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By email to: taxtreaties@oecd.org

3 February 2017

Dear Sir/ Madam,

BEPS Discussion Draft on non-CIV examples

PricewaterhouseCoopers International Limited on behalf of its network of member firms (PwC) welcomes the opportunity to comment on the OECD's *Public Discussion Draft on non-CIV examples*.

We appreciate the efforts from the OECD in finding a solution for non-CIVs and acknowledge that the issue is complex and it is difficult to find a one-size fits all solution. We find it very helpful that the OECD is considering including three examples on non-CIVs alongside the CIV example (Example D) in draft updated Commentary for the OECD Model Tax Convention on the principle purpose test (PPT).

The Discussion Draft of 6 January states that the approach and text are provisional and not definitive. We appreciate that this is usually the caveat made in drafts of this nature and the examples are recognised as "substantive proposals for analysis and comment". We hope that some nuances can still be clarified but welcome the progress already shown in the discussion draft as regards treaty entitlement of some non-CIVs and our comments below are set out with that in mind.

The positive tone and emphasis on encouraging cross-border investment are particularly welcome. The restriction to three illustrations is understandable given the overall number of examples in the proposed Commentary. The extent to which indicators of a 'good fund' can be squeezed into three examples is limited but we appreciate the attempt to do so. In particular, the headings which refer to the nature of the example in each case appear illustrative rather than limiting the funds which may qualify and the requirements applicable to each type of fund.

The term 'non-CIV funds' comprises many different type of funds and while the examples may fit the case of some non-CIV funds there may in common cases also be differences. Therefore, it would be helpful if the OECD would confirm that not being able to match any one particular point set out in the examples does not necessarily, of itself, exclude a fund from passing the PPT and/ or otherwise accessing treaty benefits. The required determination will involve assessment of a balance of all the facts and circumstances. This could, for example, be clarified by adding additional commentary to accompany the examples, particularly in relation to the points raised below.

1. The regional nature of the platform and reference to its parent 'Fund' in Example 1 as an institutional investor (which could include an entity that pools large investments by a range of investors that are largely themselves institutions) appear descriptive.



2. The fiscal transparency of the fund or partnership in Example 3 does not seem to affect materially the subsequent analysis, so is more of an attempt to provide a fact pattern that people may associate with some, but not all, instances.
3. The fact patterns of two of the three examples describe that the fund is subject to some form of regulation. Compare in this respect Example 1 (where the fund itself is subject to regulation) with Example 3 (where the manager of the fund is subject to regulation). It would be helpful to clarify the relevance and the level of regulation especially where only the manager of a non-CIV fund is regulated and not the fund. This could for example be done by acknowledging in the examples that it is not uncommon in non-CIV fund structures that only the manager is subject to some form of regulation.
4. One of the facts included in the fact pattern described in Example 1 is that the regional investment platform also makes private market investment in its jurisdiction of residence. Depending on the type of fund and investment focus of the fund, this may not be a relevant factor per se. It may be emphasized that when setting up a globally active investment entity other factors such as a jurisdiction with a well-established regulatory and legal regime, amongst others, for purposes of marketing the fund to investors, may be more important.
5. The balance between having an experienced management team in the platform's location and the composition of directors of the board resident there (and the extent of activities they carry out) may presumably differ. It seems the overall substance in that location may include but not be limited to residence of members of the platform's board and of Fund's 'global management team' who may be employees of Fund or otherwise. It would also not be unusual for the local management's expertise to include reviewing investment advice provided by others, who may not be local, and that should not be prejudicial.
6. The equivalence of benefits which a resident of a State T (Fund location) that has a tax treaty with State S (investee location) achieves compared to those provided under the tax treaty between State R (platform location) and State S is perhaps confusing. It might be better to ensure all examples refer to there being a treaty benefit, albeit one that is not a major factor in the commercial decision to make the investment.
7. In Example 2, the bank retaining a small percentage of the listed debt issued is presumably a reference to a regulatory requirement rather than a factor that has to be considered. The residence and treaty status of the bank also then seem to be largely irrelevant matters. Where they may be more relevant is where the bank plays a more significant role, say, involving a total return swap with the platform over the investee shares, where it would appear more appropriate for the tested party in relation to the treaty benefit to be the bank rather than the platform.
8. It is seldom an important consideration in setting up the platform that an entity is there to administer claims for withholding tax relief, so we assume this is merely a small factual matter in a particular fictional illustration. We suggest that to avoid the risk of there being an overly narrow scope for applying the Example, the two sentences concerned simply be deleted.



We would be very keen to discuss with you any questions you have on the points we raise above or on other specific matters raised by respondents to the Discussion Draft.

Yours faithfully,

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