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A practical cross-border insight into Alternative Investment Funds work

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1 Regulatory Framework

1.1 What legislation governs the establishment and operation of Alternative Investment Funds?

The legislation (if any) governing the establishment and operation of an Alternative Investment Fund (AIF) will depend on the structure the AIF takes. For example, if the AIF is structured as a Singapore incorporated company, the Companies Act (Cap. 50) of Singapore will be the governing legislation. If the AIF is structured as a limited partnership registered in Singapore, the Limited Partnerships Act (Cap 163B) of Singapore will be the governing legislation. On the other hand, AIFs structured as unit trusts are established and operated in accordance with the terms of the trust deed constituting the AIF and there is no specific legislation governing the establishment of such trusts unless the AIF is offered to the public for investment in which case there are extensive prudential rules and procedural requirements under the Securities and Futures Act (Cap. 289) of Singapore that apply.

1.2 Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

Under the Securities and Futures Act (Cap. 289) of Singapore (SFA), a person who carries on business in fund management is required to hold a capital markets services licence (CMS licence) for fund management unless it is able to avail itself of any of the licensing exemptions. Fund management includes the management of a portfolio of securities on behalf of a customer (whether on a discretionary authority granted by the customer or otherwise). Hence, fund managers and investment advisers of private equity funds are required to be licensed and regulated by the Monetary Authority of Singapore (MAS) unless they qualify for any of the licensing exemptions. In the case where the manager or adviser to a private equity fund is undertaking fund management on behalf of not more than 30 qualified investors (essentially institutional investors and accredited investors) of which not more than 15 are collective investment schemes (CIS) or closed-ended funds that are offered only to institutional or accredited investors, the manger or adviser is exempted from licensing but is required to be registered with the MAS. The managers and advisers of AIFs that invest (directly or through another entity) in immovable assets (or corporations or unincorporated bodies whose sole purpose is to hold immovable assets) can only also be exempted from licensing if all the investors in the AIF are qualified investors.

1.3 Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

AIFs are themselves not required to be licensed by any regulatory body in Singapore. However, if the AIF is incorporated as a Singapore company, it would be registered by the Registrar of Companies and comply with rules under the Companies Act of Singapore, and if the AIF is registered as a Singapore limited partnership, it would be registered by the Registrar of Limited Partnerships and comply with rules under the Limited Partnerships Act of Singapore. Authorisation of an AIF is not generally required except where: (i) the AIF is offered only to accredited investors pursuant to a prospectus exemption in section 305 of the SFA (S305 Exemption). In that case, a simple notification of the proposed offer of the interests in the AIF is required to be filed with the MAS before the AIF is offered to accredited investors in Singapore; or (ii) the AIF is offered to the public for investment in which case the AIF needs to be authorised or recognised by the MAS and in addition there are extensive prudential rules and procedural requirements under the SFA that apply.

1.4 Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds) and if so how?

The current regulatory regime in Singapore does not differentiate between open-ended and closed-ended AIFs.

1.5 What does the authorisation process involve?

An application for a CMS licence by a fund manager of an AIF involves filling out some forms prescribed by the MAS and submitting a simple business plan, shareholding chart and organisation chart of the applicant and the applicant's audited financial statements and, where applicable, the consolidated financial statements of the group the applicant is a part of. After the application is submitted, the MAS would generally take around four to six months to review and raise any queries it has relating to the application.

1.6 Are there local residence or other local qualification requirements?

In the case where the AIF is set up as a Singapore incorporated company, at least one Singapore resident director (i.e. a Singapore citizen, Singapore permanent resident or holder of an employment

pass issued by the Ministry of Manpower in Singapore) will have to be appointed to the board of the AIF. If the AIF is set up as a Singapore limited partnership and the general partner is ordinarily resident outside Singapore, the Registrar of Limited Partnerships will require an ordinarily resident natural person acting as the local manager to be appointed.

1.7 What service providers are required?

In general, the MAS requires that assets under management be held by an independent custodian, that is, a prime broker, depositories or banks that are properly registered or authorised in their home jurisdiction, although it recognises that private equity and wholesale real estate funds can adopt other methods, subject to appropriate disclosures and other safeguards. The assets under management must be subject to an independent valuation carried out by a third-party service provider or by an in-house fund valuation function under certain conditions.

1.8 What co-operation or information sharing agreements have been entered into with other governments or regulators?

Singapore has concluded the following international co-operation and information sharing agreements with other governments and regulators:

(a) Exchange of Information Arrangements;

(b) Convention on Mutual Administrative Assistance in Tax Matters; and

(c) International Tax Compliance Agreements (e.g. FATCA, Common Reporting Standard and Country-by-Country Reporting).

2 Fund Structures

2.1 What are the principal legal structures used for Alternative Investment Funds?

Limited partnerships and private limited companies are the principal legal structures used for AIFs.

2.2 Please describe the limited liability of investors.

Under the Limited Partnerships Act of Singapore, the liability of limited partners of a fund structured as a limited partnership is limited to the limited partner's capital contribution to the limited partnership provided the limited partner does not become involved in the management of the limited partnership.

For AIFs incorporated as Singapore private limited companies, the Companies Act of Singapore limits the liability of the investors such that they will not be required to contribute more than the amount of share capital they have paid into the company.

2.3 What are the principal legal structures used for managers and advisers of Alternative Investment Funds?

Fund managers and investment advisers which are regulated by the MAS are required to be set up as Singapore incorporated companies.

2.4 Are there any limits on the manager's ability to restrict redemptions in open-ended funds or transfers in open-ended or closed-ended funds?

There are no statutory limits on the manager's ability to restrict redemptions in open-ended funds or transfers in open-ended or closed-ended funds. For AIFs that are authorised for investment by the members of the public and which are not listed on the Singapore Stock Exchange, there are certain liquidity requirements for investors prescribed under the Code on Collective Investment Schemes. However, no such AIF (being one that is not listed on the Singapore Stock Exchange) has ever been established in Singapore after a successful fund-raising.

2.5 Are there any legislative restrictions on transfers of investors' interests in Alternative Investment Funds?

In the case where the AIF is managed by a fund manager who is only licensed by the MAS to manage funds for qualified investors, all transfers of investors' interests in the AIF must be made only to qualified investors. For AIFs that have not been authorised by the MAS for investment by members of the public, the fund manager must not make any offering of the interests in the AIF to members of the public, unless one or more exceptions are invoked, such as the private placement exemption, the S305 Exemption or the institutional investors exemption, and the constitution documents of such an AIF must restrict transfers of interests amongst the investors to ensure that the interests in the AIF are not held by any member of the public.

3 Marketing

3.1 What legislation governs the production and offering of marketing materials?

The SFA, Financial Advisers Act of Singapore and the various subsidiary legislation issued thereunder govern the offering of marketing materials.

3.2 What are the key content requirements for marketing materials, whether due to legal requirements or customary practice?

For AIFs that are offered to investors pursuant to the Section 305 Exemption, the MAS has prescribed a list of disclosures to be made in the AIF's information memorandum. The items to be disclosed include the investment objective and focus of the AIF, investment approach of the manager, the risks of subscribing for interests in the AIF, details relating to the manager, and, where applicable, the trustee and custodian for the AIF and the financial supervisory authorities that they are regulated by, the conditions, limits and gating structures for redemption, the AIF's policy on side letters, details on where the accounts of the AIF may be obtained and the fees and charges payable by the investors and the AIF. In practice, even for AIFs that are not offered pursuant to the S305 Exemption, it is customary for the information memorandum to disclose almost all of the above information.

3.3 Do the marketing or legal documents need to be registered with or approved by the local regulator?

This would depend on which prospectus exemption is invoked

when marketing the AIF. If the AIF is marketed only to accredited investors pursuant to the S305 Exemption, a copy of the information memorandum (i.e. any materials distributed to investors for the purpose of enabling them to decide whether to invest in the AIF, such as the private placement memorandum and fund fact sheets) would have to be given to the MAS for record purposes. The MAS does not approve the information memorandum.

3.4 What restrictions are there on marketing Alternative Investment Funds?

Generally, an offer of interests in an AIF in Singapore would need to be made in or accompanied by a prospectus registered with the MAS unless the offer is made pursuant to one of the exemptions or safe harbours in the SFA.

The restrictions on marketing would depend on which safe-harbour or prospectus exemption is invoked when marketing the AIF. If the offer is made pursuant to the private placement exemption in the SFA, the AIF can be offered to no more than 50 offerees over a period of 12 months. If the offer is made pursuant to the "small offers" exemption, no more than S$5 million can be raised by a person from "personal offers" of interests in the AIF over a period of 12 months. In both cases, no advertisements may be published in connection with the offer and the marketing of the AIF will need to be undertaken by persons who hold a CMS licence for dealing in securities and a Financial Advisors licence for marketing collective investment schemes or persons who are exempted from holding such licences.

3.5 Can Alternative Investment Funds be marketed to retail investors?

AIFs are typically marketed to institutional investors and accredited investors (rather than members of the public) either because of the terms of offer of the AIF (e.g. higher minimum subscription amounts) or because the licence granted by the MAS to the fund manager restricts its clientele to qualified investors only.

3.6 What qualification requirements must be carried out in relation to prospective investors?

As mentioned above, prospective investors of AIFs are typically institutional investors and accredited investors. Such investors would normally be required to produce supporting documents such as their latest financial statements or bank statements as evidence of their financial worth.

3.7 Are there additional restrictions on marketing to public bodies such as government pension funds?

There are no additional restrictions on marketing to public bodies.

3.8 Are there any restrictions on the use of intermediaries to assist in the fundraising process?

Under the current legislative framework, intermediaries engaged to assist in fundraising for AIFs are required to hold a CMS licence for dealing in securities and a Financial Advisors licence for marketing collective investment schemes, or be exempted from holding such licences. When the Securities and Futures (Amendment) Act 2016 is gazetted to come into force in Singapore, all entities marketing AIFs will only be required to hold a CMS licence for dealing in capital markets products or be exempted from holding such a licence.

3.9 Are there any restrictions on the participation in Alternative Investments Funds by particular types of investors, such as financial institutions (whether as sponsors or investors)?

Banks in Singapore are prohibited under section 32 of the Banking Act of Singapore from acquiring or holding any major stakes (i.e. any beneficial interest exceeding 10% of the total number of issued shares or control over more than 10% of the voting power) in a company undertaking non-financial business. However, Regulation 7 of the Banking Regulations excludes private equity and venture capital investments from the ambit of section 32. MAS Notice 630 to banks on private equity and venture capital investments sets out the scope of private equity and venture capital investments that can be undertaken by Singapore banks, the duration of investments and the bank's involvement in the management of such investments. For example, a bank shall not hold any indirect private equity and venture capital investment, where such investee is not managed by the bank or a related party, for a period exceeding 12 years from the date of its first investment in the investee.

4 Investments

4.1 Are there any restrictions on the types of activities that can be performed by Alternative Investment Funds?

For AIFs that are not registered by the MAS for offers to members of the public, there are currently no statutory or regulatory restrictions on the types of activities that can be performed by AIFs, although investment restrictions are commonly provided for contractually.

4.2 Are there any limitations on the types of investments that can be included in an Alternative Investment Fund's portfolio whether for diversification reasons or otherwise?

For AIFs that are not registered by the MAS for offers to members of the public, there are no such limitations.

4.3 Are there any restrictions on borrowing by the Alternative Investment Fund?

For AIFs that are not registered by the MAS for offers to members of the public, there are currently no statutory or regulatory restrictions, although contractual restrictions are common.

5 Disclosure of Information

5.1 What public disclosure must the Alternative Investment Fund make?

AIFs structured as Singapore companies are required to file their financial statements, as well as information on their shareholders and directors, with the Accounting and Corporate Regulatory Authority of Singapore (ACRA). Such information can be obtained by members of the public from ACRA on payment of a fee.

AIFs structured as limited partnerships are not required to file annual returns with ACRA. In addition, the particulars of the limited partners are not open to inspection by the public if the AIF is managed by a licensed fund manager or a person exempted from the requirement to be so licensed.

In addition, AIFs that are registered by the MAS for offers to members of the public have extensive disclosure obligations in the prospectus that they have to lodge with the MAS, and as continuing disclosure obligations, the AIFs have to disclose the interests of substantial investors (namely, those who hold 5% or more of the equity interests in the AIFs), directors and the Chief Executive Officer of the fund manager in the AIFs, as well as the financial performance of the AIFs.

5.2 What are the reporting requirements in relation to Alternative Investment Funds?

AIFs structured as companies are required to make regular filings with ACRA, including with regard to issuances of securities, changes in directors and shareholders, creation of charges and annual reports. A general partner of a limited partnership is similarly required to lodge a statement with the Registrar of Limited Partnerships whenever there are changes in any of the particulars registered in respect of the limited partnership.

In addition, AIFs that are registered by the MAS for offers to members of the public have to send semi-annual and annual performance reports to their investors. This is in addition to reporting requirements imposed by the Singapore Stock Exchange, as such AIFs are invariably listed on the Singapore Stock Exchange.

5.3 Is the use of side letters restricted?

There are no restrictions on the use of side letter arrangements by AIFs. However, for restricted funds marketed only to accredited investors, pursuant to the Section 305 Exemption, the MAS has prescribed certain disclosures to be made to investors in the private placement memorandum on such side letter arrangements, such as the nature and scope of such side letters.

6 Taxation

6.1 What is the tax treatment of the principal forms of Alternative Investment Funds?

Singapore limited partnerships are not liable to tax at the entity level. Instead, each partner will be taxed on his or its share of the income from the limited partnership.

Singapore income tax is imposed on income accruing in or derived from Singapore and on foreign-sourced income received in Singapore (subject to certain exceptions). While Singapore does not impose tax on capital gains, gains from the disposal of investments may be considered as income rather than capital gains (and thus subject to Singapore income tax) if they arise from or are otherwise connected with the activities of a trade or business carried on in Singapore. Hence, one common issue for AIFs on taxation is whether gains are capital in nature and thus not taxable in Singapore, or taxable as trading income.

AIFs which are Singapore incorporated companies are generally taxed at a flat rate of 17% on their chargeable income. There is, however, an exemption in the case where an AIF structured as a company owns 20% or more of the ordinary share capital of another company, and has held those shares for a continuous period of at least 24 months prior to their disposal. In that case, the gains will be exempt from tax for any shares disposed in the investee company between 1 June 2012 and 31 May 2022.

In order to promote Singapore as a jurisdiction for fund management, the MAS administers certain tax incentive schemes (known as the basic tier tax incentive scheme and enhanced tier tax incentive scheme) available for AIFs that are managed by Singapore-based fund managers. Such schemes can effectively exempt AIFs that satisfy the qualifying conditions from virtually all incidents of income tax except where the income is sourced from Singapore immoveable properties.

6.2 What is the tax treatment of the principal forms of investment manager / adviser?

Investment managers and advisers are normally set up as Singapore companies. As such, please refer to question 6.1 on the tax treatment of Singapore companies.

A Singapore-based fund management company can apply for a 10% concessionary income tax treatment for income deriving from the management of the fund under the Financial Sector Incentive – Fund Manager Scheme (FSI-FM). This concessionary tax rate is awarded under certain conditions and at the MAS's discretion. The FSI-FM incentive is limited to a Singapore incorporated fund management company with minimum assets under management of at least S$250 million, in addition to meeting other qualitative and quantitative conditions under the scheme.

6.3 Are there any establishment or transfer taxes levied in connection with an investor's participation in an Alternative Investment Fund or the transfer of the investor's interest?

There are no establishment taxes levied in connection with an investor's participation in an AIF. An investor's transfer of shares in an AIF set up as a Singapore company will attract stamp duty at the rate of 0.2% of the consideration for the transfer or the net asset value of the shares transferred, whichever is higher. Stamp duty may be payable on the transfer of limited partnership interests in an AIF if the assets of the partnership include shares of Singapore corporations and immoveable properties situated in Singapore.

6.4 What is the tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors in Alternative Investment Funds?

The tax treatment of investors in AIFs becomes a relevant consideration for investors where the AIF is not able to invoke any of the available tax exemption schemes such as the basic tier tax incentive scheme or the enhanced tier tax incentive scheme. Limited partnerships are tax-transparent vehicles and, accordingly, income and gains received by the fund are taxable in the hands of the partners. The tax payable by a particular partner will depend on that particular partner's tax profile. Resident individual investors are taxed at progressive tax rates of up to 22% on their taxable income, while corporates are taxed at 17% on their taxable income.

Non-resident investors in a private equity fund structured as a Singapore company are not subject to taxation. There is no withholding tax on dividend distributions made by AIFs structured as Singapore companies to non-resident investors. If any interest or royalty is paid by an AIF to a non-resident investor, withholding tax at the rate of 15% is applicable.

Pension fund investors are subject to tax on their taxable income in the same manner as corporate investors.

6.5 Is it necessary or advisable to obtain a tax ruling from the tax or regulatory authorities prior to establishing an Alternative Investment Fund?

It is not generally necessary to obtain a tax ruling from the tax authority before establishing an AIF. As discussed in the last paragraph of question 6.1, there are tax exemption schemes for AIFs in Singapore known as the basic tier tax incentive scheme and enhanced tier tax incentive scheme. In practice, many fund managers of AIFs would consider applying for a tax exemption scheme if they are able to meet the qualitative and quantitative conditions.

6.6 What steps have been or are being taken to implement the US Foreign Account and Tax Compliance Act 2010 (FATCA) and other similar information reporting regimes such as the Common Reporting Standard?

Singapore and the US signed a FATCA Model 1 intergovernmental agreement (IGA) on 9 December 2014 to help ease Singapore-based financial institutions' (SGFIs) FATCA compliance burden. The IGA and Regulations entered into force on 18 March 2015.

Pursuant to the IGA and Regulations, SGFIs are now required to register with the FATCA Registration Portal as a "Registered Deemed-Compliant Financial Institution (Including a Reporting Financial Institution under a Model 1 IGA)". When SGFIs register with the US Internal Revenue Service, they obtain a Global Intermediary Identification Number. SGFIs are required to perform due diligence procedures in relation to new individual accounts and new entity accounts opened on or after 1 July 2014. SGFIs are also required to automatically remit information to the US government via the Inland Revenue Authority of Singapore (IRAS) of accounts believed to be beneficially owned by US persons (including US entities). Details exchanged would include the holder's name, US Tax Identification Number and account balance, as well as interest earned on the account.

The Income Tax (International Tax Compliance Agreements) (Common Reporting Standard) Regulations 2016 of Singapore (CRS Regulations) were published on 2 December 2016.

The CRS Regulations allow Singapore to implement the Standard for Automatic Exchange of Financial Account Information in Tax Matters (AEOI), also known as the Common Reporting Standard (CRS), with effect from 1 January 2017. The CRS Regulations require all SGFIs to put in place necessary processes and systems to collect CRS information from all non-Singapore tax resident account holders from 1 January 2017. Such collection of information by SGFIs is necessary in order for them to submit the required information to IRAS in 2018, for subsequent exchange under the CRS. This timeline is in accordance with Singapore's commitment to commence first exchange of information under the CRS in 2018.

Reporting SGFIs will be required to transmit to IRAS the CRS information of their account holders who are tax residents of jurisdictions with whom Singapore has a Competent Authority Agreement for CRS.

6.7 Are there any other material tax issues?

No, there are not.

6.8 What steps are being taken to implement the OECD's Action Plan on Base Erosion and Profit-Shifting (BEPS), in particular Actions 6 and 7, insofar as they affect Alternative Investment Funds' operations?

On 16 June 2016, Singapore joined the inclusive framework for implementing measures against Base Erosion and Profit-Shifting (BEPS). The inclusive framework was proposed by the OECD and endorsed by G20 members in February 2016. By joining the inclusive framework, Singapore has committed to implement four minimum standards of the 15-point action plan under the BEPS project, namely: (i) countering harmful tax practices (Action point 5); (ii) preventing treaty abuse (Action point 6); (iii) transfer pricing documentation – Country-by-Country Reporting (Action point 13); and (iv) enhancing dispute resolution (Action point 14).

Action point 6 seeks to address treaty abuse and, in particular, treaty shopping. The tax authority in Singapore has opined that Singapore does not condone treaty shopping and, therefore, the tax treaties signed by Singapore generally contain anti-treaty shopping provisions to prevent abuse. To further bolster the anti-treaty shopping provisions, Singapore is currently part of a group of jurisdictions working together under the aegis of the OECD and G20 to develop a multilateral instrument (MI) for incorporating BEPS measures into existing bilateral treaties to counter treaty abuse. The tax authority in Singapore has indicated that Singapore will consider whether to adopt the instrument after it is finalised and ready for jurisdictions to adopt. To date, Singapore has yet to make any public announcements on its position on specific articles in the MI or any timeline for the domestic ratification process.

In relation to Action 7 (Permanent Establishment Status), it is not yet known whether and when Singapore will implement changes to the definition of "permanent establishment" to prevent the artificial avoidance of permanent establishment status in relation to BEPS.

7 Reforms

7.1 What reforms (if any) are proposed?

On 15 February 2017, the MAS published a Consultation Paper on the Proposed Regulatory Regime for Managers of Venture Capital Funds (VC Consultation Paper). The VC Consultation Paper proposed simplified rules for managers of venture capital funds (VC managers). As the current regulatory regime for fund managers does not make a distinction between VC managers and managers handling other asset classes, VC managers are subject to the same regulatory framework and compliance regime as other fund managers.

Under the proposed simplified authorisation process, the MAS will focus primarily on a fitness and propriety assessment of the VC managers. Unlike the current regime, the MAS will not require VC managers to have directors and representatives with at least five years of relevant experience in fund management.

Under the proposed simplified regulatory framework, new and existing VC managers will not be subject to the capital requirements and business conduct rules that currently apply to fund managers in general. The base capital requirements and risk-based capital requirements will be removed and the requirement for independent valuation, internal audits and submission to the MAS of audited financial statements will not be imposed.

The proposed changes aim to expedite the application process and ease the compliance burden on VC managers.

On 23 March 2017, the MAS also issued a consultation paper on the proposed framework for the Singapore Variable Capital Company (S-VACC) to introduce a new corporate structure for collective investment schemes (CIS). The S-VACC is intended to address some of the restrictions in the use of the company structure for CIS. In particular, unlike a Singapore incorporated company, the S-VACC will provide greater flexibility for the return of capital to shareholders in order to facilitate redemption rights of investors.

The proposed S-VACC framework is intended to cater to both open-ended and closed-ended investment funds, and allow for segregation of assets and liabilities of sub-funds within an umbrella structure. This will allow asset managers to achieve cost efficiencies by consolidating administrative functions at the umbrella fund level. In addition, S-VACCs would be allowed to maintain their respective registers of shareholders, but would be required to disclose the registers to supervisory and law enforcement agencies where necessary. The S-VACC is proposed to be limited to investment fund purposes only, and would be required to be managed by a fund manager who is regulated by the MAS. Shares of the S-VACC would generally be issued and redeemed at net asset value to ensure accountability and transparency for creditors.

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Charlotte is a recommended lawyer in *The Legal 500: Asia Pacific – The Client's Guide to the Asia Pacific Legal Profession, 2017* for the area of Investment Funds in Singapore. She graduated from the University of Hull and went on to obtain a Master of Laws from the University of Sydney. She is admitted to the Singapore Bar and the New York State Bar.

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