ANREV

REGULATORY AND TAX NEWSLETTER

October 2014

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AUSTRALIAN MERGER CONTROL CLEARANCE

This brief outline of Australia's merger control regime is relevant to anyone planning to make a direct or indirect acquisition of shares or assets that would be likely to substantially lessen competition in a particular market in Australia.

Overview

Competition law in Australia is regulated by the Competition and Consumer Act 2010 (Cth) (CCA) and is administered by the Australian Consumer and Competition Commission (ACCC).

The CCA prohibits direct and indirect acquisitions that have the effect, or would be likely to have the effect, of substantially lessening competition in a market in Australia. In addition to injunctions and penalties, divestiture orders can be made for acquisitions that have the prohibited effect on competition in a relevant market.

Unlike some other jurisdictions, formal competition filings are not required in advance of an acquisition of shares or assets although, for an acquisition that may raise competition concerns, it is common to approach the ACCC informally in advance of any public announcement to discuss its likely attitude to the proposed acquisition.

Key issues

- It is common to notify the ACCC through the informal merger review process.
- The focus of prohibition is how the proposed acquisition will affect competition in the market rather than shareholding control.

What is the substantive test for merger clearance?

Acquisitions of shares or assets which have the effect, or would be likely to have the effect, of substantially lessening competition in a market in Australia are prohibited. The focus of the prohibition is therefore on how the proposed acquisition will affect competition in the market, rather than the concept of control.

As such, be aware that any acquisition of shares is potentially subject to the prohibition irrespective of the level of shareholding acquired and even the acquisition of a minority shareholding may attract competition review in certain circumstances.

For example, the following may have anticompetitive effects even if shareholding is below a level which would deliver control:

- horizontal acquisitions may increase interdependence between rivals and lead to muted competition or coordinated conduct;
- vertical or conglomerate acquisitions may increase the acquirer's incentive to foreclose rival suppliers;
- acquisitions may provide access to commercially sensitive information on competitors; and
- acquisitions may block potentially pro-competitive mergers and rationalisation.

In particular, parties are encouraged to notify the ACCC well in advance of completing an acquisition where both of the following apply:

- the products of the parties are either substitutes or complements; and
- there will be a post-acquisition market share of greater than 20% in the relevant markets.

What is the notification regime?

While there are no formal antitrust filings required in advance of an acquisition, it is usual for proposed transactions to be implemented after clearance is obtained. There are three paths to having a proposed transaction cleared or authorised:

- informal merger review;
- formal clearance; or
- authorisation.

Informal merger review

The informal merger review process is flexible in terms of timeframes, confidentiality and information requirements. Informal reviews may be confidential or public — a review may begin as a confidential review and become a public review once the acquisition becomes public. The ACCC can also initiate a review if it becomes aware of a proposed acquisition.

There are no prescribed information requirements when seeking an informal merger review. However, the ACCC encourages the following information to be supplied with a submission:

- background information about the parties and relevant company details;
- market structure and definition (including information about other market participants);
- commercial rationale for the acquisition; and
- details about, and an analysis of the acquisition and any other relevant factors relating to competitive implications.

Formal clearance

A party can also seek clearance from the ACCC on a formal basis. If a formal clearance is sought, the applicant is required to give a court-enforceable undertaking not to complete the acquisition while it is being considered by the ACCC. If formal clearance is granted, it provides the parties with legal protection from court action.

The formal clearance process has mandated timeframes, information and transparency requirements.

In practice, applications for formal clearance are relatively rare.

Authorisation

In cases in which an acquisition is likely to reduce competition in an Australian market (and therefore be unlikely to be cleared) such an acquisition may still be in the public interest.

If the public benefit would outweigh the anti-competitive detriment, then an application can be made to the Australian Competition Tribunal.

The Tribunal will not grant an authorisation relating to a proposed acquisition unless it is satisfied that the proposed acquisition would result, or would be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.

A determination will be made by the Tribunal within three months of an application being made, unless otherwise extended.

Source: Clifford Chance Briefing, July 2014.

Contact Details: David Poddar, Clifford Chance (dave.poddar@CliffordChance.com)

For details, please see:
http://www.cliffordchance.com/briefings/2014/07/an_overview_of_australianmergercontrolclearance.html

RESERVE BANK OF INDIA ISSUES CIRCULAR REGARDING FATCA

The Reserve Bank of India (RBI) has issued a circular advising all payment system providers to take note of the contents of its earlier circular dated 27 June 2014 relating to compliance with the US Foreign Accounts Tax Compliance Act (FATCA).

The June 2014 circular advised all financial institutions in India that India and the US had reached an agreement in substance on the terms of an Inter-Governmental Agreement (IGA) to implement FATCA and India is now treated as having an IGA in effect from 11 April 2014. However, the circular indicated that the IGA would be signed only after the approval of the Cabinet. Further, the circular advised all financial institutions to take note of the following arrangements relating to compliance with FATCA:

- Indian financial institutions would have up to 31 December 2014 to register with US authorities and obtain a Global Intermediary Identification Number (GIIN);
- Indian financial institutions having overseas branches in 'Model 1 jurisdictions', including those jurisdictions where an agreement under Model I has been reached in substance would have up to 31 December 2014 to register with US authorities and obtain a GIIN – since the IGA would be signed after obtaining the approval of the Cabinet, such financial institutions having overseas branches in Model 1 jurisdictions should register only after the formal IGA is signed;
- overseas branches of Indian financial institutions in a jurisdiction having an IGA 2 agreement or in a jurisdiction that does not have an IGA but permits financial institutions to register and agree to a foreign financial institution (FFI) agreement, may register with US authorities and obtain a GIIN before 1 July 2014, to avoid potential withholding under FATCA; and
- overseas branches of Indian financial institutions in a jurisdiction that does not have an IGA and does not permit financial institutions to register and agree to an FFI agreement may not register and their overseas branches would eventually be subject to withholding under FATCA.

The June 2014 circular also advised that if registration of the parent bank/head office is a pre-requisite for a branch to register, such banks may register as per the timeline indicated in the circular.

Source: Reserve Bank of India, Clifford Chance Alerter, August 2014.

For details, please see:
http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=8970

CHINA

BEIJING DE-CENTRALIZES AND SIMPLIFIES FILING REQUIREMENTS FOR REAL ESTATE FIES

In June 2014, the Ministry of Commerce (MOFCOM) and the State Administration of Foreign Exchange (SAFE) jointly promulgated the Circular Concerning Improvement of Filing Process for Foreign Invested Real Estate Enterprises (Circular 340), effective August 1, 2014. Pursuant to Circular 340, MOFCOM delegates to its provincial counterparts (collectively, COFTEC) the authority to review filing applications for foreign invested real estate enterprises (Real Estate FIEs), and simplifies the filing process by adopting an electronic-based filing system, instead of the previously required paper filings. While how the electronic-based filing process will work at any particular COFTEC remains to be seen, we expect that the filing process for Real Estate FIEs to be significantly expedited in the near future.

Overview of Existing Filing Requirements for Real Estate FIEs

On July 24, 2006, six ministries of the People's Republic of China (Ministry of Construction, MOFCOM, National Development and Reform Commission, People's Bank of China, State Administration of Industry and Commerce, and SAFE) jointly issued the *Opinions on Regulating the Access to and Administration of Foreign Investment in the Real Estate Market* ("Circular 171"). Among other things, Circular 171 requires that foreign investors set up Real Estate FIEs to acquire real estate investments in China, and that Real Estate FIEs are subject to approval by relevant COFTEC.

On May 23, 2007, MOFCOM and SAFE jointly issued the *Circular on Further Strengthening and Regulating the Examination, Approval and Supervision of Foreign Direct Investment in the Real Estate Industry* ("Circular 50"). Circular 50, among other things, requires the relevant COFTEC branch that approves a Real Estate FIE to immediately transmit a copy of such approval to MOFCOM for filing, and states that MOFCOM may take corrective measures with respect to Real Estate FIEs that receive improper local approvals. This filing requirement effectively gave MOFCOM the power to substantively review and control COFTEC approvals of Real Estate FIEs.

On July 11, 2007, SAFE issued the *Circular on the Issuance of the List of the First Group of Foreign-funded Real Estate Projects Approved by MOFCOM for Record by the General Affairs Department of SAFE* ("Circular 130"). Under Circular 130, Real Estate FIEs were not permitted to make a foreign exchange registration or to convert foreign currency into RMB (or vice versa) without completing the MOFCOM filing requirements.

On June 13, 2008, MOFCOM issued the *Circular Concerning Administration of Filing for Foreign Investment in the Real Estate Industry* ("Circular 23"). Under Circular 23, MOFCOM authorized COFTEC to conduct substantive review of Real Estate FIE filing documents. After such review, a filing form, chopped by the relevant COFTEC branch and provincial government authority, was to then be submitted to MOFCOM for its filing.

From a practical standpoint, the foregoing requirements meant that a Real Estate FIE did not receive its MOFCOM/COFTEC approval until the relevant COFTEC filing had been accepted by MOFCOM. The acceptance of such filing was not merely an administrative matter, but represented another necessary Real Estate FIE approval.

Summary of Circular 340

A. Simplified Filing Process

Circular 340 significantly simplifies the existing filing process for Real Estate FIEs as follows:

- Under Circular 23, although the relevant COFTEC branches were empowered to conduct substantive Real Estate FIE review, a provincial government authority sign-off was necessary and, more importantly, MOFCOM's acceptance for filing was required as the final step for any Real Estate FIE to receive government approval. Under Circular 340, however, MOFCOM delegates to the relevant COFTEC branches the power to review filing materials submitted by Real Estate FIEs – if the relevant COFTEC branch determines that the filing materials are in order, such COFTEC branch can directly complete the Real Estate FIE filing without approval, acceptance or sign-off of either the provincial government authority or MOFCOM.

- After the relevant COFTEC branch completes a Real Estate FIE filing, Circular 340 simply requires such COFTEC branch to transmit the electronic data in respect of such Real Estate FIE to MOFCOM via their internal online system, as opposed to filing a paper form as previously required under Circular 23.

As a practical matter, it is exceedingly unlikely that a COFTEC branch will reject the filing application of any Real Estate FIE with respect to which that COFTEC branch has granted approval. Therefore, after the August 1, 2014 effectiveness of Circular 340, we expect that the Real Estate FIE filing will become merely an administrative matter, instead of the approval that it currently is.

B. Random Check by MOFCOM

- MOFCOM will, on both a weekly and quarterly basis, perform a random check on Real Estate FIEs, which have passed filings with the relevant COFTEC.

- Real Estate FIEs, which have been filed by COFTEC, except for those which fail to pass MOFCOM's above-referenced checks, will be published on the official website of MOFCOM and, thereafter, will be permitted to make foreign exchange registrations and to convert foreign currency into RMB (or vice versa).

Conclusion

Prior to the promulgation of Circular 340, it was not uncommon for it to take six months or longer to complete the MOFCOM filing in respect of the establishment of, or a capital increase or transfer of an equity interest with respect to, a Real Estate FIE. In certain cases we are aware that parties have canceled prospective transactions given the uncertainty of either completing the MOFCOM filing or the expected length of time for completion, notwithstanding the receipt of approval from the relevant COFTEC branch.

Circular 340 significantly simplifies the filing requirements for Real Estate FIEs, removing both the provincial government's sign-off and the MOFCOM acceptance for filing requirements. This is positive news for foreign investors in Chinese real estate, and appears to be a signal from the Chinese central government to the market that existing restrictions on foreign real estate investments are being loosened.

Source: Paul Hastings Publications, July 2014.

Contact Details: David Blumenfeld, Paul Hastings (davidblumenfeld@paulhastings.com)

For details, please see:
http://www.paulhastings.com/publications-items

CHINA SECURITIES REGULATORY COMMISSION CONSULTS ON PRIVATE FUND RULES

The China Securities Regulatory Commission (CSRC) has published a consultation draft of the 'Interim Administrative Rules on Private Investment Funds', which are intended to promote the development of the private fund industry. The rules will apply to privately-offered investment funds that raise capital from qualified investors and invest in stocks, equities, bonds, futures, options, fund interests or other subjects as agreed in the relevant investment contracts (private funds). Amongst other things, under the draft rules:

- managers of private funds are required to register with the Asset Management Association of China and make filings for all the private funds managed by them;
- private funds shall be offered to qualified investors within the limited number as prescribed by the applicable laws;
- 'qualified investors' are subject to a minimum subscription amount of RMB 1 million for each private fund and shall be (i) an entity with a net asset value of no less than RMB 10 million or (ii) an individual who has financial assets of no less than RMB 3 million or an average annual income of no less than RMB 500,000 in the last three years;
- social security funds, enterprise annuity funds, endowment funds, investment schemes regulated by financial regulators and investment management professionals that invest in the private funds under their management will be considered as qualified investors; and
- private funds shall appoint fund custodians unless otherwise agreed under the fund contracts.

The rules will also apply to companies or partnerships set up for investment purposes and managed by fund managers or general partners and the private fund business engaged by the securities companies, fund management companies and securities companies.

The consultation period ended on 10 August 2014.

Source: CSRC, Clifford Chance Alerter, July 2014.

For details, please see:
http://www.csrc.gov.cn/pub/zjhpublic/G00306201/201407/t20140711_257649.htm

HONG KONG

HKMA AND SFC SEEKS CONSULTATION ON OTC DERIVATIVES MANDATORY REPORTING

The Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission (SFC) have released a public consultation paper (2014 Consultation Paper) containing draft rules to implement a mandatory reporting and record keeping regime for OTC derivatives.

Among other things, the 2014 Consultation Paper contains detailed rules on the scope of mandatory reporting of OTC derivatives which are "conducted in Hong Kong" by authorized institutions, approved money brokers and licensed corporations. For example, any Type 9 licensed corporation that enters into a reportable OTC derivative contract on behalf of another person (i.e. a fund) is required to disclose such transaction to the Hong Kong Trade Repository.

Moreover, entities that are "Hong Kong Persons" (broadly, residents in Hong Kong and entities established under Hong Kong law, as well as overseas companies registered or required to be registered under the Companies Ordinance in Hong Kong) and enter into reportable OTC derivative transactions must report such transactions, subject to certain minimal thresholds and in the absence of another Hong Kong regulated person doing reporting such transaction.

Initially, mandatory reporting will be limited to:

- Non-deliverable forward transactions in ISO 4217 currencies (including some precious metals) to be specified by the HKMA;
- Plain vanilla floating vs fixed interest rate swaps in ISO 4217 currencies and floating rate indices to be specified by the HKMA; and
- Plain vanilla floating vs floating basis swaps in ISO 4217 currencies and floating rate indices to be specified by the HKMA.

The requirements are expected to be introduced by the end of Q4 2014 or in early 2015.

Source: Clifford Chance Client Briefing, July 2014.

Contact Details: Matthias Feldmann, Clifford Chance (matthias.feldmann@CliffordChance.com)

For details, please see:
http://www.cliffordchance.com/briefings/2014/07/hong_kong_releasesconsultationpaperondraf.html

SFC PUBLISHES REIT CODE AMENDMENT CONSULTATION CONCLUSIONS

The Securities and Futures Commission (SFC) has published the conclusions of its January 2014 consultation paper on proposed amendments to the Code on Real Estate Investment Trusts (REIT Code). The proposed amendments are intended to give real estate investment trusts (REITs) the flexibility to invest in property development activities and financial instruments.

The SFC has indicated that the proposals were generally supported by the market and will be adopted with some modifications and amendments taking into account the comments received. The revised REIT Code will become effective after it is published in the Government Gazette. The SFC will also provide further practical guidance to the industry by way of a set of frequently asked questions (FAQs).

Source: HKSFC, Clifford Chance Alerter, July 2014.

For details, please see:
http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=14PR91

REVISED REIT CODE TAKES EFFECT

The Securities and Futures Commission (SFC) has announced the gazettal and the commencement of the revised Code on Real Estate Investment Trusts (REIT Code). Amendments to the REIT Code have been made to implement proposals to give real estate investment trusts the flexibility to invest in property development activities and financial instruments.

The SFC has also published an updated set of frequently asked questions (FAQs) to provide further guidance to the industry on how to apply the amendments. Questions 6, 11 and 19 have been updated and Questions 39 to 50 have been added.

The revised REIT Code became effective on 29 August 2014.

Source: http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=14PR107

SFC REPORTS ON ANNUAL FUND MANAGEMENT ACTIVITIES SURVEY FOR 2013

The Securities and Futures Commission (SFC) has published its report on the annual fund management activities survey 2013. The survey found that the combined fund management business in Hong Kong hit another record high of assets under management (AUM) of HKD 16,007 billion as of the end of 2013, representing year-on-year growth of 27.2%. The report indicates that Hong Kong continued to be a preferred platform for international investors to invest in Asia. Contributions from overseas investors reached a historic high of HKD 11,382 billion, 72% of the total fund management business in 2013.

Amongst other things, the report notes that:

- non-REIT (real estate investment trust) asset management business increased by 38.5% to HKD 11,417 billion in 2013;
- other private banking business increased by 2.7% to HKD 2,752 billion in 2013;
- fund advisory business grew by 11.6% to HKD 1,661 billion in 2013; and
- the market capitalisation of SFC-authorised REITs increased by approximately 1.7% to HKD 177 billion in 2013.

Source: HKSFC, Clifford Chance Alerter, July 2014.

For details, please see:
http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=14PR84

KOREA

GOVERNMENT REGULATIONS TO EASE FOREIGN DIRECT INVESTMENT

The Korean Government has announced that it will ease regulations on foreign direct investment (FDI) in order to improve business conditions in Korea, lessening the number of procedures required for foreign investors to invest in Korea. The government will also simplify regulations in Free Economic Zones (FEZs) and Free Trade Zones (FTZs).

The government intends to shorten existing notification and registration procedures, requiring fewer documents. The government has decided to automatically cancel business registrations when an FDI firm shuts down its business and reports the closure to the tax office, shortening the existing cancellation time. The government will reduce the number of existing reports and change the registration procedure when an FDI firm transfers stock from its business. The government has also agreed to abolish the capital goods registration system, which, under the special tax treatment control law and customs law, entitled a tax reduction for ex post facto management. Further, the current notification and reporting procedures related to new technologies will be eased by removing the notification process when businesses sign a contract on new technologies in the aerospace or defense sectors.

Regarding FEZs, the government has decided to adopt a so-called ‘negative system’ with regard to regulations at eight FEZs, including the one in Incheon. In the past, FDI businesses were required to get specific permission from the ministry whenever they wanted to change their development plan or start a new project, unless it was a minor issue. Under the proposed arrangements, such firms will be able to receive permission from the mayor or governor of the related city or province, instead of from the ministry directly, except on some crucial projects that require government funding. In an effort to turn Korea’s FEZs into hubs that create high added-value services, the government has indicated it will improve regulations and limitations concerning education, tourism, medical services and other sectors related to FDI firms.

To promote trade, the government has decided to abolish the ‘move-in permit system’ in thirteen FTZs built around industrial complexes, airports or container terminals. Businesses that wish to move into the zones can now sign contracts with the FTZ authority, as long as it meets certain requirements. In the past, such businesses were required to receive permission from the government, which first screened and approved each applicant.

Source: Korea Ministry of Trade, Industry and Energy, Clifford Chance Alerter, May 2014.

For details, please see:
http://www.korea.net/NewsFocus/Policies/view?articleId=119491

MINISTRY OF STRATEGY AND FINANCE ANNOUNCES TAX REVISION PROPOSALS FOR 2014

The Ministry of Strategy and Finance (MOSF) has announced the tax revision proposals for 2014. Amongst other things, the proposals are intended to stimulate the economy and provide for a fair and transparent taxation regime. The key proposals regarding the business/corporate sector include the following:

- income tax deduction will be increased from 50% to 100% for the first 15 million won of investment in venture businesses until 31 December 2017;
- tax exemptions (non taxable profits on stock sales, for example) for venture investment firms and venture investment cooperatives will be extended for 3 years until 31 December 2017;
- the corporate tax deduction for dividend income taxes paid by overseas secondary subsidiaries will be lifted, and the domestic parent companies will be required to hold more than 25% (previously 10%) of shares in overseas primary subsidiaries to receive the tax deduction;
- independent taxation for social overhead capital (SOC) bonds, the tax deduction given to losses from overseas fund investment, and the sales tax exemption for stock transactions by special purpose companies for recapitalisation will be ended;
- a cap will be put on independent taxation for overseas resources development funds at 200 million won;
- overseas tax evasion regulations will be strengthened by requiring Koreans to pay income taxes after residing in the country for only 183 days (used to be over 1 year);
- the tax exemption on overseas asset gifts will be lifted and a tax deduction on taxes paid overseas will be introduced;
- the statute of limitations on tax evasion which involves international trade, and the penalty tax for tax frauds will be increased;
- tax deductible interest payment costs for multinational corporations will be reduced from debt amounting to the three fold of capital to the two fold; and
- a value-added-tax (VAT) on financial and insurance services will be imposed starting from 1 July 2015.

Source: Korea Ministry of Strategy and Finance, Clifford Chance Alerters, July 2014

For details, please see:
http://english.mosf.go.kr/pre/view.do?bcd=N0001&seq=3661&bPage=2

SINGAPORE

PROPOSED REGULATORY CHANGES IN SINGAPORE AFFECTING PRIVATE REAL ESTATE VEHICLES

The Monetary Authority of Singapore ("MAS") issued a Consultation Paper in July 2014 seeking feedback on its proposals to enhance regulatory safeguards for investors in the capital markets. Some of these proposals will have an impact on private real estate funds which are offered to the non-retail public in Singapore, as they impact offers made pursuant to a specific exemption or safe harbour" under the Securities and Futures Act of Singapore ("SFA") such as offers made to "accredited investors" and "institutional investors".

A. Proposed changes to the definition of an accredited investor in the SFA and the accredited investor regime

The definition of "accredited investor" will be refined such that inter alia (i) a corporation which is wholly owned by accredited investors; and (ii) a trustee of any trust in which all beneficiaries are accredited investors, will each be considered an accredited investor. Previously, a corporation wholly owned by accredited investors will only be an accredited investor provided its sole business is investment holding and a trustee of a trust will only be considered an accredited investor if the value of the total assets under the trust exceed S$10 million.

The MAS is also proposing to move to an opt-in regime for accredited investors under which an eligible accredited investor has to take a positive step to accept being treated as an accredited investor before he/she/it may be treated as such. This means that before a private fund can be marketed under the relevant exemption to such investors, the distributor would have to ascertain that they have opted in to accredited investor status.

B. Proposed changes to the definition of an institutional investor in the SFA

The definition of an "institutional investor" will be expanded to include inter alia (i) foreign entities carrying out financial services activities and that are authorised, licensed and/or regulated in one or more foreign jurisdictions; and (ii) all central governments and central governmental agencies of foreign states, supranational governmental organisations (e.g. the World Bank and the International Monetary Fund) and sovereign wealth funds.

While the opt-in regime for accredited investors may impose an administrative burden on distributors, the changes to the definitions of "accredited investor" and "institutional investor" will broaden the range of investors to which a private real estate fund can be offered.

Notably, private real estate funds will be able to rely on the institutional investor exemption under the SFA to offer their shares to sovereign wealth funds and foreign entities carrying out financial services activities that are authorised, licensed and/or regulated in one or more foreign jurisdictions (and which were previously excluded from the definition of an "institutional investor"), without having to meet the SFA prospectus requirements.

C. Proposed changes to the definition of a collective investment scheme ("CIS")

At present, CISs are arrangements in respect of any property which exhibit all of the following characteristics:

1. participants have no day-to-day control over the management of the property;

2. the property is managed as a whole by or on behalf of the scheme operator;

3. participants' contributions are pooled;

4. profits or income of the scheme from which payments are to be made to the participants are pooled; and

5. the purpose or effect of the arrangement is to enable participants to participate in profits arising from the scheme property.

One key element of the current definition of a CIS is that the contributions of the investors must be pooled together for the purpose of enabling investors to participate in, or receive profits through, their investment. The MAS intends to amend the regulatory regime by regulating arrangements which present all the elements of a CIS except for the pooling of contributions. Such arrangements will be subject to the same regulatory regime as CISs.

The expansion of the CIS regime will likely catch the following investment schemes in respect of real estate:

1. arrangements in which investors are offered fractional interests in undeveloped land and are required to use the scheme operator's services in obtaining planning permission for, or disposing of, the land as a whole (or both);

2. an investment into land for forestry or harvesting purposes, where investors acquire fractional interest in a plantation plot or individual trees on a plantation plot, but with the day-to-day control of the plantation plot left in the general management and control of the scheme operator; and

3. a buy-to-let scheme in which: (i) investors are offered units in real estate on the understanding that the investor will be entitled to participate in rental income generated; (ii) the scheme operator will have control over the rental of the property; and (iii) the rental income is pooled and allocated to scheme participants on a proportional basis to their interests in.

Source: Clifford Chance Client Briefing, August 2014.

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For details, please see:
http://www.cliffordchance.com/briefings/2014/08/mas_publishes_proposalstoenhanceregulator.html

MAS CONSULTATION ON STRENGTHENING THE REIT MARKET

The Monetary Authority of Singapore (MAS) published a consultation paper on a set of proposals to strengthen Singapore's real estate investment trust (REIT) market in October 2014. The proposals will enhance the transparency and corporate governance of the REIT market and improve its attractiveness to issuers and investors.

Singapore's regulatory regime for REITs, established in 1999, provides investors the opportunity to gain exposure to real estate assets while diversifying their risks through a pooling arrangement. The last major review of the REIT regime was conducted in 2007, and since then, the REIT market has grown in breadth and depth. Singapore is now one of the largest REIT markets in Asia.

To instill greater investor confidence in the REIT market, MAS has drawn up a range of proposals, taking into account views and suggestions from industry stakeholders.

The key proposals are as follows:

(a) The REIT manager and its directors will have the statutory duty to prioritise the interests of REIT investors over those of the REIT manager and its shareholders, in the event of a conflict of interest. The Board of a REIT manager will have a stronger independent element, to enhance its objectivity when considering the interests of REIT investors.

(b) REIT managers' performance fees will be computed based on a methodology that primarily takes into account the long-term interests of REIT investors, to better align the interests between the REIT manager and REIT investors.

(c) The development limit of a REIT will be increased from 10% to 25% of its deposited property. In addition, the leverage limit imposed on REITs will be increased from 35% to 45% of the REIT's total assets, while the provision for REITs with credit ratings to leverage up to 60%, will be removed. These proposed changes will provide the REIT with greater operational flexibility to rejuvenate the REIT's maturing portfolio of assets.

(d) The REIT manager will provide more comprehensive disclosure to REIT investors by including in the annual reports, items such as:

    (i) the amount of income support payments received by the REIT;

    (ii) more information on the lease expiry profile and refinancing needs of the REIT; and

    (iii) its remuneration policy for directors and executive officers, and their remuneration.

The MAS consultation paper is available on MAS website and comments should reach MAS by 10 November 2014.

Source: Monetary Authority of Singapore, October 2014

Contact Details: reits@mas.gov.sg

For details, please see:
http://www.mas.gov.sg/News-and-Publications/Media-Releases/2014/Strengthening-the-REIT-market.aspx

ALTERNATIVE INVESTMENT FUND MANAGERS' DIRECTIVE (AIFMD) REFERENCE GUIDE

The one-year transition period for the AIFMD ended on 22 July 2014. INREV has published a reference guide which provides an overview of the regulatory framework, contains a summary of relevant publications of the European Commission, ESMA and member states, and contains links to relevant documents.

Source: INREV Publications

For details, please see:
https://www.inrev.org/publications/185-aifmd

REGULATORY WORKING GROUP

- Matthias Feldmann (Chair), Clifford Chance
- Ben Brandon-King, Aberdeen Asset Management Asia Limited
- Yong Kai Wong, CITIC Capital
- John Moutsopoulos, Norton Rose Fulbright
- Mark Kemper, KPMG
- Kwon Lee, Lee International IP & Law Group
- Pui Ming Lai, Pramerica Real Estate Investors

PUBLIC AFFAIRS

AIFMD Reference Guide

- Overview of regulatory framework
- Listing of EC, ESMA and Member States publications
- Hyperlinks to relevant documents

The Alternative Fund Managers Directive, officially titled Directive 2011/61/EU of the European Parliament and of the Council of the European Union of 8 June 2011 on Alternative Investment Fund Managers[1], but more commonly known as AIFMD, entered into force in the European Union in 2011. Also known as the Level 1 directive, EU Member States were required to implement it into national legislation by 22 July 2013.

Although the Directive became effective on 22 July 2013, EU Alternative Fund Managers (AIFMs) were given a one-year transition period, until 22 July 2014, to apply for authorisation. In the transition period, AIFMs have been obliged to use their best efforts to comply with the requirements of AIFMD.

The AIFM Directive seeks to regulate the managers of alternative investment funds (AIFs), making a distinction on the basis of whether the AIFM is EU or non-EU domiciled. The AIFM must comply with a set of requirements including compliance, risk, organisation and reporting.

AIFMD covers a range of non-UCITS collective investment vehicles including private equity, venture capital, hedge funds and real estate.

Since the adoption of Level 1 measures, the Directive has been supplemented by implementing measures issued by the European Commission, often called the Level 2 Regulations[2], which were published on 19 December 2012. These implementing measures cover:

- Calculation of assets under management (Articles 2-5)
- Methods to calculate leverage (Articles 6-11)
- Additional own funds and professional indemnity insurance (Articles 12-15)
- Operating conditions - general principles and conflicts of interest (Articles 16-38)
- Risk management (Articles 39-46)
- Liquidity management (Articles 47-49)
- Investment in securitisation positions (Articles 50-56)
- Organisational requirements (Articles 57-66)
- Valuation (Articles 67-74)
- Delegation of AIFM functions (Articles 75-82)
- Depositary (Articles 83-102)
- Transparency requirements (Article 103 -112)
- Rules related to third countries (Articles 113-115)

The European Securities and Market Authority (ESMA) has also published numerous other documents contributing to the body of guidance for interpreting and implementing the AIFMD. Additional guidance on key concepts of the AIFMD[3], was released in May 2013, which helps clarify the types of vehicles falling within the definition of ''collective investment undertaking" and structures qualifying for the joint venture exemption.

ESMA issued guidelines on remuneration[4], in July 2013, which provide more detailed guidance on how the Level 1 requirements on remuneration are to be applied.

ESMA also released a standard template and further guidelines on reporting to regulatory authorities[5] covering common supervisory approaches and practices in the application of the AIFMD and its implementing measures.

The European Commission has also issued several other implementing regulations related to AIFMD. In May

2013, the Commission established the procedure for AIFMs that choose to opt in to the Directive[6]. On the same day, the Commission established the procedure for determining the Member State of Reference of a non-EU AIFM pursuant to the Directive.[7]

A definition of closed end funds[8] was also released by the European Commission. Following this definition, AIFs that offer any redemption rights, no matter how limited, will be treated as open ended.

More recently, ESMA published a set of questions and answers[9] addressing commonly raised issues under AIFMD, which is frequently updated. ESMA has also issued a list of alternative investment fund managers[10] authorised by the competent authorities of the Member States on the basis of information provided to it.

Further guidance relevant to real estate vehicles is issued from time to time and can be found on the European Commission[11] and ESMA[12] websites.

National regulators issue further guidance

France

The Authorité des Marchés Financiers (AMF) published AIF guide on modernisation measures for French collective investment products[13]. On 25 July 2013, the AIFMD was transposed into law by the Council of Ministers.

Germany

The Federal Financial Supervisory Authority (BaFin) has published several guidance notes on AIFM[14] focused on Regulations on the Investment Code and FAQs. On 11 April 2014, the German federal government published a draft law[15] amending the Capital Investment Act (KAGB). The draft focused on the distinction between open and closed-ended AIFs.

Luxembourg

The Commission de Surveillance du Secteur Financier (CSSF) published a Q&A providing guidance on practical aspects of the AIFM Law. The latest version of the Q&A[16] was released on 18 July 2014.

Netherlands

The amending bills[17] were submitted to the Parliament between March and June 2013 and after passage the AIFMD entered into force on 25 June 2013.

Sweden

The AIFMD was implemented both via a new Act, the Swedish Alternative Investment Fund Managers Act and other regulations[18], which came into force in July 2013.

United Kingdom

The Financial Conduct Authority (FCA) issued consultation papers[19] on implementation of the AIFMD and a guide on how to complete AIFMD marketing passport application form[20]. However, AIFMs applying for a variation of permission are not required to be authorised by 22 July 2014, only to have submitted a complete application by then. The extensions of the transitional provision does not apply to firms needing new authorisation[21].

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2. *Commission Delegated Regulation, No 231/2013 of 19 December2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0231&from=EN*

3. *ESMA, Issues and Priorities, 2013, http://www.esma.europa.eu/system/files/2013-600_final_report_on_guidelines_on_key_concepts_of_the_aifmd_0.pdf*

4. *ESMA Guidelines on Sound Remuneration Policies under AIFMD, Final Report, 2013, http://www.esma.europa.eu/es/system/files/2013-232_aifmd_guidelines_on_remuneration_-_en.pdf*

5. *ESMA Guidelines on Reporting Obligations, http://www.esma.europa.eu/system/files/2013-1339_final_report_on_esma_guidelines_on_aifmd_reporting_for_publication_revised.pdf*

6. *Commission Implementing Regulation (EU) No 447/2013 , http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL_2013_132_R_0001_01&from=EN*

7. *Commission Implementing Regulation (EU) No 448/2013, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:132:0003:0005:EN:PDF*

8. *European Commission Regulation on Closed End Funds, http://ec.europa.eu/internal_market/investment/docs/alternative_investments/131217_delegated-regulation_en.pdf*

9. *ESMA, Questions and Answers, Application on the AIFMD, 2014, http://www.esma.europa.eu/system/files/2014-esma-868__qa_on_aifmd_july_update.pdf*

10. *ESMA list of Alternative Investment Fund Managers, http://www.esma.europa.eu/European-Union-and-national-contacts*

11. *http://ec.europa.eu/internal_market/investment/alternative_investments/index_en.htm#maincontentSec2*

12. *http://www.esma.europa.eu/*

13. *http://www.amf-france.org/technique/multimedia?docId=workspace://SpacesStore/923b0a56-73bd-428e-9ed7-ec2ee814148b_fr_1.2_rendition*

14. *http://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Jahresbericht/2012/jb_2012_VI_1.1_aifm-umsetzungsgesetz_en.html*

15. *http://www.mondaq.com/x/309010/Fund+Management+REITs/KAGBAmendments+Changes+To+Distinction+Between+OpenEnded+And+ClosedEnded+AIFs*

16. *http://www.cssf.lu/fileadmin/files/AIFM/FAQ_AIFMD.pdf*

17. *http://www.loyensloeff.com/nl-NL/News/Publications/Flashes/Pages/AIFMDupdate15May2012.aspx*

18. *http://www.fi.se/upload/90_English/30_Regulations/1_Regulatory%20code/2013/fs1310_eng.pdf*

19. *http://www.fsa.gov.uk/static/pubs/cp/cp13-09.pdf*

20. *http://www.fca.org.uk/static/documents/notify-fca-cross-border-servies-aif.pdf*

21. *http://cdn.akingump.com/images/content/3/0/v2/30510/UK-Implementation-of-AIFMD-Transitional-Period-Extended.pdf*