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Mr. Jacques Sasseville
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Organisation for Economic Co-operation and Development
Paris, France

October 20, 2015

Dear Jacques,

With reference to our call Thursday 8 October, please find below our comments regarding the pension fund definition as proposed in the final report on action item 6 released on 5 October 2015.

We greatly appreciate the OECD's consideration of the issues raised in the letters filed by the abovementioned parties. As the final report indicates that the OECD will continue work on certain areas of interest to us, we are keen to work with the OECD to further explore solutions that take into account our concerns and particular circumstances, while also addressing national governments' concerns about base erosion and profit-shifting behaviours.

1 The definition of a pension fund

There is considerable diversity in the legal and organizational characteristics of pension funds around the world. It is important that the pension fund definition which is scheduled for adoption by the planned revision to the OECD Model Tax Convention (the "**Model Tax Convention**") appropriately captures the diverse range of such organizations, including entities and arrangements that are constituted and operated exclusively or almost exclusively to invest funds for the benefit of entities or arrangements that will themselves qualify as "recognized pension funds".

We further suggest that the other provisions dealing with pension funds within the Model Tax Convention and elsewhere are harmonized with the definition of a recognized pension fund.¹

We also recommend that this provision be considered for inclusion as part of the BEPS Multilateral Instrument Action.

¹ The definition could be included by adding a new subparagraph (i) to define "Recognized pension fund" in paragraph 1, Article 3 (General definitions) of the Model Tax Convention.

The OECD has suggested certain criteria which need to be met in order to be considered a “recognized pension fund”. We therefore agree with including the following definition by adding a new subparagraph (i) in paragraph 1, Article 3 (General definitions) of the Model Tax Convention (based on the OECD criteria with addition in **bold underline**, deletion in ~~striketrough~~):

- i) the term “recognized pension fund” of a State means an entity or arrangement established in that State that is treated as a separate person under the taxation laws of that State; and*
- (a) that is constituted and operated exclusively or almost exclusively to administer or provide **pension**, retirement or similar benefits to individuals and that is regulated ~~as such~~ by that State or one of its political subdivisions; or*
- (b) that is constituted and operated exclusively or almost exclusively to invest funds for the benefit of entities or arrangements referred to in subparagraph (a).*

We have inserted the term “pension” in subparagraph (a) to ensure the definition is in line with the current US Model Income Tax Convention, this should not change the aim and purpose of the provision.

We have deleted the phrase “as such” in subparagraph (a) as it read “that is regulated as such by that State”. Pension funds can be regulated in a variety of ways. The cumulative requirement to be “constituted and operated ... to administer or provide, pension, ... benefits” should provide sufficient safeguards to prevent unintended use of the recognized pension fund definition by others covered under the same regulation.

Below we will address each of the elements of this definition.

1.1 Limited or complete exemption from taxation

As stated in our previous submissions we agree with the OECD that in order to be considered a recognized pension fund it should not be relevant whether the pension funds benefit from a limited or complete exemption from taxation in the State in which it is resident.

As recognized pension funds will be included in the text of article 4 paragraph 1 of the Model Tax Convention, paragraph 8.4 of the Commentary to the Model Tax Convention (the “**Commentary**”) can be amended to reflect this change. We suggest to amend paragraph 8.4 to read (addition in **bold underline**, deletion in ~~striketrough~~):

*“It has been the general understanding of most member countries that the government of each State, as well as any political subdivision or local authority thereof, is a resident of that State for purposes of the Convention. Before 1995, the Model did not explicitly state this; in 1995, Article 4 was amended to conform the text of the Model to this understanding. **Similarly, in [2015] article 4 of the Model was amended to include a ‘recognized pension fund’ as a resident of that State to reflect the general understanding of most member countries.**”*

For the recognition of pension funds as tax treaty residents in the Model Tax Convention we refer to paragraph 2 below.

1.2 A separate person under the taxation laws of that State

The term “*a separate person under the taxation laws of that State*” is understood in conformity with the current definition of a “*person*” as defined in article 3 paragraph 1 subparagraph a of the Model Tax Convention. We do not see a necessity to further expand on this term in the Commentary or the Model Tax Convention itself.

1.3 Entities or arrangements established in a State and constituted and operated exclusively or almost exclusively to administer or provide pension, retirement or similar benefits to individuals

We suggest to include in the Commentary a new paragraph 8.9:

“The term in article 3 paragraph 1 subparagraph i) “established in that State” is to be understood to include entities or arrangements which are owned by that State. Further, the term “that is constituted and operated exclusively or almost exclusively to administer or provide pension, retirement or similar benefits to individuals” aims to include all entities or arrangements which by virtue of their purpose are

constituted and operated to provide pension, retirement or similar benefits. The purpose of such entity or arrangement could be evidenced by its constituting documents, articles of association or any other means.

With respect to the term “exclusively or almost exclusively”, it is noted that pension funds sometimes have other activities which are complementary or related to the pension fund activities and less frequently perform activities which are unrelated or not complementary. The contracting States may agree on the application of this term taking into account the specific characteristics of pension funds in each of the States.

With respect to the term “regulated by that State”, it is noted that this may be evidenced by a statement from that State or a regulatory authority, a reference to a register held by the regulatory authority (for example on their website), the existence of provisions for accountability and review contained in the entity’s or arrangement’s constituting legislation, an independent person (for example an advisor) confirming that the pension fund is subject to regulatory supervision, or any other means. The regulation itself can take any form as long as it is endorsed by that State.”

1.4 Entities or arrangements that are constituted and operated exclusively to invest funds for the benefit of entities or arrangements referred to in subparagraph (a)

We suggest to include in the Commentary a new paragraph 8.10:

“Pension funds often invest together with other pension funds pooling their assets in certain arrangements or entities, or may for example invest via wholly owned entities or arrangements resident in the same State for commercial, legal or regulatory reasons. These entities or arrangements need to be constituted and operated exclusively or almost exclusively to invest funds for the benefit of recognized pension funds in order for themselves to be considered recognized pension funds. As such these entities or arrangements may claim a reduction or exemption applicable for recognized pension funds if the treaty concluded between the States provides for such a reduction or exemption.”

2 Recognition of pension funds as tax treaty residents

We welcome the OECD’s endorsement of the explicit recognition of pension funds as tax treaty residents.

Article 4 of the Model Tax Convention describes a resident as ‘any person who, under the laws of that State, is liable to tax therein (...)’. The OECD mentions in paragraph 8.6 and 8.7 of the OECD commentary to article 4 that this requirement may sometimes result in uncertainties for pension funds, since these are often exempt from corporate income tax. As most states already view such entities as residents for purposes of the Model Tax convention and as numerous bilateral tax treaties include a definition to that extent, we suggest formalizing current practice by including the following wording in article 4 of the Model Tax Convention (addition in **bold underline**, deletion in ~~strike through~~):

*“For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, ~~and also includes~~ **including** that State and any political subdivision or local authority thereof and **recognized pension funds.**”*

3 Some general comments

We appreciate the OECD’s recognition of the economic importance of non-CIV funds and the need to ensure that treaty benefits be granted where appropriate. Should the OECD wish to receive input from this coalition we would welcome the opportunity to do so.

We also appreciate the insertion of paragraph 2 to article 1 of the Model Tax Convention referred to in the report on action item 6, providing treaty benefits to investors investing via entities that one or both Contracting States treat as fiscally transparent, provided the income derived through such entities will be taxed in the hands of the investors.

In its Public Discussion Draft “Follow up Work on BEPS Action 6: Preventing Treaty Abuse”, released November 21, 2014, the OECD expressed interest in exploring a reciprocal exemption from source taxation for pension funds. However, the final report does not make any recommendations on the matter or sets out any specific steps to further examine the merits of such exemption. To reiterate, we believe this reciprocal exemption is of critical and growing importance to the global pension fund community. Near-term action on the matter is both desirable and appropriate, notably to avoid double taxation.² Further work on this matter would support the OECD’s core objective of fostering economic growth through cross-border trade and investment.

We are of course willing to further contribute in identifying workable solutions and would gladly provide you with our input.

Sincerely,

On behalf of the parties listed above

² For further details, please see paragraphs 23 to 43 of the previous Canadian Submission, in particular regarding the compelling policy rationale for such an exemption, including notably the avoidance of double taxation and paragraph 4 of the previous Dutch Submission, both dated 9 January 2015.