Non-resident CGT guidance

BPF

To: nrcg.consultation@hmrc.gsi.gov.uk
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Introduction

1. The British Property Federation (BPF) represents the real estate sector – an industry with a market value of £900bn which contributed more than £60bn to the economy in 2016[1]. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help drive the UK's economic success; provide essential infrastructure and create great places where people can live, work and relax.

2. The sector is one of the most successful in the world at attracting domestic and overseas long-term investment capital into the renewal of the UK's towns and cities. Such large, long-term, patient investors are critical to the urban redevelopment and regeneration of our country, and crucial for creating and maintaining modern and productive work places.

3. Given the scale and complexity of some commercial real estate and regeneration projects, it is very common for investors to invest collectively. Therefore, we commend government's efforts to ensure that exempt investors are still able to maintain their exempt status while investing collectively – and ensuring that such investment structures are not subject to double tax simply because the fund structure has multiple tiers of companies.

4. We welcome the opportunity to provide comments on the draft guidance.

5. Our detailed comments on draft Appendix 14 (core CGT) and Appendix 15 (Sch 5AAA) are included in the appendices to this paper, with our primary recommendations set out below:

    a. ***More clarity as to the scope of reporting rules and other administrative requirements***

    Failure to comply with the reporting requirements means that a fund risks losing the benefit of an exemption election. It is therefore critical that funds have a clear understanding of the information required to be provided to HMRC – not only to secure their own compliance, but also to ensure that they can, where required, obtain specific consent from new investors in subscription arrangements. As we set out in Appendix 2, paragraphs 253 to 263, there are still areas of uncertainty as to what information HMRC require.

    We therefore ask that this section of the guidance be revised -and be much more specific as to what information is mandatory (such that a fund needs to ensure that it can provide that information) and what information is only required if readily available (so failure to provide is not a "breach"). (As the details of these requirements were, as a policy matter, left for HMRC to determine (rather than be fixed by legislation), we assume that there is

[1] Property Data Report 2017, Property Industry Alliance

the flexibility to provide greater detail on these in Appendix 15.)

In addition, we ask that HMRC make public as soon as possible contact details for the filing of any elections under either paragraph 8 or 12 of Sch 5AA, and if a particular format for an election is envisaged, make that similarly available.

b. ***Certainty as to the application of the GDO test to real estate funds: the need for a temporary clearance process***

The foreword to the draft IFM guidance on the GDO test says that no clearance procedure is envisaged for funds within the scope of Sch 5AAA.

We ask HMRC to reconsider this decision, at least for an initial period of say, 3 - 5 years following commencement of the new CGT provisions. This is because the guidance in general reflects experience in relation to AIFs and offshore funds, and although some private equity real estate funds may be marketed in a similar way, others are likely to approach targeting investors differently – particularly those that are closed-ended. For such funds, there may be areas of current HMRC practice that may not readily cross-over (or certainly not in a way that a fund manager can have the relevant degree of certainty that it would need, given the implications for its investors if it gets it wrong.

A clearance process will provide funds with certainty -and in addition the clearance process will provide information to HMRC that allows the guidance to be updated to reflect the reality of real estate funds.

For more information, see Appendix 2, paragraphs 264 to 276.

c. ***Legislative amendment, not just guidance, where the legislation does not work as intended***

d. As we have previously noted, we very much welcomed that constructive nature of HMRC's engagement with the funds sector during 2018 to identify an appropriate solution to the issues raised during the original consultation on the CGT changes. That approach meant that the draft Sch 5AAA was subject to limited stakeholder review prior to the Finance (No 3) Bill being introduced into Parliament. Since then, a very small number of aspects of Sch 5AAA have been identified as not necessarily working as intended – for example, the interaction between paragraphs 12(3), 13 and 46 in relation to the non-close condition and also the rules relating to feeder funds owned by qualifying institutions (which seem to preclude indirect ownership given that they require the feeder fund to be "wholly owned" using the same definition that applies for paragraph 12 – see Appendix 2, paragraph 244).

Although we very much welcome HMRC's willingness to acknowledge this and seek to provide comfort on these issues within the draft guidance, ultimately the nature of the issues involved mean that guidance cannot substitute for the need for the legislation to be amended. We would ask that these amendments be made as soon as practicable – and in particular before the expiry of the 12 month window in which an existing fund can make an election.

6. We welcome the opportunity to respond to the Consultation, which is structured as follows:

   Appendix 1: BPF comments on Appendix 14

   Appendix 2: BPF comments on Appendix 15

7. If you would like to discuss any aspect of our response in more detail, please get in touch.

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Appendix 1: BPF comments on Appendix 14

8. References to sections of the Capital Gains Tax Manual are to the section numbers set out in draft Appendix 14.

CG73920 - "The charge"

9. The third paragraph states "For other persons a non-resident CG disposal is within the charge to Corporation Tax."

10. The charge to corporation tax on chargeable gains (CT) is charged only on "companies" as defined within the Taxes Acts. We suggest "other persons" is replaced by "companies".

"Direct and Indirect disposals"

11. Indirect disposal is described as "involving rights to assets": even though this is introduction, should this be "rights or interests in" to reflect the scope of the indirect charge set out in para 3(1)(a) Sch 1A? It would be helpful to reference the legislation here for direct disposals (s1A(3)(b) and s2B(4)(a)) and indirect disposals (s1A(3)(c), s2B(4)(b) and Sch 1A) as is done in the other introductory paragraphs.

"CGT - Rates of CGT"

12. In the third paragraph (the rate that applies), it would be helpful to reference s1I and s1J: as the TCGA rules have been rewritten, it would assist taxpayers to see where rewritten provisions can be found (especially where there has been no change in law).

"CGT - Use of losses"

13. The second paragraph summarises the losses that can be offset against gains under the CGT charge. In addition to referencing s1E, it would be helpful to reference the transitional rules in para 121, Sch 1 FA2019 (this will assist taxpayers identify how to confirm the treatment of "old" losses, given that such are not dealt with in the TCGA itself (see our comments on the draft Finance Bill provisions:

    "26. Although the interaction between NRCGT/ATED and the new rules is a matter of transition (and therefore appropriately dealt with in the draft Finance Bill), significant time could elapse between enactment of this legislation and the first disposal by a taxpayer within s1A(3), and so a taxpayer with NRCGT/ATED losses may not need to consider their availability for some years after 2019."

14. In terms of losses that can be offset against gains chargeable under s1A(3)(b) and (c), s1E92) states that:

    "the only allowable losses that qualify for deduction from chargeable gains under section 1A(3) (non-UK residents) are those 30 accruing to the person on disposals of assets within that subsection."

15. This suggests that a loss that arises on a disposal of an asset within s1A(3)(a) (UK situs assets connected to a UK permanent establishment) are equally available to offset gains arising on direct/indirect disposals of land. This paragraph should be amended as it seems to suggest that only losses arising on disposals under s1A3(b)(c) can be offset against gains chargeable under those subsections.

16. In addition, the guidance should comment on the rules for loss relief as they apply to temporary non-residents, particularly given s1E(3) and s1G, and how the new rules take precedence over the existing temporary non-resident rules.

"CT - use of losses"

17. It would be helpful to reference the transitional provisions at para 121, Sch 1 FA2019 so that taxpayers can readily identify how to confirm the carry forward of "old" losses.

18. We note that HMRC is currently consulting on proposed reforms to the CT capital loss rules. We would ask that the reforms are referenced here - even though the consultation is still ongoing, it was presented as a consultation "on delivery only".

19. Further, the proposed anti-forestalling provisions will, if enacted as proposed, apply as at 6 April 2019 when the CGT reforms take effect. Non-residents, previously outside the scope of CT, may have no familiarity with the proposals and yet, because of their ownership of real estate, will be in one of the sectors most impacted by the change - therefore we would ask that this upcoming change is highlighted in this guidance now.

20. It would also be helpful to confirm that a s171A election will be available in respect of "old" and new capital losses, with a cross-reference to the relevant grouping section of the CGT manual.

CG73930 Indirect Disposals

21. After the first bullet in the introduction, add "(a UK property rich asset"): this links to the way the test is explained/referred to in the guidance.

"Substantial indirect interest"

22. The paragraph here ("but is broadly....") is correct but it would be helpful to note that in relation to certain collective investment vehicles, "any" interest can be a substantial indirect interest and link to the guidance on Sch 5AAA. This then alerts taxpayers that they need to look elsewhere. (There is nothing in the section on CIVs in the same section of the draft guidance to indicate what the "specific rules" are - and this is such a material difference in the scope of the charge that it would be helpful to highlight upfront).

"Collective investment vehicles"

23. It would be helpful to note that for these purposes collective investment vehicles include UK REITs and their overseas equivalents (as these are not entities that would normally be seen as CIVs).

CG73932 Indirect Disposals - The Basics

24. The diagram and commentary is helpful. We suggest a couple of minor amendments:

    a. In the introduction, after the second bullet, add "(the UK property richness test"): this links to the way the test is explained/referred to in the guidance.

    b. Similarly after the third bullet, add "(the substantial indirect interest test)" for the same purpose.

    c. In the section headed "UK property richness", in the second line, "they must calculate the proportion of **D's** assets that are UK land in relation to ~~the~~ **D's** overall assets."

    d. In the section headed "Calculating the gain", the reference to "5 April 2018" should be 5 April 2019 (see para 1(1) Sch 4AA TCGA).

CG73934: UK property richness

"Market value"

25. Would the "most recent" balance sheet be a "recently updated balance sheet" - given that it could pre-date the disposal by several months?

"Undertaking the test"/"Tracing asset value to include in the test"

26. Assume a holding company has two wholly owned subsidiaries (A and B) and a minority interest (say 25%) in a third company (C). Only B owns UK land.

27. In working out the holding company's market value, we assume that account in taken of the value of its shareholdings in A and C and the land owned by B (ie the asset it holds - being the shares in B - are disregarded because of the tracing? Example 1 in CG73940 suggests the "look-through" B - but as both subsidiaries in that example hold UK land, there is no discussion relevant to A and C.

28. Please can you state this here to avoid ambiguity: the guidance references taking account of a company's "own market value and that of other assets it has a right or interest to".

29. The holding company's own market value is based on its shareholdings in A, B and C. As A and C do not own land, presumably the holding company takes account of their market value without tracing to their underlying assets: is that correct? For B, we assume tracing applies given it holds UK land, and so with B's land being attributed to the holding company, we assume the value of B's shareholding, although relevant to the holding company's market value, is ignored.

30. Please add commentary on what is a "right or interest in a company" for these purposes. Here, the charge to tax on indirect disposals links to an asset which is UK property rich where the non-resident has a substantial indirect interest in land.

31. Part 2 defines what is an "asset". Part 3 is about determining if a person has a substantial indirect interest in land, and the 25% investment test applies only to determine whether a person has a substantial indirect interest in land (and not whether the asset is within the charge).

32. Where a person has an "asset" (ie a right or interest in a company), para 3, Sch 1A is about determining the market value of that asset. Par 3(2) - (40 are about tracing - and the exclusion of "normal commercial loans" if for the purposes of applying the tracing rules only (para 3(2)).

33. We assume "right or interest" in a company must mean shares (or an interest in shares) or, where Sch 5AAA deems an entity to be a company, share equivalents: this seems the implication of paras 4(2) and 5, Sch 5AAA. In particular, a right that a person has as a creditor is a right to be repaid by the company (often secured by a charge over specific assets), and not an interest in the company as such.

34. The guidance suggests that a normal commercial loan is not a "right or interest" in a company, suggesting that other loans would be. Here, para 3(2) does not deal with what is a "right or interest": it deals solely with tracing - which is relevant to para 3(1)(b) (when determining the market value of the asset in question) - and not whether an asset is within para 3(1)(a) (you have to have an asset within para 3(1)(a) before tracing can apply).

35. In relation to para 3(2), certain alternative finance arrangements (sukuk al ijara) may involve the issue of sukuk by a company that owns UK land. Sukuk are generally results dependent securities (by reference to Shari'a requirements) and so Part 6 CTA 2009 effectively treats sukuk to be "normal commercial loans" for group relief purposes. We consider that a similar "deeming" should be adopted here to ensure consistency between conventional and alternative financing structures (though this requires legislation, not guidance.

36. In the section on "Tracing asset value...." it would be helpful to link to the specific example that illustrates the point made elsewhere in the guidance: this is an aspect of the rules where practical examples are essential to aid understanding.

37. In applying the basic rule, the tracing rule is to identify the extent to which assets "derive from UK land". It would be useful to comment briefly on what is "excluded" for these purposes; the fact that tracing cannot be done through a normal commercial loan means a (vanilla) loan to a company that owns UK land is not an asset derived from land. It would also be useful to confirm that cash proceeds of sale of land are not assets derived from land - ie what this is looking at is a link to actual land then held in the relevant group.

CG73936: Substantial Indirect Interest

"Attribution of connected persons' interests"

38. In the commentary on "connected", the second bullet states "A person is not automatically connected to their business partners .....".

39. The effect of para 10(3) is that a person is **not** connected to their business partner simply because they are partners: that person is only connected with their business partner if that partner is otherwise connected with them (ie spouse. lineal ascendant etc), We suggest you amend the text - as "automatically" does not accurately reflect the exclusion of the partnership connection rule (it

implies that there can be a circumstance linked to the partnership arrangement that could still trigger connection).

40. On the meaning of "normal commercial loan", see comments above on alternative finance investment bonds.

"Insignificant ownership period"

41. In the fourth paragraph, second sentence, please clarify what is meant by the "leeway where the total ownership period is very brief" - it is unclear what is being explained here so an example of what is in mind would be helpful.

42. For the final paragraph on connected parties, examples would be helpful - one to show concurrent interests and one consecutive interests.

43. So, for example, A and B are civil partners. For the last three years, A has owned 15% of a company. Two years ago, B owned 20%, but B's holding reduced to 5% 23 months ago. In the last two years, there was a month in which A and connected persons held over 25%. This is an insignificant period so A is not within s1A(3) when it makes a disposal of its 20% interest.

44. But if B maintained their 10% interest until 6 months ago (before then selling to a third party), then there was an 18 month period in which A and connected persons held over 25% and so A would be within s1A(3) when it made a disposal.

45. A third example would be applying the test where say A is the father and B a child, and A held a 30% interest for 1 year before transferring to B to illustrate consecutive interests.

CG73938 Establishing the level of investment

"Measures of investment"

46. The guidance refers to "25+": it would be helpful to explain what this is being used to signify, particularly as the legislation simply references a 25% investment.

47. See comment above on the meaning of normal commercial loan in relation to alternative finance investment bonds.

48. Where investment is through partnerships, please add "the partnership agreement will be relevant" (which is referenced in CG73934 in terms of "whatever way is appropriate").

CG73940 Examples

49. Example 1: In the paragraph beginning "A had a substantial indirect interest in B", we suggest this is rewritten slightly:

    "A has a 25% investment in B and so, as B is UK property rich, A has a substantial indirect interest in UK land. Here, because of the tracing rules, B is treated as having an interest in 10% of D's land when working out if B is UK property rich and it is irrelevant that B (and therefore A) do not have a 25% investment in D as we are looking at the disposal of B only.

If, instead of A disposing of its interest in B, B was selling its shares in D, even though D is UK property rich there would be no charge under s2B(4) as B does not have a 25% investment in D (and so does not have a substantial interest in land because of its ownership of D)"

50. This follows on from how para 8, Sch 1A is worded: the disposal by A is of a right or interest in B (its shares): B is property rich and so, provided A has a 25% investment, in B (the company in which it has the right/interest) then A has a substantial indirect interest in UK land.

51. A has an indirect interest in D through its ownership of B, that is an indirect 25% investment - but it is not relevant here because the test is whether A's interest in B means it has a substantial interest in land."

52. By adding the comparison to B disposing of D, the example helpfully illustrates the application of the 25% investment test by reference to the company being disposed of only.

53. Example 2: In the paragraph beginning "The partnership is not a legal entity...." in the final sentence, we suggest amending to "a partner has a 25% or greater investment in Z", then that partner will have a substantial indirect interest in land under Part 3". This highlights expressly that you are looking at the interest in Z.

54. In the discussion of the three shareholders, given the legislation differentiates between a 25% or more investment in a company and a substantial indirect interest in land (because of that investment), we suggest that the term "substantial indirect interest in Z" is avoided (eg see discussion of W).

55. An additional example would be helpful on the facts of A and B having 50% each of a holding company C. C has three subsidiaries: one (D) owns UK land, one (E) owns non-UK land and one (F) which owns 100% of company (G) that owns UK land. This would help show the way in which tracing works - both indirectly (as C owns F which owns G) and also in relation to a company that is not property-rich (E).

56. Finally, it would also be helpful for an example to illustrate how the timing of the charge works. So, assume A owns company B which owns UK land and other assets, but is property rich. If A sells B, then there is an indirect disposal: but if B sells the land, and then makes a capital distribution to A, then there is no indirect disposal as B is not then property rich.

CG73942 Linked disposals

57. In the second paragraph, where it says "outside of the rules covered in this page", it would be helpful to add "(para 6, Sch 1A)" to make it clear what those rules are.

"When disposals are linked"

58. In the example in the fourth paragraph, it would be helpful to expand on "different persons" by using letters to connote the different persons: this could be done by linking back to figure 1, so for example:

> "Using figure I, assume company E holds two subsidiaries G and H, and F owns one subsidiary, J. The D group agrees with company X to sell G and J. G has a UK property worth £1m, J has non-UK assets worth £20m. The sales of G and J would be linked and so there would be no charge under s2B(4) on the sale of G."

59. A partnership example could be useful added (here, "several partners" in a partnership presumably means all the partners in the partnership). It would be helpful here to explain how para 6(4)(d) works in relation to a partnership (ie because each partner is connected with the other partners, all their rights are attributed to each other and hence each partner will "control" the company being disposed of regardless of their partnership interest),

60. It would also be helpful to illustrate the effect of para 6(3).

61. Finally, we assume that a unit trust scheme that has elected for transparency (and so is treated as a partnership) can benefit from this provision (with unitholders treated as partners for s286(4) purposes as a necessary consequence of para 8(2) Sch 5AAA).

CG73944 Related party assets and liabilities

62. It would be helpful to give an example where the related party asset is something other than a loan or derivative, to illustrate the scope of this provision. We reference our comments on the draft Finance Bill provisions (at paragraphs 90 to 97): the drafting of para 4 is difficult to follow in places, and hence clear guidance, and multiple examples, would be useful.

CG73946 The trading exemption

63. This exemption applies "if it is reasonable to conclude" so. As we understand it, it is intended to avoid shareholders having to enquire into "property-richness" where a company is a trading company. It would be helpful to comment on what evidence etc would be relevant to enabling a "reasonable" conclusion.

"Meaning of qualifying trade"

64. The confirmation as to trade successions following a sale of a business is helpful. This acknowledges that, within the legislation the obligation for the person carrying on the trade to be connected to the possibly "property-rich" company is only for the period ending on disposal (para 5(3)(b) does not reference who the trade has to be carried on by, unlike para 5(3)(a) – the guidance seems to assume a requirement that the trading company (if different to the property-rich company) is transferred to the purchaser group at the same time, and so the trade needs to continue to be carried on by a connected company.

65. The application of this provision is particularly relevant to Opco-Propco structures within a group, it would be helpful to include an example as to how the provision applies in that context.

66. For example, a group has set up a company to hold all its property interests (a propco) that lets out the properties to an operating company within the group. As the properties are used in a

qualifying trade of a connected company, the trading exemption is available to the group in the following circumstances:

a. a sale of the group's holding company (and therefore the propco and the operating companies);

b. a sale of both propco and the operating company to the same person; and

c. a sale of propco – on the basis of the guidance. we assume this is not intended to be within the safe harbour- but note the properties continue, because of the leases, to be used in the operating company's trade after the disposal even though the opco is no longer connected.

67. The guidance states that "letting out of property is not, in itself a trade", it would be helpful to reference where a trader lets out surplus space: here, we assume the "low-value" safe harbour is intended to apply.

68. After CG53000P it would be helpful to reference "(SSE)".

"Land not being used in the trade"

69. It would be useful to comment also on where land is "used in the trade" to illustrate the scope of this provision. For example, a supermarket group that owns its stores; a care home group etc.

70. It would be useful to give an example of "low-value" non-trade interests in the context of one of these types of business eg a supermarket group that owns operating stores; stores closed for remodelling and sites bought to build new stores (even if construction has not yet started) as well as closed stores where the business intends to sell the asset. This would help illustrate the points being made here,

71. In addition, as we set out in our comments on the draft Finance Bill, a property developer will own land as trading stock and so the land it owns would be "used in" its qualifying trade (of developing and selling property). This is different to "letting out property" which the guidance states is not a trade. Please can this be commented on in the guidance.

72. In relation to "low-value" property interests, a particular issue arises in relation to hotels. Within a hotel, various spaces may be let out to unconnected enterprises for their own purposes (eg restaurants, bars, coffee shops and gyms). These leases are granted to support the hotel trade - and given the nature of the arrangements, may not in all cases be "low value" at a specific time. How would the rules apply here - where a business that is land-based is letting out part of its land (and reporting the income as property business income) to be used for others' trading purposes to support its own trading activities from that land.

73. Similarly, it would be helpful to understand HMRC's views on the position of companies operating in the residential living sector, where particular issues may arise because of the nature of the development.

74. In the residential living sector (particularly the high-end part of the market which is increasingly seeing investment in the UK) a propco will acquire a site, and develop it to include both residential and commercial units. The commercial units could be retail, restaurants, gyms etc and would be generally let to unconnected business tenants.

75. The residential units are effectively sold (ie disposed of to residents under a lease of say 125 years at a premium.

76. The propco is responsible for managing and operating the sire overall; - in particular offers care support services. For this, it as a result charges a fee to residents: this would normally be charged only on a disposal of the long lease by the relevant resident (ie on death or if they move to residential care) – and that fee can be significant (up to 30% of the value of the lease).

77. Propco's activities - although related to a single business - are therefore mixed as far as UK tax is concerned: for the residential units, it is likely to be seen to be acting *qua* developer; in terms of the commercial units, it is acting as a landlord carrying on a UK property business and in terms of services to residents, again it is likely to be trading. It would helpful if HMRC could address how sch 1A (and in particular the trading exemption) would apply to such a fact-pattern. Particular issues here are that:

    (a) the nature of the commercial units means that they are unlikely to be "low-value" and they are not themselves used by propco (or a connected person) for its trading purposes even though they (in a business sense) are indeed a part of the overall "offer" made by propco to residents – and are used for trading activities; and

    (b) in terms of "assets", propco has a right to a future payment (the fee referenced above) and it is unclear how this would be recognised when determining the value of qualifying assets for the purposes of Sch 1A. As can be appreciated, this is likely to have significant value (when realised).

78. If the trading exemption does not apply, then a disposal of an interest in propco (or its parent) would be a disposal of a property-rich entity even though all the activities are linked to the single "business" of providing residential living. (We note that, depending on the value of the right o future fees (which would be received on trading account), it may be possible to access SSE, by reference to "assets" though we appreciate that SSE is not a matter for this guidance – but this will be fact-specific).

79. We appreciate that this may be rather a specialised area, whereas the guidance is directed at providing general information to inspectors on how the rules apply. However, given the increased investment in care-related property development we consider it would be helpful in any event if HMRC could indicate (whether in this guidance, or in an alternative forum, the approach to the issues highlighted above – particularly as there may be other mixed developments that raise similar, but not identical issues.

CG73948 Impact of Double Tax Agreements

80. Under Sch 5AAA, an investor's residence in a jurisdiction that has a tax treaty with the UK without a securitised land provision can mean a fund cannot qualify for exemption. Would it be possible to include here (or in the guidance on Sch 5AA) a list of some of the main jurisdictions that are in this category, to help fund managers identify where there may be an impact on the fund's status.

CG73950 Calculating the gain

81. In the second paragraph, the final two sentences should be merged and the point being made here could be made more clearly if rather than "less than that", it said "now owns 10%, any chargeable gain is calculated by reference to the allowable expenditure and consideration given for the 10% the person is now disposing of."

82. Here, in relation to the final paragraph, an example would be very useful at illustrating the point being made. For example, "A owns company B. Company B owns UK land worth £10m and other assets of £1m. It has liabilities of £3m, and so its net asset value is around £8m. If A sells its shares in B, any gain will be based on the difference between the £8m consideration it receives for them and its base cost in those shares."

CG73952 Targeted anti-avoidance rule (TAAR)

83. The TAAR in para 11, Sch 1A has two elements to it (treaty-shopping and Sch 1A arrangement). The commentary however is focused on treaty shopping only. It would be helpful to reference the type of arrangement that is envisaged as within the scope of the Sch 1A TAAR. This is particularly important given that the way a non-resident structures its property ownership (holding directly or by a company) and/or its disposal strategy will impact whether Sch 1A applies or not to a particular disposal (ie selling a property rather than a company or vice versa) and will affect the amount of tax chargeable - yet these are normal commercial activities. An election to treat a unit trust as transparent will also have the effect of meaning that Sch 1A will not apply - and that could be to obtain a tax advantage (eg benefitting from an exemption that would not be available if the JPUT were to remain a (default) company).

84. In addition, a non-resident may have financed through loans that are non-commercial loans, and so may wish to refinance - this would have a benefit in relation to the 25% investment test, and also potentially for CIR (and in the latter case should be covered within the commercial restructuring safe-harbour within Sch 5).

85. We therefore ask that HMRC add commentary on the non-treaty shopping element of the TAAR and produce a "white list" to indicate the type of transaction where the TAAR is) not intended to apply (ie it would not result in any adjustment). As, although para 11 is heeded "anti-avoidance" the test that applies is simply whether there is a main purpose of getting a "tax advantage", there is no element of "abuse" or "avoidance" required, an understanding of what this is intended to apply to is key to provide taxpayer certainty.

86. A particular area which we would ask the guidance to cover concerns the taking of steps to restructure a holding platform in order to be able to benefit from one of the exemption elections

or other reliefs available under Sch 5AAA. Although some forms of restructuring are referenced at CGXXX07 in App 15, there are other examples which we consider it would be helpful to consider:

a. a fund constituted as a partnership (LP) owns a single holding company, which in turn holds individual property companies (directly or indirectly). If the holding company is not itself property rich (but does hold some property rich subsidiaries), the fund may look to remove the holding company so that it can hold the property rich subsidiaries directly (and so make a para 12(3) election), We assume this would not be seen as within the TAAR even though the consequence is that (i) Sch 1A applies to the fund's interest in the subsidiary (where it did not before) and then (ii) relief is obtained, because of the election;

b. same facts as (b) but here the holding company stays in place, but future UK property investments are acquired by companies held by the fund directly (and not the holding company) so that Sch 1A applies to those companies and the election under para 12(3) is available;

c. an election is made to treat a JPUT as transparent, so that a pension fund unitholder can benefit from its exemption: here, the arrangements mean that Sch 1A does not apply to the JPUT;

d. a pan-European fund is structured as a partnership with a single holding company, It sets up a parallel holding company to which it transfers all its UK-land owning subsidiaries so it can make an exemption election; and

e. two funds constituted as LPs together own a company that is property-rich. A new LP is set up, in which the two existing LPs are partners, to hold the shares in that company. As a result, that company is wholly-owned by a single LP and so an election under s12(3) is possible. Here, the LPs' interest in the company was, and remains in, Sch 1A, but the arrangements mean that the exemption provided by Sch 5AA can apply because of the restructuring. We assume that this is not an arrangement within para 11(1)(a).

87. It may be more appropriate to provide the specific guidance in Appendix 15 (adding to the discussion in CGXXX07): but in any event, it would be helpful to reference that other guidance here (ie "See CGXXX07 for a discussion on the application of the TAAR in relation to CIVs). If HMRC consider that the guidance is not the appropriate place to comment generically on (all or some) such types of restructuring, will some form of non-statutory clearance process be possible?

88. In addition, the examples above may also mean that changes are needed the guidance in Appendix 15 on LP CISs on page 21.

89. In relation to treaty shopping, given that the MLI has now been ratified, can the guidance confirm the interaction between the PPT test and this provision (we assume that the two will be applied by HMRC in the same way).

CG73960 Computational rules for CGT from 6 April 2019

90. In the introduction section, it would be helpful to provide a summary that explains (simply) in a user-friendly style for each type of disposal/asset, what Part of Sch 4AA applies and which part of the guidance relates to that. We appreciate that the technicalities of the interaction between NRCGT and the new rules is that it is difficult to distinguish simply between commercial and residential property, but a summary that directs the reader to how Sch 4AA is structured would be helpful (see also our comments on the draft Finance Bill).

91. So for example (changes marked):

> "The computational rules apply for both direct and indirect disposals by a non-UK resident person. For an individual the provisions also apply to disposals in the overseas part of a split year.
> Where the asset was acquired on 6 April 2019 or later any gain or loss is calculated under normal principles.
>
> Where the asset was acquired before 6 April 2019, then in calculating any gain or loss, there are special rules to determine what base cost is brought into account. There are a number of different rules to be considered: which apply depends on the type of asset and the tyoe of person making the disposal.
>
> This is because the extension of the scope of the non-resident CG rules from 6 April 2019 means ~~additional rules are required because~~ the asset may have not been within the scope of non-resident CGT (see CG73980) or was only partly (or for part of the period) within the scope of the non-resident CGT charge between 6 April 2015 and 5 April 2019 (see CG73962 and CG73974).
>
> Therefore the rules in Sch 4AAA have two main roles: first, to allow for rebasing of base cost to market value at 6 April 2019 for assets not previously within the charge to non-resident CGT (which will include assets within the indirect disposal charge and non-residential property) and secondly, to address the transition from non-resident CGT (under the rules that applied before 6 April 2019) and the new charge to CGT on direct disposals of UK land by all non-UK residents under s1A(3)/s2B(4).
>
> The previous non-resident CGT rules applied where there was a disposal of land was (fully or partly) residential. ~~For cases involving direct disposals of UK land the asset~~ For the purposes of Sch 4AA, land is not regarded as having been fully residential before 6 April 2019 if in the period beginning with 6 April 2015 (or acquisition if later) and ending 5 April 2019, there was no day on which the land consisted of or included a dwelling (para 2(2), Sch 4AA).
>
> If, on every day throughout that period the land consisted of or included a dwelling (including where ~~If~~ the interest in land subsisted under a contract for the acquisition of land that at any time before 6 April 2019 and consisted of or included a building to be constructed or adapted

for use as a dwelling) the disposal is taken to be fully residential before that date (para 6(2) Sch 4AA).

In addition, as the previous non-resident CGT charge only applied to a disposal of UK land made by certain types of person only (for example, an individual or a closely-held company or collective investment fund) Sch 4AA applies differently depending on whether the person making the disposal was previously within the scope of non-resident CGT (para 2(4), Sch 4AA). See CG73980.

This means the rules are quite detailed but in summary:

a. Direct disposals of non-residential property and indirect disposals: Where the asset was held before 6 April 2019 but was not within the scope of the charge to NRCGT before 6 April 2019 in calculating the gain or loss on a disposal it is assumed that the asset was disposed of and immediately reacquired at its market value on 5 April 2019 (para 3 Sch 4AA). ~~An~~ Examples of where this applies would be an indirect disposal (whether the underlying land is residential or non-residential), a direct disposal of commercial property (ie property that is not fully residential) and a direct disposal of residential land by a person that was not previously within the scope of NRCGT (see Part 2, Sch 4AA).

   An election can be made for this rebasing to not apply. If an election is made, gains and losses are calculated under normal CGT rules, However, for an indirect disposal of UK land any loss arising as a result of making the election is not an allowable loss (para 4 Sch 4AA). See CG below.

b. Direct disposals of residential property owned pre-April 2015: Where the asset was owned before 6 April 2015 by a person that was within the scope of NRCGT, and was fully residential from then until 5 April 2019, then in calculating any gain or loss on a disposal after 6 April 2019, it is assumed that the asset was disposed of and immediately reacquired at 5 April 2015 (see Part 3, Sch 4AA). See CG73962 below.

   An election can be made for this rebasing not to apply and to either calculate gains and losses under normal CGT rules or to work out base cost under a straight-line time apportionment. This effectively maintains the position that applied to NRCGT.

c. Direct disposals of "mixed" property whenever acquired: Where the asset was only partly residential before 6 April 2019, different rules apply (see Part 4, Sch 4AA). See CG73964 below.

d. Direct disposals of residential property acquired post-April 2015: Where the asset was acquired after 5 April 2015, and was fully residential from acquisition until 5 April 2019, normal CGT rules apply: in this case, none of the Parts of Sch 4AA apply. see CG#### below.

> If an election is made for rebasing not to apply and it is necessary to determine how much of a gain is a residential property gain the applicable period would start with the date of acquisition or if later 31 March 1982 (see CG73924)."

CG73962 CGT - Computation

92. It would be helpful to identify that this Part of Sch 4AA applies to an asset which, if disposed of pre-April 2019, would have been within NRCGT - and is intended to replicate the base cost rules that applied to NRCGT. Explaining it this way will be particularly helpful in pointing out to advisers what this achieves.

CG73964 CGT - computation

93. Again, it might be helpful to reference that this is about mixed-use property whenever it was acquired.

94. The paragraph immediately following the first example it says that if an election is made to not rebase, the taxpayer should specify whether a retrospective basis or time-apportionment basis applies. However, under para 14, Sch 4AA, only the retrospective basis is available.

95. This means that the two paragraphs beginning "Where a valid election is made ...... accruing" and "examples 1, 2 and 3" should be deleted. If it is intended that a time-apportionment election is to be available, then the Finance Act will need to be amended,

96. It would be helpful to include an example where the asset was acquired in, say, 2017 to show how Part 4 applies to post-2015 acquired property.

97. In the penultimate paragraph, this may be irrelevant given no time-apportionment.

98. It would also be helpful to provide further detail on how para 13(2) works, in addition to the example included. For example, at the end of the second paragraph, add:

> "As the example below shows, this means that, when the asset is actually disposed of, there are two CGT calculations: the first is a deemed disposal as at 5 April 2019, with any gain or loss calculated by reference to a 5 April 2015 market value base cost and the second is on the actual disposal with the gain or loss calculated by reference to a 5 April 2019 market value base cost. Both gains/losses accrue at the time of the actual disposal."

CG73970 Computational rules for CT

99. Would it be simpler to add, after the first three paragraphs, reference to the fact that for assets acquired before 6 April 2019, the same rules apply for CT purposes as to CGT, and delete the rest of the text and also CG73972 -73974 (save that, where a company owns a residential asset, it will not be necessary to calculate any residential gain under Sch 1B (this will be helpful as close companies would, prior to 2019, have had to do this) and that indexation will be available where a retrospective basis is adopted). If necessary, the examples could be subsumed within the CGT

section. This would minimise the risk of discrepancies between descriptions of the same provisions.

Computational - general

100. Please confirm that NRCGT/ATED-related gains guidance (including that linked to at CG73980) will remain in place for an appropriate period after its repeal. In addition, please comment on the intended scope of the TAAR at para 2(7).

101. Please add a section to comment on when this Schedule applies - ie the first occasion on which a disposal happens. It would be useful to reference that this applies even where that disposal is a no gain/no loss disposal (which links to para 1(4)(d)).

102. In relation to Parts 3 and 4, it would be useful to comment on any interaction with the NRCGT pooling rules: ie one company acquired an asset pre-2015 and transferred it to another company in, say, 2018.

CG73988 Interactions with exit charges

Companies migrating from the UK

103. In the second paragraph, at the end of the first sentence it would be useful to add "(this is the same result as previously applied to NRCGT and ATED-related gains)"

104. Given the overlap between certain rebasing rules, and the migration charge, and the impact of an election, it would be very useful to include an example here. For example:

 "In 2018, Company A is UK resident and owns UK land. In 2021, it migrates to the Netherlands. At that point it would, under s185, realise a gain on the UK land of £10m (its then market value is £40m). Under s187A that gain is deferred until an actual disposal of the asset.
 In 2024, A sells the UK land for £38m. At this point A, under s187A, A would accrue a gain of £10m and separately a loss of £2m.
 However, because of para 18, Sch 4AA, when A sells the UK land in 2023, there is no deemed disposal under s185. As a result, A calculates one gain: being the difference between the £38m consideration received and A's original base cost.
 If however Company A only acquired UK land in 2020, para 18, Sch 4AA cannot apply as it did not hold UK land on 5 April 2019. Therefore, sections 185 and 187A apply, so that on the disposal of the UK land in 2024, A accrues a gain of £10m and a separate loss of £2m."

105. It may also be useful including an example where A held the UK land as at 5 April 2019, migrated and made the election to disapply s187A (and so s185 applies on migration), with a disposal taking place several years later. Here, as A will have accrued a gain/loss at migration, how does para 18 Sch 4AA then apply?

Other issues to be considered:

Changes to the CGT group rules

106. Please can you consider adding a section explaining how the CGT grouping rules will apply as between property-rich companies and other members of the group (some non-residents may be familiar with NRCGT pooling, and so it would be useful to reference the differences, with a link to the guidance on grouping.

Payment on account and returns

107. Given the experience of NRCGT returns and payment on account, clear guidance on what Sch 2 Finance Act 2019 requires in practice should be either included as, say, Appendix 16, or linked to from here.

Appendix 2: BPF comments on Appendix 15

108. References to CGXXX# are to the draft section numbers of that Appendix.

CGXXX01 Schedule 5AAA

109. We assume that this will consist only of the section on "Purpose and scope" when finalised. If so, it would help to have a link to the Technical Note issued at Budget 2018 which gives useful background on this. It would be helpful to understand the status of the Technical Note now the legislation is in final form.

110. It would be useful to know what the expected contents of the Investment Funds Manual will be, and if possible, the expected timeline (ie when in early 2019).

CGXXX02 Overview

"Default position for CIVs and their investors"

111. In the third bullet at the top of page 4, after "... CIV is UK property rich", please add "whatever the size of their interest," This explains the rule, with the text beginning "so..." then explaining the consequences.

112. The diagrams are helpful here, but it would be useful to include a key to help understanding. In particular, this is because of the importance of distinguishing between the impact of the rules on:

(a) CIV companies or deemed companies,
(b) CIV partnerships, and
(c) Any type of CIV (either a partnership or company).

113. CIV partnerships are clearly represented by triangles, and an actual company by a rectangle, but the rectangles with rounded edges seem to be used to reflect both CIV companies (eg as in the main comparison diagram) and also 'any type of CIV' (the right-hand side diagram at the bottom of page 4). can this be clarified?

114. CIV partnerships are clearly represented by triangles, and an actual company by a rectangle, but It would also be helpful if the diagram showing whether or not the 25% investment rule applies could reference the specific paragraph of para 6, Sch 5AAA that is being illustrated. For the diagrams at the bottom of page 4, working from left to right, it would be helpful if:

- the diagram referred to Para 6(3)(a). The CIV could be any type of CIV.
- the diagram referred to Para 6(3)(b). The CIV could be any type of CIV.
- the diagram referred to Para 6(4). The CIV has to be a CIV partnership.
- the diagram referred to Para 6(5). The CIV has to be a company or deemed company (not a partnership). There should also be some property shown on this diagram in the bottom Company (currently missing)?
- the diagram referred to Para 6(6). The CIV's could be any type of CIV.

115. In addition, the guidance references the 25% ownership test as an "exemption". Strictly speaking, this is not the case. In the core rules, the existence of a 25% investment is a condition to the application of the charge to CGT (ie s1A(3) and s2B(4) require a person to have a substantial indirect interest in land for any charge to arise). An interest of less than 25% means that the owner is not within the scope of the charge, not that they are exempt. (The effect may be the same, but there is a difference between the two). This should also be picked up elsewhere in the guidance (some we reference below).

"Elections for transparency or exemption"

116. The second bullet says that the exemption election is available "For all offshore CIVs". We note that this is a summary, and there is a link to the detailed guidance, but this is not correct. A CIV that is an AIF (and not a CIS) cannot make the exemption election under para 12(2). Perhaps "For most offshore CIVs..."?

CGXXX03 Definitions

"Introduction"

117. When finalised, it would be useful to link to the later sections of the guidance that deal with the Parts 4 and 6 definitions.

118. The approach taken here to explain both the concept and its relevance is welcome.

"Meaning of collective investment vehicle"

119. Thank you for addressing the points we highlighted in our note dated 26 November 2018 relating to entities similar to REITs. It is now clearer that this can apply to any company that meets the conditions, whether or not it is within a REIT regime.

120. Where investors invest in Offshore Holdco which holds shares in Propco/s, it would be helpful for the guidance to include an example which makes clear that the Offshore Holdco:

- falls within para 1(2)(b) if at least half of its income is derived from dividends from Propco (assuming the only source of income in Propco is income deriving from land held on a long term basis), and
- falls within para 1(2)(d) if it is not subject to tax on those dividends under the law of any territory in which it is resident.

In other words, it is irrelevant whether the Propco is subject to tax on its property income in the territory in which it is resident.

"UK property rich"

121. It would be useful to also reference the deeming of a CoACS to be a company under para 5, Sch 5AAA.

122. At the end of this section, when referencing its relevance, it would be helpful to add "(TCGA92/SCH5AAA/para12(2)(c) and para 6(1)(a))".

BPF

CGXXX04

"Offshore funds deemed to be companies"

123. Please reference TCGA92/SCH5AAA/para 3.

"Default treatment for non-resident CIVs"

124. Please add ", other than partnerships," after "non-corporate CIVs" in the first line. This highlights that partnerships are different - with the final sentence explaining how.

"Interaction with rules in Chapter 3 of Part 3"

125. In the second paragraph, line 3, we assume "and that analysis" means "having to carry out that analysis"?

126. The table is helpful. But before the table is introduced, we suggest that the following is added:

"In particular, depending on whether, under Sch 5AAA, the offshore non-corporate CIV is deemed to be a company or elects to be treated as a partnership, some or all of these provisions in Chapter 3 of Part 3 no longer apply to that CIV."

127. In the table, in relation to "transparent" non-resident unit trusts (in the third row), in the left hand column, it is not clear what the first note (as to "similar effect to s99") means here: under the core rules, s99 is switched off, s103D applies and treatment as an "asset" was intended to differentiate the treatment of such funds from those within s99 (and now both s99 and s103D will be switched off with Sch 5AAA taking precedence - and so the practical effect of s103D is no longer relevant).

128. We suggest that in the left-hand column of this third row therefore, where there is reference to "similar effect" the following is added:

"although, unlike s99. S103D does not provide for the tax treatment of the actual unit trust scheme itself".)"

129. Plus, in the right hand column of this third row after the discussion on para 4(1)(2), to highlight the combined effect under para 4 and para 8add

> "…this treatment <u>and TCGA92/SCH5AAA/para 8(b) disapplies the application of S103D</u> where an election…" ." (added text marked)

130. Similar comments apply to the final box (Non-UK CoACs) where we suggest the right had column includes:

> "Note: Such schemes are treated as transparent under general principles. Therefore, the only gains taxed will be at unit holder level in accordance with S103D".

CGXXX05 Disposals by non-residents

"Property funds that are not within the Sch 5AAA definition"

131. In line 6, we suggest adapting this to read as follows"

> ".....company is UK property rich if the investor, because of their interest in the company, has a "substantial indirect interest in land". This is subject to any exceptions, including where the availability of the 25% de minimis is relevant – see the guidance on the core rules at CG73920 onwards for further details."

"Property funds that are within the Sch 5AAA definition"

132. After "non-corporate CIVs" in the first line, perhaps add "(other than partnerships)".

"Disposals by non-resident investors of interests in CIVs and assets with an 'appropriate connection' to CIVs "

133. It would be helpful to reference para 6. Sch 5AAA in the title.

134. In lines 3 and 9 of the first paragraph, and line 1 of the third paragraph we suggest replacing "exemption" with "de minimis" (see comment above). The 25% test is integral to whether a charge arises: it is not an exemption per se.

135. We welcome the inclusion of examples for each of the relevant subparagraphs, In relation to some of the examples then listed, it would be helpful for a diagram to be included (compare CGXXX02): this is particularly helpful for those parts of para 6 where the drafting is fairly complex (ie the less straightforward "connections").

"Para 6(3)"

136. In the second bullet, perhaps reference that this could include a "feeder fund",

137. In the example at the top of page 12, where it says "As at least half of A's value…" the reference here to "A" should be to "Company B". The reference to "exemption" should be to "de minimis".

138. Here, if A is itself a company, it would be useful to highlight the position on a disposal by an investor of an interest in A.

139. A diagram would be helpful.

"Para 6(4)"

140. After the first paragraph, it would be helpful to add: "For these purposes a disposal is made in respect of a person's investment in a partnership where a person disposes of their partnership interest (and accordingly a fractional share of partnership property (TCGA92/s59)) and also where the partnership itself disposes of an interest in a partnership asset" - ie language similar to that at the bottom of page 13.

141. A diagram would be helpful.

142. Where it says "For capital gains purposes, X has made a disposal of their in terest in Y; as this disposal was in Y's capacity as a partner in ..." the reference to "Y's capacity" should be to X's (X, not Y, is the partner).

143. The reference to 25% exemption should be to de minimis. At the end of the final paragraph, perhaps add "This means that non-resident partners in a CIV partnership that owns a UK property rich company will be subject to CGT on any gain on any indirect disposal of that company whatever their partnership interest."

"Para 6(5)"

144. In line 2, perhaps add "This sub-paragraph only applies.....".

"Para 6(6)"

145. A diagram would be particularly helpful here: the drafting of this provision, and how it applies, is perhaps the least obvious in para 6.

146. Perhaps at the end of the first paragraph add: "This would include, but is not limited to, joint ventures involving one or more CIVs.

147. In the example at the top of page 13, the relevant 'company' in Para 6(6)(b) [being the company owned at least 50% by CIVs] would appear to be the company that makes the disposal (T) (not the company whose shares are sold (U)). T is a company within para 6(6)(a) but does not appear to be a company within para 6(6)(b) as it is only owned by S (and not S and R) and para 6(6)(b) requires that the company making the disposal is at least 50% owned by the CIV and one or more other CIVs, so a company wholly owned by a single CIV would appear not to fall within this). U is a company within para 6(6)(b) but is not making any disposal.

148. Therefore, should the example start with S owning 10% of T, and R owning 90% of T, and T selling its 10% shareholding in U. That way T is owned by the vehicle (S) and one or more other vehicles.

149. It may be useful in any event to include the original example and the amended one, to highlight the differences between the two analyses. It may also be useful to add a third example: S owns all of T (a company); T and R own U and U owns a UK property rich company V. U makes the disposal. Here, T and R directly own U, and only R is a CIV: but because of the 50% investment rule (based on Part 3 Sch 1A) S;s indirect interest in U means that the disposal by U has an appropriate connection.

"Establishing the percentage"

150. It would be useful to give an example of the "single person" rule here and to confirm that this provision is only relevant to para 6(6) (we assume this is the meaning of "for this purpose" in para 6(8)) - this may be what the position of this section within the text is intended to do, but it is not clear in the formatting.

"Disapplying the appropriate connection rules"

151. Note, this should be the 25% de minimis. Perhaps to simplify this it could read:

    "....so that non-resident investors making a disposal which would otherwise have an 'appropriate connection' to a CIV will only be within the scope of CGT on an indirect disposal of a UK property rich company where they have a 25% investment in that company (and so are within the core rules in Part 3 of Schedule 1A and not para 6)– see CG73920 onwards). "

152. In explaining the rationale, perhaps this could be phrased as: "The reason for this is that the loss of the 25% de minimis under para 6, Sch 5AAA is directed at funds that are, and are intended to be. UK property rich. A fund like a pan-European fund may, at a particular point of time, be UK property rich based on its then investments, but is not expected to remain so. Para 7 means an investor in such a fund is subject to the core rule in Sch 1A throughout their ownership period. However, this treatment is only available where the offshore CIV is a company (including a deemed company)."

CGXXX06 Transparency and exemption election

"Introduction - the transparency election"

153. In the first bullet on page 14, need 'the' before 'charge to tax'.

154. On page 15, in the first paragraph, "This exemption …" should be "This election...".

"Introduction - the exemption election"

155. In the second paragraph, "(see CGXXX05 regarding the 25% ownership exemptions ...)" should be "(see CGXXX05 regarding the disapplication of the 25% ownership de minimis)"

"The transparency election in detail"

156. Please add TCGA92/Sch5AA/paras 8, 9 and 49 after the heading.

157. Should this be made a separate CGXXX section (as has been done for the exemption election?) - the heading of CGXXX06 references both elections, but other than in the introduction is only about the transparency election (with CGXXX07 dealing with the exemption election, by overview and detail). As the two are separate (albeit with a common underlying policy) it may be useful to separate out in the guidance more clearly - in particular the transparency election is likely to be of wider application outside the "funds" world as such - and as a result, we assume that CG manual guidance dealing with s99 (and also the REIT guidance on investment via unit trusts) will be updated to reference the para 8 election provisions (and this manual section).

158. In line 3 of the second paragraph, it should be "case law principles". In commenting on the transparency test, it would be useful to reference the similarity to the Offshore Funds Regulations test.

159. In the final paragraph, after "predominately in UK land" add "such that it will be UK property rich" (the test is 75% as per para 8(6) 0 which may or may not be the same threshold as "predominately" suggests).

"How and when the election should be made"

160. Please add TCAG92/Sch5AA/Paras 9, 49 after the heading.

161. Please include in the guidance (and possibly on HMRC's website at an appropriate place in advance of the guidance being updated) information as to where in HMRC an election by a JPUT etc should be sent (ie as the JPUT will not necessarily have any dealings with HMRC what officer should elections be notified to, and is there a particular form of election (in terms of information required) that HMRC would expect to receive.

162. Other information about the process for making an election should also be publicised as a matter of priority: funds may want to make the election as soon as possible after 6 April 2019 to have certainty as to their (and investors') position.

163. A key issue relates to evidence of consent. Is that evidence something that the fund manager keeps as part of their records (ie it does not have to be shown to HMRC save where there is an enquiry). If so, is there a period for which records need to be kept.

164. The possibility of assuming consent from language in the fund documentation etc is appreciated: the statutory language refers to "have consented" which suggests a positive act. In practice, for new funds, we expect that the fund documents will require express consent to be given.

"Effect of election"

165. In the third paragraph, after referencing the TCGA, also reference the TMA provisions for partnership returns (and if possible link to guidance on the partnership return rules - this is particularly relevant given the recent changes to partnership return requirements).

166. On page 16 the example given is "Company A owns 100% of the units in a CIV which is subject to the transparency election, and that CIV owns 100% of the shares in Company B". This example would be more helpful if the relevant percentages were less than 100%, perhaps 80% at each level, to draw out the point more clearly (we note it is unlikely that a 'wholly owned' CIV would in fact be capable of being a CIV under any of the relevant definitions in any event - hence the "almost wholly" concept within Sch 5AAA.)

167. On the timing of when the election takes effect (its retrospective effect), a simple example would be useful - one for a pre-existing JPUT and one for a new one. This will be helpful in illustrating the effect of para 8(2) - ie treatment "as if, in relation to all times on and after its constitution, it were to be regarded as a partnership".

168. So, for example:

 "An (income transparent) unit trust was set up in 2014 with three unit holders (A, B and C) to invest in several UK properties. In 2018, C sold its units to D and the unit trust disposed of a property. In July 2019, the unit trust sells another property.

In December 2019, a transparency election is made with the consent of A, B and D. As a result the unit trust is treated as if at all times it was a partnership. The election only has effect to disposals on or after 6 April 2019 (TCGA92/SCH5AAA/para49(3) even though the unit trust is treated as having been a partnership when it was set up and so only the disposal of the property in July 2019 is treated as made by the unitholders".

And

"An (income transparent) unit trust is set up in January 2020 to invest in UK land. It first acquires a property in September 2020. The time limit for a transparency election no later than 12 months after that first acquisition (TCGA92/SCH5AAA/para 9(1)(c)) but it can make the election before it acquires any actual UK property. This means that it can make the election at any time from January 2020 to September 2021."

169. After the publication of the Finance Bill in November 2018, we had an email exchange with HMRC on the interaction with para 12(3) given that para 12(3) references the general law definition of partnership (rather than just referencing "partnership"). Please can you add a sentence (perhaps at the end of the third paragraph starting "The TCGA rules...." confirming that: "As a result, where a transparency election has been made by an offshore CIV, that offshore CIV will be regarded as a CIS constituted as a partnership for the purposes of making an exemption election under para 12(3) in respect of any non-CIV companies it owns that are UK property rich (see CGXXX07 in relation to the exemption election)." We note this is dealt with in CGXXX07 but it would be helpful to reference here as well.

170. Where an election is made, and then the unit trust ceases to be property rich, the election is still valid (as confirmed on p16), As a r

"Interaction with rebasing rules in Schedule 4AA TCGA"

171. Please add (TCGA92/Sch5AA/para 11) after the heading.

172. In the final paragraph ("Where the CIV itself is making the disposal...") can you include an example of what you envisage as being covered here. Given that if a transparency election has been made, we are unsure of the circumstances in which the CIV itself would be making a disposal (as it is a partnership) - para 11 references "a disposal made by a participant in the vehicle" and that would seem to cover both a disposal of units and a disposal by the vehicle which is treated as made by the participant under s59.

"Effect of the election on UK tax resident investors"

173. For investors in CIVs that do not make the election, as you say the base cost carries over. The position is more complex where a JPUT makes an election. Prior to the April 2019, the base cost was attributed to the units (a separate asset). After April 2019, that base cost is attributed to the underlying assets.

174. Would it be possible to include a simple example to illustrate how this works? In particular, because paragraph 8 deems the offshore CIV to have always been a partnership, does this mean that on a disposal in, say, 2020, a UK investor has to look at any changes in unitholder/partner rights since the CIV was formed, or do the D12 provisions only have relevance if there are changes post-April 2019?

175. An indication of how the "catch-up" is intended to work would be useful - particularly as where a JPUTs has mixed investors (ie UK and non-UK, and taxable and exempt), all need to consent for an election to have effect (and consent requires an understanding of the practical implications of an election). Where the CIV is say "special purpose" and the unitholders static (eg a classic JV arrangement), transition is likely to be relatively simple: but if there is say a multi-JPUT structure with various properties, or there have been changes, less so. A simple example (say three investors (one UK and two non-UK), one change in holdings (ie profit sharing ratios) pre-2019, and some debt funding at the JPUT level, so the JPUT has a higher base cost than its investors in the underlying assets) to illustrate approach (there would be no need to work through numbers etc, just to highlight how "D12/s43 would assist") would assist taxpayers working out what transparency means for them.

"Interaction with 30 day reporting....."

176. After the heading, could you add "FA19/SCH2/PARA11" to highlight where to look to see the applicable provisions.

177. In the first sentence, after "opaque", please add "(as it is deemed to be a company)" and after "from its own disposals", add "which it will need to report under normal CT self-assessment." This clarifies that there is no 30 day reporting to consider for the fund. As a result, in practice, given the 12 month window for elections, it is extremely unlikely that a CIV will have filed and paid tax on a disposal before a transparency election is made and so, given the retrospective effect of the election, the CIV itself will never have to report the disposal in any event. It would be useful to confirm this after the end of the first paragraph. eg by adding "and as a result, if the CIV has not yet filed its CTSA for the period in which the disposal took place, the CIV will not itself have to report the disposal."

178. The final sentence of the first paragraph reads "The election for transparency has retrospective effect, so that a disposal by the CIV will become chargeable on the investor": should this instead say: "If the election for transparency is made, it has retrospective effect, so that a disposal by the CIV prior to the election being made would then become chargeable on the investor."

179. At the end of this section, could you comment on para 10 Sch 2 FA 2019. We assume that para 10(1)(b) is intended to apply to persons within CGT where (a) the amount of any gain is covered by the annual exempt amount and (b) where the person is tax-exempt (such as trustees of a pension fund. It also appears to include where carry forward allowable losses (or same year, already realised capital losses) would offset the gain as per para 7(2) Sch 2. Can this be addressed here (or a link made to the main guidance on the returns provisions)?

180. If the investor is a company, then no return obligation arises in any event given the scope of Sch 2.

CGXXX07 The exemption election

181. After the heading, please add "TCGA92/SCH5AAA/paras 12 and 16".

"Offshore CIVs'

182. In the line under the bullets, please add "proportionate exemption" before "for entities in which...",

"Commercial restructuring"

183. This is helpful - thank you.

"Limited partnership collective investment schemes ...."

184. At the end of the paragraph please add "under TCGA/SCH5AAA/para12(2)".

"CIVs - elections under para 12(2)"

185. In the paragraph under the bullets, the text states "The entities in which the CIV has an interest and which are covered by the election....". Should this be amended to read:

186. "The entities in which the CIV has at least a 40% interest and which will also be exempted because of the election.... ". (We suggest this as the election only exempts the CIV itself - this is clear from 12(1) which states that the election is made for a CIV to be exempt; whereas para 16 is a consequence of that election, and technically does not provide for an exemption as such, but rather prevents a gain being a chargeable gain).The 40% point is made in the next para, but it is useful to highlight upfront.

187. There is discussion in the third paragraph about the application of para 16. This refers to the gain being exempted proportionately to the level of investment electing CIV has in the entity. It then refers to the level of investment being established through Sch 1A/Para 9. Please could this specifically confirm if the "appropriate proportion" of the gain within Sch5AAA/para 16(4) is determined by applying Sch 1A/para 9 (such that the reference to "indirectly" in Sch5AAA/Para 16(4) is in the context of the application of Sch1A/Para 9).

188. In the final paragraph, rather than: "this will trigger a deemed disposal and reacquisition of the interests of the investors", should this say "this will trigger a deemed disposal and reacquisition by the investors of their interests in the CIV".

“Companies invested in by LPs and CoACS”

189. After the heading, please put “elections under para 12(3)”.

190. In the second paragraph, the reference to “companies in those structures” is presumably to companies that the LP/CoACS own, whether directly or indirectly: can this be clarified in the first sentence (as it is in the second) (particularly as the CoACS is deemed to be a company for certain purposes only). We note the election is only available to companies directly owned by the LP/CoACS: this should be clarified (indirectly owned companies are covered by para 16).

191. In the final sentence, perhaps this could be put more simply (to make clear the distinction between different tiers) as “Where an election is made in respect of a company wholly (or almost wholly owned) by a LP CIS/CoACS (which is defined to mean a company directly owned by the LP/CoACS; see SCH5AAA/para 40, then if that qualifying company has a minimum 40% interest in another company, then that other company will also be exempted because of the election (TCGA92/SCH5AAA/para 16).”

192. In the third paragraph (on p21) it would be useful to repeat the section on the para 12(2) election that failure to meet the conditions means a deemed disposal - the same rules apply to both elections.

193. For the sections on para 12(2) and 12(3) it would be useful to have a diagram indicating which entities are/are not covered (eg one showing a 12(2) CIV with three subsidiaries (X, Y and Z) in which it holds 100%, 50% and 10% respectively (here, CIV, X and Y benefit from exemption) ; the other showing a LP with two subsidiaries (A and B), with a 100% interest in A and a 50% interest in B; with A then holding a further two investments, C and D in which it has 50% and 10% respectively (here, A and C only can benefit from exemption).

“LP CISs”

194. See comments on App 14 (CG73952 - TAAR): if two LPs co-own a company, and interpose a new LP to hold that company (so their interest is direct) to benefit from para 12(3), would this be seen by HMRC as a “commercial restructuring” and not within the Sch 1A TAAR? Here, there would be a tax advantage (due to the election), but the interposition of the common LP does not affect the application of Sch 1A to a disposal of the company by the “original” LPs.

195. The guidance says the common LP “could” meet the requirements: we assume that it “would” meet para 12(3)(a), but the other requirements will depend on the facts - is this correct?

196. We note the final paragraph.

197. Under the diagrams on p22, it would be helpful to link to the guidance on the GDO, not close and UK tax conditions.

“Intermediate holding vehicle”

198. Here, after “This rule is necessary....” add “or feeder funds”. This makes clear that the exemption can apply where the QII has its own SPV to invest in the CIV, but also where the fund manager has

set up a feeder fund through which several tax exempts co-invest into the CIV. (See for example p32). We also refer you to our comments at paragraph 224 below.

"Inter-dependency between para 12 and para 33"

199. It would be helpful to illustrate the example with a diagram.

CGXXX08: The exemption election

200. After the heading please add "TCGA92/SCH5AAA.para 13".

201. The table is very helpful at showing the conditions to be met in each case, although we are not sure as to reference to para 12(4) in the box on para 13: should this be para 4?

"The non-close condition"

202. Although there are 4 modifications in para 46(2), the guidance only refers to three in the bullet points with the LP modification included further down the page - should these all be in the bullet points?

203. In the paragraph before the example, in referring to "qualifying investors", the guidance notes that a look through is allowed to establish control. It notes that the look through must be through bodies corporate. This reflects Sch5AAA/para 46(7).

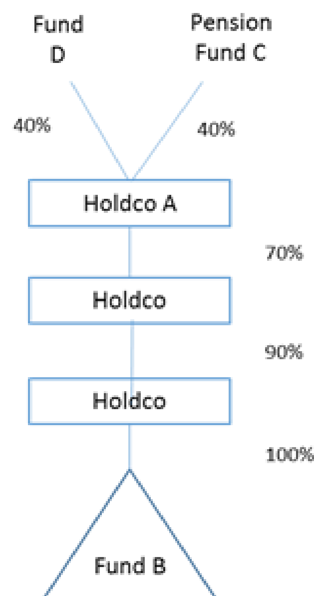
204. How does this apply if the intermediate entity is an entity which would not be a body corporate under general principles but is an entity which is an offshore CIV and so capable as being treated as a company under Sch5AAA/para 4. Here, in applying the non-close condition, it appears that the test must be applied to the entity held by the intermediate entity and not the intermediate entity itself. Is this what is intended – or can you treat the (deemed company) intermediate entity as body corporate for the purposes of para 46(7)? We note that para 4(3) refers to "relevant purposes" being "the purposes of this Schedule" – if this includes "for the purpose of applying para 46", does this mean para 4 applies to the intermediate entity in this tracing exercise? We would assume the answer is yes given that s1121 CTA 2010 defines "company" as meaning any body corporate etc for the purposes of the Corporation Taxes Acts, and so by deeming an entity a company for the purposes of Sch 5AAA, that entity should similarly be regarded as a "body corporate". It would be helpful to confirm in the guidance.

205. Therefore, please comment on whether intermediate entities which are offshore CIV will be treated as bodies corporate here when deemed to be a company under para 4.

206. In addition, the example addresses the situation where there is a single corporate tier between QI and fund, where the Holdco is wholly owned by QIs. It would be helpful if the guidance could also comment on the application of the tracing rules where the investors in the fund include non-QIs. For example, assume there is a 20% minority non-close shareholder (X) in Holding Company A – such that (in effect) 12% of Holding Company A is attributable to X on a tracing exercise, although control of Holding Company A remains with QIs. Would the conclusion be the same?

207. In addition, it would be useful for the guidance to comment on the tracing exercise that applies where there is more than one intermediate company between Holding Company A and Fund B. We assume that, provided the ultimate indirect aggregate of the interests of the QIs in Fund B remains over 50%, so that the Fund could not be close, the conclusion would be the same – so that the tracing exercise effectively involves treating the Qis as if they were holding direct interests in the Fund? This seems the clear implication of para 46(9)-(11), but it would be useful to clarify how the attribution to A of interests held by B (where B is not directly below A) works – in -particular as the legislation confirms that A "has a share or interest" in B, but without specifying how that share is quantified. We assume the approach that applies is similar to that for proportionate holdings for group relief.

208. In diagram form this might be as below, where we assume Fund B is treated as 50.4% owned by Fund D and Fund C (90% x 70% x 80%) and Fund B can only be treated as close by the inclusion of the indirect holdings of the QIs, Fund C and Fund.



209. We appreciate the inclusion on p26 of HMRC's view on how the non-close condition applies to a GP's rights. We understand why it was not possible to amend the legislation during the Parliamentary process, but ask that this point is dealt with by an amendment to the Finance Act provisions given its importance to funds constituted as LPs. We note that HMT has been given wide powers to amend this legislation by Regulation (see para 124, Sch 1 FA19) and we would be grateful if HMRC could confirm that an amendment will be made during 2019 - this would mean that the legislation is clear within the 12 month window for elections inherent in para 17, Sch 5AAA.

210. In addition, it would be helpful if HMRC could confirm that this is an aspect of the rules on which it would be willing to consider providing non-statutory clearances pending any legislative amendment: although the guidance is helpful, it is not technically binding on HMRC and many funds are likely to want certainty as to their position (given that the decisions made by the fund will have an impact on investors).

211. A diagram to illustrate the example would be helpful.

"The UK tax condition"

212. Would it be possible to reference the principle jurisdictions (by way of a "for example") to assist here?

CGXXX09 Making and revoking the election

"Making the election"

213. Please can HMRC confirm timing of the election form. We assume that the form will be "voluntary". We assume the mailbox will be available by 6 April 2019.

"Timing of election"

214. Please reference both para 50, Sch 5AA in the third paragraph (after the words in brackets in line 3).

215. A simple example would be useful, eg:

> "A fund is set up in 2016 and acquires UK land. It makes the exemption election in March 2022 in advance of making disposals. The election can take effect at any time after March 2021 (and the fund specifies 31 March 2021in the election). At the time it makes the election, the fund must provide information about its investors for the period from 31 March 2020 to 30 March 2022.

216. If however the fund made the election in December 2019, to take effect from April 2019, it would need to provide investor information from 6 April 2019 to December 2019 only (TCGA92/SCH5AAA/para 50) "

"Revocation of election - protect the public revenue"

217. It is helpful for HMRC to set out how its intended approach to the test in practice.

"Exemption for gains on direct/indirect disposals"

218. In the line below the bullet points perhaps add "Similarly, if the disposal gives rise to a loss, it will not an allowable loss". Although this is obvious, non-resident investors will not be familiar with CGT.

"Rebasing assets etc..."

219. The first paragraph refers to assets having been covered by the para 12 election for a period of 12 months prior to disposal.

220. However, para 31(5) does not say the asset needs to have been covered by the election for 12 months - only that "throughout the period of one year ending with the day on which the disposal of the asset is made, the asset has been held by C or any other company covered by the election or by Q'". For an existing fund that makes an election with effect from April 2019, and makes a disposal in say September 2019, it will have held the asset in the fund for more than 12 months, but only been covered by the exemption for 5 months. On the basis of para 31(5), we would assume that rebasing would apply here. Please confirm.

221. Again, a diagram of the fund structure would be helpful for the example.

222. In relation to Fund A's investment in Company D, would it be possible to include some numbers to illustrate how the proportionate uplift works.

"Limiting the exemption"

223. An example would be useful here - just to show how HMRC sees the "more than 100%" arising.

"Corporate feeder vehicles"

224. An exempt investor may set up a holding company that in turn sets up SPVs to act as feeder funds for particular CIS. Each such SPV is "wholly owned" and we assume would be able to benefit from para 33. However the definition of wholly owned is based on a modified version of para 9 of Sch 1A which also applies to para 1(3) and therefore implies "direct" ownership, We appreciate that direct ownership is relevant to a para 12(3) election, but we would suggest a different approach is appropriate for para 33. Again, we consider a change here should be legislative to provide the necessary certainty, under HMT's regulation-making powers. In the meantime, perhaps this could be clarified in guidance.

"Interaction of different exemptions"

225. This is very helpful. Would it be possible to add a simple example: eg QII has 50% stake in REIT which owns 80% of a para 12(2) CIV with subsidiaries (with the remaining 20% owned by another QII)? Here, the CIV would be part of the REIT group, and so the REIT rules apply first. Then para 16 applies and any QII SSE. An example would assist in illustrating the final section on separate applications (para 37).

CGXXX10: Ceasing to have effect

226. Please add "TCGA92/SCH5AAA/paras 20-30"

227. In the section "Ceasing to meet the applicable exemption conditions" it would be helpful to give examples on when this might occur: eg it sells UK property and so ceases to be property rich: a new Luxembourg investor acquires an interest resulting in the fund either becoming close or breaching the UK tax condition.

228. In addition, on "property rich" it would be useful to reference that where a LP CIS owns a number of UK property rich subsidiaries, and para 12(3) elections have been made in respect of those

subsidiaries, then each time one of those subsidiaries exits its investment, it will cease to be property rich triggering a deemed disposal for its investors.

229. In the section on the 30 day remedy period, after the bullets, it would be helpful to add “As a result, the failure to meet the conditions is effectively ignored as there are no consequences for the fund or its investors.”

230. In the section on the 9 month remedy period on p35, it would be useful to add, after the second paragraph: “This would be the case, for example, where a UK property has been sold, resulting in the fund not being UK property rich, but the fund intends to reinvest the proceeds into a further UK property within the next few months.”

231. At the end of this section, it would be helpful to add “As a result, the failure to meet the conditions (if remedied within the nine month period) has no effect on the fund’s exemption but, unlike the 30 day period rules, there is a consequence for investors.” This helps explain the effect of the second bullet.

“Manager winding up”

232. In the second paragraph, it might be easier to explain this as ”Where an election has been made under para 12(3) (and so is made in respect of a qualifying company), it is the “parent” fund itself (ie LP, CoACS or, if applicable, deemed partnership under para 8) that must be being wound up - and the ‘relevant fund manager’ is the manager of that fund.”

233. In the final paragraph, it would perhaps be helpful to clarify how this works which could be done by rewording slightly as follows:

234. “Note however that whilst the exemption continues to have effect for the qualifying fund/qualifying company (ie in respect of any disposals in the course of being wound up), if a a result of the steps taken by the fund manager, any of the applicable exemption conditions are not met, the investors will be deemed to dispose of an reacquire their interests in the fund at that time. For when the investor is chargeable to CGT on any gain on that deemed disposal, see CGXXX11.”

“Rebasing on leaving para 12 regime”

235. Is it worth noting that rebasing under para 32 works differently to that under para 31?

236. A simple example could be usefully included to illustrate how this works. For example. Q makes a para 12(2) election. It owns a holding company A, that in turn owns companies B and C. B owns UK land and C owns 30% of company D that owns UK land. Q is deemed to sell A under para 32(3). Under para 32(4), A is deemed to sell B and C as they were covered by the election. B is deemed to sell its land as it is covered by the election. But neither C nor D are “rebased” given the 30% investment.

237. After the final sentence, perhaps add” “For example, if A only held 50% of B, then ......”

CGXXX11 - Deemed disposals

238. Please add after the heading “TCGA92/SCH5AA/paras 21-24”.

239. In the first paragraph on p37, “a return of value” should be “certain returns of value” - a fund may make revenue distributions that are not within para 21.

“Ceasing to be property rich”

240. The reference to 30 days in the first paragraph should be nine months (the 30 day remedy period does not apply where a person ceases to be property rich).

241. We welcome HMRC’s willingness to accept quarterly appraisals of property richness.

“Payments not otherwise taxable”

242. For completeness. could you confirm in the guidance that this is “capital value” and that “normal distributions”, eg in respect of rent would not be within these rules. (Technically, any grant of a lease can be a disposal for CGT purposes, with the amount brought into account for income tax purposes as rent then excluded from any computation of a gain and so there is no “gain” for CGT to apply to: s21(2), s37 - the rent would be taken into account as income, but not by the participant,).

243. In addition, it would be useful for similar clarification where value is derived from a disposal of land in a form that is taxable to a company owned by the fund as income (whether under the short lease premium rules, or as property trading income, or under the transaction in land rules). The headnote references para 21 as applying to “payments not otherwise taxable” but this is defined by reference to whether the participant is otherwise taxable (para 21(1)(c)). Our understanding is that this provision is included to deter a fund looking to distribute a tax exempt gain to participants as an income distribution – and so if the profit on disposal is taxable on the fund, this should not apply as and when that profit is distributed. If this is correct, then as “value” in para 21(1)(b) is generic (and so is not limited to value that would, but for the exemption, be brought into account for CGT) and “disposal” for CGT purposes has a wide meaning, in addition to addressing this in the guidance, we would ask that HMRC consider amending para 21 to clarify its intended scope by reference to an ultimate capital gain realized on the disposal (although we note that the gain may be “passed” up to the fund in a capital or revenue form).

244. In relation to the sentence in the fourth paragraph of this section: ”The deemed disposal only arises for....” please can you reconsider this - as it is not clear what “investors who would be subject to tax on that distribution” means here.

245. The legislation deems the disposal to be made by a participant not within IT/CT on the distribution - so an investor within the charge to IT/CT may be within the charge to tax but would not be within para 21. An exempt investor (and also a treaty protected investor) would not be taxed under It/CT but similarly would not be taxed on the deemed disposal. Any other investor may not be subject to tax on the distribution under the treaty, but would be taxed on the deemed disposal. It would

be helpful to set this out – particularly for the benefit of investors who could be within these rules even though their investment is "small".

"Calculation of gain or loss...."

246. Would it be possible to include a simple example based on a fund ceasing to be property rich with the final disposal (on winding up) is say two years later (with numbers).

"Time at which gains accrue"

247. The table is helpful. Would it be possible to add to this details of when notification is required to be given, and from that when any payment of account obligation is due (so it addresses both the legal and the compliance position in one place). For fund managers and investors this would be particularly helpful.

248. It would be useful to give a simple example of how the timing rules work - perhaps then adapting to show how the limit on gains charged works: for example (and assuming you agree):

> "Non-UK corporate CIS (Fund) holds UK properties. Investor acquires interest at base cost of £1m in May 2019.
>
> In 2021, Fund makes qualifying fund election, relying on not-close/UK tax conditions.
>
> In September 2024, Fund becomes close and breach is not cured. NAV of Investor interest then £1.6m.
>
> Investor makes deemed disposal in September 2024: gain = £0.6m.
>
> Two years later, Investor sells its interest for £2m: ie actual disposal.
>
> On actual disposal: two gains chargeable to CGT
> Gain 1: gain on deemed disposal of £0.6m
> Gain 2: gain on actual disposal - base cost = MV at Sept 2024 (£1.6M) and disposal consideration = £2m => gain of £0.4m"

"Notification to investors..."

249. Is it worth noting that there is strictly no notification requirement where a fund fails to meet the fund conditions (as this is not a revocation) - it is only when para 23(8) apply that this arises and perhaps mentioning that a fund manager may wish to notify the investor given that the gain on that deemed disposal will become chargeable as and when there is an actual disposal.

250. In the first full paragraph on p41 (beginning "In the case of... ") please add "FA19/SCH2/para 12" at the end: in the first line, after "reacquisition" add "under these provisions, although generally"; in the second line after "to HMRC" add "must do so: and in the penultimate line, after "notice" add "from the fund manager". It would therefore read:

> "In the case of a deemed disposal and reacquisition under these provisions, although generally investors in the CIV who are required to make a return and payment on account to HMRC must do so within 30 days of making a disposal of UK land, they will instead have 30 days from receiving notice from the fund manager of the deemed disposal to make a report and payment."

CGXXX12: Wholly owned

251. Is it worth adding why this is there: ie a LP CIV may own an interest in a (actual or deemed) partnership which owns a company?

252. A qualifying company election could be made in relation to the company - but if the partnership is a CIV, there will have to be a second investor in it so it can be a CIS and hence the 99% minimum *requirement*

CGXXX13 Reporting requirements

253. On p42, where it says "they are instead set out in this guidance" please confirm that the contents of the guidance are to be taken as having been specified by an officer (the legislation requires an HMRC officer to specify - guidance, being an internal HMRC publication, is not strictly this.

254. Please confirm expected timing for updating App 15 to include further information.

255. Please confirm that this supersedes the Technical Note (which included detailed information on the reporting requirements).

"Reporting: CIVs formed on or after 1 June 2019"

256. On p41 in the penultimate line please refer to the fact that information is only required to be provided for periods from 6 April 2019.

257. We note that the date 1 June 2019 is purely a matter of HMRC discretion in specifying, and not connected with any legislative requirements. The leeway is appreciated - it means that funds that are midway through formation etc can benefit from the existing fund adaptations.

258. It is important that the information requirements of HMRC are as clear and unambiguous as possible. This is because it will determine what funds look to ask their investors to provide (either within fund documents or investor side-letters) - and as information is generally subject to being "required by law or applicable practice", clarity is key. We appreciate that HMRC is looking to be flexible here and not unduly prescriptive, and this is appreciated - but it means that there are some aspects of the requirements where more information is needed.

259. It is also important that information requirements are clear given the consequences of failing to meet the requirements.

260. Starting with the information for the fund:

a. there is a reference to “overall gain/loss on disposals (if appropriate)”. What is meant by “if appropriate”?

b. We assume that overall gain/loss means the “net” gain loss: as the fund is not itself chargeable, is this to be calculated by CGT principles, or simply accounts entries, or is either possible (subject to consistency).

c. Total value of disposals is presumably where the disposal is UK land-related (ie within s1A(3)(b)(c) or s2B(4)).

261. In terms of information from investors:

a. UTRs “If held”: we assume from this that HMRC is not requiring the fund to obtain such information from investors to comply with the reporting requirements: this is simply that if, for some other reason, the fund has that information, it reports it. Is this correct?

b. Total value of investor disposals: here, in general we assume this requirement refers to the information the fund manager has about disposals “to” the fund alone (ie it will know any redemptions etc). An issue then arises in relation to other disposals. The guidance references that the CIV must report on the basis of information it can reasonably be expected to obtain given the terms of its agreement with the investor and the information it has available.

c. In terms of secondary market dealings (where the fund may know of a disposal because of the need to register a change of owner but no other details), we assume that this is not requiring funds to include a requirement that investors must report to them such information. If its agreement is simply that sales must be reported, then presumably HMRC accept that it would not be reasonable to expect the fund to obtain information as to value.

   The issue is what is envisaged by an agreement meaning this information being available. (We note that these may seem “odd” questions in some ways, but as new funds will be taking account of these requirements when drafting fund documents, they need to have a sense of what is “anticipated” to ensure that their investors allow disclosure of information where required, to ensure they have the right to require mandatory information, but equally that they do not need to impose on investors an obligation that is unnecessary or onerous in terms of ongoing requirements.)

d. Overall capital gain/loss (if calculable): what does if calculable mean here? Presumably this is if the fund has enough information to calculate. The fund should know initial subscription and the redemption price, but other factors (eg pooling) may influence a CGT calculation - therefore the fund may not have certainty that it can calculate (even though the gain etc will always be

calculable).

e. Tax status of investor (if held): again, we assume this is not requiring the fund to insist on the investor providing the information - it is only if the fund has it.

262. Where a fund set up pre-June 2019 cannot disclose information, is it required to state that legal requirements mean that it has not been able to disclose information about all its investors. This links to the consequences of failure to report.

263. On page 44 the guidance repeats the thresholds for a serious breach as £1m or 25% of the fund. There may be some funds for which £1m is a "low" threshold meaning that a failure to disclose any investor's information is a serious breach, We appreciate that this requirement links to HMRC wanting to ensure it collects tax from investors who are likely to have a CGT charge: but query whether it may be possible to agree for some funds a serious breach links solely to investors with a certain (lower than 25) % of the fund. This would not impact the obligation to report, which is absolute, but would adapt the meaning of "serious" breach to the nature of the fund.

Annex 1 - GDO

264. The foreword to this guidance says that no clearance procedure is envisaged because, in part, "customers and advisers are now more familiar with how the conditions operate".

265. We ask HMRC to reconsider this decision, at least for an initial period of say, 3 - 5 years. Although many advisers and customers may have familiarity, it is not necessarily the case that they are involved in setting up, or advising on the setting up, of offshore CIVs within the real estate sector. In particular, firms that advise on real estate private equity funds may not have experience in those sectors that have previously had to consider GDO. As a result, funds and their advisers will be effectively "new" to the rules.

266. A clearance process will provide funds with certainty, and the clearance process will provide information to HMRC that allows the guidance to be updated to deal with "known" queries as and when the clearance process is withdrawn. Further we consider it likely that, because of the differences between private equity real estate funds and funds already subject to GDO, there may be areas of current HMRC practice that may not readily cross-over (or certainly not in a way that a fund manager can have the relevant degree of certainty that it would need, given the implications for its investors if it gets it wrong.

267. For example, real estate funds may be widely held, but with only a few investors and there would be no distributors as such (see IFM17300). There may not be a substantial body of unconnected investors (see IFM17335). Often, as closed ended funds, there is a day one marketing - and no further activity after that once the fund is "signed up". This means reliance would be placed on "marketing activities not required" (p50) - and a fund may wish confirmation that its approach meets HMRC's tests here.

268. By way of illustration, in the typical private equity real estate fund model, interests in the fund are likely to be widely available (and interests are so marketed and made available in an appropriate manner to reach the intended categories of specified investor).

269. Neither the specified categories of investor, nor the terms and conditions governing participation in the Fund, should have a limiting or deterrent effect. Like all funds (whether closed- or open-ended), who the Fund can be marketed to will be dictated by a myriad of regulations. In addition, Fund documents should typically be in line with Condition A of the genuine diversity of ownership test set out in Regulation 75. Here, it is not customary in a private equity fund private placement memorandum to specify intended categories of investor.

270. However, because a typical private equity fund is "closed-ended" - whilst the interests are widely available and marketed in such a manner, the interests are not available publicly. Interests are privately placed, with specific categories of investors privately approached by fund managers or placement agents in accordance with private placement and other regulations.

271. Further, a typical private equity fund will have a "fund-raise period" (for example, this could be between 6-18 months) after which (or once a target of investor commitments is reached) no more investors will typically be admitted. Interests cannot generally be redeemed, and instead are bought and sold on the secondary market subject to the fund manager consent.

272. The upshot of this is that a person may fall within one of the intended categories of investor but, depending on the stage of the marketing process the fund is at, may not be able to approach the fund manager and/or acquire units (or, in this example, partnership interests) in the Fund. Accordingly, on a strict interpretation of Regulation 75, it appears that Condition C may not be able to be met by a typical private equity fund solely because of its closed-ended nature, and not because it fails to be widely held and marketed.

273. Given the purpose of the exemption election is to prevent multiple charges to tax within a fund structure and to preserve the exempt status of investors exempt other than by reason of residence (i.e. sovereigns, UK/EU charities, qualifying pension funds) then the question is how HMRC will interpret Regulation 75 in the context of such private equity funds (ie that are marketed in such a closed-ended manner), where they otherwise meet the conditions of Regulation 75 in terms of their interests being widely available to specific categories of investor (but are targeted by the fund manager on a private placement or similar basis). The guidance, as proposed, which reflects experience of a different segment of the funds market, is unlikely to assist fund managers fully in determining their eligibility under the GDO test - and hence a temporary clearance process would be useful in setting out the parameters of how Regulation 75 applies to such funds.

274. In this context, we would suggest an approach similar to that which has been applied in relation to the "public infrastructure exemption" under the corporate interest restrictions, where the guidance says that HMRC will accept applications for non-statutory clearances on particular aspects of the rules for the first few years (and any such applications will also help shape any

changes to the guidance). Therefore, in IFM17050, the final paragraph could say (added text highlighted):

> "Note that one of the key differences between the GDO rules for Schedule 5AAA purposes…… clearance requests. However, notwithstanding that there is no specific clearance procedure for funds that are not either AIFs or offshore funds already subject to the GDO test, HMRC are willing to accept an application for a non-statutory clearance on specific aspects of the GDO rules in relation to Sch 5AA for a short period of time after Sch 5AAA comes into effect (up to April 202*). In addition, HMRC will continue to work with ………"

275. Such an approach would be time-limited and would fall within the existing non-statutory process. If would be of particular benefit in allowing funds to provide certainty to investors in the first few years (and any clearances received will help shape modifications to the guidance, thus rendering clearances unnecessary in the future).

276. We appreciate that the rules provide an alternative test (the non-close, UK tax condition), but, as can be appreciated, in many cases this could impose a significant administrative burden in terms of both management time and cost (and, for funds already existing, fund documents may not contain adequate information gathering powers for the fund to perform such a complex and detailed analysis). Further, to the extent investor make-up change throughout the life of the Fund, as interests are bought and sold on the secondary market, on-going monitoring and compliance becomes even more challenging - and there is the possibility that a single investor change could result in all investors losing the benefit of investing in an exempt fund (and indeed suffer a deemed disposal).

Annex 2: REITS

GREIT04050

277. In example case 2, on page 58, in the final paragraph, "gain relating to B" should be "gain relating to P."

278. Please confirm whether there will be updates to other parts of the REIT guidance (eg GREIT11100-11115 (non-resident group members); joint ventures and GREIT 12140)