Introduction

1. We have set out below our comments on the draft Finance Bill 2019-20 Schedule *Workers' services provided through intermediaries* (the *draft legislation*) and accompanying documents released on 11 July 2019[1].

2. We have arranged our comments around specific topics and areas covered by the draft legislation, rather than considering it clause by clause. The availability of practical and business focused guidance will be key to the successful introduction of the reforms proposed by the draft legislation (referred to here as the *off-payroll rules*). We have therefore highlighted below not just areas where we believe the draft legislation could be improved, but also where issues will need to be specifically addressed in this guidance.

3. Our primary concerns arise from the lack of detail contained in the draft legislation. It appears that many important practical issues, such as when liability can be transferred within a supply chain and exactly what information will need to be shared by clients, is to be addressed at a later point in either secondary legislation or guidance and as a result are likely to receive less scrutiny. This approach also results in a lack of clarity as to how the off-payroll rules will operate in practice, making it difficult for businesses to make adequate preparations. We would therefore encourage HMRC to release detailed draft secondary legislation and guidance as soon as possible.

4. Unless otherwise stated, all paragraph references are to the draft legislation, and section references to ITEPA 2003.

Transfer of liability

5. Page 11 of *Off-payroll working rules from April 2020 – summary of responses* ('the Consultation Response') published on 11 July 2019[2] confirms the intention to proceed with proposals to transfer liability for unpaid tax and NICs to the first agent in a chain and then the client where these amounts cannot be collected from the party who has failed in their obligations under the off-payroll rules.

6. We welcome comments made in the Consultation Response which acknowledge concerns raised during the consultation period regarding the application of these transfer of liability proposals. In particular, we note that page 5 of the Consultation Response states:

   "The proposals are not intended to transfer liabilities in cases of genuine business failure, where deliberate tax avoidance has not occurred. Draft legislation will set out conditions

[1] https://www.gov.uk/government/publications/rules-for-off-payroll-working-from-april-2020

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822204/Off-payroll_working_rules_consultation_summary_of_responses.pdf

under which the liability may be transferred to the top parties in the labour supply chain. Supporting guidance will clarify the steps HMRC expect clients and agencies at the top of the supply chain to demonstrate they have exercised reasonable care".

7. However, we note that the draft legislation does not include any detailed provisions regarding how and when the transfer of liability provisions may be applied. Paragraph 15 introduces a new s688AA, but this merely provides for PAYE Regulations to make provision for collection of amounts from a *relevant person* (defined in s688AA(2) as effectively being anyone in the labour supply chain). This suggests that the detail around the transfer of liability provisions will be contained in secondary legislation which has not yet been released in draft.

8. Notwithstanding the reassuring comments in the Consultation Response, we find the lack of detail in this area to be concerning. We also note that this seems to be a further example of important detail being omitted from primary legislation and demoted to secondary legislation or even guidance, which by its nature receives at best a lower level of scrutiny.

9. We have seen no indication as to when detailed secondary legislation on transfer of liability will be published. We would urge that this be sooner rather than later. The details as to when liability could be transferred will be very important to the risk analysis and preparations of businesses affected by the off-payroll rules. In particular, they are likely to be important in framing the level and nature of due diligence which needs to be carried out in a labour supply chain before the rules come into force next April.

10. The Consultation Response appears to be contradictory in terms of what the guidance on transfer of liability will cover. The quote from page 5 (paragraph 5 above) indicates that this will only look at practical steps around due diligence of the supply chain (which appears reasonable). However, page 14 appears to indicate that the actual scope of the provisions will be established in the guidance, stating that:

    "The government will legislate in line with the consultation proposals and HMRC will make clear in guidance the circumstances in which it will not seek unpaid liabilities from parties further up the labour supply chain."

11. We are uncomfortable with the suggestion from the quote above that the legislation on transfer of liability could have a potentially broad application that is then narrowed by guidance. Whilst guidance can provide some comfort to taxpayers, it does not deliver certainty as it has no statutory force and is subject to change at short notice and without Parliamentary scrutiny.

12. It is important that the key areas of the scope of the transfer of liability provisions (including that they will not apply in cases of genuine business failure where tax avoidance is not in point) are set out clearly in legislation, with guidance then acting to clarify potential points of uncertainty and give practical advice.

Exclusion for small clients: definition of small

13. Paragraph 5 introduces new s60A to s60G which set out when a person qualifies as small for a tax year. These new sections introduce use a number of terms which are not defined in the draft legislation, but instead derive from Companies Act 2006 ('CA06'). For example, *small companies regime*, *accounts and reports* and *undertaking*.

14. The use of CA06 terms in the draft legislation could cause some confusion. These definitions may be unfamiliar to many, especially unincorporated businesses and their advisers who will have had little reason to consult CA06 to date. We also note that some terms (for example 'group') may have a different meaning for CA06 purposes from that generally understood for tax.

15. The use of CA06 terms in the draft legislation could also mean that details are missed. For example, under CA06 a company has to be above the relevant limits for two successive years before it ceases to be small. This is a welcome and pragmatic aspect to include in the off-payroll rules but it is not at all obvious from the legislation alone without consulting CA06 and searching for the relevant section (s382(2)).

16. Our preference would be for *all* terms used in the draft legislation to be clearly defined within it, especially where they may differ from familiar tax definitions. If the approach taken in the draft legislation is maintained, it will need to be made very clear in guidance where a CA06 definition is being used, together with a signpost to where that definition can be found. It would also be helpful to include in the guidance a glossary of CA06 terms used in the new legislation.

Exclusion for small clients: clients ceasing to be small

17. Under the draft legislation, clients falling under s60A, 60D and 60E, will have at least nine months from the end of a financial year/accounting period in which they cease to be small before they come into the off-payroll rules. For example, under s60A companies will look at the results reported in their most recent accounts at the start of the tax year, but only if they were due to be filed by then (with the accounts filing deadline for private companies being nine months).

18. However, the situation appears to be different for clients who are individuals. We understand that they come within s60F ('other persons'). s60F(1) states that you look at turnover for the last calendar year, and if that is above the threshold then the off-payroll rules apply from the start of the next tax year. This appears to indicate that those who fall within s60F will only have some three months (rather than at least nine months) to check whether they are in the off-payroll rules and put appropriate arrangements in place.

19. We are also unsure why the test in s60F is based on turnover to the calendar year end. Most sole traders, who we understand will be the main businesses to fall within s60F, are unlikely to calculate their turnover on a calendar basis. Instead they will normally calculate their turnover to the date they draw up their accounts for tax purposes.

20. We note that basing the test in 60F on turnover to the calendar year end may make it difficult to monitor compliance, as HMRC would not normally have this information available to them, and would therefore have to specifically request it from the individual client. By contrast, basing the turnover test on the amount shown in accounts drawn up for tax purposes would allow compliance to be monitored without the additional compliance burdens for all parties of such a request.

21. Section s60F should therefore be amended so that:
    a. The tests are based on turnover calculated to the date accounts are drawn up for tax purposes.
    b. Where turnover exceeds the relevant limit, in common with all other forms of clients, there will be at least nine months until they are required to apply the off-payroll rules.

Exclusion for small clients: other comments

22. In the draft legislation, the rules around determining when a client is *small* are to be inserted into Chapter 8 of Part 2 ITEPA 2003 (i.e. the IR35 rules). However, as it is the client (and not the worker or their personal service company) who will be required, and have the necessary information to carry out these tests, it would appear more appropriate to include these rules in Chapter 10 of Part 2 (i.e. alongside the off-payroll rules) rather than in Chapter 8.

23. New s60G sets out that, broadly, the turnover of *connected persons* needs to be included when deciding whether a client is *small*. There is no indication as to what definition of *connected person* is to be used here. S60G(7) states that *"Expressions used in this section and in the Companies Act 2006 have the same meaning in this section as in that Act."*. However, CA06 only discusses connection in relation to who is connected to a company director, which is not relevant in this situation. We therefore assume that, per s718 ITEPA 2003, the definition in s993 ITA 07 applies. As this is a departure from the more general use of CA06 terms it would be helpful to cross-refer to s993 ITA 07 in the legislation, or failing that, highlight the point in guidance.

24. There appears to be an error in s60G(5)(b), which should, per the rest of the section, refer to an *assessment year* rather than an *assessment period*.

25. In section 3.11 of our response to the previous round of consultation on these measures[3], we suggested that it would be helpful to require small clients that benefit from the exclusion to inform the fee-payer and/or worker that this is the case. We note that this suggestion is mentioned in section 4.13 of the Consultation Response, but does not appear to be reflected in the draft legislation. We believe that there remains a risk that workers may not realise they have to apply IR35 in such cases. We would encourage HMRC to revisit this point.

[3] https://www.att.org.uk/technical/submissions/payroll-working-rules-2020-att-response

Information flows

26. Para 12 of the draft legislation introduces a new s61NA which sets out the meaning of a status determination statement (SDS). However, this section contains only minimal detail as to what an SDS is required to cover.

27. Extensive guidance will be needed to support this provision and explain what clients need to provide in an SDS. This should address, for example, what is meant by *"explain the reasons"* in s61NA(1)(a) and (b). Would a printout from a CEST analysis suffice or is more detail needed?

28. It would be particularly helpful, both in terms of clients' administrative burdens and ensuring workers receive valuable information, if HMRC were to provide a template SDS alongside their guidance.

Status disagreements

29. Para 13 introduces a new s61T ITEPA 2003 setting out the requirements for a client-led disagreement process. This section introduces a new term – the *deemed employer*, being the person who makes the deemed direct payment to the worker under s61N(3).

30. Our preference would be to avoid introducing additional terms solely for the purposes of the status disagreement process as this increases complexity and could cause confusion. However, we appreciate that a new term may be necessary, as the *deemed employer* could be someone other than the fee-payer. [S61N(7)) states that s61N(3) can apply to other persons "*as if they were the fee-payer"*]. We would recommend a new term other than *deemed employer*. This might be misconstrued as referring to the client as they would be the deemed employer on applying the IR35 tests. An alternative term such as *deemed direct payment maker* would be clearer and avoid this confusion.

31. We think that s61T(2)(a) should read *"inform the worker and (as the case may be) the deemed employer…."*. This would be consistent with s61T(2)(b) and would fit in with the requirement under s61N(5) for clients to give an SDS directly to the worker as well as pass it down the chain.

Client ceasing to be medium or large

32. Para 13 introduces a new s61TA ITEPA 2003 which, in summary, requires a client that becomes small to withdraw an SDS. Such a withdrawal statement has to be given to:

    a. The worker if the original SDS was given to them.
    b. The *deemed employer* (usually the fee-payer, as discussed above) if the original SDS was given to the first agent in the chain.

    We note that the second of these departs from the principle established elsewhere in the draft legislation that information should flow down the chain to the fee-payer, rather than being delivered directly from the client to the fee payer. We note that, on page 11 of the

Consultation Response, such a shortcut for transmission of the SDS is rejected on practical grounds. It would therefore appear more consistent, and more practical, to require withdrawal notices to be passed down the chain to the fee-payer, rather than directly from the client to the fee-payer.

33. We have two further observations on draft s61TA:

- The title of s61TA uses the acronym 'SDS' which is not defined or used anywhere else. It would be clearer if this were to spell out 'status determination statement' in full.
- The requirements set out in s61TA(1) may need to include that the engagement is still ongoing in the tax year in question. Otherwise the requirement could be read as applying to engagements that have already ended by the time the client becomes small.