



Private Equity

in 33 jurisdictions worldwide

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2011



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Private Equity 2011

Contributing editor:

Casey Cogut
Simpson Thacher & Bartlett LLP

Business development managers

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Sarah Walsh

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Subscriptions manager

Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

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Production editor

Anne Borthwick

Subeditors

Chloe Harries
Davet Hyland

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

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Fax: +44 20 7229 6910
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Bermuda

Sarah Demerling (née Moule)

Appleby

Formation and terms operation

1 Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

Format of legal vehicle

Private equity funds will typically be formed as limited partnerships or limited liability companies. Bermuda funds (investment funds) can be set up as limited liability companies (fixed or unlimited duration), limited partnerships or unit trusts (open-ended or closed-ended). The optimal structure of the fund will depend on a number of factors including where the fund is to be marketed, the nature of the potential investor base and the identity and objectives of the promoters. Tax and regulatory issues will be important in determining the structure of the fund vehicle. Tax advice should be obtained in the onshore jurisdiction.

Stand-alone funds are the most straightforward to form; however, funds can be structured as part of a master feeder, umbrella or fund-of-funds type structure. Special vehicles such as segregated accounts companies (SAC) can also be utilised by private equity funds to provide a level of protection of the assets of one account from the liabilities of another.

Separate legal personality: legal consequence to investors

Company

Once formed, a company has a legal ‘personality’ or existence that is separate and distinct from its shareholders. Interests in a company are usually shares in its capital, which may be voting or non-voting and may have special rights attached. Typically, voting shares are held by the investment manager.

The liability of shareholders in a Bermuda company is limited to the amount paid up on their shares. In the case of a fund, the shares will be fully paid at the time of issue so there will be no further liability. A company cannot, without shareholder consent, increase the liability of an existing shareholder by any subsequent change to its memorandum of association or by-laws. It is rare for a liquidator to be able to ‘pierce the corporate veil’ to seek to impose liability on shareholders.

Limited partnership

A limited partnership consists of one or more general partners (which may be bodies corporate, or general or limited partnerships, formed under the laws of Bermuda or another jurisdiction) and one or more limited partners (ie, investors) whose relationship is governed by a partnership agreement. In Bermuda, partnerships (general and limited partnerships) are not legal entities separate from their partners. Nevertheless, a partnership may function as an ‘entity’ and may sue and be sued and carry on business in its own name. Under Bermuda law, it is possible for a partnership to irrevocably elect to have legal

personality. In effect, in the event that such an election is made, the partnership will continue regardless of whether all the partners die or are declared bankrupt or there is a change in its constitution.

General partners are fully liable for partnership debts and obligations. In the case of limited partnerships, the general partner or partners will have such general liability to third parties, while in broad terms, the liability of the limited partners is limited to the value of money and the ‘value of any property’ (ie, the value assigned to property other than cash) that it contributes or agrees to contribute to the limited partnership. The position of a limited partner in a limited partnership is in this respect analogous to that of the shareholder in a limited company.

Unit trust

A trust is not a legal entity but rather a relationship between a fiduciary officer, namely the trustee, and beneficiary under a document known as a trust deed. The trustee has onerous duties. Beneficial interests in investment trusts are packaged as units. The units are then sold to investors and the proceeds form part of the collective fund. Unit holders in a trust have no liability for the actions of the trustee, and the trustee’s liability is usually limited to the amount of the trust fund.

2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

Private equity funds can be formed as a private equity company, a mutual fund open-ended company or a closed-ended company, a limited partnership or a unit trust.

Formation of a private equity company

A Bermuda exempted limited liability company (thus called because they are exempted from those provisions of Bermuda law that stipulate that at least 60 per cent of the equity must be beneficially owned by Bermudians) can be established with a single shareholder, any amount of authorised share capital and unrestricted objects and the capacity and powers of a natural person. (The minimum share capital requirement in Bermuda of US\$12,000 was revoked effective 29 December 2006). In general terms, the Companies Act 1981 (Companies Act) restricts an exempted company from carrying on business in Bermuda, except to the extent that it has been granted a licence by the minister of finance (the minister). There are certain activities that are expressly excluded from the requirement of a licence, including doing business with other exempted companies in furtherance of the business of the exempted company that is being conducted outside Bermuda and dealing in securities of exempted companies or partnerships.

There is no requirement to advertise the intention to incorporate an exempted company. The first step in the incorporation process is the reservation of a name for the company with the registrar of

companies (the registrar). The incorporation application is then submitted to the Bermuda Monetary Authority (BMA) together with details of the nature of the company's intended business and its proposed ownership. Approval is sought from the BMA for the intended beneficial ownership of those with voting rights in the company, details of which are confidential. Personal declarations must be signed by the beneficial owners, unless the owners are already sufficiently well known to the BMA or are listed companies or do not have the right to vote for or appoint directors of the company. Ordinarily, incorporation can be accomplished in two to three business days. An exempted company can only commence business or issue shares after it has been organised and the requisite BMA consents have been obtained.

Formation of mutual funds

Authorisation of mutual fund companies is effected by submitting an application to the BMA consisting of certain forms together with a draft of the prospectus. In addition, detailed information must be submitted on the promoter or management company of the fund. If the promoter is a listed institution or a subsidiary of such an institution, this information will usually consist of a summary of that institution together with its latest annual report and a note of its ticker symbol and the name of the exchange on which it is listed. If the promoter is a private individual or group of individuals, details of their investment expertise must also be submitted.

The time to incorporate a mutual fund company, after submission of the application to the BMA, is usually four to five business days. A mutual fund company may only commence business and issue shares after it has been organised and the requisite BMA consents have been obtained.

A Bermuda mutual fund is required to have an administrator, custodian, investment manager, auditor and a registrar unless it is exempt under the Investment Funds Act 2006 (the IFA).

Limited partnership

The procedure for the formation of limited partnerships commences with an application made (typically by the partnership's local attorneys) to the BMA. The application documents must include, inter alia, the following:

- the certificate of particulars of exempted partnership and the certificate of particulars of limited partnership (certificates of particulars), which includes the name or names of the general partner or partners only and the address of its registered office and resident representative in Bermuda; and
- partnership agreement, which may be in draft form.

Documentation supplied to the BMA is confidential and is not disclosed to the public. Generally, financial information is not required on the limited partners.

The BMA vets the application (see question 10). Once the BMA has consented to the establishment of the limited partnership, the partnership must be registered with the registrar by filing the certificates described above, together with the applicable registration fee. A partnership may potentially fall under the IFA if it falls within the definition of an 'investment fund'. However, if there are fewer than 20 partners and the partnership does not promote itself to the public generally, it would benefit from exclusion under the IFA. In addition, most partnerships will not fulfil the definition of 'investment fund' under the IFA as the limited partners are not usually entitled to have their interests redeemed at their request.

Unit trust

No governmental consent is required to form a trust; however, prior approval of the BMA is required to issue voting units to investors. Unit trusts are constituted by a trust deed, usually made between the management company that is promoting the vehicle and the trustee.

A unit trust may, under the IFA, also be authorised as a Bermuda institutional, standard, administered or exempted fund.

Costs

See table below.

3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records or a corporate secretary, and how is that requirement typically satisfied?

Whether the fund will be required to maintain a custodian or administrator locally will depend on whether the fund falls within the provisions of the IFA and if so, the classification of the fund as standard, institutional, administered or exempted (see below). In general, there is no requirement for a local administrator or custodian. There is no requirement for a local custodian or administrator if the company is set up as a private equity company rather than as a mutual fund.

Institutional and administered funds

Funds authorised as institutional funds under the IFA are only open to qualified participants, or require each participant to invest a minimum of US\$100,000 in the fund. An institutional fund must have an officer, trustee or representative resident in Bermuda who is a person who has access to the books and records of the investment fund. Funds authorised as administered funds must have an administrator who is licensed under the IFA and require their participants to invest a minimum of US\$50,000 in the fund or be listed on a stock exchange that is recognised by the BMA.

Standard funds

Any investment funds that do not qualify to be authorised as either institutional or administered funds are authorised as standard funds. Funds authorised as standard funds under the IFA are (except where the administrator of a fund is carrying on fund administration business in Bermuda) required to have a custodian, which is normally a financial institution in Bermuda or a subsidiary of such an institution. The BMA may waive compliance with this requirement if it is satisfied that appropriate alternative arrangements are in place for safeguarding fund property. Requirements may also be waived for feeder funds.

Registered office/accounts

Company

A company (which includes a mutual fund company) must at all times have a registered office in Bermuda, which is not a post office box, to which all communications and notices may be addressed. In addition, every company must keep proper records of accounts and a minute book at the registered office of the company or at such other place as the directors think fit. Mutual fund companies and unit trusts that are authorised under the IFA are also required to prepare annually audited financial statements under the IFA.

The company secretary can be an individual ordinarily resident in Bermuda or a company that is ordinarily resident in Bermuda. An assistant corporate secretary or deputy secretary may be an individual or company and either resident or non-resident in Bermuda.

The accounts are not open to public inspection.

Partnership

Every exempted partnership must designate a resident representative and have a registered office, which must not be a post office box. A partnership must maintain at its office in Bermuda such audited accounts and records of its acts and financial affairs as will show the business and true accounting of its affairs at the end of each financial year.

The accounts are not open to public inspection, nor are there any requirements to file the accounts with any governmental or other agency.

4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

Company

The information disclosed by a search on the file of a company maintained at the office of the registrar in Bermuda will include:

- the authorised share capital of the company and par value of the shares;
- any prospectus filed, memorandum of association, certificate of incorporation, certificate of incorporation on change of name of the company and any charges registered against the company; and
- registered address.

The register of members of an exempted company maintained at the registered office of the company is open to inspection by the public without charge. However, the register of members of a mutual fund company is closed to the public and is therefore not open to inspection (except where otherwise provided in a fund's constitution or prospectus). By-laws and financial information and accounts are likewise not open to public inspection. This information is, however, open to inspection by directors and resident representatives who must be able to determine the financial position of the company and by investors in accordance with the relevant prospectus. The register of directors and officers of every Bermuda company is available to the public at the registered office without charge. If an inspection of the register of members or the register of directors and officers is refused, the company that is in default is liable to a default fine.

Partnership

The certificates of particulars must be filed with the registrar upon formation of a limited partnership and are available to the public. Both certificates must contain the names and addresses of the general partner or partners, but not the limited partners. For partnerships that are general partnerships only, the 'Certificate of Particulars of a Limited Partnership' is not required.

A register of the limited partners must be maintained at the partnership's registered office and must contain up-to-date information on the names and addresses of all limited partners. This register is open for inspection by any limited partner. If an inspection of the register is refused, every general partner who is in default is liable to a default fine not exceeding US\$20 for every day during which the default continues.

Trust

Financial information is not available to the general public. The beneficiaries do, however, have a right to require a trustee to provide them with information to determine whether the trust is being administered correctly. Beneficiaries have a right to see the financial records. The relationship between the beneficiaries and the trustee, and any consequences of failing to make certain information available, will be governed by the applicable trust deed.

5 Limited liability for third-party investors

In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

Company

Generally speaking, the limited liability of the investors in a private equity fund will be respected as a matter of local law. Examples of when the corporate veil may be lifted include when the corporate structure has been used as a device or facade to conceal criminal activities or where dishonesty or abuse of the corporate form is shown.

Limited partners

General partners, the managers of the venture, have unlimited liability while limited partners (ie, investors) have limited liability unless they participate in the management of the venture, in which case they may forfeit their limited liability status.

6 Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

The investment manager appointed as investment manager of a Bermuda company does not generally owe a direct contractual duty under Bermuda law to the investors. The investment management agreement would be the usual instrument in which any fiduciary duties would be explicitly set out. This would normally cover matters such as the full and proper disclosure of fees and commissions, the method by which conflicts of interest are to be resolved, segregation of client assets and the duty of the investment manager to ensure that its own deals are not aggregated with client deals, namely 'piggy-backing'.

A general partner owes fiduciary duties to the limited partners of a limited partnership, which are prescribed by statute and common law, and any additional obligations that may be set out in the partnership agreement.

A trustee has a duty to exercise care and skill in carrying out its powers and functions as a trustee. This fundamental duty of care may only be qualified or limited by the terms of the trust instrument or by statute.

Directors of a company are under a fiduciary duty and a statutory duty to act in the best interests of the company.

An investment manager remains responsible for the performance of services by any sub-adviser.

Additional duties may be imposed under the Investment Business Act 2003, as amended (the IBA). The IBA imposes explicit fiduciary duties on persons required to be licensed under the IBA, unless exempt. It should be possible for most private equity funds to apply for an exemption from the requirement to be licensed. Additional duties for funds required to be licensed include, for example, a duty to keep accounts and maintain client accounts separately from their own. Generally speaking, a licence would only be required if the fund had a physical presence in Bermuda.

7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

In general, the answer to this question is no. The common law does not recognise a difference between simple negligence and 'gross' negligence.

The parties may, however, include a definition of 'gross negligence' in a contract such as a management contract. If they do, a court may apply this contractually defined higher standard of negligence notwithstanding that the common law recognises no such distinction.

8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

There are no special requirements particular to private equity funds. Bermuda partnership law does not provide for a continuation of a partnership into Bermuda, the normal process in these circumstances would be to form a new exempted limited partnership and register this as appropriate with the registrar. It is possible for overseas partnerships to apply for a permit to engage in a trade or business in Bermuda. A unit trust may be able to change its governing law to Bermuda law if this is permitted in the trust deed, subject to any restrictions that may be contained in the trust deed. Companies can continue into Bermuda, provided all necessary authorisations are obtained from the foreign jurisdiction and the BMA.

9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

The bankruptcy, insolvency or change of control of a sponsor, usually being the investment manager, would not trigger an automatic dissolution or removal rights at the fund level, unless this is specifically provided for in the fund's offering document, constitutional documents and in the investment management agreement.

In the case of a partnership, the situation will be governed by the terms of the partnership agreement, but it is usual for the limited partners to have the right to vote to bring in a replacement general partner, if desirable, in this eventuality.

The BMA would need to be notified of any replacement of the investment manager and would need to approve such a change.

Regulation, licensing and registration

10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the audit and inspection rights available to those regulators?

The principal regulatory bodies are the BMA and the registrar. The BMA has been given the responsibility, on behalf of the minister, to review and approve applications to incorporate companies and form partnerships and, under the Exchange Control Act 1972, to permit the issue of shares or units of a fund and to designate a fund as non-resident for exchange control purposes. The BMA is responsible for the vetting of applications and where a fund refuses to submit any information required by the BMA, the IFA provides certain information-gathering powers to the BMA, including powers to obtain information and require the production of documents, and rights of entry to obtain documents. The BMA also has investigative powers regarding the nature, conduct or state of an authorised fund or licensed administrator's business and the ownership or control of the

operator of an authorised fund or licensed fund administrator, and powers to investigate suspected contraventions under the IFA.

11 Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

If a unit trust or company is established as an open-ended fund, an application will need to be made to the BMA for it to be authorised as a standard, institutional or administered fund (or it may be exempted or excluded under the IFA).

Investment funds are prohibited from being operated in or from Bermuda unless they are authorised or exempted under the IFA. However, the requirement to be authorised or exempted does not apply to investment funds that are deemed to be private, that is, the number of participants in the fund is 20 or fewer and the promotion, communication and offer to participate in the investment fund is restricted and is not made to the general public.

Requirements for authorisation are that the fund prepares annual financial statements that will be audited; the fund has appointed, or will on authorisation appoint an investment manager, an auditor and a fund administrator; and the fund property has been or will on authorisation be entrusted to a custodian.

An investment fund may apply to the BMA for an exemption from authorisation if it is open only to 'qualified participants' (as defined in the IFA), it is administered by an administrator that is recognised by the BMA, it has appointed an investment manager, registrar, custodian or prime broker and an auditor and it has an officer, trustee or representative resident in Bermuda with access to its books and records.

A closed-ended mutual fund company does not fall under the IFA. As mentioned above, a partnership may come under the IFA if it falls within the definition of an 'investment fund' and is not excluded under any other IFA provision. The IFA provides an appeals procedure for operators of a fund that are aggrieved by certain decisions made by the BMA. Fund administrators are required to obtain a licence under the IFA to carry on the business of a fund administrator in or from Bermuda.

12 Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

This is possible but unlikely. The IBA requires that any person who provides investment services from a place of business maintained by such a person in Bermuda must either be licensed or exempted. Investment services are very broadly defined and include dealing in investments, arranging deals in investments, managing investments, providing investment advice and safeguarding and administering investments.

Whether a fund would be required to register as an investment adviser depends on whether the fund has a physical presence in Bermuda. Most mutual fund companies would be able to apply for an exemption (see question 24).

13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

There are no specific requirements; however, the BMA will consider applications and principals concerned on a case-by-case basis and will grant approval after taking all factors into consideration, including the structure, experience of individuals and companies involved,

and the results of vetting to determine whether the principals are fit and proper persons.

14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

None (although individual managers and investment advisers may have their own internal policies regarding the same).

15 Use of intermediaries

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities.

A fund, if authorised, will be required to disclose information relating to placement agents, promoters or intermediaries in accordance with the IFA, the Fund Prospectus Rules 2007 and the Companies Act generally in its offering documentation.

16 Bank participation

Describe any legal or regulatory developments emerging from the 2008 financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

The BMA has completed the first phase of a comprehensive review of liquidity requirements for local banks (of which there are four). This work is designed to ensure the BMA's liquidity policies remain in line with best international practice as promulgated by the Basel Committee of Banking Supervisors.

Taxation

17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Under current law in Bermuda, private equity fund vehicles are not subject to any tax, as there is no Bermuda income, capital gains or withholding tax, corporation or profits tax applicable to a fund or to its share or unit holders. An exempted company or exempted partnership and exempted unit trust is able to obtain from the minister under the Exempted Undertakings Tax Protection Act 1966, as amended, an assurance that, in the event of there being enacted in Bermuda any legislation imposing withholding or other tax computed on profits or income, or computed on any capital assets, gain or appreciation, such tax shall not be applicable to such exempted undertaking until 28 March 2016. The minister has recently announced that this period will be extended to 2035. Such assurance, however, does not prevent the application of any such tax or duty to such persons as are ordinarily resident in Bermuda, or application of land taxes imposed under Bermuda land tax laws.

18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

Under Bermuda law, investors in a Bermuda fund other than investors ordinarily resident in Bermuda are not subject to income, capital

gains or withholding tax, corporation or profits tax, capital transfer tax, estate duty or inheritance tax or any return filing requirements in Bermuda.

19 Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

There are no local tax considerations. However, we do recommend that the promoters of a Bermuda exempted company, and the intended directors and shareholders, obtain and carefully consider professional advice from those qualified in the relevant jurisdictions in relation to the potential liability to tax of the company, under the laws of those jurisdictions in which and with which it may carry on business.

20 Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

The annual government fee is based on the company's 'assessable capital'. For most companies, the assessable capital is the amount of the company's authorised share capital plus its share premium account (if any). For mutual fund companies, the assessable capital is the amount of the company's authorised share capital only. Different or additional fees are payable in respect of certain types of businesses (eg, foreign sales corporations and management of unit trusts) or in certain other situations.

The appropriate fee payable is determined in accordance with the following table:

Assessable capital (US\$)	Government fees (US\$)
0–12,000	1,995
12,001–120,000	4,070
120,001–1,200,000	6,275
1,200,001–12 million	8,360
12,000,001–100 million	10,455
100,000,001–500 million	18,670
500,000,001 or more	31,120

If the company is incorporated on or after 1 September, half of the relevant fee is payable for the balance of the year.

Partnership

The annual government fee is US\$2,235, which is payable upon registration of the partnership; however, if the partnership is registered after 31 August the fee is US\$1,117.50.

21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

There are no special tax considerations from a Bermuda standpoint.

22 Tax treaties

Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

Apart from a tax treaty between Bermuda and the United States, which has no application to funds, there is no network of double taxation treaties available. As at 14 February 2011, Bermuda has signed 23 Tax Information Exchange Agreements (TIEA) with various countries around the world and one double taxation agreement with Bahrain. (Standards for the Organisation for Economic Co-operation and Development (OECD) compliance are to have at least

12 signed TIEAs with either OECD member countries or non-OECD member countries.)

23 Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

No.

Selling restrictions and investors generally

24 Legal and regulatory restrictions

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

If the offer by way of a company of the investor shares or by a Bermuda-established trustee or manager of the units is calculated to result in such shares or units being made available to in excess of 35 persons, any offering memorandum issued by the company or unit trust will need to be filed with the registrar in Bermuda as a prospectus unless an exemption is available. The prospectus will be required to comply with the disclosure requirements set out both in the Companies Act and the IFA. The disclosure requirements are not onerous. There is no requirement to issue a prospectus in relation to the offer of partnership interests in a Bermuda partnership.

See question 10, which sets out Bermuda's exchange control requirements.

The procedures and restrictions in relation to the proposed offer of securities in Bermuda are decided primarily in the context of the IBA. 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 a person in Bermuda. Therefore, unless the offeror maintains an office in Bermuda or has an arrangement that the minister by order determines shall constitute the carrying on of business in Bermuda, the IBA will not apply to any offers of interests in a private equity fund.

The IBA allows persons to whom the requirement for a licence would otherwise apply to be exempt if they fall within the scope of the Investment Business (Exemptions) Order 2004 (the Exemption Order).

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, which means 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; and current year means the year in which he or she purchases an investment;
- (ii) a high-net worth private investor, which means 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; and 'net worth' means the excess of total assets at fair market value over total liabilities;
- (iii) a sophisticated private investor, which means 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;

Update and trends

Bermuda is continually seeking to ensure that its laws and regulations are in line with international best practice. The IFA was amended in December 2010; the resulting amendments and additions to the existing IFA are designed primarily to align the regulatory framework for funds and fund administrators in Bermuda more closely with the requirements that exist in other regulatory legislation in Bermuda while ensuring that the framework overall remains risk-based and recognises the unique nature of the funds industry locally.

In making these amendments, Bermuda has sought to preserve an appropriate balance between securing appropriate degrees of protection for investors, most of whom are institutional or may be presumed to have a high degree of financial sophistication, while not imposing an undue regulatory burden on the industry.

- (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 category 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'.

25 Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

There are no further restrictions.

26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

In respect of individual investors, there are 'know your client', anti-money laundering and anti-terrorist financing compliance requirements governed by law, which are usually monitored by the administrator. The BMA should be appraised of any change in the ownership, management or control of the fund manager. The BMA has the responsibility for vetting, on a strictly confidential basis, the proposed beneficial ownership of business enterprises with a foreign ownership component, and any changes in such ownership. Thus, the consent of the BMA must be obtained before any shares or other securities of an exempted company can be issued or transferred, unless a general permission applies or has been granted. It is usual to obtain a general permission for investors in mutual fund companies and unit trusts. It is a requirement under the IFA that a material

change (which would include a change of a principal making decisions on behalf of the investment manager) shall not be made to a fund's offering document without the prior approval of the BMA.

27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

None other than as required under the IFA or IBA, as described above.

28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

A financial service provider must be satisfied that a prospective client is who he or she claims to be, as well as collect sufficient information on the nature of the business that the customer expects to undertake. In general terms, there is a requirement to see through any corporate veil to the underlying beneficial owner and obtain identification data and supporting documentation for that individual and undertake appropriate verification of their identity.

Exchange listing

29 Listing

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

The Bermuda Stock Exchange (BSX) is a full member of the World Federation of Exchanges and an affiliate member of IOSCO. In addition, the BSX is recognised by the US Securities & Exchange Commission as a Designated Offshore Securities Market under Regulation S and by the UK's Financial Services Authority and HMRC. The BSX is the world's leading fully electronic offshore securities market.

Where a private equity fund is established according to Bermuda's IFA it may list under the BSX Listing Regulations, which define 'collective investment vehicle' as a 'collective investment vehicle whether structured as a company, a unit trust, limited partnership or other legal entity that engages in the investment of capital'. It is therefore possible to list securities of almost any type of collective investment vehicle, including open-ended and closed-ended fund structures.

In conjunction with the Bermuda Business Products Committee (the Committee), there is an arrangement in place with the BMA and the BSX whereby upon the establishment of a mutual fund there can be a simultaneous listing of that fund on the BSX. The Committee reached an understanding with the BMA and BSX that such vehicles would be approved on a fast track basis. These vehicles are referred to as 'launch and list funds'.

There is no data to reflect whether private equity funds in particular take advantage of the opportunity to list on the BSX. The BSX currently has 800 listed securities with over 320 listed fund structures.

The principal ongoing requirements for listing are that a fund must:

- be incorporated or otherwise established in Bermuda or in a recognised jurisdiction, and it must also have at least 25 per cent of its listed securities held by the public at all times (although this does not apply if using qualified investor rules). Recognised jurisdictions are the British Virgin Islands (for funds registered as public funds), Canada, France, Germany, Guernsey, Hong Kong, Ireland, the Isle of Man, Japan, Jersey, Luxembourg, Mauritius, Switzerland, the United Kingdom and the United States;
- may be incorporated in a jurisdiction other than those noted above on the basis that the fund restricts investments in it or the acceptable listed securities to a qualified investor, which is defined under section I of the Listing Regulations, which lists multiple tests that may be applied to confirm an individual, corporation or institutional investor as being suitable under the qualified investor rules; or
- the fund must have a primary listing on another stock exchange that is recognised for this purpose by the BSX.

If the fund's listed securities are restricted as noted above, then shares may not be dealt on the BSX where the initial value of the trade is less than US\$100,000.

The BSX lists institutional funds under a 'commercially sensible' regulatory environment that meets international standards. The BSX does not impose minimum capital requirements or investment restrictions and allows flexibility for hedge funds and the use of prime brokers.

The BSX's BEST electronic trading system and BSD Securities depository together allow trading for closed-end funds, the dematerialisation of funds' shares and efficient settlement of trades. At the time of publication, the market capitalisation of the BSX exceeded \$300 billion and the securities depository had over 5,000 account holders.

APPLEBY

Sarah Demerling
Jerome Wilson

sdemerling@applebyglobal.com
jwilson@applebyglobal.com

Canon's Court
22 Victoria Street
PO Box HM 1179
Hamilton HM EX
Bermuda

Tel: +1 441 295 2244
Fax: +1 441 292 8666
www.applebyglobal.com

30 Restriction on transfers of interests

To what extent can a listed fund restrict transfers of its interests?

The securities of a collective investment vehicle must be freely transferable, at least between qualified investors (defined above). A fund may not apply arbitrary restrictions to transfers without approval from the BSX. In most cases, the BSX will only allow a restriction to be placed due to legal or tax reasons. A fund must thoroughly prove its case as to why a restriction is to be placed to comply with the Listing Regulations.

Participation in private equity transactions**31. Legal and regulatory restrictions**

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

There are no specific restrictions upon a fund's ability to participate in a private equity transaction; however, counterparties should have regard to any restrictions contained in the fund's documentation in any given case.

32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

Not applicable.

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