

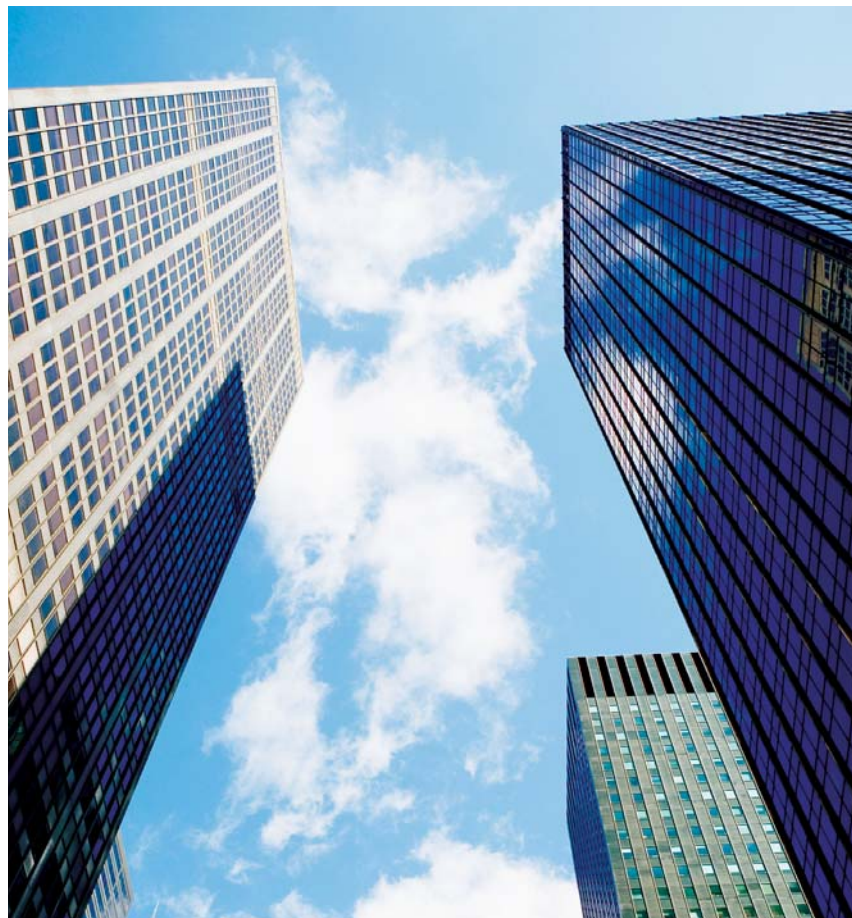
16th Annual Private Investment Funds Seminar

Tax, ERISA and Transatlantic Issues

Philippe Benedict | David M. Cohen | Christopher Hilditch |
Daniel S. Shapiro

Thursday, January 18, 2007

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- II. **Outlines**
- III. **Presentation**
- IV. **Additional Information**



About the Speakers



Philippe Benedict

919 Third Avenue
New York, NY 10022
212-756-2124 | philippe.benedict@srz.com



Philippe Benedict is a partner in the Tax Practice Group of Schulte Roth & Zabel LLP in New York. His practice concentrates on the tax aspects of investment funds, mergers and acquisitions, international transactions, real estate transactions and financial instruments.

Philippe is a graduate of the New York University School of Law where he received a J.D. in 1990 and an LL.M. in 1993. During law school he was a staff member of the *Journal of International Law and Politics* and a recipient of a Gruss Fellowship. He received his B.S. degree in 1985 from Adelphi University.

David M. Cohen

919 Third Avenue

New York, NY 10022

212-756-2141 | david.cohen@srz.com



David M. Cohen is a partner in the Employment and Employee Benefits Practice Group of Schulte Roth & Zabel LLP. His practice includes matters related to fiduciary responsibility, ERISA (The Employee Retirement Income Security Act of 1974), and qualified plans.

David is a 1981 graduate of the George Washington University Law School and a 1978 graduate of Columbia University. His experience includes the private sector (as vice president and assistant general counsel to a major investment firm) and government service in the Department of Labor's Employee Benefits Security Administration. He speaks and writes widely on ERISA and benefit fund-related issues and, as a member of the American Bar Association's Employee Benefits and Executive Compensation Committee, is co-chair of the subcommittee on fiduciary responsibility. In recognition of his achievements, he was listed in *Super Lawyers*.

Christopher Hilditch

20 Savile Row

London W1S 3PR

+44 (0) 20 7081 8002 | christopher.hilditch@srz.com



Christopher Hilditch is a partner in the Investment Management Group at Schulte Roth & Zabel working in the London office. His practice concentrates on hedge funds, investment funds, joint ventures and corporate transactions, and he has acted on many of the European launches.

Chris is a graduate of the College of Law, Guildford. He received his M.A., *with honors*, from Pembroke College, Oxford University. He is a regular speaker at conferences and is active in numerous industry committees, including the Sound Practices Committee of the Alternative Investment Management Association. He is listed in *The International Who's Who of Private Fund Lawyers* and as a "Leading Individual" for investment funds in *Legal 500*.

Daniel S. Shapiro

20 Savile Row
London W1S 3PR
+44 207 081 8001 | daniel.shapiro@srz.com



Daniel S. Shapiro is a partner in the Investment Management and Tax Practice Groups of Schulte Roth & Zabel, head of its London office and a founding member of the firm. His practice focuses on tax and regulatory issues related to investment funds. He lectures and writes extensively on the legal, tax and business aspects of investment funds.

Dan is a 1963 graduate of the Columbia University School of Law where he was a James Kent Scholar and a Harlan Fiske Stone Scholar, and served as the articles editor of the *Columbia Law Review*. After law school, he was a Fulbright Fellow at the London School of Economics. Dan received his A.B. degree, *cum laude*, in 1960, also from Columbia University. He is a past member of the executive committee of the Tax Section, and is chair of the Income from Real Property Subcommittee of the New York State Bar Association, and a member of the Real Estate Division of the Tax Section of the American Bar Association.

Known for his civic and philanthropic involvements, Dan is on the board of governors of the Weizmann Institute of Science in Israel, former secretary and executive committee member of the New York City Partnership and Chamber of Commerce Inc., and past president of the Federation of Jewish Philanthropies of New York.

Outlines



Transatlantic Issues: MiFID

Christopher Hilditch

January 18, 2007

1) Markets in Financial Instruments Directive (“MiFID”)

- a) Intended to establish consistent standards across EU for:
 - i) regulatory authorizations;
 - ii) regulation of markets; and
 - iii) conduct of business.
- b) Full implementation from Nov. 1, 2007

2) What Is Changing for Hedge Fund Managers?

- a) Conflicts of interest rules
- b) Compliance arrangements
- c) Risk management
- d) Record-keeping requirements
- e) PA dealing rules
- f) Client classification/client agreements
- g) Best execution rules

3) Conflict of Interest Rules

- a) Under MiFID firms must:
 - i) identify conflicts between the firm (NB: including directors, managers, employees and tied agents) and its clients or between one client and another; and
 - ii) maintain and operate effective arrangements to prevent conflicts from adversely affecting clients' interests.
- b) Firms must establish and maintain an effective conflicts policy and procedures.
- c) Firms should disclose to their clients a general description of the conflicts policy.
- d) Procedures should include, but not be limited to:
 - i) use of Chinese Walls;
 - ii) separation of conflicting business lines; and
 - iii) removing links between remuneration of individuals involved in conflicting activities.
 - iv) NB: Disclosure is regarded as a last resort rather than primary tool of conflicts management.
- e) Maintain and update a record of actual and potential conflicts.

4) Compliance Arrangements

- a) MiFID sets out three primary responsibilities for the compliance function:
 - i) Put in place policies and procedures to ensure compliance with regulations.
 - ii) Monitor compliance with such policies and procedures.
 - iii) Advise the firm in complying with regulations.
- b) MiFID also requires that the compliance function operate “independently.”

- c) The requirements for independence are that:
 - i) the compliance function has the necessary authority, resources, expertise and access to relevant information;
 - ii) a compliance officer is appointed;
 - iii) individuals should not be involved in performing activities they monitor; and
 - iv) the method of remunerating staff should not compromise their objectivity.
- d) The FSA in its CP 06/9 states that the requirement for independence will not apply if it is disproportionate given the nature, scale and complexity of the firm's business. NB: The firm will still have to show the compliance function is "effective."

5) Risk Management

- a) Firms are required to establish, implement and maintain adequate risk management policies and procedures.
- b) Policies and procedures should identify risks relating to the firm's activities, processes and systems (e.g., credit risk, market risk, liquidity risk).
- c) Firms must have a separate risk control function where proportionate, depending on the nature, scale and complexity of its business).
- d) Risk control function to be responsible for monitoring the firm's risk management policies and procedures and should be independent as far as possible from operational areas, depending on the nature, scale and complexity of the business.

6) Record Keeping Requirements

- a) MiFID imposes a five-year record-keeping requirement.
- b) Five-year records of all services and transactions undertaken.
- c) Mismatch with current FSA three- or six-year requirements.
- d) FSA to clarify in due course.

7) PA Dealing Rules

- a) MiFID will require an appropriate policy governing personal dealing by "relevant persons."
- b) "Relevant persons" include the firm's directors, partners and employees but also any person providing services to the firm as a contractor or consultant who has access to confidential information (e.g., IT contractors; compliance consultants). Implementation? Enforcement?
- c) Catches personal PA trades, trades for the account of certain relatives and also for the account of a person where the "relevant person" has a direct or material interest in the outcome of the trade.
- d) Firm's PA dealing policy must ensure that:
 - i) the firm is notified of PA trades by "relevant persons"; and
 - ii) the firm keeps a record of all PA trades.

8) Client Classification/Client Agreements

- a) Client classifications will change under MiFID.
- b) MiFID requires firms to classify their clients as retail clients, professional clients or eligible counterparties.

- c) Hedge funds will be classed as professional clients.
- d) Some adjustments to client agreements are expected to be necessary.
- e) Certain other aspects of MiFID may also require changes to be made (e.g., best execution requirements).
- f) The FSA may also make some changes to its requirements for client agreements, again necessitating changes. NB: Q4 COB Consultation.

9) Best Execution Rules

- a) MiFID requires firms to take reasonable steps to obtain the best possible result for their clients when executing orders.
- b) This includes orders in all financial instruments, whether on exchange or OTC.
- c) Firms will need to assess and provide best execution based on a number of factors, including price, cost, speed, likelihood of execution and settlement, size, nature and any other relevant considerations.
- d) Hedge fund managers may rely on third parties to deliver best execution, but must have taken reasonable steps to select entities most likely to deliver the best possible result and must monitor the execution quality.
- e) Application to swaps/similar unclear.
- f) Firms should establish and implement an order execution policy, including information on trading venues and selection procedures.
- g) Firms should provide information to clients on their order execution policy and obtain the client's consent to it. Written consent required if orders may be executed outside a regulated market.

Transatlantic Structuring and Tax Issues

Daniel S. Shapiro

January 18, 2007

- 1) **Recent Trends in Operating Management Companies in the US and the UK**
- 2) **Structures of UK Managers – Use of UK LLP**
 - a) Capital Contribution Requirements for the Member: £1,000 - £10,000
 - b) Possible Tax Risk of Not Being a True Partner
 - c) Regulatory Capital Issues
- 3) **UK Tax Issues**
 - a) Investment Manager Exemption (IME)
 - i) Inland Revenue Revising its Statement of Practice
 - ii) Exempt Categories of Income under the IME
 - (1) Loan Origination Activity/Syndication
 - (2) Commodity vs. Commodity Futures Trading
 - (3) Carbon Trading
 - b) Other IME Issues
 - i) IME "Independence Test"
 - ii) "Customary Rate of Remuneration"
 - (1) UK-based personnel cannot participate in US deferred fee plan, except in very limited circumstances
 - (2) Payments to non-domiciliaries of the UK outside the UK for "offshore marketing" and "administration" – subject to attack by Inland Revenue
 - (3) Can UK LLP members have an equity interest in the US Manager?
 - c) Opportunities for UK Tax Deferral substantially closed down

U.S. Tax Issues

Philippe Benedict and David Griffel

January 18, 2007

1) Deferrals

a) Extended Transition Relief Under Section 409A - Notice 2006-79

- i) Written Compliance Deadline: Jan. 1, 2008. Through Dec. 31, 2007, taxpayers must operate in reasonable, good faith compliance with Section 409A.
- ii) Payment Changes: Under transition relief, taxpayers may elect to change the payment dates for deferred compensation subject to Section 409A, provided:
 - (a) No such election may be made after Dec. 31, 2007. Beginning in 2008, taxpayers are limited to redeferrals and those elections must be made at least one year in advance and for a minimum five-year period;
 - (b) No such election may be made in 2007 to bring a payment into 2007; and
 - (c) No such election may be made in 2007 to prevent a payment from being made in 2007.

b) Impact of Sale (including partial sale) of Management Company on Existing Deferrals

- i) A management company must be on the cash method of accounting in order to defer income.
- ii) If a management company is sold to a subchapter "C" corporation (or to an entity owned, directly or indirectly, by a subchapter "C" corporation), it can no longer be on the cash method of accounting under Section 448. This rule applies even if the interest sold is a minority interest in the management company.
- iii) Once the management company is on the accrual method of accounting, it can no longer defer in the future and its existing deferral must be included in income over a 4-year period under Section 481.
- iv) Under Section 409A, cash can be paid to the management company in the following circumstances:
 - (a) Specified date designated in deferral election;
 - (b) Separation from service;
 - (c) Death;
 - (d) Disability;
 - (e) Unforeseeable emergency; and
 - (f) Change of control.

A change in method of accounting is not a permissible payment event under Section 409A. The management company will have potential phantom income if the deferral is taxable over a four-year period but the cash is only available on the original distribution date or other earlier event permissible under Section 409A. Such transactions in 2007 will not result in phantom income because of the transition relief.

2) Tax-Exempt Organizations; Excise Tax on "Prohibited Tax Shelter Transactions" - Section 4965

- a) Prohibited Tax Shelter Transactions: "Reportable transactions" described under the tax shelter reporting regulations that are:
 - i) Listed Transactions (including transactions that are subsequently listed). Certain funds report total return swaps and other transactions on a protective basis as transactions that are substantially similar to "listed transactions";
 - ii) Confidential Transactions; or
 - iii) Transactions with Contractual Protection.
- b) Organizations Impacted: Organizations exempt from tax, including but not limited to, Section 501(c)(3) organizations and pension plans.
- c) "Party to the Transaction" is not defined. The legislative history indicates that "indirect involvement" (e.g., investment in a mutual fund) in the absence of other factors does not rise to the level of a "party to the transaction."
- d) Amount of Tax
 - i) Tax Exempt organization: generally, the maximum corporate tax rate in effect (currently 35%) for a particular taxable year, multiplied by the greater of:
 - (a) The net income from such transaction for such year; and
 - (b) 75% of the entity's proceeds attributable to such transaction for such year.

If the entity knew or had reason to know about the transaction at the time it became a party to the transaction, the tax is 100% of the greater of (i) or (ii) above.

 - ii) Entity manager: \$20,000 for each approval.
- e) Treasury Guidance: The Treasury Department has solicited taxpayer comments and expects to clarify the rules in the future.

3) Certain ECI and FIRPTA Considerations for Non-U.S. Funds

- a) Bankruptcy Reorganizations
 - i) ECI Assets: Debtholders may receive ECI-generating assets from the reorganization, including LLC or LP interests in an active business.
 - ii) Proposed Solution: Contribute the debt to a "blocker" corporation prior to the exchange. A U.S. blocker corporation will pay any associated U.S. income tax on such assets and will not be subject to the branch profits tax.
- b) Stock Investments Subject to FIRPTA, including REITs

- i) U.S. Real Property Holding Corporation ("USRPHC"): Gain from the disposition of stock in a U.S. corporation is subject to U.S. net income tax if, generally, more than 50% of the real property and business assets of the corporation are U.S. real property interests (in each case, including interests in other USRPHCs).
 - (a) USRPHCs include REITs (other than certain mortgage REITs), certain oil and gas companies and other corporations.
 - (b) Due diligence as to USRPHC status should be undertaken prior to the acquisition of stock in a company that is not regularly traded or the aggregate acquisition of a greater than 5% interest in a regularly traded company (see III.B.2.).
- ii) Regularly Traded Exception: The disposition of shares in a USRPHC is not subject to FIRPTA if during the five-year period ending on the date of disposition:
 - (a) the class of shares is listed on an established securities market;
 - (b) the class of shares is regularly traded; and
 - (c) the non-U.S. fund did not hold directly or indirectly (e.g., through a partnership) more than 5% of the value of such class.

Nonpublicly traded stock may still qualify for the exception if there is another class that is regularly traded and the non-U.S. fund has not held stock worth more than 5% of the regularly traded class with the lowest fair market value.

iii) Special Rules for REITs

- (1) Domestically Controlled REIT: Even if a REIT does not qualify for the public trading exception, if more than 50% of the REIT is beneficially owned by U.S. persons, disposition of the REIT interests is not subject to FIRPTA.
- (2) Property Distributions by REITs: Distributions made by a REIT that are attributable to dispositions of U.S. real property interests by the REIT are subject to the net U.S. income tax and possibly branch profits tax. However, if the stock meets the public trading test above (using a one-year look-back period for this purpose), there would instead be a 30% withholding tax on the distribution.

Presentation



SchulteRoth&Zabel

2007 Private Investment Funds Seminar



Tax, ERISA and Transatlantic Issues

Philippe Benedict

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Christopher Hilditch

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Transatlantic Issues

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FSA Authorization

- Activities that require authorization
- Exemption: research/advice provided to group company

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FSA Authorization

- Process detailed
- 3-6 months to completion
- No interim authorization
- Criminal offence if not authorized

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FSA and Side Letters

- FSA concerned about:
 - **Market failure**
 - **Breach of principles**
- AIMA industry guidance

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FSA and Side Letters

- UK Authorized Firms
 - Disclose side letters with “material terms”
- “Material terms” depend on circumstances
 - “Material”:
 - enhanced transparency or liquidity
 - “Non-material”:
 - MFN, fee rebates

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FSA and Side Letters

- Disclosure to existing and prospective investors
- Generic disclosure may not be enough
- Application to multi-national groups

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Markets in Financial Instruments Directive (“MiFID”)

- Intent: establish consistent standards across EU for:
 - **regulatory authorizations**
 - **regulation of markets**
 - **conduct of business**
- Full implementation from November 1, 2007

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What is changing for Hedge Fund Managers

- Conflict of Interest Rules
- Compliance Arrangements
- Risk Management
- Record Keeping Requirements
- PA Dealing Rules
- Client Classification/Client Agreements
- Best Execution Rules

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Transatlantic Issues

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**Transatlantic Structure
and Tax Issues**

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ERISA Law Changes

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ERISA Law Changes

**August 17, 2006
President Bush signs
Pension Protection Act of 2006**

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Pension Protection Act (PPA)

Two Key Changes

- Foreign and government plan assets morph

bad \$\$\$ → good \$\$\$

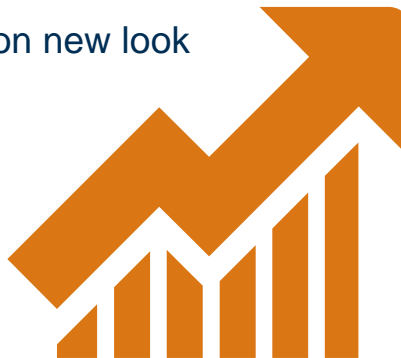
- Proportionate counting replaces
all or nothing

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Pension Protection Act (PPA)

Two Key Effects of Changes

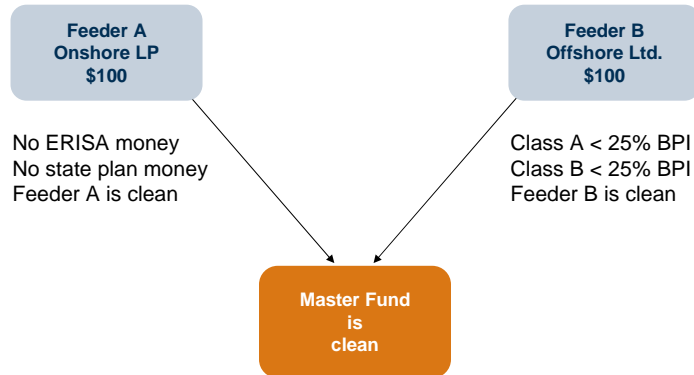
- ERISA capacity greatly increased
- Fund structuring takes on new look



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Counting Plan Assets: Old Law v. New Law

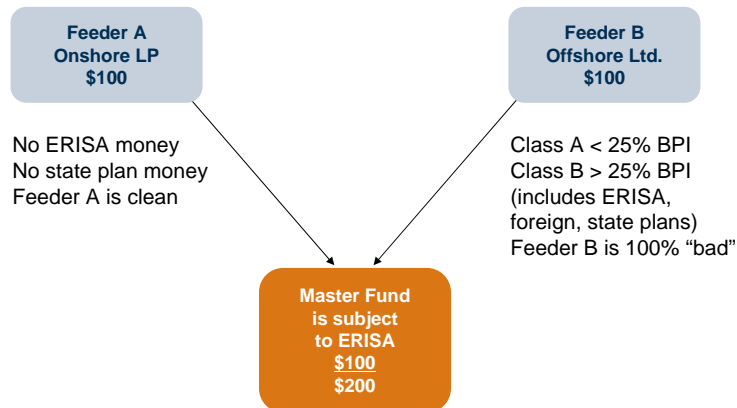
Old Law: Clean Picture



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Counting Plan Assets: Old Law v. New Law

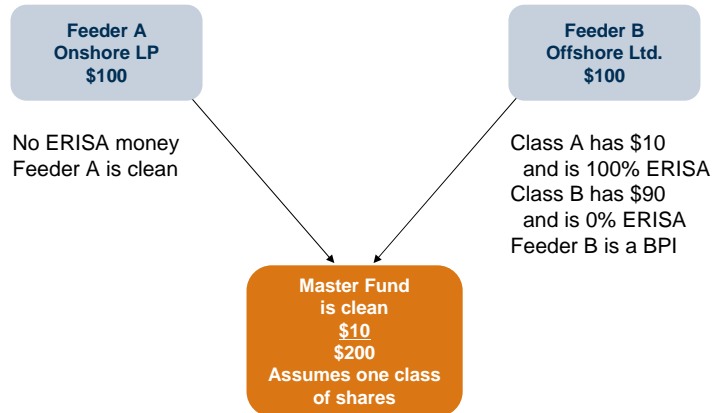
Old Law: ERISA Problems



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Counting Plan Assets: Old Law v. New Law

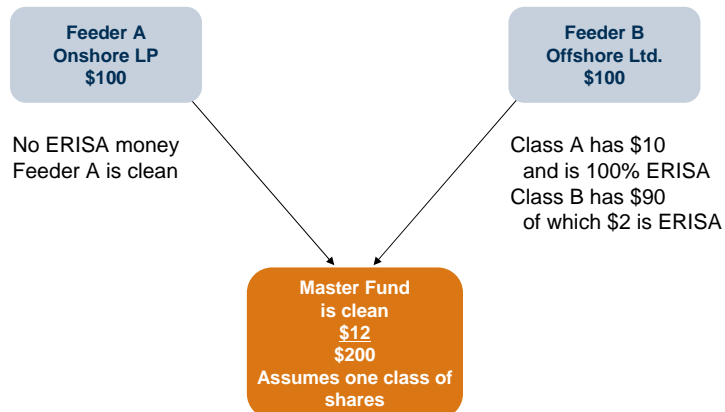
New Law: Variation 1



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Counting Plan Assets: Old Law v. New Law

New Law: Variation 2



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Counting Plan Assets: Old Law v. New Law

Update BPI count

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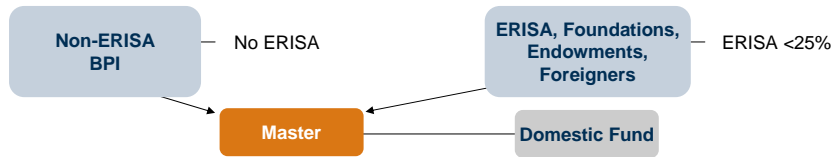
How to Avoid Plan Assets

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How to Avoid Plan Assets

Before August 18, 2006

1. Master/Feeder



2. Side by Side



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How to Avoid Plan Assets

After August 18, 2006; Not Necessary

1. Master/Feeder



2. Side by Side

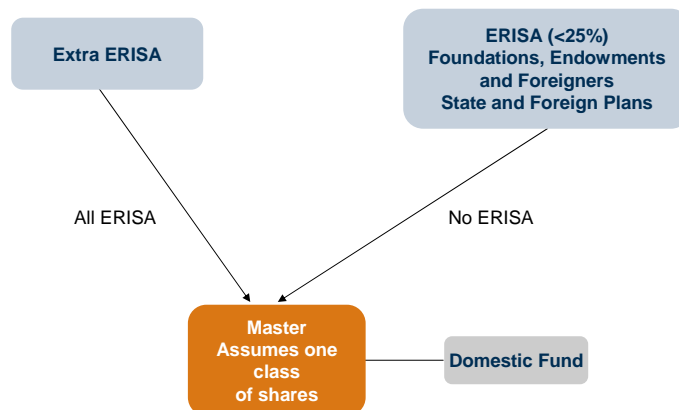


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Should you restructure?

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How to Avoid Plan Assets: New Law Potential Structure



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Things That Didn't Get Fixed

What is:



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Where We Are

- Death knell for private defined benefit plans?
- Defined contribution plan assets exceed defined benefit plan assets
- State defined benefit plans mega under-funded
- Legislative push to replace state DB plans with 401(k) plan

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Where You Need to Focus

The Defined Contribution Market

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Tax Issues

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Deferrals

2007 Extension

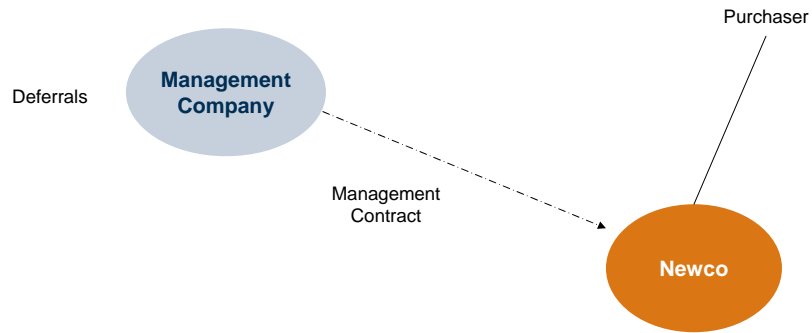
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Deferrals – Sale to a “C” Corp

No future deferrals
Existing deferral included in income

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Deferrals – Potential Solution



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ECI

Bankruptcy Reorganizations

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ECI

Solution: Blocker Corp.

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FIRPTA - Rule

Stock of U.S. corporation taxable if more than 50% of assets are U.S. real property interests

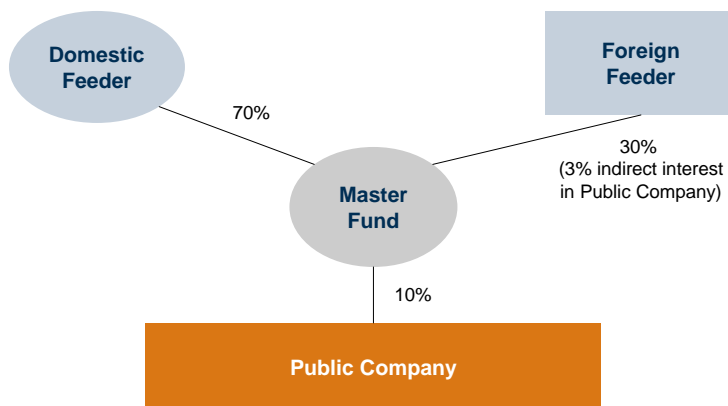
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FIRPTA – Publicly Traded Exception

5% Exception

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FIRPTA – 5% TEST



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Additional Information



ALERT

GUIDANCE ON DISCLOSURE OF SIDE LETTERS

4 OCTOBER 2006

UK-authorized hedge fund managers must disclose, by 31 October, the existence of certain side letters.

Background

In March of this year, the UK Financial Services Authority (FSA) issued a Feedback Statement (FS 06/2) on its earlier Discussion Paper entitled "Hedge Funds: A discussion of risk and regulatory engagement." In the Feedback Statement, the FSA stated "we believe that a market failure may be present regarding the use of side letters" and that "failure by UK based hedge fund managers to disclose the existence of these side letters is, amongst other potential breaches in breach of Principle 1 of our Principles for Business (a firm must conduct its business with integrity)." The FSA went on to indicate that managers must disclose the existence of side letters and that disciplinary action might be taken against those who fail to do so. The use of side letters would be specifically reviewed by FSA inspection teams.

The FSA's statements gave rise to a great deal of concern in the industry. The issue of side letters and equality of treatment of investors is well known, but the Feedback Statement seemed to require disclosure of all side letters, even those which do not give preferential rights, and suggested the managers had a conflict of interest to manage even though their only client is the fund.

AIMA (the Alternative Investment Management Association), a trade body representing a large number of participants in the hedge fund industry, established a small working party to work with the FSA to produce a guidance note. As a result of this process, which is an excellent example of collaboration between the regulator and the industry, a guidance note has now been published. The full text of the guidance note is available at www.aima.org.

What Must be Disclosed?

It is not necessary to disclose the existence of all side letters, only those which contain material terms. The disclosure should be a brief summary of the nature of the term, and it is not necessary to disclose how many side letters there are, when they were entered into or to whom they were granted. Accordingly, confidentiality provisions should not be breached.

Additional disclosure may be required where the relevant terms are in favour of investors whose interests, individually or collectively, are "significant" (in excess of 10%).

What is a Material Term?

It is not possible to provide a prescriptive list of "material terms" as it will be a facts-and-circumstances test. Accordingly, the AIMA guidance note sets out a definition of a material term as follows:

Any term the effect of which might reasonably be expected to be to provide an Investor with more favourable treatment than other holders of the same class or interest which enhances that investor's ability either (i) to redeem shares or interests of that class or (ii) to make a determination as to whether to redeem shares or interests of that class, and which in either case might, therefore reasonably be expected to put other holders of shares or interests of that class who are in the same position at a material disadvantage in connection with the exercise of their redemption rights.

Terms that might typically be regarded as material are those granting preferential liquidity (such as reduced notice, "key man" or waiver of redemption gates) or enhanced portfolio transparency, even where not combined with preferential liquidity, as such information could influence a decision whether to redeem.

Non-material terms might include fee rebates, most-favoured-nation clauses and tax accounting.

A term which might otherwise be material can be made non-material where in practice no investor is favoured (i.e., the preferential right is extended to all investors).

It will be noted that the definition refers to "classes" of interest. Different classes may have different rights, and significant investors may be issued shares in a different class to enshrine their preferential rights. Although the existence of such classes is not a side letter per se, they should be referred to in the Fund's offering documents, which should also highlight their primary differences to those generally available. Managed accounts could, of course, give rise to conflicts of interest, which the manager should ensure are adequately managed.

Disclosure

The disclosure must be made by the UK-authorized firm. The disclosure requirement applies where the firm has awareness of a side letter even if it is not itself a party. Thus the UK firm may need to disclose the existence of side letters given by the fund(s) it manages or the manager's non-UK affiliates. This is an issue which will need to be managed in respect of UK-authorized affiliates of, for example, US principal managers.

Initial disclosure must be made by 31 October 2006. The disclosure should be made to existing and prospective investors and should cover all existing relevant side letters, and it will be necessary to keep it reasonably up to date. It is envisaged that many managers will make the relevant disclosure in their investor newsletters.

Status of Guidance Note

The guidance note has been prepared by AIMA for the benefit of the industry. It is not prescriptive, and firms are free to chose how they comply with the FSA requirements. Although the FSA has not formally approved the guidance, it has confirmed that it will take it into account in its inspections and reviews. Managers and more particularly fund directors should, however, continue to consider the appropriateness or otherwise of side letters and the discharge of their fiduciary duties.

What should you do now?

As indicated above, the compliance deadline is 31 October 2006. Accordingly, it is important to review existing side letters and determine whether or not they contain material terms which might need to be disclosed now. If investors are granted side letters in the future, then it will be important again to determine materiality, including whether the provision becomes significant in light of other existing similar provisions.

If you have any questions concerning this Alert, please contact:

Stephanie Breslow	+1 (212) 756 2542	stephanie.breslow@srz.com
David Cohen	+1 (212) 756 2141	david.cohen@srz.com
Lawrence Eckert	+1 (212) 756 2597	lawrence.eckert@srz.com
David Efron	+1 (212) 756 2269	david.efron@srz.com
Steven Fredman	+1 (212) 756 2567	steven.fredman@srz.com
Kenneth Gerstein	+1 (212) 756 2533	kenneth.gerstein@srz.com
Peter Halasz	+1 (212) 756 2238	peter.halasz@srz.com
Christopher Hilditch	+44 (0)20 7081 8002	christopher.hilditch@srz.com
Kelli Moll	+1 (212) 756 2557	kelli.moll@srz.com
David Nissenbaum	+1 (212) 756 2227	david.nissenbaum@srz.com
Paul Roth	+1 (212) 756 2450	paul.roth@srz.com
Phyllis Schwartz	+1 (212) 756 2417	phyllis.schwartz@srz.com
Daniel Shapiro	+44 (0)20 7081 8001	daniel.shapiro@srz.com
George Silfen	+1 (212) 756 2131	george.silfen@srz.com
Richard Thompson	+44 (0)20 7081 8003	richard.thompson@srz.com
Marc Weingarten	+1 (212) 756 2280	marc.weingarten@srz.com

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919 Third Avenue, New York, NY 10022 ■ Tel: (212) 756-2000 ■ Fax: (212) 593-5955 ■ www.srz.com ■ e-mail: wwwmail@srz.com

ALERT

Pension Protection Act of 2006 Changes 25% Plan Asset Rule

AUGUST 4, 2006

Yesterday, the Senate passed the Pension Protection Act of 2006. The Act makes sweeping changes to ERISA's prohibited transaction rules and significantly narrows the entities covered by those rules. The key change for investment funds is that the Act eliminates the counting of foreign pension plans, U.S. state and local government pension plans, and church plans when determining if the fund is subject to ERISA. These changes will be effective the day after President Bush signs the bill.

Under the current Plan Asset Regulation, an investment fund will be deemed to hold ERISA plan assets (which subjects the fund and the fund's manager to ERISA's fiduciary rules and the prohibited transaction provisions of ERISA and the Internal Revenue Code) if 25% or more of the value of any class of equity interests is held by "benefit plan investors." The term benefit plan investors is defined to include employee benefit plans subject to ERISA, Individual Retirement Accounts, U.S. state and local government retirement plans, foreign plans, and so-called church plans. The Pension Protection Act overrides the Plan Asset Regulation and defines benefit plan investors to include only ERISA-covered plans and IRAs. Thus, government plans, foreign plans, and church plans will count as "good" money in determining if 25% or more of the value of any class of an investment fund's equity interests is held by "benefit plan investors."

In addition to narrowing the definition of benefit plan investor, Congress adopted a second change to better count actual ERISA and IRA investment in a fund. Under the Plan Asset Regulation, an investment fund counts an investment from a fund of funds either as all "good" money (because less than 25% of each class of the equity interests in the fund of funds is held by benefit plan investors) or as all "bad" money (because 25% or more of any class of the fund of fund's equity interests is held by benefit plan investors). Congress rejected this rule. Instead, a fund of funds will count as "good" money if less than 25% of each class of its equity interests is held by benefit plan investors. An over-25% fund of funds will only count as "bad" money in the proportion of ERISA and IRA investment in the fund of funds. Thus, if ERISA investors own 36% of the only class of interests in a fund of funds, the underlying fund will count 36% as "bad" money and 64% as "good" money.

Certain hoped-for changes to the ERISA plan counting process did not end up in the Pension Protection Act. First, Congress did not raise the 25% threshold to a higher number, although it enacted 25% as a floor which could be raised by the Department of Labor when it revises the Plan Asset Regulation. Congress continued the class-by-class requirement of the 25% test, but neglected to define the term "class."

Finally, Congress did not clarify whether the exclusion of a fund's investment manager investment in a fund from the numerator and denominator of the fund's assets applies to investment vehicles controlled by the investment manager or merely to the personal assets of the investment manager. An Advisory Opinion request posing just this question remains unanswered at the DOL.

In light of these changes, we recommend several immediate and long term steps. First, you may wish to review your current 25% count. Consider reviewing each subscription agreement of an investor that indicated it was a benefit plan investor to determine if the investor indicated that it was subject to ERISA or section 4975 of the Code. If it did not, that investor's assets will now likely count as "good" money. Second, you may wish to solicit each fund of fund investor to provide you with the August 1 percentage of its assets derived from ERISA and IRA investors. The answer will allow you to further refine your plan asset count. Third, over time you may wish to adopt internal controls so that each time the fund is open to investments or redemptions, you automatically resolicit the fund of fund investors for an update of their ERISA and IRA percentage. Finally, over time you may wish to review the benefit plan investor status of each of your investors and request confirmation of their status as a benefit plan investor.

If you have any questions concerning this Alert, please contact:

Stephanie Breslow	(212) 756-2542	stephanie.breslow@srz.com
David Cohen	(212) 7562141	david.cohen@srz.com
Lawrence Eckert	(212) 756-2597	lawrence.eckert@srz.com
David Efron	(212) 756-2269	david.efron@srz.com
Steven Fredman	(212) 756-2567	steven.fredman@srz.com
Kenneth Gerstein	(212) 756-2533	kenneth.gerstein@srz.com
Peter Halsz	(212) 756-2238	peter.halasz@srz.com
Christopher Hilditch	+44 207-081-8002	christopher.hilditch@srz.com
Kelli Moll	(212) 756-2557	kelli.moll@srz.com
David Nissenbaum	(212) 756-2227	david.nissenbaum@srz.com
Paul Roth	(212) 756-2450	paul.roth@srz.com
Phyllis Schwartz	(212) 756-2417	phyllis.schwartz@srz.com
Daniel Shapiro	+44 207-081-8001	daniel.shapiro@srz.com
George Silfen	(212) 756-2131	george.silfen@srz.com
Marc Weingarten	(212) 756-2280	marc.weingarten@srz.com

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