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VIA E-MAIL

Ms. Marlies de Ruiter
Head, Tax Treaties, Transfer Pricing and Financial Transactions Division
Centre for Tax Policy & Administration
Organisation for Economic Co-operation and Development
2, rue André-Pascal
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Re: Comments on Discussion Draft on BEPS Action 6: Preventing Treaty Abuse

Dear Ms. de Ruiter:

This letter is submitted on behalf of the members of the Association of Global Custodians ("AGC" or "Association") to provide you with comments in respect of the OECD Revised Discussion Draft: Preventing Treaty Abuse, issued on 22 May 2015 (the "Discussion Draft") pursuant to Action 6 of the BEPS Action Plan.

As you know AGC members have been keenly following (and in some cases actively participating in) the work of the Organisation for Economic Co-Operation and Development ("OECD") for many years on various key tax developments and welcome the opportunity to provide comments to you on the third and final Discussion Draft.

The Association is an informal group of 11 member banks that provide securities safekeeping and asset serving functions to cross-border institutional investors worldwide including investment funds, pension funds, and insurance companies.

In providing global custody services, AGC members routinely seek appropriate tax treaty withholding tax relief on behalf of custody clients. The members typically collectively process millions of such relief claims each year, affecting substantial amounts of cross-border portfolio investment flows in and out of countries worldwide. A significant portion of the income for which the members process treaty relief claims is income received by institutional investors. As such, the AGC members experience on a daily basis the costs, inefficiencies, and excessive withholding that arises when the procedures for claiming lawful relief are unduly burdensome or complicated for the investors involved, or when the

standards for entitlement to treaty relief are too unclear or complicated to effectively accommodate treaty relief claims, whether at source or by refund.

The Association notes on page 1 that the OECD wish for comments to be kept as short as possible and we have endeavored to adhere to that request. Our comments are attached in the Annex.

Sincerely yours on behalf of the Association,

Mary C. Bennett
Baker & McKenzie LLP
Counsel to the Association

Annex

ANNEX

AGC comments on the 22 May 2015 Revised Discussion Draft on BEPS Action 6: Prevent Treaty Abuse

General Comments on Discussion Draft

The over-arching concern the Association has in connection with Action 6 is that there is still no substantive detail around how the testing of a Limitation on Benefits (LOB) or Principal Purpose Test (PPT) will work procedurally for cross-border investors claiming their due entitlements. Based on the Revised Discussion Draft (RDD) there appear to be three possible outcomes in testing under Action 6:

1) A Limitations on Benefit (LOB) accompanied by a Principal Purpose Test (PPT)
2) An LOB accompanied by an anti-conduit rule
3) A stand-alone PPT

We are also concerned that the final version of the Model provisions and related Commentary are due to be finalized by September 2015 without industry input into how operationally the various outcomes will be implemented for cross-border investors. We also note that there are a number of open items yet to be discussed at the Working Party meeting in June 2015 of which the outcome will not be known until the finalization of the model provisions in September 2015. In particular, we acknowledge the comments in the RDD that further work is required on exploring solutions to issues related to the treaty entitlement of non-CIV funds. However, the omission of appropriate solutions dealing with the non-CIV funds and the risk of finalization of Action 6 without appropriately dealing with this issue with the direct participation of relevant stakeholders is a cause of serious concern. We urge the OECD and the governments as a matter of urgency to work with the relevant industry stakeholders to devise workable solutions ensuring non-CIV funds are not denied treaty entitlements, while addressing concerns highlighted in the RDD around treaty shopping and deferral of recognition of income.

The Association very much welcomes the comments in the (RDD) around Collective Investment Vehicles (CIVs) noting that a single approach is not the way to address these vehicles in the practical application of obtaining treaty benefits. Each CIV will have its own specific fact pattern and having the flexibility and the worked examples in the 2010 CIV Report to stand behind (and be adopted by Governments into tax treaties) will almost certainly assist Governments, Investors and Service Providers gaining more comfort on a practical basis.

That being said, we have some concern about how the solutions from the 2010 CIV Report can be accommodated through the proposed multilateral instrument contemplated by Action 15, and we are also concerned about how those solutions would interact with a decision by a State to incorporate a PPT provision in its treaties, whether alone or in conjunction with one of those solutions as part of an accompanying LOB provision. The Association continues to be seriously concerned about the lack of clarity around the application of the PPT to cross-border institutional investors, and we were very disappointed that the RDD did not take the opportunity to provide more guidance on that, instead continuing to rely exclusively on one narrow example regarding an investment fund which raises as many questions as it answers. It will be critical to the stability of the cross-border

portfolio investment markets for there to be much greater clarity around the substantive and procedural application of the PPT simultaneously with its introduction into treaties.

In addition, we wish to stress the importance of ensuring that the "alternative simplified LOB" which is to be offered as a possible provision to combine with a PPT includes a paragraph 2(f) (i.e., a specific provision identifying the CIVs that will be treated as "qualified persons"). We note that the descriptive LOB article set out in the Annex to the RDD includes a paragraph 2(f), but since no corresponding paragraph appears in the sample alternative simplified LOB set out at paragraph 3 of the RDD, we want to make sure the version ultimately included in the Commentary does include the necessary language.

While the Association welcomes the RDD's confirmation that the Working Party 1 delegates "agreed … that the implementation of the recommendations of the TRACE project was important for the practical application of" the conclusions around the 2010 CIV Report, the Association notes that such an agreement at the Working Party level falls far short of the commitment needed by Governments to actually move forward with implementation of the TRACE regime simultaneously with the introduction of any treaty changes based on the outcome of Action 6. If the restrictions contemplated by Action 6 are introduced across a wide number of treaties in the near term (e.g., through the multilateral instrument contemplated by Action 15) without a simultaneous introduction of the procedural mechanisms contemplated by the TRACE Implementation Package to clarify and guarantee how those changes will be implemented in practice, the Association foresees a period of widespread and serious disruption to legitimate treaty claims across the international markets, with correspondingly detrimental effects on cross-border investment. Accordingly, the Association urges the OECD in the strongest possible terms to ensure that any country intending to move forward with introducing the Action 6 restrictions into its treaty network formally commit to simultaneous adoption of the TRACE regime, particularly in light of the pertinent information OECD Member Countries will receive under the OECD Common Reporting Standard, which we expect to be in force prior to the Action 6 recommendations being adopted.

New Developments in the RDD

The Association observes that there are new recommendations being made to Action 6 as a direct result of proposed changes to the US model income tax convention. These are:

- Rule relating to Special Tax Regimes
- Partial Treaty termination
- Restrictions on the trade or business test

The Association notes that when the OECD Model provisions and Commentary are finalized in September 2015, and if these recommendations are adopted, clear procedural guidance of how this will fit into a multilateral instrument will need to be made available. The Association further notes that great care will be needed in drafting any provision aimed at addressing Special Tax Regimes to ensure that it does not operate to inappropriately deny benefits to either State's CIVs or other legitimate institutional investors, including pension funds. We anticipate that this drafting could be difficult to achieve in the context of a

proposal potentially to be included in a multilateral instrument, and we question whether there is adequate time to properly consider this new recommendation at such a late stage in the process.

The Association fully understands the aim of the OECD in introducing a multilateral instrument by December 2016 to combat perceived treaty abuses. However, as a result, the Association can envisage more bilateral agreements (i.e. moving away from the multilateral route) being introduced by Governments, thus meaning more divergence in rules in testing treaty eligibility in an already difficult environment for genuine cross-border investors.

Comments on Previous Issues

The Association has the following comments on the RDD's treatment of issues previously addressed in our comment letter of January 9, 2015, the contents of which we still stand behind.

Issue #2 -- Non-CIV funds: application of the LOB and treaty entitlement

We welcome the RDD's confirmation that there will be a change to the Model Tax Convention to confirm that a pension fund should be considered to be a resident of the State in which it is constituted regardless of whether it benefits from a limited or complete exemption from taxation in that State. We further welcome the RDD's confirmation that consideration will be given at WP1's meeting this month to add further Commentary guidance on the application of the LOB and PPT provisions to non-CIV funds, and that further work to explore solutions to issues related to the treaty entitlement of non-CIV funds might continue between September 2015 and December 2016.

That being said, the Association notes that these are issues of great importance and significant complexity, requiring a full understanding of the different types of non-CIVs, their characteristics, and the types of procedural requirements they could reasonably be expected to satisfy to guarantee their legitimate entitlement to treaty relief. Our January 9, 2015 comment letter expressed particular concern about these issues in relation to pension funds. We therefore urge the OECD, as a matter of highest priority, to lay out a transparent process for identifying solutions to these problems, with the direct participation of relevant stakeholders and with effective consultation, beginning no later than September 2015. We further urge the OECD to ensure that any country intending to introduce the Action 6 recommendations into its treaty work formally commit to simultaneously adopt the solutions so identified.

We also note that under Issue #4 (Alternative LOB provisions for EU countries), the RDD notes the possibility of introducing a new derivative benefits safe harbor for pension funds which would allow a fund to qualify for benefits provided that more than 90 percent of its beneficial interests are held by individuals who are residents of the fund's State or a third State with a comprehensive treaty with the source State, and provided further that the fund, if it were a resident of such third State, would be entitled to the same source State relief as applies under its own treaty with the source State. While we appreciate the apparent intention to preserve treaty benefits in such cases, we note that:

- the availability of this safe harbor will be meaningless unless there is a clear and workable procedure for a pension fund to establish its entitlement to this provision; and
- treaty tests which have required a pension fund to establish its hypothetical entitlement to exemption under the domestic law of another country (presumably a constituent element of establishing satisfaction with the "same rate" test) have proven notoriously difficult to apply in practice, and a better approach here would be to deem the claimant pension fund to be an entity that would qualify as a pension fund under the equivalent beneficiary's treaty and then enquire whether that treaty provides the same withholding tax relief on dividends and interest as the fund's actual treaty does.

Issue #6 -- Issues related to the derivative benefit provision

The Association is pleased the RDD indicates that favorable consideration is still being given to including a derivative benefits provision, strongly urges the OECD to move forward with including such a provision without regard to the outcome of the deliberations on the new proposals on special tax regimes and subsequent domestic law changes, and references its comment above about the applicability of a derivative benefits provision to pension funds.

Issue #12 -- Inclusion in the Commentary of the suggestion that countries consider establishing some form of administrative process ensuring that the PPT is only applied after approval at a senior level

The Association was disappointed that the RDD included such a weak response to the comments urging greater procedural safeguards around the application of the PPT. As indicated in our January 2015 comments, we believe there should be a minimum standard of procedural process around the application of the PPT, and that the minimum standard should include high level panel review of any proposed denial of benefits under the provision and a timely ruling process to obtain certainty about the provision's application. These safeguards remain particularly critical for cross-border portfolio investors in light of the continuing lack of clarity as to the substantive interpretation of the PPT in their circumstances.

Issue #16 -- Drafting of the alternative "conduit-PPT rule"

Finally, the Association believes it is important to confirm that the alternative "conduit-PPT rule" will not operate to deny benefits to a CIV that is a "qualified person" under the LOB (or simplified alternative LOB) provision simply because the CIV distributes its income to its investors. We suggest that a statement be added to the Commentary to provide that confirmation.