ANREV

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AIFMD

AIFMD publication for non-EU fund managers marketing non-EU funds in the EU (third edition)

PwC Singapore in association with its Luxembourg office (headquarters of their Global Fund Distribution services) has launched the third edition of the AIFMD publication for non-EU fund managers marketing non-EU funds in the EU.

This publication provides an overview of the main requirements and steps to follow in order to market without passport within the European Union.

For details, please click **here**.

Source: PricewaterhouseCoopers, May 2016

ESMA issues second advice on third country AIFMD passport

The European Securities and Markets Authority (**ESMA**) published its second advice as to the application of the AIFMD passport to non-EU managers and non-EU alternative investment funds.

It concluded that, in addition to Guernsey, Jersey and Switzerland, Japan, Canada and, subject to certain conditions, Australia would be eligible for application for a third country AIFMD passport.

Whether a third country AIFMD passport will be introduced is subject to a decision of the European Commission. If and when such decision will be made is still unclear.

For details, please click **here**.

Source: Loyens & Loeff, July 2016

BEPS

BEPS Action 13: Latest country implementation update

KPMG issued a country implementation summary that offers a snapshot of implementation of country-by-country reporting and Master file/Local file documentation requirements in relation to bare erosion and profit shifting (**BEPS**) Action 13 around the world.

For details, please click **here**.

Source: KPMG, August 2016

- **Hong Kong**

  The Hong Kong Government has announced that it has accepted the Organisation for Economic Co-operation and Development's (**OECD's**) invitation to join, in the name of 'Hong Kong, China', as an Associate in the inclusive framework for implementation of BEPS.

  As an Associate, Hong Kong will become a member of the BEPS Project and work on an equal footing with the OECD, the G20 and other countries and jurisdictions to implement the BEPS Package and to develop standards.

  The BEPS Package covers 15 areas, and seeks to ensure that multinational corporations pay a fair share of taxes in respect of their profits, and to plug the loophole of 'double non-taxation' among jurisdictions.

  In becoming an Associate to the BEPS Project, Hong Kong has committed to the comprehensive BEPS Package, including its four minimum standards (i.e. in the areas of harmful tax practices, tax treaty abuse, country-by-country reporting requirements and improvements in cross-border tax dispute resolution), and to its consistent implementation. In coming up with the timelines for implementation, the government will take into account relevant factors such as the characteristics of the domestic tax regime, the envisaged magnitude of legislative changes involved and the practical need to prioritise amongst the BEPS measures.

  The Hong Kong Government is conducting analysis on the BEPS Package, with a view to mapping out its work priorities. The government intends to consult the industry on the strategy for implementing the relevant proposals at an appropriate juncture and prepare for taking forward the necessary legislative amendments.

  For details, please click **here**.

  Source: Clifford Chance Alert, June 2016

- **Singapore**

  On 16 June 2016, the Ministry of Finance announced that Singapore will join the inclusive framework for the global implementation of the BEPS Project.

  Singapore supports the key principle underlying the BEPS Project, namely that profits should be taxed where the real economic activities generating the profits are performed and where value is created. As a BEPS Associate, Singapore will work with other jurisdictions to help develop the implementation and monitoring phase of the BEPS Project.

  For details, please click **here**.

  Source: Mayer Brown JSM, June 2016

Hong Kong

IRD guidance on offshore funds

In May, the Hong Kong Inland Revenue Department **(IRD)** published its guidance on the revised offshore funds exemption (Department Interpretation and Practice Note No.51 **(DIPN 51)**). The new exemption is designed to allow non-resident private equity funds to be exempt from tax in Hong Kong provided the relevant conditions are met. Unfortunately, the legislation is not well drafted and unnecessarily complex and the IRD's guidance has not provided the clarity required for its practical implementation. The many difficulties for real estate funds have been documented elsewhere, including restrictions on investing in Hong Kong real estate, restrictions on investing in various overseas vehicles commonly used for real estate investments, limitations on the roles of holding companies, the need still to manage the fund itself and the target companies from outside Hong Kong, the lack of clarity on the taxation of intercompany debt and restrictions on access to tax treaties. For these reasons, most private equity funds, and especially those in the real estate sector, are likely to find the new rules of limited application.

This paper therefore seeks to highlight a few of the observations the IRD made which are likely to have relevance to all funds, including those which continue to follow existing procedures to manage their tax exposures.

Transfer pricing
DIPN 51 makes it clear that investment managers and advisors based in Hong Kong should be adequately remunerated for their services, and that a cost-plus based performance fee is unlikely to be arm's length. This does not come as a surprise. Despite the absence of any targeted transfer pricing legislation in Hong Kong, the IRD made it clear some time ago that they would expect the arm's length principle to be followed, and we have seen an increasing number of tax audits focusing on the remuneration of Hong Kong managers. To date, these have mainly focused on hedge fund and private equity managers, although the principles would appear to apply equally to real estate funds. We also understand that the IRD is looking to introduce formal transfer pricing legislation, probably later this year. The move towards putting transfer pricing onto a proper legal footing is, on balance, to be welcomed, and will hopefully assist taxpayers in understanding their responsibilities. But, in the meantime, fund managers should ensure that they are able to justify using arm's length principles for the allocation of fees between Hong Kong and offshore managers.

Carried interest
The IRD; sets out a number of circumstances in which it considers that carried interest arrangements should be subject to tax in Hong Kong. Where carried interest is received by the investment manager offshore, the IRD will closely examine whether the remuneration paid to the Hong Kong advisor is adequate, considering the functions, assets and risks attributed to the Hong Kong operations. Similarly, for individuals, the IRD states that as the executives provide services in Hong Kong, distributions from a carry arrangement would be taxable using general anti-avoidance principles, as employment income in Hong Kong, if the distributions are not genuine investment returns.

It is clear that carried interest arrangements will become an increasing focus for the IRD. The IRD states it may look to tax executives where the return they receive differs from a normal investment return received by external investors and where the service fee or employment income they receive for their services is not computed on an arm's length basis. It will therefore be critical that carried interest arrangements are properly structured and documented so that the return is investment income arising from capital at risk, and that employment remuneration is adequately supported by transfer pricing documentation at arm's length for the services.

Residence
The IRD's comments on residence seem to fly in the face of all the available legislation, treaties and case law and are very unhelpful for anyone looking to use Hong Kong as a base for their investment operations. The IRD broadly states that in ascertaining the residence of a holding company, the place of incorporation and the place where the board of directors exercises control over the company should both be ignored. Instead, on the basis that the holding company's operations are limited, its residence should generally follow that of the fund that owns it.

It should be remembered that a holding company within the context of the offshore funds exemption is restricted to a very limited role (in fact, the role is so limited that taken literally it could not fulfil its company law obligations), so it may be possible to differentiate holding companies that are not within the offshore funds exemption. Nonetheless, we have seen an increasing reluctance on the part of the IRD to issue residence certificates to Hong Kong companies unless they can demonstrate "substance" in Hong Kong, and the application form for a tax residence certificate requires details to be provided of Hong Kong resident directors and staff.

Commercially, it is generally not necessary or desirable for a holding company to be substantial so, in the light of the IRD's stance, fund managers should consider whether their existing structures remain appropriate.

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Source: KPMG, June 2016

Legislation on open-ended fund companies gazetted

The Hong Kong Government has gazetted the Securities and Futures (Amendment) Ordinance 2016, which enables the introduction of a new open-ended fund company (**OFC**) structure in Hong Kong. Currently, an open-ended investment fund may be established under the laws of Hong Kong in the form of a unit trust, but not in corporate form due to various restrictions on capital reduction under the Companies Ordinance.

The Amendment Ordinance mainly amends the Securities and Futures Ordinance (**SFO**) to provide for a legal framework for the registration and incorporation of OFCs and the regulation of such companies and their businesses. Its main provisions will commence operation on a date to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

An OFC is an open-ended collective investment scheme set up in the form of a company, but with the flexibility to create and cancel shares for investors' subscription and redemption in the funds, which is currently not enjoyed by conventional companies. Also, OFCs will not be bound by restrictions on distribution out of share capital applicable to companies formed under the Companies Ordinance, and instead may distribute out of share capital subject to solvency and disclosure requirements.

Given that OFCs are set up as an investment fund vehicle, the Securities and Futures Commission (**SFC**) will be the primary regulator responsible for the registration and regulation of OFCs under the SFO. The Companies Registry will be responsible for the incorporation and statutory corporate filings of OFCs.

The detailed operational and procedural matters will be set out in a new piece of subsidiary legislation, the OFC Rules, to be made by the SFC under the SFO.

For details, please click **here**.

Source: Clifford Chance Alert, June 2016

India

Protocol amending tax treaty with Mauritius

Representatives of the governments of India and Mauritius signed a Protocol to amend the income tax treaty between the two countries on 10 May 2016. The Protocol is pending the ratification procedures of each country before it can enter into force.

The Protocol includes measures concerning:

- The source-based taxation of capital gains on shares (e.g., India can impose tax on capital gains arising from the alienation of shares in a company resident in India).
- The benefit of a 50% reduction in the tax rate for a transition period 1 April 2017 to 31 March 2019 will be subject to the "limitation on benefits" (that is, a resident of Mauritius, including a "shell company," will not be entitled to benefits of 50% reduction , the tax rate if it fails the "main purpose" and "bona fide business" tests).
- The source-based taxation of interest income of banks (e.g., interest arising in India to Mauritian resident banks will be subject to withholding tax in India, at a rate of 7.5% for debts or loans made after 31 March 2017, and amounts in respect of debts-claims before that date will be tax-exempt in India).
- An exchange of information and a provision for assistance in tax collection are included.

In terms of India's comprehensive economic cooperation agreement with Singapore, residence based capital gains tax treatment together with LOB clause exists in respect of shares of an Indian company. However, such agreed tax treatment is co-terminus with the current residence based capital gain taxation under the India-Mauritius tax treaty. With the amendment to the tax treatment of capital gains on transfer of shares of an Indian company under the India-Mauritius tax treaty, the similar benefit of the India-Singapore tax treaty may also automatically comes to an end.

For details, please click **here**.

Source: KPMG, May 2016

*Note: A brief summary of this article was published in the ANREV weekly activity email on 18 May 2016, as well as an **ANREV Webinar** on 31 May 2016.*

Vietnam

FATCA agreement between United States and Vietnam

On 19 April 2016, the US Treasury Department released the official text of the intergovernmental agreement (**IGA**) that the United States has signed with Vietnam for implementation of the Foreign Account Tax Compliance Act (**FATCA**). The US-Vietnam IGA is based on the non-reciprocal Model 1B Agreement (No TIEA or DTC). Accordingly, Vietnamese financial institutions will be required to report tax information about US account-holders to the government of Vietnam, which will in turn relay that information to the US Internal Revenue Service (IRS). Article 12(1) of the US-Vietnam IGA provides that the IGA will enter into force on the date of Vietnam's written notification to the United States that Vietnam has completed its necessary internal procedures for entry into force of the IGA. The US Treasury Department states on its web page that Vietnam is not treated as having an IGA in effect, and further that Vietnamese financial institutions cannot be treated as covered by a Model 1 IGA (including for withholding or registration purposes) until the US-Vietnam IGA has entered into force.

For details, please click **here**.

Source: Mayer Brown JSM, June 2016

Global

Amendments to margin rules in Europe trigger uncertainty in trading of derivatives

While real estate, infrastructure, microfinance and private equity funds currently are not required by regulation to post margin on their fund-level derivatives transactions, as a result of new rules being introduced in Europe and the U.S. (as well as other countries), they could soon be required to do so. Both the European and the U.S. margin rules have extra-territorial reach and could potentially affect real estate, infrastructure, microfinance and private equity fund managers in Asia.

Under the new rules in the U.S. and E.U., the obligation to post variation margin was due to start on 1 March 2017. However on 9 June this year, the European Commission (**EC**) announced it would delay the implementation of the requirements. This created the prospect of a major divergence between the regulatory regimes of the U.S. and the E.U. It would have meant that margin would only be required under the rules in the U.S. but not under the E.U.'s rules, while the delay ensued. This lack of harmonisation and the confusion and complexity that it would have caused was a source of major concern for industry bodies and regulators. The result would have been that fund managers and real estate investors (including those in Asia) could face significantly different requirements if they traded with counterparties subject to the U.S. rules, compared with those subject to the E.U. rules.

However, the EC issued an announcement aimed at resolving this disparity. On 28 July 2016 the EC proposed an amendment to the European rules, making the new start date of the obligation to post variation margin the later of 1 March 2017 or 1 month following the entry into force of the final rule. While there may still be a short period during which the U.S. rules are implemented but the E.U. rules are not yet in effect, this delay should not be nearly as long as what was originally feared. When the E.U. first announced its intention to delay the implementation of the margin rules, it appeared as though the variation margin obligation would not begin until the second half of 2017. Therefore the latest announcement goes some way towards addressing industry's and regulators' concerns regarding a lack of harmonisation.

The large number of developments in this area over the past few months as well as the scrutiny which the margin requirements have received from regulators and industry bodies, highlights the need for market participants to track the regulatory landscape closely and understand to what extent they will be affected. At present, regulatory margin seems to be a constantly changing landscape and fund managers or real estate investors who use derivatives for hedging purposes need to be prepared for the introduction of the cross-jurisdictional obligations on a phased in basis. This necessitates an understanding of the timetable for implementation, a clear view of which entities/ trading relationships are impacted and ensuring the appropriate resources are in place to deal with the obligations when they arise.

Source: Chatham Financial Europe Ltd, August 2016

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