

# BERMUDA: RESPONDING TO THE AIFMD

JONATHAN BETTS AND ANDREA MONIZ-DESOUZA OF COX HALLETT WILKINSON LIMITED EXPLAIN HOW BERMUDA WILL CONTINUE TO MAINTAIN ITS REPUTATION OF EXCELLENCE WHILE COMPLYING WITH THE LATEST REGULATIONS



**Jonathan Betts** is a senior associate in CHW's Corporate and Commercial Department. He advises Bermuda-based and international clients on a range of corporate matters. He focuses primarily on mergers and acquisitions, private equity and banking and finance transactions but also advises on the formation of investment funds and insurance matters.

**W**hile the global regulatory space is ever-changing, Bermuda is committed to ensuring that its regulatory regime remains practical and effective so as to maintain consistency with international best practice. It continues its proactive approach to assessing its framework and ensuring it can sustain the global requirements for co-operation and transparency.

The Alternative Investment Fund Managers Directive (AIFMD) was developed to address a number of risks identified in respect of alternative investment funds (AIFs) in the wake of the financial crisis, which exposed a series of vulnerabilities in the global financial system that contributed to the severity of the global economic crash. The European Commission, having noted that managers of AIFs were responsible for a significant amount of invested assets and exercised substantial influence on the markets and companies in which they invest, determined that steps had to be taken to regulate their activities with the aim of ensuring that if there was another financial crisis; clients' money would be protected. The Directive is therefore aimed at regulating the distribution and marketing of AIFs and their management organisation and operations:

- by increasing the transparency of alternative investment fund managers (AIFMs) towards investors or stakeholders,
- by providing tools for regulators to monitor systemic risk, and
- by ensuring investor protection, achieving a single European market and increasing the accountability of AIFMs holding controlling stakes in companies.

The AIFMD, approved in November 2010 by the European Parliament, was adopted by the European Council on 27 May 2011 and entered into force on 21 July 2011. European Union (EU) member states were then given two years to incorporate the Directive into national law. The Directive will shape and influence the forms investment funds under management will take and is designed to directly regulate AIFMs while indirectly monitoring AIFs and their service providers.

The activities of AIFMs are currently regulated by a combination of national regulations and general provisions in EU law, supplemented in some areas by industry standards. The Directive's objective is to establish requirements for the authorisation and supervision of AIFMs, in

order to provide a consistent approach to the related risks and their impact on EU investors and markets. Through the Directive, national regulators in each member state will supervise AIFMs and not the AIFs they manage. The AIFMD is due to be implemented across Europe by 22 July 2013. The Directive applies if the AIFM or AIF is EU-based or if the AIFM intends to market its investment fund(s) in the EU.



THE ACTIVITIES OF AIFMS ARE CURRENTLY REGULATED BY A COMBINATION OF NATIONAL REGULATIONS AND GENERAL PROVISIONS IN EU LAW, SUPPLEMENTED IN SOME AREAS BY INDUSTRY STANDARDS



The Directive will impact numerous areas of business for AIFMs, including:

- how AIFMs distribute their funds, cross-border or otherwise,
- how they remunerate their people,
- how operational workflows are communicated to regulators,
- the conduct of the business and general operating requirements: AIFMs must comply with organisational requirements such as capital, conduct of business, conflict management, risk management, remuneration and delegation,
- complying with rules relating to the fund: liquidity management, valuation, depositary, transparency, leverage, distribution and controlling interests,
- how AIFMs deal with custodians and depositories,
- how AIFMs monitor funds and oversee the verification of ownership of non-custody assets, and
- ensuring transparency and the extensive pre-investment disclosure requirements for initial offering documents.



European Parliament,  
Brussels

The new rules will also impact non-EU AIFMs. While non-EU AIFMs will still not be formally regulated or need to hold statutory regulatory capital, EU countries and jurisdictions where funds are marketed will impose some reporting requirements.

As Bermuda is one of the leading international financial centres for AIFs, its government and investment funds industry have dedicated significant efforts to understanding and working alongside the EU and the European Securities and Markets Authority (Esma) to make the implementation process (and the effect of the AIFMD on Bermuda-based funds and fund managers who want to conduct business in Europe once the AIFMD is implemented) run effortlessly and to ensure that the fund sector can continue to operate from Bermuda successfully.

Investment funds based in Bermuda, or funds whose managers are based there, are required to meet certain conditions if they are to be marketed in Europe under the current private placement regimes of EU member states and, following the anticipated extension of the passporting regime (which will permit the distribution of AIFs in any EU member state without additional authorisation or registration requirements and which will replace, after a transitional period, the national private placement regimes) to countries which are classified as “third countries”. There are three core conditions applicable to third countries under the AIFMD which must be satisfied, namely that:

1. there is in place a cooperation agreement with the third country fund domicile and home member state,

2. third countries (manager domicile or fund domicile) are not on the Financial Action Task Force list of non-cooperative jurisdictions, and
3. agreements for exchange of information for tax purposes are in place between EU States and the third country.



**Andrea Moniz-DeSouza**

is an associate in CHW's Corporate and Commercial Department. She advises Bermuda-based and international clients on a range of corporate and commercial matters. She has particular expertise in the establishment of investment vehicles, including issues relating to structuring and operating investment vehicles, corporate governance and regulatory compliance.

As Bermuda has a 60-year track record of firm and fair regulation designed to provide a climate of safety and security, its sophisticated regulatory framework for investment funds already provides a solid foundation to support the level of cooperation Esma is seeking. The Bermuda Monetary Authority is aiming to sign the co-operation agreements required for third country regulators under the Directive before the July deadline and has confirmed that Bermuda is able to satisfy these three core conditions. Bermuda will continue to be able to offer significant benefits for new and existing funds and fund managers seeking access to European markets.

The Government of Bermuda and its investment funds industry are collectively ensuring that Bermuda continues to be recognised as a sophisticated jurisdiction with considerable expertise and a professional services infrastructure to support fund business with global scope. Bermuda plans to continue its tried and tested strategy of rapidly adapting its business and social infrastructure to facilitate fund managers and investors in their flight to quality, economy and user-friendly jurisdictions. Bermuda is consistently regarded as a jurisdiction that offers responsible regulation and it is the fund domicile of choice for the most reputable participants in the global investment funds market. ■