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Dear sir/ madam,

BEPS Discussion Draft: Treaty Residence of Pension Funds

PricewaterhouseCoopers International Limited (PwC) welcomes the opportunity to comment on the OECD's *Public Discussion Draft on the Treaty Residence of Pension Funds*.

We commend the Working Party for its efforts to date in reaching agreement over many of the recommendations. We set out in this document our concerns over some areas and our responses to the OECD's specific questions.

We appreciate your consideration of our comments on the Discussion Draft and we would be pleased to assist the OECD further in its efforts in this area.

The response in the pages that follow reflects the views of the PwC network of firms.

Overview comments on the Discussion Draft

We recognise the OECD's endorsement of the explicit recognition of pension funds as tax treaty residents and greatly appreciate that the draft Commentary now formalises a lot of what is current practice by acknowledging that most states already view such entities as residents for purposes of the Model Tax Convention.

It is important in some circumstances that a recognised pension fund is considered 'liable to tax', even if it benefits from an exemption from corporate income tax. The OECD could make this even clearer in the Commentary beyond saying that "In many States, a person is considered liable to comprehensive taxation even if the Contracting State does not in fact impose tax".

It is important to note the potential for double taxation for pension funds and pension beneficiaries, so a reciprocal exemption from source taxation for pension funds should also be considered.

We note that it is also important to recognise certain pension business written by life insurance companies as able to benefit from reliefs and exemptions available to pension funds. It is important that the drafting does not inadvertently impact on the status quo in this regard.

Treatment as a separate person

The form of entity or arrangement which constitutes a pension fund for the purposes of the Model Tax Convention should include, under the laws of a state, any legal framework for establishing a procedure that is treated as a person for tax purposes. In a particular state that could include the trustees of a trust, a body which may include beneficiaries, a contractual arrangement, sponsors or others potentially regarded as owners or stakeholders. We note that the Discussion Draft states that "Consultation with stakeholders will be necessary to ensure that the definition and its Commentary cover the main forms of pension funds that currently exist" and, in that regard, the status quo for the life insurance companies with pension business that currently qualify will need to be maintained. Such pension business is a separate contractual arrangement which is regulated and which is part of that insurance company. We refer for example to the competent authority agreement between the United States and the United Kingdom qualifying it as a pension scheme pursuant to the UK-US double tax treaty.

The current wording of Article 3 and Article 4 of the Model Tax Convention and Article 3 of the 2016 US Model Tax Convention do not require the existence of a separate person and the addition of the words 'treated as a separate person' potentially puts at risk qualification under the legal frameworks of some states. It is sufficient that the entity or arrangement is recognised within the context of the taxation laws of the state.

Retirement or similar benefits an exclusive purpose

The discussion draft posed two questions that appears to be closely related. The first is as regards the purpose of the fund having to relate to the provision or administration of retirement or similar benefits. The second is that the purpose is the exclusive reason it was constituted or operates. There is also a connected point about the fund having to be regulated as such.

A recognised pension fund should be constituted, and required to operate, essentially with the purpose of providing retirement or similar benefits. But it does not seem necessary for this to be an exclusive purpose such that, as is relatively common, such funds cannot carry out relatively small activities that would not be described as similar to retirement often serve a social or public purpose.

A number of states currently allow for some leeway in the activities that can be performed by pension funds through an 'exclusively or almost exclusively' test. This was also the wording used in paragraphs 12 and 13 of the final version of the Report on Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances), which was presented to the G20 in October 2015, as regards the follow-up work required. We also refer to the 2016 US Model Tax Convention which contains 'exclusively or almost exclusively' in the activities test for pension funds.

Activities that may be performed by pension funds that may or may not be considered similar to providing retirement benefits might include, for example, certain health products (such as screening), financial advice (such as in relation to savings) or certain housing-related benefits (such as mortgage advice). Australia, for example, legislated criteria which allow superannuation funds to release accumulated benefits to members facing conditions of financial hardship. If it were decided necessary for the arrangement to be exclusively for the provision or administration of retirement or similar benefits, it would be critical for the description of what is similar to include these examples and a description of the nature of other benefits now existing or which might be created in future.

Having discussed the purposes of the fund, the additional reference to the fund being "regulated as such by that state or one of its political subdivisions or local authorities" could be problematic. Removal of the words 'as such' would still be sufficient to refer to adequate regulation of a fund's pension arrangements. An example of this would be where a state-owned fund had appropriate constitutional review.

Inclusion of entities or arrangements exclusively to invest funds for recognised pension funds

Pension funds often pool their invested monies in certain joint arrangements or entities and it is appropriate to treat these investment intermediaries in the same way as the pension funds that invest through them.

It is also common for pension funds to invest via wholly-owned entities or arrangements for commercial, legal or regulatory reasons. There does not seem to be any particular reason for such arrangements to have to be within the same state and this is not mentioned in relation to the pooling of monies by pension funds. In some cases, where a pension is investing through a wholly-owned subsidiary, it may be advisable to establish the subsidiary in the same jurisdiction as the situs of the investment as a local entity may have more ready access to the courts should litigation develop. In other cases, a third jurisdiction may sometimes be used because the third jurisdiction has strong creditor protections.

The exclusivity of the arrangements to investment of monies for recognised pension funds and not for wider investment intermediaries seems in keeping with the treatment of the funds themselves.

We hope that the comments we make above are helpful to the Working Party and we remain available to provide any assistance that the OECD may require.

Yours faithfully,

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