

Many Canadian plans are seriously considering or have decided to allocate a portion of the plan assets to an alternative asset class (infrastructure, real estate, private equity). However, investments in alternative investments are more complex than investments in traditional asset classes such as public equities because of the way these investments are structured. This Alternative Investment Checklist is designed to help the plan administrator ensure that the plan receives the maximum return from the investment in a manner which is compliant with tax and pension laws.

This Checklist is not intended as legal advice nor is it an exhaustive treatment of the considerations that need to be taken into account as each investment raises its own unique issues. Plan administrators who decide to invest in an alternative investment should consult their legal advisors as early as possible in the investment process.

## A. Decision-Making Process

1. Does the plan administrator have sufficient expertise internally to make a decision to invest in alternatives? If not, has expert advice been obtained?
2. Has a thorough and independent due diligence process (including as applicable a review of any financial modelling) been carried out?
3. Have the appropriate approvals under the plan's governance system been obtained?
4. Does the investment comply with legislative requirements (see below)?
5. Has a monitoring process and reporting structure been put in place?
6. Have all the steps taken during the decision-making process been thoroughly documented? Is the record relating to the investment organized and easily accessible?

## B. Commercial Issues

1. Has the administrator been provided with copies of all of the transaction documents (e.g., offering memorandum, limited partnership agreement, subscription agreement, side letter, closing legal opinions, etc.)
2. What is the jurisdiction of organization of the investment and what type of entity is the investment vehicle?
3. Is the administrator satisfied that it is aware of and understands the main features of the investment (e.g., financial terms, fee structure, liquidity of the investment, etc.)
4. Are Canadian-specific issues addressed in the transaction documents or in a side letter? (e.g., any tax or pension issues and other issues such as *Foreign Account Tax Compliance Act*)?
5. Is there a report that identifies the commercial/legal issues and documents how these issues were resolved?

## C. ITA Issues

1. Is the investment compliant with the requirements for investments under the *Income Tax Act* (Canada) (ITA)?

NOTE: Non-compliance with the investment requirements in the ITA could put the plan in a revocable status, thus jeopardizing its tax-exempt status. If the investment is made by a tax-exempt corporation wholly-owned by the plan, non-compliance with the applicable ITA requirements could result in the tax-exempt corporation losing its non-taxable status.

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2. Is it documented that the investment is compliant with the ITA?

## D. Other Tax Issues

1. Is the investment structured in as tax-efficient manner as possible in order to minimize foreign and domestic tax leakage and maximize returns?
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2. If the investment is in a fund established outside of Canada, or the fund can invest outside of Canada, has there been an analysis of the foreign tax implications? Is the investment structured as tax efficiently as possible, taking into account the tax laws in those other jurisdictions?
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3. Has there been an analysis of the tax efficiency of any feeder fund or parallel investment vehicle (if offered in connection with the investment)?

## E. Pension Law Requirements

1. Is the investment authorized under the plan's Statement of Investment Policies and Procedures (SIPP)?

If not, was the SIPP amended prior to the making of the investment?

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2. Is the investment compliant with the applicable investment laws (e.g., the 10% rule/the 30% rule/related party restrictions)?

NOTE: Non-compliance with legislative requirements could result in regulatory sanctions, and could also put the plan into a revocable position under the ITA, thus jeopardizing its tax-exempt status. If the investment is made by a tax-exempt corporation wholly-owned by the plan, failure to comply with the pension rules could result in the tax-exempt corporation losing its non-taxable status.

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3. Is it documented that the investment is compliant with the pension investment rules?

This Alternative Investment Checklist was prepared by members of the Pension Investment Team at Osler, Hoskin & Harcourt LLP. The Pension Investment Team provides advice on the legal aspects of investing to pension plans of all sizes.

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