efama
European Fund and Asset Management Association

For the attn. of
Mrs. Marlies de Ruiter
Head, Tax Treaties, Transfer Pricing and
Financial Transactions Division
OECD / CTPA

Sent via e-mail: taxtreaties@oecd.org

17 June 2015

Ref. 15/1059

Dear Mrs. de Ruiter,

**REVISED DISCUSSION DRAFT – FOLLOW UP WORK ON BEPS ACTION 6: PREVENT TREATY ABUSE - 22 MAY 2015**

EFAMA[1] welcomes the opportunity to comment on the Revised Discussion Draft **"BEPS Action 6: Prevent Treaty Abuse"** issued on 22 May 2015.

## 1. Part 2.A.1.: Collective Investment Vehicles ("CIV")

EFAMA welcomes the recognition of the importance of ensuring CIV treaty entitlement is retained. We support that the conclusions of the 2010 CIV Report are appropriate in the context of dealing with the application of any limitation on benefits ("LOB") clause.

EFAMA also welcomes the Simplified LOB approach, to the extent that it results in a less subjective outcome than widespread primary reliance on principal purpose tests ("PPT"). The Simplified approach should facilitate the more effective application of such LOB rules for international business generally. We agree that, as intended, the Simplified LOB is likely mean many more source countries preferring the LOB approach. For funds that are primarily sold mainly in just one home or domestic market, demonstrating that most investors are primarily entitled, or at least equivalent beneficiaries, may be quite easy.

Many funds are however much more widely distributed, and Luxembourg or Irish domiciled funds are routinely distributed beyond Europe to Asia and Latin America, with any one fund often achieving

[1] EFAMA is the representative association for the European investment management industry. EFAMA represents through its 26 member associations and 63 corporate members almost EUR 19 trillion in assets under management of which EUR 12.7 trillion managed by 55,600 investment funds at end March 2015. Just over 29,300 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining 26,300 funds composed of AIFs (Alternative Investment Funds). For more information about EFAMA, please visit www.efama.org

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substantial sales in 25-30 countries. In such circumstances, demonstrating compliance with an "equivalent beneficiary" test is less straightforward. Retail funds are typically held through distributors and would only have information about those distributors as legal owners (as opposed to beneficial owners). FATCA and Common Reporting Standard ("CRS") require the financial services industry to enhance the documentation of investors, but even these significant initiatives work on the core principle that each financial institution only sees the next institution in the chain, and only rarely require look-through to the end beneficial investor. So, even a fully CRS compliant fund would not know the treaty entitlement of its end investors.

TRACE, by contrast, is designed to improve efficiency for claiming treaty benefits for investors. The BEPS Action 6 Revised Discussion Draft acknowledges the role of the TRACE project in the practical application of the CIV Report recommendations. We are supportive of early TRACE implementation, but are concerned that in practice implementation may be quite protracted and will not in all cases ensure treaty entitlement of CIVs.

In sum, wider adoption of an LOB approach means more cases where the lack of data about underlying beneficial owners is problematic, and while TRACE is a potential solution for certain distribution structures of CIVs in some countries, it may not be workable for CIVs in all countries or may not be in place for some years. We therefore believe the commentary to the Multilateral Instrument should encourage governments to adopt:

- A purposive approach to applying the 2010 Report[2], and constructive use of the Clause 2(f) proposed in the OECD Report dated 16 September 2014[3], to ensure CIVs are protected even in cases where LOB approaches are practically difficult;

- "Administrative flexibility", such that any analysis of the "equivalent beneficiary" test should be based on available data on a best efforts basis. For example, where a CIV's units are distributed through intermediaries, it should explicitly be permitted that the jurisdiction of the intermediary is taken as the country of residence of the investors on whose behalf the intermediary has invested. Another example is where a CIV has obtained authorization by financial market authorities in order to be distributed in specific countries, it should explicitly be permitted that the CIV's units are deemed to be held by residents of those countries where the units are distributed; and in addition,

- Fast track adoption of TRACE.

## 2. Part 2.A.2: Non-CIV

Unlike CIVs, non-CIV funds are not sold to the public, and although some might be widely held, determining ownership is typically less difficult than for widely held and widely distributed CIVs. The Simplified LOB approach, with a suitably drafted equivalent beneficiaries' provision, might be an appropriate determinant of treaty access.

Non-CIV funds provide vital source of capital to companies, particularly to small and medium businesses, infrastructure projects, property development and other essential economic activities. They are formed for the purpose of providing access to investment opportunities for a variety of

[2] Report on "The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles" adopted by the OECD Committee on Fiscal Affairs on 23 April 2010
[3] Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – OECD – 16 September 2014

investors, typically institutionally investors representing pension funds and insurers. We welcome the proposal to include examples of non-CIV funds in the commentary on the application of the PPT rule, and we hope the examples reflect the true purpose of the vast majority of non-CIV funds. For the purpose of clarity, we also believe that the examples could also illustrate situations where non-CIV funds are used for treaty shopping purposes.

We believe that an appropriately applied LOB rule, along with suitably targeted examples of non-CIV funds in the Commentary should mitigate concerns that non-CIV funds can be used to provide treaty benefits to investors that are not themselves treaty entitled.

However, if there remain concerns about inappropriate access to treaties through non-CIV funds, one additional safeguard would be to deny treaty benefits for non-CIV funds where a single investor (along with its related parties) that is not treaty entitled, or an equivalent beneficiary, holds over 10% of the economic interest in the fund. This would provide even greater surety that it cannot be used for treaty shopping purposes.

We are grateful in advance for your attention to the concerns expressed in this letter and we welcome the opportunity to discuss these with you. In case there is any additional information that we can provide, please contact EFAMA at info@efama.org or +32 (0) 2513 3969.

Kind regards,

Peter De Proft
Director General