UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

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VIA EMAIL
Pascal Saint-Amans
Director
Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
2 rue Andre-Pascal
75775, Paris
Cedex 16
France
(taxtreaties@oecd.org)

Re: USCIB Comment Letter on the OECD Discussion Draft on Treaty Entitlement of Non-CIV Funds

Dear Mr. Saint-Amans,

USCIB is pleased to submit these comments on the "BEPS Consultation Document on the Treaty Entitlement of Non-CIV Funds," dated March 24, 2016 (hereafter, the "Discussion Draft"). We understand that the Discussion Draft was produced as part of the follow-up work on BEPS Action 6, which contemplates that the OECD would continue to examine the issues of tax treaty entitlement presented by non-CIVs. We also understand that the questions and proposals set forth in the Discussion Draft were raised by commentators and do not necessarily represent proposals of the OECD. This process makes providing comments difficult, especially given the short comment period. As a result, USCIB focuses on general principles rather than attempting to respond to particular proposals.

Most importantly, any proposed resolution should keep in mind that the goal of tax treaties is to encourage cross-border trade and investment.[1] Rules that prevent legitimate investors from accessing benefits to which they are entitled run counter to this fundamental principle.

Investment funds should be understood to include all vehicles formed for the purpose of pooling capital contributed to the fund by diverse investors and investing that pooled capital in

[1] The BEPS project has been addressing instances of treaty-abuse that result in the elimination of tax in both the source and residence country. While addressing such concerns is appropriate, USCIB is concerned that the pendulum has swung too much in this direction and legitimate investors will be unable to access treaty benefits to which they are entitled. If this occurs, it will create a drag on cross-border trade and investment, which is undesirable in the best of times and counter-productive as the world economy continues to struggle with the after effects of the great recession.

investments, which investments can include stocks, bonds, other securities and other assets normally held by individuals and corporations for investment purposes. An investment fund will be managed by a manager or sponsor, who may or may not have a capital interest in the fund. Investors in private investment funds often include pension plans, endowments, and charitable foundations.

Although not stated explicitly in the Discussion Draft, we believe that the aim of a tax treaty pertinent to private investment funds should be to impose a final tax only once, at the level of the ultimate investor, at the treaty rate that such investor would be entitled to if he or she had invested directly in the underlying assets of the fund. The tax should be collected by the source country or the residence country (or split between them) depending upon the terms of the applicable treaty. We believe that any regulated, widely-held CIV, such as a US mutual fund or a European UCITS fund, should qualify as a treaty resident and as a per se “qualified person”.

In our experience, investment funds, particularly non-CIVs, are sometimes forced to choose a treaty-eligible vehicle simply to avoid duplicative taxation on their investors. For example, a U.S. private equity fund planning an investment in a European target company might in theory prefer to invest directly, if the source country would look through the fund and withhold only on the basis of the residence and entitlements of its partners. Unfortunately, many treaties do not permit this look-through treatment, or do so under circumstances that make it impossible to obtain certainty. In order to escape an extra level of taxation at the fund level, the fund will instead often invest through a European holding company, for example in Luxembourg, in order to avoid taxation at the fund level. Structuring these investments is complex. A better solution would be to implement a regime for looking through investment funds, as well as alternatives for those funds for which a look-through approach is not feasible.

We believe that the framework for private investment funds should include permitting such investment funds to receive proportional treaty benefits, to the extent that underlying investors in a fund would be entitled to treaty benefits if they had invested directly rather than through a pooled investment fund, as well as an equivalent beneficiary approach formulated to be of practical use. Accordingly, USCIB strongly supports the TRACE[2] project. Experts from countries and business have been working together for years in order to design and implement a system that would both improve compliance and allow taxpayers to claim treaty benefits at source. Implementing the results of the TRACE project -- in a reasonable and orderly time frame -- would go a long way towards achieving those goals, which would in turn alleviate at least some of the double taxation concerns that are raised by non-CIV investment funds. Nevertheless, even in the absence of implementation of the TRACE project, private investment funds are already required to gather detailed information about their investors under myriad regulatory requirements, including FATCA, UK CDOT and OECD CRS. On that basis, we support the adoption of a self-certification system, whether as formally part of the TRACE project or as an addendum to the other regulatory regimes listed above. To the extent that investment

[2] Treaty Relief and Compliance Enhancement Project.

funds have investors who are intermediaries, such intermediaries would be required to conduct similar diligence via the self-certification system.

Finally, while we note with approval the OECD's recent efforts to resolve questions about the eligibility of pension funds to claim treaty benefits as "residents" of the State where they are organized,[3] we also urge the OECD to find reasonable methods for ensuring that pension funds are not effectively denied treaty benefits because of onerous procedural requirements out of all proportion to the treaty abuse risk they pose. It is the norm that pension funds operate to provide a retirement investment vehicle and pension benefits for individuals who are resident in the State where the funds are created. There are a variety of factors (e.g., residence of the employer, employees' need to invest for retirement through funds recognized as tax-favored retirement plans in their country of residence) that point towards very low risk of treaty shopping through pension funds. But procedures that require pension funds to obtain documentation from high numbers of participants or beneficiaries in order to "prove" their status as "qualified persons" pose costly and often unsurpassable barriers to legitimate claims for treaty relief. We urge the OECD to make particular efforts to find reasonable solutions to this growing problem.

Sincerely,

William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)

[3] *Discussion Draft on the Treaty Residence of Pension Funds,* OECD, Paris, February 29, 2016.