7 July 2025

Via Electronic Mail: dpt-tp-pe-reform@hmrc.gov.uk

HM Revenue & Customs
100 Parliament Street
Westminster
London
SW1A 2BQ
United Kingdom

Re: Reform of UK law in relation to transfer pricing, permanent establishment and Diverted Profits Tax

MFA[1] appreciates the opportunity to participate in the consultation process relating to transfer pricing, permanent establishment, and Diverted Profits Tax, published on 28 April 2025 (the "**Consultation**").[2] As a respondent to the 2023 policy consultation,[3] we welcome this further engagement on the proposed legislative changes.

We continue to welcome the UK's effort to simplify and update the operation of the UK tax code and keep pace with evolving international standards. We appreciate, in particular, the UK government's receptivity to feedback from the asset management industry, in recognition of the greater strain placed on the Investment Manager Exemption ("**IME**") from moving to the latest OECD definition of a dependent agent permanent establishment ("**DAPE**"). However, we remain concerned about unintended consequences, for example, from the potential breadth of the amended definition of a DAPE and the

[1] Managed Funds Association (MFA), based in Washington, D.C., New York City, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest it, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 fund manager members, including traditional hedge funds, private credit funds, and hybrid funds, that employ a diverse set of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors diversify their investments, manage risk, and generate attractive returns throughout the economic cycle.

[2] "Reform of UK law in relation to transfer pricing, permanent establishment and Diverted Profits Tax," HM Revenue & Customs, https://www.gov.uk/government/consultations/reform-of-transfer-pricing-permanent-establishment-and-diverted-profits-tax/reform-of-uk-law-in-relation-to-transfer-pricing-permanent-establishment-and-diverted-profits-tax (published 28 April 2025).

[3] "Reform of UK law in relation to transfer pricing, permanent establishment and Diverted Profits Tax," HM Revenue & Customs, https://www.gov.uk/government/consultations/uk-law-reform-in-transfer-pricing-permanent-establishment-and-diverted-profits-tax/reform-of-uk-law-in-relation-to-transfer-pricing-permanent-establishment-and-diverted-profits-tax (published 19 June 2023).

potential narrowing of the benefit afford by the IME as a result of the new statutory definition of "investment fund," among others.

Accordingly, our responses below reflect the legal and commercial issues we expect our members and the wider asset management industry to encounter in the application of the draft legislation. We offer recommendations that would either further clarify the operation, or otherwise prevent any unintended broadening or narrowing, of foundational concepts—like reliance on the IME or the absence of a DAPE on first principles—on which the asset management industry requires certainty. We have not responded to every question posed by the Consultation, and the broader policy concerns which informed our feedback to the 2023 policy consultation are not repeated here.

Transfer Pricing

Question 1: The participation condition[4]

MFA does not consider that the introduction of a new "main purpose" test ("**Section 162B**") relating to arrangements which might otherwise avoid the (new) participation condition is necessary or proportionate. MFA understands the need to ensure that the participation condition is not artificially circumvented but considers that the specific clarifications and extensions set out in the draft legislation should be sufficient to achieve this objective, especially since the transfer pricing notice regime is to be extended to cover the participation condition ("**Section 148A**") and will, therefore, enable HMRC to, in effect, treat the participation condition as satisfied pending formal resolution of the correct legal position.

In that context, the "main purpose" test, which addresses only the most exceptional and rare scenarios that might otherwise fall outside the (amended) participation condition, does not sufficiently advance the draft legislation's purpose to justify the significant burden which will be placed on taxpayers and their advisors to determine, on an affirmative and conclusive basis, that no part of often complex asset management arrangements could be construed as having a "main purpose" of avoiding the participation condition. Section 162B may represent a sensible precaution in the abstract, but in practice, the "main purpose" test creates a need for taxpayers to take costly advice to affirm their filing positions, and HMRC should consider whether this burden is proportionate to the perceived residual risk which Section 162B is intended to address.

Section 162A also contains new rules relating to agreements for common management. The Consultation describes these rules as being relevant to situations in which entities have "*different shareholders*", but the draft legislation is more expansive and expresses the construct simply in terms of "management" of each relevant person. First, Section 162A is seemingly intended to apply only with respect to "direct participation" (within the meaning of Section 157), but the draft legislation would benefit from

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[4] Question 1: The government welcomes views on the proposed amendments to the participation condition, particularly whether the draft legislation will create participation in the intended scenarios.

clarity on this point. MFA considers that Section 162A only needs to apply with respect to "direct participation" in order to achieve its intended purpose. Second, absent a specific statutory definition for the key term "management" (and the complexity which this broad concept would therefore introduce for asset managers), MFA recommends that—consistent with the apparent intent of the Consultation—the application of Section 162A be limited to bodies corporate and to the types of "management" control described in relation to bodies corporate in Section 1124(2) of Corporation Tax Act 2010.

Question 2: UK:UK transfer pricing[5]

With respect to Section 164A, MFA appreciates that UK-to-UK transactions cannot be excluded from domestic transfer pricing if one of the UK tax resident participants is not a company or is a company but has a special UK tax status. MFA would, however, suggest that consideration be given to excluding UK-to-UK transactions in situations where both participants are UK resident companies which are "excluded" within the same heading of Section 164A(5). For example, MFA would suggest that exclusion from domestic transfer pricing would be appropriate for transactions between two companies which are both subject to the Qualifying Asset Holding Company ("**QAHC**") regime (which would both fall within the same heading of Section 164A(5)(m)). Such transactions do not appear to contravene the purposes of the draft legislation. Nonetheless, these transactions may not be entitled to the intended simplicity for UK-to-UK transactions between companies which otherwise have the same domestic UK tax status.

Permanent Establishment

MFA appreciates the careful consideration given to prior feedback on the permanent establishment reforms and notes that the proposed amendments to the IME should address many of the concerns previously identified by our members seeking to rely on the IME. However, MFA continues to believe that the proposed changes to the permanent establishment ("**PE**") and agent of independent status ("**AIS**") constructs will not be easily absorbed by asset management structures, notwithstanding HMRC's view that only limited substantive change to the application of UK law is intended.

Accordingly, MFA provides several proposals below to ease this transition in the PE and AIS regimes, primarily in response to Question 10. Even if these proposals are adopted, it will be critically important that asset managers can rely on the (amended) IME and are able to assess and monitor IME compliance on a clear and objective basis, including in dealing with contractual counterparties and investors to whom clear assurances are typically required to be given around UK PE risk. MFA provides several recommendations in this regard, primarily in response to Questions 13, 14 and 15.

[5] Question 2: The government welcomes views on the draft legislation relating to UK:UK transfer pricing. In particular, comments are invited on whether the proposed test will be simple to apply and the suggested exclusions (which include persons within the charge to Income Tax).

Question 10: DAPE[6]

MFA appreciates HMRC's intention that the amended definition of a DAPE should be no broader than the current definition under UK law. In the context of the asset management industry, however, it is not apparent that this will always be borne out in market participants' response to the amended definition. A number of fund structures do not currently rely on the IME in practice (in terms of risk assessment and compliance) and rely instead on there not being a DAPE on first principles (or, if a DAPE were to arise, they would rely on the AIS), on the basis that a UK advisor or sub-advisor does not (typically) engage in the decision-making, investment committee or deal execution functions in the UK. Hence, asset managers are generally advised that a UK advisor or sub-advisor is not actually responsible for "doing business" on behalf of a non-UK fund or its investors and, therefore, does not constitute a PE of non-UK funds or investors.

The substitution into Section 1141(1)(b) of the words "*or habitually plays the principal role leading to the conclusion of contracts, that are routinely concluded without material modification*" risks disturbing the analysis which leads to this prevailing view. This substitution could be interpreted as placing a focus on a role for a UK advisor or sub-advisor which is distinct from the actual investment decision-making by referring to certain tangential elements of the investment process which ultimately lead to the separate investment decision by a non-UK person. These functions to which the focus of Section 1141(1)(b) may have shifted have always been understood as not giving a UK advisor or sub-advisor discretion because they are advisory in nature and not binding on non-UK persons to whom they are provided.

The amended IME acknowledges (in Paragraph 16) that a UK sub-advisor which does not hold the appropriate UK regulatory authorisation to undertake "*investment management*" activities in the UK should not be treated as a DAPE. Although this is a welcome acknowledgment of the concern articulated above, MFA urges that this principle be reflected more explicitly in the draft legislation relating to DAPE, rather than being expressed only through the IME text. Additionally, MFA recommends that this protection should explicitly apply to UK persons who do not hold specific "investment manager" regulatory authorisation in the UK, even though they may hold "advisor" or "arranger" regulatory authorisation. At a minimum, this protection should apply to the extent that such UK persons are providing relevant services (which do not include discretionary investment management services requiring "investment manager" regulatory authorisation) either (i) to affiliates or (ii) to unrelated third-parties (*e.g.*, third-party Alternative Investment Fund Managers) which do not hold "investment manager" regulatory authorisation.

This protection would ensure that common arrangements in which a UK sub-advisor is providing non-discretionary advisory or arrangement services, either to affiliates or to third-parties which are themselves regulated to provide discretionary investment management services, are adequately protected

[6] Question 10: The government invites comments on the changes to section 1141 CTA 2010 in the draft legislation, including any practical or administrative consequences that are expected to arise from the proposed change to the definition of a DAPE.

from the risk of creating a DAPE for the offshore funds or persons with respect to whom such non-discretionary UK services are ultimately provided. This protection would also ensure that a UK sub-advisor may continue to rely on the AIS, where necessary, without having to undertake a full IME analysis. For example, a UK sub-advisor may provide non-discretionary advisory or arrangement services to a US Securities and Exchange Commission-registered entity, with respect to offshore funds advised or managed by the US entity. Such services typically require some level of advisor or arranger regulatory authorisation for the UK person. However, the UK sub-advisor does not provide discretionary investment management services or "ready" contracts directly to the offshore funds. Accordingly, the UK sub-advisor should be protected from the risk of creating a DAPE for the offshore funds or for the US entity to whom UK services are provided, without undertaking the administrative burden and cost of a full IME analysis.

MFA recommends that carve-out protection of this nature should be built into the operation of amended Section 1141(1)(b) (to limit the application of the new "leading to the conclusion of contracts" rule in these circumstances) and new Section 1142(1A) (to limit the application of the "closely related" exclusion from the AIS in these circumstances).

Relatedly, MFA understands that the new "closely related" exclusion from the AIS in Section 1142(1A) is not intended to apply where the IME conditions are satisfied because the amended IME is intended as a safe harbour from DAPE status on its own terms. MFA recommends that this intention be reflected more explicitly in the draft legislation, for example, by expressly carving out in the opening words of Section 1142(1A) those circumstances in which the IME conditions are satisfied.

Question 12: Exclusion from Income Tax to the UK trading income of non-resident companies with no PE[7]

MFA understands that the draft legislation relating to the removal of the residual charge to Income Tax may already reflect the greatest extent to which HMRC considers it viable to remove this charge. However, the draft legislation only applies to remove the residual charge to Income Tax in circumstances where the IME or the AIS is otherwise available. The draft legislation does not appear to remove the charge to Income Tax in circumstances where there is simply no PE on first principles (within the meaning of Section 1141), despite the apparent intent reflected in Paragraph 10 of the amended IME that "*non-resident companies which are not chargeable to Corporation Tax on their trading income by virtue of Chapter 2, Part 24 Corporation Tax Act 2010 are also outside the scope of Income Tax in respect of that income*." The Consultation itself, in the lead-in to Question 12, reflects the same intent.

Since Section 1141 does fall within Chapter 2, Part 24, amended Section 3 of Corporation Tax Act 2009 should extend not only to circumstances in which the application of (amended) Sections 1142 to 1144

[7] Question 12: The government invites comments on the extension of the exclusion from Income Tax to the UK trading income of non-resident companies with no permanent establishment.

of Corporation Tax Act 2010 result in there being no UK PE, but also to circumstances in which there is no UK PE on first principles (within the meaning of Section 1141). This is the likely outcome under many UK double tax treaties, by operation of standard "business profits" articles. For the asset management industry, it is important to have this outcome supported directly by the underlying domestic legislation which, as currently proposed, does not appear to reflect the stated intent of the Consultation or the proposed text of the amended IME.

To the extent a wholesale amendment to extend the removal of the charge to Income Tax to situations in which there is no UK PE on first principles (within the meaning of Section 1141) is not provided, at a minimum, a more limited carve-out for corporate form investment fund vehicles, broadly equivalent to the carve-out from UK corporate tax residence for alternative investment funds ("**AIFs**"), which already exists in Section 363A of TIOPA 2010, should be considered.

MFA further notes that the current proposals extend only to corporate taxpayers which creates an unnecessary and artificial distinction in terms of residual exposure to Income Tax between investment funds established in corporate form and investment funds established in partnership form with non-corporate investors, where no UK PE exists in either case. MFA appreciates that it may not be viable to remove the charge to Income Tax for non-corporates in all circumstances in which a PE does not exist. However, MFA recommends a carve-out for investment fund partnerships or non-corporate investment schemes which are AIFs or collective investment schemes ("**CISs**"), aligning broadly with the principle of Section 363A of TIOPA 2010, or, in the alternative, for partnerships or non-corporate investment schemes which are "qualifying funds" (within the meaning of the QAHC regime), to ensure that such investment funds (or, more accurately, in the case of funds established in partnership form, their investors) are subject to the same Income Tax rules as investment funds established in corporate form where no UK PE exists. Both corporate- and partnership-form investment funds would therefore be subject to UK tax on the same principles, *i.e.*, only if they are trading in the UK through a UK PE (and the IME or the AIS are not available to exempt the UK PE).

MFA understands that it may be necessary, in this context, to preserve the UK's taxing rights with respect to certain withholding regimes, *e.g.*, yearly interest, royalties or annual payments, and with respect to dealings in UK land, which could, potentially, be achieved by focusing the removal of the Income Tax charge more specifically around Income Tax arising under Section 6(2) of Income Tax (Trading and Other Income) Act 2005. MFA otherwise believes that these recommendations are capable of delivering parity of treatment for corporate- and partnership-form investment funds by exposing either to UK tax only in respect of trading through a UK PE.

Question 13: Definition of "investment transaction"[8]

MFA is broadly comfortable that the proposed changes to the definition of "investment transaction" should not inadvertently narrow the scope of the transactions and securities to which the IME is intended to apply; in this respect, the changes represent a welcome clarification.

MFA notes that HMRC is already aware that amended Section 1150 is deficient in that sub-section (3) thereof purports to afford the benefit of the IME only to relevant transactions carried out by an "investment fund" (which is defined in sub-section (7) to mean an AIF or a CIS only). MFA understands that the forthcoming legislation is intended to be revised such that sub-section (3) refers instead to transactions carried out by "any non-UK resident person" (or some similar formulation). This revision is a suitably broad formulation of the rule. It is essential that the application of the IME is not limited to AIF and CIS vehicles and that the IME can apply equally to relevant transactions carried out by an investment manager for special purpose vehicles or other holding, feeder or parallel structures of investment funds which may not themselves constitute an AIF or a CIS.

Question 14: 20% test (formerly Condition D)[9]

MFA has no further comment on the proposed removal of the 20% condition which is a welcome development in applying the amended IME.

Question 15: Statement of Practice 1/01[10]

The interaction between the amended Statement of Practice 1/01 and the draft legislation are addressed in the above commentary. For example, comments made in relation to Question 10 would, if adopted, imply some consequential updates to Paragraph 16; and comments made in relation to Question 13 would imply updates to Paragraph 29.

Paragraph 6 suggests that the existing (old) version of the IME may continue to be applied in circumstances where, and to the extent that, the terms of the amended (new) IME would require the non-resident or its investment manager to make changes to current circumstances or contractual arrangements. MFA appreciates the flexibility afforded by this provision and recommends that a long-stop

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[8] Question 13: The government invites comments on the definition of 'investment transaction' in the draft legislation, including whether any transactions or persons which would previously have been in scope have been omitted and whether any practical difficulties in applying the definition are anticipated.

[9] Question 14: The government invites comments on the proposal to repeal the 20% test (formerly Condition D) and the charging provision in section 1152, including whether this would cause any practical difficulties to businesses previously in scope of the Investment Manager Exemption.

[10] Question 15: The government invites comments on the draft amended Statement of Practice 1/01, including whether it is consistent with the draft legislation and whether businesses foresee any difficulties in applying the revised guidance in respect of Condition C.

date of five years from introduction of the amended (new) IME would be appropriate to enable any affected contractual arrangements to run their course or come up for renewal, or simply to allow asset managers time to adjust their contractual and compliance arrangements to the amended (new) IME.

MFA would also suggest it should be made clear in Paragraph 6 that this grandfathering is an optional approach for affected arrangements which need only apply the existing (old) IME in place of the amended (new) IME to the extent required to accommodate their historic arrangements. Funds or asset managers whose pre-existing arrangements tie them into certain aspects of the existing (old) IME, for example, because they expected to rely on the 70% test, rather than the 50% test, in order to fall within the safe harbor to the "independent capacity" test, or because they have contracted with onshore third party asset managers in terms of the 70% test, will not, in order to preserve their access to those elements of the existing (old) IME on which their pre-existing arrangements rely, be required to apply the existing (old) IME in full, for example, by having to retain the 20%, when this has otherwise been abolished by the amended (new) IME.

MFA considers that the extension in Paragraph 46 of the "independent capacity" test to include a "qualifying fund" as defined in the QAHC regime is a helpful and appropriate improvement to the IME regime. Given the expected and necessary expansion of the "investment transactions" rule to cover any non-UK resident person (*cf.* Question 13 above), MFA recommends further expanding Paragraph 46 such that the "independent capacity" test may be satisfied for IME purposes if the non-resident person is also a company which is wholly or almost wholly owned by a "qualifying fund." The definition of an "intermediate company" from Paragraph 10 Schedule 2, Finance Act 2022, may be adapted for this purpose.

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MFA appreciates the opportunity to submit a response to HMRC, and we would be pleased to meet with HMRC representatives to provide further support for appropriate legislative changes in this area. If the HMRC team has questions or comments, please do not hesitate to contact Joseph Schwartz, Vice President and Senior Counsel, Regulatory Affairs, at jschwartz@mfaalts.org.

Respectfully submitted,

/s/ Rob Hailey

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