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BRIEFING

HAVE REGULATORY DEVELOPMENTS IN HONG KONG KEPT PACE WITH THE PRIVATE FUNDS INDUSTRY?

Hong Kong positions itself as a global financial center and the asset management industry is an important sector within the Hong Kong financial services industry. It is a sector which is fast changing, driven by product innovation, market forces and changing legal landscape globally. Hong Kong faces challenges both within the Asian region and globally to maintain its status as a centre for asset management. Has it done enough so far to keep pace?

CHALLENGES FROM ONSHORE AND OFFSHORE JURISDICTIONS

Hong Kong faces challenges from a number of jurisdictions around the world to be a domiciliation of choice for funds. Whether it is a mutual fund, private equity fund, hedge fund or real estate fund, the choice of jurisdiction for fund domiciliation ranges from offshore jurisdictions such as Cayman Islands, BVI, Jersey, Guernsey and Malta, to the more mid shore jurisdictions such as Ireland and Luxembourg, to onshore jurisdictions such as Delaware, the UK and Singapore. As a general legal trend, most of these fund domiciliation jurisdictions have, in the past decade or two, either fine-tuned their existing company laws so that their existing legal vehicles can be more accommodating or may be more suitable to act as a fund vehicle, or introduced new laws altogether so as to create new legal vehicles that are designed specifically to be used as a fund vehicle. Take Luxembourg, for example – it has been prolific in its legal innovations to create different types of legal vehicles that are suitable for a wide range of funds.

HONG KONG AS A JURISDICTION FOR FUND VEHICLE DOMICILIATION

The Hong Kong experience is somewhat different. Legislative developments aimed at introducing new forms of legal vehicles designed to be used as a fund vehicle and with features designed to be funds friendly have been few and far between. For a start, it is rare to domicile a fund vehicle in Hong Kong except for the use of a Hong Kong trust as a fund vehicle for certain types of mutual funds. Even the use of a Hong Kong trust has only become more common for mutual funds in the past couple of years due to two main reasons: firstly, in order for a fund to qualify for the Hong Kong mutual fund recognition scheme between Hong

Kong and mainland China that was launched on 1 July 2015, the mutual fund must be domiciled in Hong Kong, amongst other criteria; secondly, the amended trust laws enacted in 2013, which was the first significant update of the trust law in Hong Kong since 1934, made a Hong Kong domiciled trust more relevant as a 21st century fund vehicle. Besides the use of a Hong Kong trust as a legal vehicle for certain types of mutual funds, there is almost no usage of any other types of legal entity domiciled in Hong Kong as a fund vehicle. The reason is obvious – the absence of any legislative changes to create the types of legal vehicles which are suitable as fund vehicles. Take for example, once again, developments in trust laws – England went through in 2001 a similar exercise as Hong Kong did in 2013 in amending its trust laws, and Singapore completed in 2004.

Hong Kong is disadvantaged in its drive to be a fund domiciliation center because it lacks a legal creation which is directly comparable to the Open Ended Investment Company in the UK (which was introduced in the UK in 1997) or the European SICAV. Similarly, in the offshore world, there are comparable legal structures, such as the Cayman Island exempted limited company. In fact it is fair to say that most jurisdictions with a significant financial services industry and most offshore jurisdictions have some type of vehicles which share some characteristics of such open ended investment companies. However, this is not the case in Hong Kong. Essentially this form of legal vehicle has the following key features which are essential for it to be used effectively as a fund vehicle: (i) such vehicle takes the form of a company that allows for variable capital, i.e. can freely issue shares when money is invested and redeem shares when requested by investors; and (ii) shares can be bought and sold at a price which is based on the current net asset value. There has been some recent efforts from the Hong Kong government to lay the groundworks for the introduction of such open ended investment company in Hong Kong. For instance, the Hong Kong government issued a Consultation Paper on Open-Ended Fund Companies in March 2014. Further, the Hong Kong Financial Services Development Council (the "HKFSDC") recently issued a Paper on the Tax Issues on Open-ended Fund Companies which set out certain suggestions on the tax aspects of a proposed open-ended investment company.

As a domiciliation for private equity funds, Hong Kong is almost never considered because (i) its limited partnership law, which was enacted in 1912 under the Limited Partnership Ordinance, has largely been unchanged since its original enactment and hence is not particularly accommodative for private equity fund vehicles; and (ii) there are uncertainties as to whether a limited partnership domiciled in Hong Kong is tax transparent for Hong Kong tax purposes.

In contrast to Hong Kong, many jurisdictions, both onshore and offshore either have introduced new legislation for the purpose of creating a type of legal vehicle which is suitable to be used as a private equity fund vehicle or have refined their existing laws to make their limited partnerships more suitable to be used as vehicle for private equity funds. For example, in Singapore, the Limited Partnership Act came into effect in 2009. Since its introduction, it has been widely used as a vehicle of choice for private equity funds, at least for private equity funds managed from Singapore. With legislative amendments made to the Limited Partnership Act 1907 over the past decade, the UK limited partnership today is the market standard structure for European private equity and venture capital funds as well as many other types of private funds. Similarly in PRC, limited partnership laws have gone through many refinements over recent years and today the domestic PRC limited partnership is the vehicle of choice for RMB private equity funds managed from the PRC. Not to mention that the US which has the Delaware LLC and the Cayman Islands' widely used exempted limited partnership, etc. The need to update the existing limited partnership laws in Hong Kong to make it more suitable to be used as a private equity fund's jurisdiction has been recognised – once again the HKFSDC has recently issued a Paper on the Limited Partnership for Private Equity Funds and has suggested a number of updates to the limited partnership laws in order to make it possible to be used as a fund vehicle for a private equity fund.

HONG KONG AS A REGIONAL HUB FOR THE ASSET MANAGEMENT INDUSTRY

Legislative changes that are aimed at creating legal vehicles which are suitable as fund vehicles by themselves are of course not enough to ensure Hong Kong's global competitiveness as a centre for asset management. Legal and regulatory developments should be wide enough to capture the entire ecosystem and value chain that constitute the asset management industry. This would include not only fund domiciliation, but also fund management, fund distribution and fund product development.

In terms of bringing more fund management activities into Hong Kong, the Inland Revenue (Amendment) (No. 2) Ordinance recently enacted in July 2015, which extended profit tax exemption to private equity funds is an example of a regulatory change aimed at encouraging more asset management activities to be brought back to Hong Kong, in this instance in the private equity space.

As for fund distribution, most attention (and for good reasons) recently has been on Hong Kong's role as an offshore RMB centre and the role it can play in China's opening of its capital markets. In this regard the recently launched mutual fund

recognition scheme between Hong Kong and mainland China has been a significant milestone. Against this background though, certain countries in the region have formed the Asia Region Funds Passport, which is expected to be launched in 2016. With its eyes firmly on mainland China, has Hong Kong lost sight of other regional and global opportunities?

In this age of intense global competition for capital, Hong Kong cannot afford to lose out in this race due its failure to modernize its laws. Legislative developments and regulatory changes need to be responsive to market demands and industry needs. These changes can be brought about with a collaborative approach between the Inland Revenue Department, the SFC and the various Hong Kong government departments.

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簡報

香港的法規發展是否能追上私募基金行業?

香港將自己定位為一個國際金融中心。資產管理是香港金融服務業重要的一環。這是一個變化急速，由產品創新、市場推動及環球法律環境之變更而驅使的行業。香港正面對來自亞洲地區以至全球的挑戰去維持資產管理中心的地位。然而，香港過去所做的是否足以追上發展的步伐？

面對在岸及離岸司法管轄區的挑戰

香港面對世界上多個司法管轄區的挑戰去成為基金選擇的落戶地點。不論是互惠基金、私募基金、對沖基金、房地產基金，可供選擇讓基金落戶之司法管轄區範圍涵蓋離岸的開曼群島、英屬處女島、澤西、根息島及馬爾他、較為中岸的愛爾蘭及盧森堡及在岸的德拉瓦、英國及新加坡。作為一個普遍法律趨勢，大部份此等基金落戶的司法管轄區已經於過去十至二十年調整其現行的公司法，使當地現行的法律工具能夠更方便或甚至更適合作為基金工具；或引

進全新的法律，特別設計使用為基金工具的新法律工具。例如:盧森堡過去富於法律創新以建立適合廣泛基金之不同類別的法律工具。

香港作為基金工具落戶的司法管轄區

香港的經驗略有不同。香港的法律發展很少旨在引進設計使用為基金工具或具備方便基金的特性的新型法律工具。除了某些種類的互惠基金以香港信託作為基金工具外，鮮有基金工具落戶香港。雖然過去幾年互惠基金使用香港信託作為基金工具愈趨普遍，但其實只是因為下列 **2** 個主要原因：第一，為了符合香港及中國大陸於 **2015** 年 **7** 月 **1** 日啟動的互惠基金互認計劃中的其中一個條件，互惠基金必須落戶香港**(**除其他條件外**)**；第二，因為於 **2013** 年立法修訂的信託法是自 **1934** 年以來香港信託法的首次重要更新，使落戶香港的信託較適合成為二十一世紀的基金工具。除了以香港信託作為某些互惠基金的法律工具外，幾乎沒有使用香港的任何其他種類的法律實體作為基金工具。原因顯然是因為缺乏任何法律改革去建立適合成為基金工具的法律工具種類。再次引用上述的例子 — 信託法的發展，英國於 **2001** 年便進行了類似香港於 **2013** 年的信託法修訂，而新加坡於 **2004** 年完成修訂。

香港因為缺乏可以直接比得上英國於 **1997** 年引進的開放性投資公司或歐洲的可變資本投資公司的法律創新以致不利於推動成為基金落戶中心。同樣地，於離岸世界亦有可比的法律架構，例如開曼群島的豁免責任有限公司。事實上大多數具備顯著金融服務業及大部份離岸司法管轄區均有某些種類的工具開放式投資工具的特性。但是香港的情況並非如此。基本上，這種法律工具具備下列主要特質，這些特質是被使用為有效的基金工具所必須的:**(i)**該等工具以一種容許可變股本的公司型式存在，例如:當投入資金時可以自由發行股份及當投資者要求時可以贖回股份；及**(ii)**可以基於現有的資產淨值的價值買賣股票。最近，香港政府嘗試為引進開放式投資公司做準備。例如，香港政府於 **2014** 年 **3** 月發表開放式基金公司的咨詢文件。另外，香港金融發展局**(**下稱「金發局」**)**最近發表關於開放式基金公司的稅務問題文件及就擬推出的開放式基金公司的稅務問題提出意見。

基於下列的原因，香港幾乎不會被考慮成為私募基金的落戶地點，因為**(i)**根據 **1912** 年立法的《有限責任合夥條例》，香港的有限責任合夥法與最初制定的條文大致上沒有分別，所以並不特別適合成為私募基金工具；及**(ii)**以香港稅務為目的，存在有限責任合夥公司落戶香港是否稅收透明的不確定性。

對比香港，很多在岸及離岸的司法管轄區已引進新的法律以建立一種適合成為私募基金工具的法律工具；或已改進其現有的法律使其有限責任合夥公司更適合成為私募基金工具。例如：新加坡的《有限責任合夥公司法》於 **2009** 年生效。自始，最低限度對於新加坡管理的私募

基金而言，新加坡的有限責任合夥公司被廣泛選擇使用為私募基金的工具。自從約於十年前英國修訂其於 **1907** 年的《有限責任合夥公司法》後，英國的有限責任合夥公司是今天歐洲私募基金及風險資本基金及其他種類的私募基金之市場標準架構。同樣地，中國的有限責任合夥公司法經過多年的修訂，至今國內的有限責任合夥公司是中國管理的人民幣私募基金的選擇工具。更不必說美國有德拉瓦州公司及開曼群島廣泛使用的豁免責任有限合夥公司等。更新香港現有的有限責任合夥公司法以容讓香港更適合被使用為私募基金的司法管轄區的需要已經被認定—金發局最近已發表關於私募基金的有限責任合夥公司文件及建議數項有限責任合夥公司法的更新，以致更新後的有限責任合夥公司法能夠被使用為私募基金的基金工具。

香港作為資產管理業務的地區中心

法律改革旨在建立適合成為基金工具的法律工具。單靠法律改革當然不足以確保香港成為資產管理中心的環球競爭力。法律及法規的發展應該夠廣泛以奪得構成資產管理業市場的整個生態系統及價值鏈。這不單指基金落戶，亦包括基金管理、資金分配及基金產品的發展。

於引進更多基金管理活動到香港這方面，最近於 **2015** 年 **7** 月立法的《稅務（修訂）（第 **2** 號）條例》將利得稅豁免延伸至私募基金是旨在鼓勵更多在私募基金方面的資產管理活動返回香港的一個法規改變例子。

至於資金分配方面，最近大多數關注香港在人民幣離岸中心及中國開放其資本市場的角色。在此，近日啟動的香港及中國大陸之間的互惠基金互認計劃是一個重要里程碑。在這樣的背景下，附近地區的幾個國家已成立亞洲地區基金護照，預計於 **2016** 年啟動。當大家牢牢地關注中國大陸的時候，香港是否丟掉了其他地區及環球的機會？

在這環球資本競爭激烈的年代，香港不能因為落後的法律而輸掉這場比賽。法律發展及法規改革必須回應市場的需求及行業的需要。稅務局、證券及期貨事務監察委員會及香港的不同政府部門可以一種互相合作的方式為香港帶來這些改變。

關於我們可以怎樣協助您的進一步詳情，請以電郵(**info@altquest.com.hk**)聯絡我們。

本資料謹提供一般資訊，並沒有意圖提供法律意見。

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