

Capital Markets Tax Committee of Asia

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To: Mr Pascal Saint-Amans
Director, CTPA

By email: taxtreaties@oecd.org

To: Tax Treaties, Transfer Pricing and Financial Transactions Division
OECD/CTPA

Dear Mr Saint-Amans and the Tax Treaties, Transfer Pricing and Financial Transactions Division of the OECD/CTPA

Revised Public Discussion Draft – Revised Proposals Concerning the Meaning of Beneficial Owner in Articles 10, 11 and 12 of the OECD Model Tax Convention ("the Revised Proposals")

CMTC Submission

This submission is respectfully made in response to your invitation for comments on the revised discussion draft issued by the OECD on 19 October 2012. In the Revised Proposals the OECD has made changes to the proposals after consideration of the comments received on the first discussion draft that was released on 29 April 2011.

We wish to thank you for giving us the opportunity to provide our comments.

Capital Markets Tax Committee of Asia ("CMTC")

By way of introduction, the Capital Markets Tax Committee of Asia (CMTC) is a financial services industry body consisting of a number of banks, investment banks, securities firms and other diversified financial services institutions operating in Asia who are represented through their regional tax directors.

CMTC's membership comprises ABN Amro, ANZ Bank, American Express, Bank of America Merrill Lynch, Bank of China International, Barclays Capital, BNP Paribas, Citigroup, CLSA, Credit Agricole CiB, Credit Suisse, Daiwa Securities SMBC HK Ltd, DBS, Deutsche Bank, Fidelity Investments, Fortis Bank, Goldman Sachs, Hang Seng Bank, HSBC, ING, JP Morgan Chase Bank, Macquarie Bank, Morgan Stanley, Nomura, Rabobank, Royal Bank of Canada Capital Markets, Royal Bank of Scotland, Société Générale, Standard Bank Asia, Standard Chartered Bank, Swiss Reinsurance Co and UBS.

The main objects of the CMTC, according to its constitution, are "to provide a forum for discussion by corporate tax managers responsible for the tax affairs of investment banks, securities firms, banks and

other diversified financial services institutions of topical taxation issues in Asia affecting their capital and securities markets and similar activities; ... to keep members informed of up to date information on taxation matters affecting capital and securities markets, and to exchange views on the technical analysis thereof; [and] to represent the interests of its members through acting as the respected voice of investment banks, securities firms, banks and other diversified financial services institutions, and to participate in liaison or advocacy activities on tax matters either directly or indirectly through representation with other groups or societies concerned with or by fiscal matters”.

Submission by CMTC

At the outset, the CMTC acknowledges the importance of the OECD Commentary to the Model Tax Convention and is supportive of the OECD's initiative to clarify the meaning of beneficial ownership to create more certainty for taxpayers.

CMTC members have analysed the OECD's Revised Proposals on the meaning of beneficial owner and set out below our response to these proposals. As requested, we have confined our focus to drafting issues with a view to ensuring that the drafting properly reflects the intention of the OECD in this key area. We have included in Appendix 1 a suggested redrafting of Paragraph 12.4 of the Commentary on Article 10 which takes into account the comments outlined below and have included in Appendix 2 a suggested example which could be added to the commentary for clarity.

Our comments on the revised proposals are as follows:

- Notwithstanding the significant and welcome changes to the original 29 April 2011 discussion draft, in our opinion, some of the changes set out in the Revised Proposals may still lead to a risk of reinterpretation of the concept of "beneficial ownership" and could therefore create uncertainty and difficulty for financial institutions in the ordinary course of their business of financial intermediation. As mentioned in our submission of 14 July 2011, tax authorities in Asia often refer to the OECD Commentary for guidance on the interpretation of Double Tax Treaties. The changes relating to the crucial area of Paragraph 12.4 of the Commentary on Article 10 (and the corresponding Paragraphs relating to Articles 11 and 12) contained in the Revised Proposals remain capable of being interpreted in different ways and this increases the risk that the Commentary will be interpreted inappropriately.
- Specifically, the CMTC is concerned about the introduction of the concept of “related to” in Paragraph 12.4 of the Commentary on Article 10. The CMTC members believe that the phrase, “This type of obligation must be *related to* the payment received” could be interpreted to imply that where any relationship whatsoever exists between a payment received and a payment made, this would preclude the intermediary from being held to be the beneficial owner of the relevant amount. The CMTC believes that a mere relationship between a receipt and a payment or obligation should not be a trigger for concerns that the recipient of the income is not the beneficial owner. We do not believe that this was the intention of the OECD in suggesting the drafting in the Revised Proposals but we are concerned that the inclusion of the “*related to*” concept may be taken to imply that this was the intention of the OECD. To address this concern, the CMTC considers that Paragraph 12.4 of the Commentary on Article 10 should be amended to remove the “*related to*” concept. In Appendix 1 we have suggested some drafting that minimizes any consequential amendment to Paragraph 12.4.
- In contrast, the CMTC does support the approach of describing obligations that are “unrelated to” the payment received, as helpful in illustrating the types of obligations which will not affect an intermediary’s status as beneficial owner.

- The CMTC considers that it would in fact be helpful to expand this section slightly to explicitly include obligations that are merely calculated by reference to the underlying payment received but do not amount to a contractual or legal obligation which constrains the recipient's right to use and enjoy the income. This type of calculation by reference to an underlying payment may be a feature of financial transactions entered into by our members (for example, a hedging transaction) in situations where they are quite clearly the beneficial owner of the payments received. The use of the amount received as a mere basis of calculation for an obligation should not affect this status, and we believe that it would be helpful for the commentary to make this point explicit.
- We have included in Appendix 2, an example of a TRS product illustrating the above position, in support of our submission. CMTC understands the OECD's concerns regarding examples, as expressed in paragraph 31 of the Revised Proposals. Nevertheless, we feel it should be possible to include some examples that provide greater clarity on the OECD's intention in this area, without needing to become too fact specific. We believe the OECD has taken this approach, and done so effectively, with regard to the Commentary on Article 5 of the Model Convention regarding Permanent Establishments, and that this approach can be replicated for the revised Commentary on Article 10.
- In this regard, we submit that the TRS example in Appendix 2 should be included in the final Commentary. CMTC would also be pleased to work with the OECD to further develop this, or other financial services examples, as appropriate.

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If you would like to discuss anything contained in this submission further, we would appreciate the opportunity to do so, especially where it is likely to lead to greater certainty in the interpretation of this important concept.

I can be contacted on +852 2252 6083 or jesse.kavanagh@nomura.com if there are matters you wish to discuss.

Yours sincerely



Jesse Kavanagh
Vice Chairperson
Capital Markets Tax Committee of Asia

Appendix 1

Suggested Changes to Paragraph 12.4 of the Revised Proposals (changes are underlined and deletions are in ~~strikethrough~~)

12.4 In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the recipient of the dividend is not the “beneficial owner” because that recipient’s right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment received to another person. Such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person. This type of obligation ~~must be related to the payment received;~~ it would therefore not include contractual or legal obligations unrelated to the payment received even if those obligations could effectively result in the recipient using the payment received to satisfy those obligations, nor would it include obligations that are merely calculated by reference to the payment received. Examples of such unrelated obligations ~~are~~ include those ~~unrelated obligations~~ that the recipient may have as a debtor or as a party to financial transactions or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 6.8 to 6.34 of the Commentary on Article 1. Where the recipient of a dividend does have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the “beneficial owner” of that dividend. It should also be noted that Article 10 refers to the beneficial owner of a dividend as opposed to the owner of the shares, which may be different in some cases.

Appendix 2

Example: Total Return Swap

X, a financial institution resident in State R enters into a financial derivative with a client, Y. Under the derivative, Y gains economic exposure to the performance of shares issued by Z, a resident of State S. This exposure includes the right to receive payments from X equivalent in amount to any dividends distributed by Z. X has no obligation to purchase the shares, but must still pay Y an amount equivalent to the dividends, even if X does not acquire the shares and does not receive the dividends. If X chooses to hedge its exposure under the derivative by acquiring shares in Z, X should still be regarded as the beneficial owner of the dividend when X pays an equivalent amount to Y. This is because X has no contractual or legal obligation to pass on the dividend it receives. X can choose to use the dividend in whatever manner X wishes. X's obligation to Y is independent from the dividend that X receives. If X chose not to hedge the derivative with shares of Z, X would still be obliged to pay the same amount to Y.