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**OECD/G20 Inclusive Framework on BEPS  
Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the  
Digitalisation of the Economy: Secretariat Proposal for a “Unified Approach” under Pillar One**

The Alternative Investment Management Association (AIMA)<sup>1</sup> and the Alternative Credit Council (ACC)<sup>2</sup> would like to provide comments on the proposals set out in the OECD Secretariat’s public consultation document (Unified Approach) relating to Pillar One as proposed in the Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy (Programme of Work).

AIMA and the ACC are concerned that, as the focus of the OECD’s BEPS Action 1 work has moved away from multinational enterprises (MNEs) operating in what might be regarded as tech or digital industries and now addresses the operation of the international tax system more broadly, there will be consequences for very many businesses which operate in all sectors of the global economy including financial services and which

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<sup>1</sup> AIMA is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA’s fund manager members collectively manage more than \$2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 100 members that manage \$350 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors).

<sup>2</sup> The ACC currently represents over 170 members that manage over \$400bn of private credit assets. The ACC is an affiliate of AIMA and is governed by its own board which ultimately reports to the AIMA Council. ACC members provide an important source of funding to the economy, providing finance to mid-market corporates, SMEs, commercial and residential real estate developments, infrastructure as well the trade and receivables business. The ACC’s core objectives are to provide direction on policy and regulatory matters, support wider advocacy and educational efforts, and generate industry research with the view to strengthening the sector’s sustainability and wider economic and financial benefits.

would not be regarded as MNEs as the term is generally understood. The relevant factor now seems to be whether a business has retail customers rather than whether it operates in a manner which may provide a tax benefit. Consequently, very many businesses will face significant additional compliance burdens and face uncertainty of tax treatment without their tax liabilities having changed in any material way. The OECD must address what limits should be set on the application of new global rules envisaged by the Unified Approach if these are not to restrict the ability of businesses to operate effectively where they have cross border activities.

Looking at the Unified Approach overall, we consider that:

- For the majority of businesses generally, including ones that would not ordinarily be considered MNEs, the Unified Approach will increase compliance costs while not significantly affecting the amount of tax they pay or the jurisdictions where it is payable;
- For the minority of very large MNEs which through application of the Unified Approach would pay more tax and in different jurisdictions, more targeted solutions would be appropriate;
- For all businesses affected by the Unified Approach, their tax affairs will become more complex, more uncertain and subject to challenge by competing jurisdictions with inadequate means of resolving conflicting claims;
- Inevitably, tax authorities would also be drawn into the uncertainty.

These risks are very relevant to the financial services industry. The asset management sector would face its own challenges. We propose these measures:

- We welcome the proposal for an exemption for financial services. overall, much of the financial services industry deals with businesses rather than retail consumers. It does not generate substantial revenue from the supply of consumer products, nor does it provide digital services that have an obvious consumer-facing element. The high degree of regulation to which the industry is subject identifies its jurisdictional links and often requires a physical presence to be established. This informs the tax treatment of each business. Financial services businesses are not the MNEs at which the Unified Approach is aimed. This is true of investment managers as well as other financial services businesses;
- The exemption should extend to funds and underlying fund structures. As collective investment schemes, funds operate on the basis that there should be little or no taxation incurred by the fund so that investors are as nearly as possible in the same position in respect of the fund's investments as they would be if they held the investments themselves (since investors remain subject to tax in respect of their interests in the fund). By reason of such tax neutrality, there is no tax liability which should be apportioned between jurisdictions;
- Jurisdictions have the option of enacting rules for the taxation of investors in domestic and offshore funds to ensure equality of treatment;
- The exemption would relieve financial services MNEs and tax authorities of the significant compliance burden which would arise from justifying in each of the very many jurisdictions in which these MNEs have counterparties that there is no reason to alter the basis on which the MNE is paying tax.



We set out in the Annex the implications of the Unified Approach for asset management businesses, but observe that these may also be more widely applicable.

We would be pleased to provide any further explanation required.

We also wish to attend and participate in the public consultation in Paris on 21 and 22 November 2019.

Yours sincerely

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## Annex

### Implications for asset management businesses

#### 1. Scope

- **Consumers**

We acknowledge that sales to consumers (retail market) may act as a proxy for the target attributes (user participation, marketing intangibles, significant economic presence). The classification of customers as consumers will often not be straightforward. This analysis is made more difficult to perform through the use of intermediaries, which is common within the financial services industry.

Further, some financial services products may be provided to an independent business which provides their benefit expressly to its (retail) customers without any relationship being created with the provider (i.e., it is not a transaction through an intermediary). For instance, an insurance company may permit a holder of an investment contract (marketed to retail investors) to nominate the underlying investments to be acquired by it: the ultimate consumer has no relationship or even contact with the third party provider.

Within the alternative investment management sector, customers will for the most part be businesses (institutional investors such as pension funds). In some instances, management businesses may have both retail and institutional product offerings, and therefore the question of how such mixed business are to be treated will arise.

- **Defining MNEs**

Pillar One will have to address the complexities of business models in a way which provides certainty for MNEs and tax authorities. Business models should be shaped by commercial considerations, not the international tax system. While asset managers often have a physical presence in market jurisdictions as a result of local regulatory requirements, there are instances where asset managers, like many other businesses which provide goods and services internationally, have customers in a market jurisdiction without necessarily having a physical presence. These businesses will have to evaluate annually whether a compliance obligation and potential tax liability exists in every market jurisdiction in which they operate which in the case of the largest asset management businesses could be a hundred jurisdictions.

- **Thresholds**

Adopting the CbC reporting threshold would in principle remove all but the largest asset management businesses from scope, provided it is observed by all jurisdictions rather than adopting a local sales threshold only.

- **Collective investment vehicles**

A fund should not itself be regarded as a business since it is a vehicle for collective investment. In very many cases a fund will not fall to be regarded as part of a MNE since it holds only portfolio investments, but in some instances a fund may have sufficient ownership or control over investments so that it may be treated as a holding entity. This will raise issues as to which other investments held by the fund should be regarded as part of the MNE and the extent to which the businesses of companies which are otherwise entirely independent should be considered together for these purposes. This would raise significant compliance issues for the fund and for the affected companies.



- **Exemptions**

We believe that an exemption for the financial services industry, including the asset management sector, would be appropriate. The industry does not exhibit the factors which the Unified Approach seeks to address (such as scale without mass, significant use of intangible assets, data, user participation). It is also highly regulated, so that the tax treatment should be consistent with rather than cut across the regulatory framework.

## **2. Nexus**

Many businesses which have no overseas presence could be found to have a nexus with a market jurisdiction. For instance, an investment manager may market interests in a fund within a jurisdiction and carry on investor relations activities there subsequently. The issue may arise as to what proportion of fees received by the manager from the fund (and so indirectly borne by the investors) should be allocated to the market jurisdiction. Even if the analysis of Amount A, Amount B and Amount C shows that no significant tax liability arises, the business will have substantial compliance obligations across multiple jurisdictions.

We note that a number of US states (and some other jurisdictions) apply nexus rules for income taxes which do not require a physical presence in the state. These states generally apply low thresholds (for which a claim has to be made by filing a tax return or other notice). The compliance cost for businesses selling into those states can be disproportionate to their revenues arising there.

## **3. Computation and compliance**

The requirement to divide and allocate profits by reference to factors such as business activities, value-additive functions and customer location will require MNEs to reach agreement with jurisdictions with competing interests. If one jurisdiction challenges the basis adopted by the MNE, that will affect its position in other jurisdictions, even if the MNE has reached agreement with the tax authorities there.

Amount B rests on a cost plus basis of taxation which has been an acceptable basis for transfer pricing when used in defined circumstances within the asset management sector. We expect that jurisdictions will not be willing to accept a standard rate but will wish to judge it by the circumstances, though this overlaps with the computation of Amount C. Again, the MNE bears the increased compliance burden.

## **4. Double taxation**

Even in simple circumstances current domestic double taxation relief rules may not apply. In more complicated circumstances where one group company is effectively taxed on profits arising from the activities of another group company – or it is not clear to which group company the profits arise – double taxation relief rules will not function at all.

A solution may be that where tax charged by the market jurisdictions cannot be relieved under domestic rules, the home jurisdiction(s) should be required to provide a refund or credit against the tax liability of the parent (or another appropriate group company). That company should then be able to make tax-free subvention payments to other group companies to balance the outcome. In effect, the MNE would be treated on a consolidated basis. However, the various home jurisdictions would have to accept the division of liability between them.

## **5. Dispute resolution**

Truly effective dispute resolution mechanisms will be required in respect of all aspects of the Unified Approach and not solely in relation to Amount C. Existing mechanisms have their value but ultimately



depend upon the goodwill of the jurisdictions involved and the effectiveness of enforcement measures (about which businesses may be sceptical). For the Unified Approach to be effective, most of the world's largest businesses will need to reach agreements with tens (if not more) tax authorities on a multilateral basis.