No content requirements.

Private placement funds ("PPF")

The offering document must contain an investment warning and disclosure statements (in the form prescribed in the PPF Guide). A general principle is that the PPM must contain all material information which is in the knowledge of the persons responsible for issuing the PPM and which investors, and their professional advisers, would reasonably require for the purpose of making an informed judgment about the merits of investing in the fund, and the nature and extent of the risks accepted by making such an investment.

Expert and listed funds

In addition to the disclosure requirements under the CIF Prospectus Order, the offering document must contain an investment warning and standard disclosure statements (in the form prescribed in the Expert Fund Guide and Listed Fund Guide (as appropriate)). More generally, the expert and listed funds regimes require that any prospectus or other offering document sets out clearly and fully all material information that a prospective investor would reasonably require or expect to be brought to their attention in respect of the fund for the purposes of making an informed judgment about the merits of participating in the fund and the risks accepted by participating.

Unclassified funds

The disclosure requirements under the CIF Prospectus Order apply. These include details *inter alia* of: the constitution and objectives of the fund; persons involved with the fund; the characteristics of units in the fund; valuation methods; fees, charges and distribution

processes; subscription and redemption processes; minimum subscription amounts; conflicts of interest; risks warnings; and financial reporting requirements.

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

Unregulated funds and private funds

No.

Private placement funds, expert funds, listed funds and unclassified funds

The offering document or prospectus must be sent to the JFSC.

3.4 What restrictions are there on marketing Alternative Investment Funds?

Unregulated funds

None.

Private funds

Maximum of 15 offers/investors, by way of private placement only.

Private placement funds

Maximum of 50 offers/investors, by way of private placement only.

Expert funds, listed funds and unclassified funds

None.

3.5 Can Alternative Investment Funds be marketed to retail investors?

Unclassified funds may be marketed to retail investors. Unregulated Exchange-Traded Funds also have no restriction on marketing.

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

Unregulated funds

Unregulated eligible investor funds are restricted to 'eligible investors'. As noted above, there are no investor qualification requirements for unregulated exchange-traded funds.

Private funds

None.

Private placement funds

Restricted to "professional" or "sophisticated" investors.

Expert funds

Restricted to "expert" investors.

Listed funds

None, beyond any required by the relevant stock exchange or market.

Unclassified collective investment funds

None.

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

No, there are not.

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

No. However, a Jersey-based distributor to a Certified Fund would need to be licensed under the FS Law.

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

No, there are none.

4 Investments

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

Generally no, but the JFSC may refuse to grant regulatory consent if the fund proposes to undertake activity which is detrimental to the reputation of the Island.

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?

Unregulated funds, private funds, private placement funds, expert funds and listed funds

None.

Unclassified funds

The OCIF Guide provides recommended investment restrictions for open-ended funds.

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

Unregulated funds, private funds and private placement funds

None.

Expert funds and listed funds

Generally unrestricted, but further information may need to be provided to the JFSC where (other than in the case of hedge funds) borrowing will be in excess of 200 per cent of the fund's NAV.

Unclassified funds

The OCIF Guide includes recommended borrowing restrictions for open-ended funds.

5 Disclosure of Information

5.1 What public disclosure must the Alternative Investment Fund make?

A Jersey company's statement of particulars (disclosing the company's registered office), memorandum and articles of association and certificate of incorporation are open to public inspection, as is its annual return (which *inter alia* includes details of the company's register of directors and registered shareholders, etc.).

A Jersey limited partnership's declaration of limited partnership (disclosing the partnership's registered office address and general partner details) and certificate of registration are open to public

inspection as is its annual return (which *inter alia* includes details of its general partner).

No trust documentation is publicly available.

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

Unregulated funds

None, unless the fund is a company, in which case audited annual accounts must be prepared and filed with the JFSC.

Private funds

None.

Private placement funds

A copy of the fund's accounts must be provided to the JFSC if the auditor's report is qualified.

Expert funds, listed funds and unclassified funds

The Certified Funds Codes prescribe various notifications and consents, including requirements to file audited annual accounts, to notify the JFSC of certain material events or changes and the Expert Fund Guide or Listed Fund Guide (as appropriate) include other specific requirements.

5.3 Is the use of side letters restricted?

The Certified Funds Codes provide that where the fund is a hedge fund, disclosure should be made to investors of: (i) the existence of any side letters agreed by the fund with one or more investors; and (ii) the extent to which the terms of any such side letters may have a material adverse effect on non-party investors. This does not apply to non-Certified Funds.

6 Taxation

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

Jersey has had a general zero rate for corporate tax (subject to certain limited exceptions). As a result, Jersey funds established as companies will pay no Jersey income tax and there is no requirement to withhold tax on interest or dividends payable by such corporate funds.

In relation to unit trusts established in Jersey, no assessments to Jersey income tax are raised in respect of investment income or profits arising from non-Jersey sources or from bank deposits held by such unit trusts in Jersey.

Limited partnerships are tax transparent vehicles and are not, therefore, subject to Jersey income tax in their own name.

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

A Jersey investment manager and/or adviser structured as a company, which is common, is taxed at the zero rate. Jersey limited partnerships which act as GPs are tax transparent, as noted above.

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?

No death duties, capital gains tax, gift, inheritance or capital transfer taxes are levied in Jersey. No stamp duty is levied in Jersey on the issue, transfer or redemption of participating shares held. Probate stamp fees may be payable at the rate of up to 0.75 per cent of the value of the Jersey estate in the event of the death of the holder of participating shares.

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

Jersey resident individuals are liable to pay income tax at the rate of 20 per cent and will need to declare income received from all sources, including from funds.

Investors not resident in Jersey will not suffer any Jersey tax on receipts from Jersey investment funds, whether in the form of distributions (income or capital), on redemption or otherwise.

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?

It is not necessary but may be advisable to obtain tax clearance from the Jersey Comptroller of Income Tax.

6.6 Are there any other material tax issues?

Jersey has entered into several double taxation agreements, including with the United Kingdom, Guernsey, Malta, the Isle of Man, Hong Kong and Singapore. It has also signed up to tax information exchange agreements with numerous countries, including the United Kingdom, the USA, China and Australia.

7 Reforms

7.1 What reforms (if any) are proposed?

The Alternative Investment Fund Managers Directive (the "Directive") must be implemented by EU Member States by 22 July 2013. The Level 2 implementing measures, which were published by the European Commission last December and which contain further detail on key issues covered by the Directive, are directly applicable in EU Member States from the same date. Jersey has been proactive in its response to the Directive and is in the process of preparing requisite legislation to implement those provisions of the Directive which apply to third countries.



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Martin is head of the Investment Funds and Private Equity group. He has considerable offshore finance experience, particularly in relation to property funds, private equity funds and structured investments. His practice area also encompasses banking and general commercial work and regulatory advice.

Martin is a member of Jersey Finance industry working groups, sits on the Jersey Funds Association committee and chairs its education committee.

Martin is recognised in the *Chambers* legal directory as "a dedicated lawyer who is happy to work through the night when he needs to". *Chambers Research* 2013 say he is "excellent". He has also been acknowledged by *The Legal 500* directory as "responsive, practical and solution driven". Martin is recognised as a leading individual by the current *The Legal 500* directory, as a leading lawyer in Investment Funds, in *IFLR1000* 2013, and *PLC Which Lawyer?* 2011 recommends him in investment funds.

Bedell Cristin is a leading provider of legal services across key jurisdictions: Jersey; Guernsey; London; Geneva; Mauritius; BVI; and Singapore. We offer a broad range of Channel Islands, Mauritian and BVI legal advice. Our expertise and client focused approach have earned us a strong client base of world class institutions, corporates, high net worth individuals and intermediaries.

Our funds practice provides expert legal advice for all types of investment structures, including private equity funds, property funds, hedge funds and numerous hybrid structures. We act for promoters, fund managers, administrators, banks and investors in all aspects of investment fund work - from formations to reorganisations and investments to exits and liquidations.

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