Chartered Institute of Taxation.

TEMPORARY REPATRIATION FACILITY AND MIXED FUNDS

1 INTRODUCTION

1.1 The Temporary Repatriation Facility (TRF) was announced at Spring Budget 2024, allowing remittance basis users (RBUs) during tax years 25/26 or 26/27 to remit past years' foreign income and gains (FIG) at a flat 12% rate of tax.

1.2 The Budget Technical Note[1] - section 3.6 – also confirms that "*there will be some relaxation of the mixed fund ordering rules to make it easier for individuals to take advantage of the TRF if, for example, they have FIG in a mixed fund or they are unable to precisely identify the quantum of their FIG"*

1.3 In our view the TRF is welcome and a pragmatic measure which will assist in the transition to the new rules for non-UK domiciled individuals. However, care will be needed in the exact design of the rules. The simple statement of principle in the Budget Technical Note hides some particularly complex issues.

1.4 In this paper we look at these design issues and present some options for HMRC and HM Treasury to consider. We would be pleased to discuss these issues in more detail with the relevant technical specialists.

[1] Technical note: Changes to the taxation of non-UK domiciled individuals - GOV.UK (www.gov.uk)

2 EXECUTIVE SUMMARY

2.1 The objectives of the TRF need to be clearly established – see section 3

2.2 TRF should apply to all income and gains of the taxpayer, including assets held by relevant persons and imputed gains – see section 4.1(a)

2.3 The TRF will need to recognise a number of complex features of the existing mixed-fund rules – see section 3.7

2.4 We recommend that the TRF should not require an actual remittance to the UK – see section 5 …

2.5 …but should instead adopt a "designation" system – see section 6

2.6 The detailed design of this designation system will need further work but we make various recommendations as to how this should work – see section 8

2.7 We suggest various ways in which we believe the TRF could both be made more attractive to taxpayers and potentially achieve greater take-up, thus increasing yield. These also include some possible sticks (including a long-stop date) as well as carrots – see section 9.

3 WHAT ARE THE OBJECTIVES OF THIS REFORM?

3.1 Before looking at detailed design issues, we think it is important to start by establishing the objectives of the TRF.

3.2 At top level, the two most obvious objectives of the TRF are:

- To yield tax receipts from the 12%[2] rate (the Chancellor mentioned a figure of £1bn in his Budget Speech); and

- To allow/encourage RBUs to remit monies to the UK which would not otherwise have been remitted (the Chancellor again mentioned a figure of £15bn[3])

3.3 We would, however, suggest that both these objectives should be set in the context of a more fundamental objective:

- To recognise that, to date, the remittance basis:

  - has had the counter-intuitive effect of discouraging non-doms from bringing funds to the UK; and

  - in seeking to tax remittances of FIG, has had the further perverse effect – as a result of the mixed-fund rules (see Appendix 1) – of discouraging/preventing remittances of otherwise remittable funds (loosely "clean capital")

3.4 We also suggest an additional objective should be:

- To tidy up a complex area of the tax code and hopefully avoid the need to keep historic rules permanently on the statute book.

3.5 We suggest that it is important to be clear about these objectives – as the priority between them may fundamentally alter the design of the TRF. For example, assume a mixed fund which consists of:

  - 2021/22 Income and Gains
  - 2020/21 Clean Capital
  - 2019/20 Income

If the sole objective of TRF were to maximise tax revenues then the design is likely to require 12% tax to be paid on both years' FIG before the Clean Capital can be released. By contrast if the sole objective were to recognise the past perversity of the remittance basis, then it should be acceptable to release the 2020/21 Clean Capital irrespective of paying tax on the FIG. A compromise between the two – recognising both objectives - would involve paying 12% tax only on the 2021/22 FIG (thereby releasing the 2020/21 Clean Capital to be remitted).

3.6 Similarly, if the objective to maximise tax yield has priority over the objective of maximising funds brought to the UK then the design is more likely to favour a system where FIG can simply be designated – rather than requiring it actually to be remitted. But if those objectives are reversed then the rules are more likely to require actual remittance to the UK.

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[2] We assume that 12% was calculated to yield the same as the projected tax which would have been received on projected remittances of past FIG. Not being a round number, we suggest, 12% may cause non-doms to give more thought to the question than a round number such as 10% (which – from conversations with clients – we suspect might actually have yielded more).
[3] We note that £1bn is only around 6.7% of £15bn, suggesting that some of the anticipated remittance of funds will be of clean capital which is thereby "unclogged".

3.7 Alongside these objectives, CIOT believes that the design of the TRF will also need to recognise the following:

(a) That FIG is rarely, if ever, a cash sum in a bank account – even though the latter is often thought of as the paradigm case. Typically, FIG will have been invested and reinvested (sometimes many times) and often alongside clean capital. Too often (as was the case in 2017) the rules are drafted on the basis of the paradigm. Yet FIG (and mixed funds) much more likely consists of, say: a portfolio investment account; a painting in a Paris Flat; a Namibian Safari Business...etc.

(b) That the mixed-fund rules are identification rules, not anti-avoidance rules. This has recently been reiterated by the Upper Tier Tribunal in *Commissioners for HMRC v Sehgal and Mehan (*[2024] UKUT 00074 (TCC)) – see paragraph 60 of the judgement. In CIOT's view, too often HMRC have treated the mixed-fund rules as anti-avoidance legislation designed to ensure that remittances are of FIG rather than of clean capital. But, as seen above, this has led to the perverse situation where the non-dom rules discourage non-doms from bringing their capital to the UK. A proper recognition that the mixed-fund rules simply seek to identify what is and what isn't brought to the UK will lead to better design decisions around the TRF.

(c) That, in practice – save in the simplest of cases – the mixed fund rules are notoriously difficult to properly apply and in some cases, impossible to do so. James Kessler comments (*Taxation of Foreign Domiciliaries 2023/24 – chapter 20.21):*

> *The ITA mixed fund rules operate on a daily, indeed minute by minute basis, as the rules must be applied at the time of every onshore and offshore transfer. They do not operate within a given tax year on a pro rata basis (contrast the s.87 or s.731 matching rules). If a client's account contains thousands of entries, the computations must be done thousands of times. The reader who has studied the chapter to here, and who contemplates applying these rules to the actual circumstances of a client, will agree that the mixed fund rules are unworkable.*

(d) That, in addition to the main mixed-fund rules, thought will also need to be given to the following:

(i) That income and gains may no longer belong to the original individual, but could be in the hands of another "relevant person" (s809M);

(ii) The rules on collateral and borrowing. FIG may still actually exist offshore (in a mixed-fund) even though – as a result of UK borrowing having been secured against it – that FIG may already have been deemed to be remitted.

(iii) Various remittance reliefs (particularly Business Investment Relief) which may mean that funds may actually be in the UK already, albeit non-taxably[4]

(iv) The rules for nominated income in s809I and s809J – which can require a re-ordering of mixed funds if "nominated income"[5] is remitted.

(v) The rules on unremittable income in chapter 4 part 8 ITTOIA 2005.

[4] Some of the reliefs operate by saying that there is a remittance but it is not taxable; others deem there not to have been a remittance (leaving open the possibility that if the asset or something deriving from it is later exported and then re-imported a further remittance might take place).

[5] Nominated income is income (or gains) which is nominated for the purposes of paying the £30,000 or £60,000 remittance basis charge. The issue lost much of its potency from 2012/13 due to the ability to nominate a sum of up to £10 as the basis for the RBC and then remit that sum without triggering the rules. However, the rules remain in place for nominated income of 2008/9 to 2011/12 and for larger nominations of later years.

(vi) The pre-2008 transitional rules (paras 86-91 schedule 7 Finance Act 2008) – which largely preserved the pre-2008 position for foreign income from years before 2008/9.

(e) On top of the above, the mixed-fund rules contain a number of anomalies and uncertainties. We give some examples in Appendix 2.

(f) That many RBUs simply do not have records of their FIG, and in many cases – for the reasons given at Appendix 1 paragraph 2.5- would not be able to reconstruct those records even if asked.

3.8 In relation to this last point, it should be noted that:

(a) The lack of records may not be down to poor record-keeping, but simply down to the complexity of the rules and, in some cases, the actual impossibility of complying with them.

(b) That there is likely to be a correlation between those who need to bring funds into the UK and the quality of their record-keeping. Those who need funds in the UK are often likelier to have invested more conservatively and kept better records. By contrast those who know they will never need funds in the UK may well not have bothered to keep the records necessary to perform the mixed-fund analysis (and to have invested in a way which makes that analysis impossible to reconstruct).

(c) If one objective of the TRF is to encourage payment of tax, there will need to be a straightforward process to allow this latter category of individuals to easily identify their FIG in a mixed-fund. There may also (see below) need to be some stick as well as carrot. Otherwise, if the rules are too difficult such individuals will simply continue as they have – knowing that they are unlikely ever to need the particular funds in the UK.

4 SUGGESTED OVERALL DESIGN OF TRF AND MIXED-FUND RULES

4.1 With the above in mind, CIOT recommends that the design of the TRF should be as follows:

(a) The TRF **should apply to any gains or income** of the taxpayer. This would not only include actual income and gains, but also:

(i) income and gains currently in the hands of another relevant person (including trusts and companies) or in the hands of a non-relevant person (e.g. an adult child) where there could still be a taxable remittance if the donor receives a benefit;

(ii) income and gains deemed to be that of the taxpayer (for instance under s720 ITA, s624 ITTOIA or s3 TCGA), or income/gains arising as a result of matching rules (for instance s731 ITA or s87, 89(2) or schedule 4B TCGA).

(b) The TRF **should not require an actual remittance** to the UK.

(c) Instead, the rules should permit the individual to **designate** the amount of income and gains on which they wish to pay the 12% tax.

(d) The design of the designation system will clearly need work. But features of it should include:

(i) The designation can either be done **individually for each mixed-fund, or across a group of mixed-funds** containing the person's FIG.

(ii) The **designation can be partial** – i.e. it need not be of the whole of the income and gains in a particular mixed fund.

(iii) The effect of designation is that remittances of up to the taxable amount can be brought to the UK tax-free at any point in the future **without the need to identify exactly** what income/gains are thereby remitted.

(iv) **The designation need not be exact**. If an individual chooses to designate more income and gains than actually exist in a particular mixed-fund then the excess will simply be treated as a voluntary payment of a slightly higher rate of tax.

(v) **Further designations can be made** for each mixed-fund until 5 April 2027 if the individual wishes to do so (for instance because they realise that they wish to bring more to the UK, or realise that there is more FIG in the mixed-fund than they at first thought).

(e) Thought will need to be given to **what remains in a mixed**-fund if only a partial designation is made. We make some further suggestions regarding this below.

(f) For difficult cases – perhaps above a de minimis amount – HMRC should be empowered and encouraged to **offer a Settlement Opportunity** – under which HMRC would negotiate and reach a binding agreement with the taxpayer as to the amount of FIG they have (and on which they will agree to pay the 12% tax rate). This feature could be designed along similar lines to the successful model of the Liechtenstein Disclosure Facility.

(g) Thought should be given:

(i) To extending the TRF period past 2 years, probably on a **stepped-basis**;

(ii) To applying special rules to **pre-2008 income and gains**;

(iii) To abolishing entirely the rules on **nominated income**.

(iv) In order to encourage take-up, to consider possible **“sticks” as well as the “carrot**” of a 12% rate.

(v) To consider (as one possible “stick”) a **long-stop end date**.

4.2 We comment on these design features in more detail in the following sections.

5 OUR PRINCIPAL RECOMMENDATION - TRF SHOULD NOT REQUIRE ACTUAL REMITTANCE

5.1 CIOT's principal recommendation is that the TRF should not require actual remittance of funds to the UK.

5.2 The reasons we recommend this include:

(a) As mentioned elsewhere, FIG is rarely cash in a bank account. It will invariably be invested – often in illiquid assets. In some cases it will be difficult and in others impossible to sell the asset and remit the monies to the UK. Requiring actual remittance would therefore significantly reduce take-up of the TRF.

(b) Even if the above is not the case, many RBUs may not have a UK bank account (or at least not one capable of receiving large sums). The difficulties, and time-frame, to open a bank account are significant and would further reduce take-up.

(c) There may be ways around the requirement for an actual remittance – for instance borrowing in the UK against the security of the FIG and then repaying that borrowing shortly afterwards. But it is unclear what HMRC gain from putting RBUs to the hassle and cost of temporary borrowing like this.

(d) It is also unclear what would be gained by requiring actual remittance to the UK. Unless this is coupled with the UK introducing some sort of exchange control rules (which would be complex and bad for the UK's reputation generally), RBUs are likely simply to remit for a few days and then send the money back out of the UK. Or, if there were some requirement to keep funds in the UK for a period, this is again likely to significantly curtail the take-up of the TRF.

(e) A system which required actual remittance would need to consider the interaction of these rules with the unremittable income rules in chapter 4 part 8 ITTOIA.

(f) RBUs are unlikely to want to keep significant funds in the UK in the longer-term due, in part, to the inheritance tax risk of doing so. (We do not believe that future inheritance tax, in any event, forms part of the projected yield).

(g) By not requiring an actual remittance and making the process straightforward to apply, take-up should be maximised and the amount of tax generated therefore also maximised.

5.3 Although this recommendation may result in lower amounts actually being brought to the UK (in the short term), we believe that our proposed "designation" system below will allow RBUs to bring those monies to the UK in future years. (This is why at the second bullet of 3.2 above we suggest that it should be made clear whether the objective of the reform is to allow or to encourage.)

6 OUR SECOND RECOMMENDATION – A DESIGNATION SYSTEM

6.1 Our second recommendation is that, instead of requiring actual remittance, the TRF should adopt a "designation"[6] system.

6.2 The broad design of the system would:

(a) allow the individual, in their tax return for 2025/26 or 2026/27, to designate an amount (D)

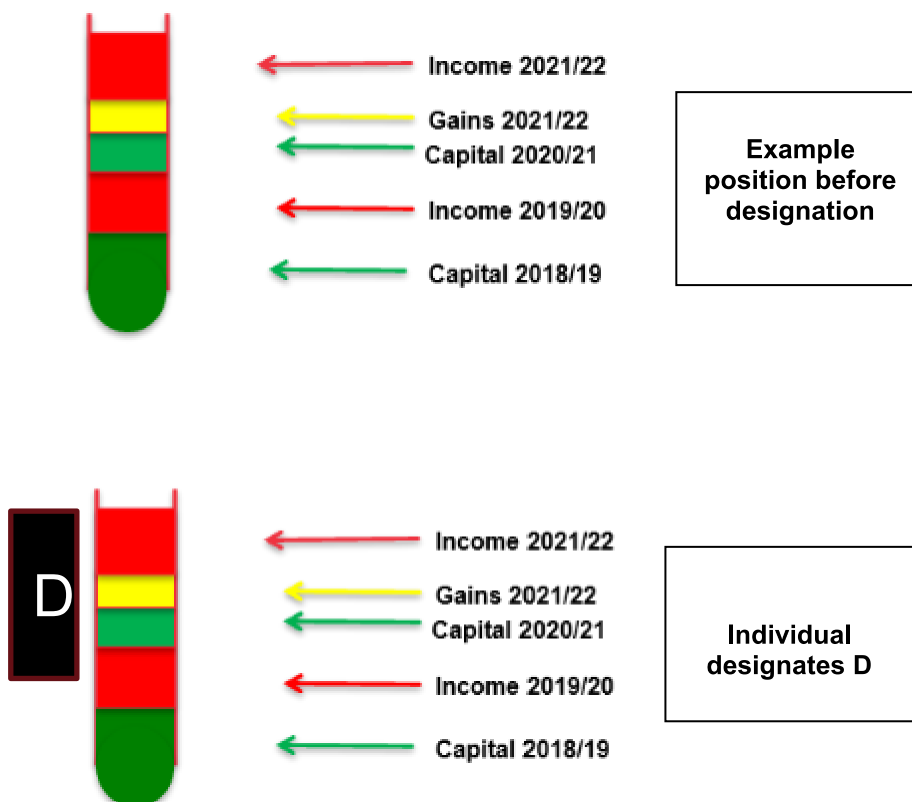
(b) pay 12% tax on D to HMRC in the tax return for the year for which the designation is made

(c) the individual could then remit amounts up to D (from the assets designated) to the UK – either in the same tax year or at any stage in the future

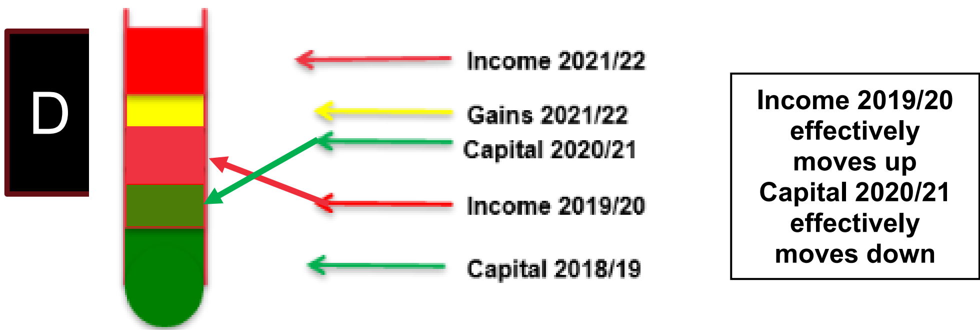
(d) those remittances (up to D) would face no further tax;

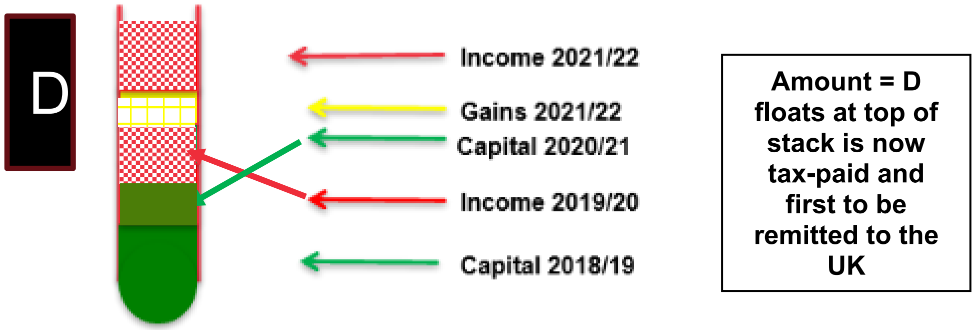
(e) and the individual's total remaining unremitted FIG would be reduced by D[7].

6.3 Conceptually, assuming for the moment a single mixed fund – and using the diagrams from Appendix 1 – FIG of an amount equal to D would be drawn up to the top of the mixed-fund where it would remain "floating" irrespective of further additions. It would therefore always be the first to be remitted to the UK – but being already-taxed monies would not face further tax.



[6] This could alternatively be referred to as a "nomination" system – but we use the term "designation" to avoid confusion with "nominated income" under s809C ITA 2007.
[7] Or, expressing the same thing in a different way, remittances up to D would be deemed to be of historic FIG.


D
Income 2021/22
Gains 2021/22
Capital 2020/21
Income 2019/20
Capital 2018/19
Income 2019/20 effectively moves up Capital 2020/21 effectively moves down


D
Income 2021/22
Gains 2021/22
Capital 2020/21
Income 2019/20
Capital 2018/19
Amount = D floats at top of stack is now tax-paid and first to be remitted to the UK

7 WHY A DESIGNATION SYSTEM?

7.1 The reasons we propose a designation system rather than requiring an actual remittance are largely the reverse of the reasons given at 5.2.

7.2 However, there are some further key reasons:

(a) Simplicity. The individual simply nominates and pays tax on a number (D). They then know, without having to do any mixed-fund analysis, that they are free to bring an amount up to D (provided it is demonstrably from the assets designated) into the UK without income tax or CGT consequences.

(b) Lack of records. As we mention at 3.7(f), many RBUs simply do not have the records of their FIG and would be unable to reconstitute the mixed-fund analysis without great difficulty (and in some cases it may be impossible to do so). A designation system does not require the analysis to be done at the outset – and so long as remittances to the UK are kept below D then the analysis may never need to be done.

(c) Over-designation. With a designation system, we anticipate that most RBUs may work out the amount they are likely to need to remit over their likely remaining residence-period, add a margin of error, and then designate that amount. In cases where they do not have records of FIG, we suspect many will err on the side of caution and designate an amount D which proves to be greater than the FIG. As we suggest at 8.6 below, over-designation should be treated as voluntary payment of a higher effective rate of tax, thus leading to additional tax yield for HMRC.

(d) Credit for foreign taxes. We anticipate – although it is not stated as such – that the intention of TRF is that the 12% should be a flat charge and (like the £30k/£60k remittance basis charge) should not be reduced by credit for foreign taxes. This will obviously need looking at closely, but we would anticipate that a designation system (where the individual effectively voluntarily pays tax on amount D – with no reference to actual FIG) will make it easier to prevent tax credits being claimed.

(e) Scottish tax. This will need further examination, but we anticipate that because the tax will be effectively a voluntary tax on amount D, it should not count as "income tax" for the purposes of Scottish rate[8]. This should avoid complications with having to get additional buy-into the policy from the Scottish Parliament.

[8] See s11A ITA 2007 and s80C Scotland Act 1998. Alternatively, it may be that TRF tax counts as savings income and therefore outside s11A.

8 FURTHER ASPECTS OF DESIGNATION SYSTEM

8.1 Practical aspects of the process of designation

(a) Our proposal is that designation must be done by way of the Income Tax Self-Assessment (ITSA) process. It will simply involve:

(i) Specifying an amount (D) on the tax return within the usual time limits[9].

(ii) Paying 12% tax on D

(iii) Keeping sufficient records ("**Designation Records**") to identify what assets are designated and how D is split between them.

8.2 Do Designation Records need filing with HMRC?

(a) We suspect that a system that requires Designation Records to be reported/filed with HMRC would be unattractive to taxpayers and would run contrary to the long-established policy of not requiring RBUs to report their foreign assets. Requiring Designation Records to be filed with HMRC would be seen by many as HMRC trying to obtain by the backdoor details to which they have not previously been privy. (This concern may be misplaced, but in our experience it would be a genuinely held belief in many cases).

(b) We suspect further that HMRC would also not welcome the mountains of paperwork which would result.

(c) As with the 2017 mixed-fund cleansing (and nominated income under s809C), we would anticipate that designation will therefore simply involve specifying the amount D on a tax return and paying tax. The Designation Records will be for the taxpayer to keep.

(d) However, as there was some confusion among clients over 2017 mixed-fund cleansing, we recommend that a simple voluntary form be made available. This would enable taxpayers to feel confident that they have properly designated. However, the form would not need to be filed with HMRC. A model might be form 50FS (which trustees can voluntarily file with HMRC if they wish, but many choose to fill out but use for their own record-keeping only).

(e) Obviously if HMRC do, in fact, want some level of Designation Records to be filed then our proposal can accommodate that. Alternatively, a system could be designed that requires Designation Records to be lodged with or signed-off by a relevant professional such as a lawyer or accountant.

(f) See also our comments about a Settlement Opportunity at section 8.9 below.

8.3 What needs to be specified on the Designation Records?

(a) We suggest it should be possible for taxpayers to choose to what assets the designation relates. The Designation Records will need to specify this at the time of the designation. (And future remittances will need to be from those assets).

(b) However, where the asset designated is a mixed-fund, in our view the Designation Records need not separate out the components (slices) of that mixed fund unless and until it becomes necessary to do so (see 8.4 below). In the first instance it should be sufficient to designate the mixed-fund as a whole and an amount (D) within that mixed-fund.

[9] In practice this will slightly extend the 2 year period until 31 January 2028 and potentially a further year after that for amendments to the tax return (s9ZA TMA 1970) – see 9.3(d)(i). We suggest that this practical extension of time limits will help what will otherwise be a tight timeframe.

(c) In some cases, taxpayers will want to designate particular accounts or other mixed funds. For instance, if a taxpayer knows that her FIG is now in three places:

(i) Her HSBC bank account

(ii) Her French house (which was purchased with FIG)

(iii) A painting (also purchased with FIG) in that house

she might choose to designate any one, more, or all of these three accounts/assets.

(d) Taxpayers should also be able to determine – in relation to portfolio accounts (see Appendix 2 paragraph 5– whether the portfolio is a single mixed-fund, or whether separate investments within the portfolio might be separately designated.

(e) We also suggest that there should be a facility for taxpayers, for these purposes, simply to treat all their foreign assets (or a specified group of foreign assets) as effectively a single mixed-fund and designate the amount D globally across all such assets. The taxpayer will then know that, whatever the source, assets remitted to the UK up to amount D will be free of tax. While this may seem quite wide in scope, we suggest that the existing loose definition of "mixed-fund" (which does not always precisely define what is a single fund) already effectively has such width within it. Designating the whole of a person's assets as a single mixed-fund should not, in our view, be an undue extension of existing rules.

(f) Thought will need to be given to the problems identified at Appendix 2 - for instance the problem that FIG can exist in more than one place at the same time. (We would broadly propose that a designation of FIG in one location should cover the same FIG in another location).

8.4 Does the whole FIG within a particular mixed fund have to be designated, or can only part be designated ("partial designation")?

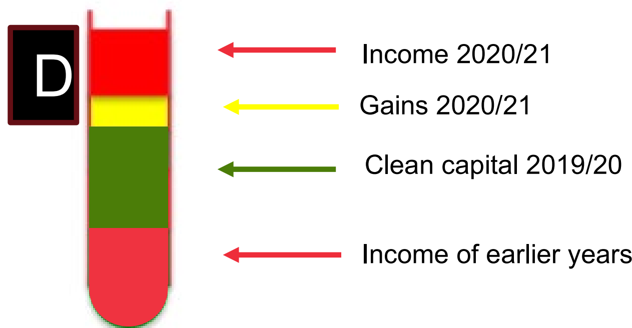
(a) While allowing partial designation may seem to add complication to the rules, we cannot recommend too strongly that the rules allow for it.

(b) If faced with an all-or-nothing choice, in our experience, a large majority of RBUs will simply choose nothing. For instance, an Ultra High Net Worth (UHNW) RBU may have, say £10bn of unremitted FIG. They might welcome the chance to specify an amount (say £1bn) just in case they ever need funds in the UK; and may well err on the side of caution in designating D at this level. For such a person paying £120m in tax may be acceptable for the safety-net that it provides. But if they are required to designate all £10bn and pay £1.2bn of tax – they will simply choose not to take advantage of the TRF at all – to both their and HMRC's loss.

(c) It is worth noting that, by definition, the FIG in question has remained outside the UK to date. So the starting assumption, on the basis that they have managed perfectly well to date, should be that the individual does not need to remit it. The design of the TRF therefore needs to be sufficiently attractive to encourage remittances that, in the ordinary course, would not otherwise have been made. Making the requirement an all-or-nothing choice makes the TRF particularly unattractive.

8.5 Won't partial designation allow RBUs to nominate only so much FIG as allows them to access clean capital?

(a) This is indeed a potential consequence of allowing partial designation. The following diagram illustrates:



(b) In the above situation the taxpayer has a mixed-fund with later year income/gains at the top, then a layer of clean capital, below which is income of earlier years.

(c) If well-advised, such a taxpayer may – if partial designation is allowed – designate amount D to equal only the later years' income and gains. Once that is remitted the next item in the stack is clean capital. The taxpayer can now access this and remit it to the UK too…without having to designate the bottom slice of income.

(d) The potential objection to this is that by allowing partial designation HMRC loses out on 12% tax on the bottom slice.

(e) We think that such a concern is misplaced, because:

(i) It is just a consequence of the existing mixed-fund rules and the fact that the clean capital of 2019/20 (in the above example) is a higher slice than the income of earlier years. As we note at 3.7(b), the mixed-fund rules are identification rules, not anti-avoidance rules.

(ii) As we further set out at 3.3 above, the remittance rules / mixed-fund rules have always had the counter-intuitive consequence that RBUs are often prevented from remitting their clean capital to the UK. Why should we object to RBUs bringing clean capital to the UK?

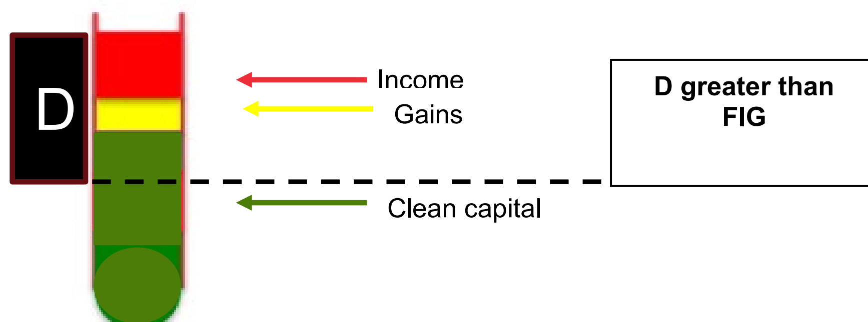
(iii) We reiterate the point made at 8.4 that not allowing partial designation is more likely simply to result in nothing being designated.

(f) For all these reasons, we think that it should be considered unproblematic that partial designation would have this consequence.

8.6 Can over-designations be made?

(a) As mentioned at 7.2(b) and 7.2(c) above, in practice many RBUs may lack the records accurately to work out how much FIG is in an account. We suspect in practice that many will want to err on the side of caution and over-designate where this is the case.

(b) The following diagram illustrates:



(c) In the above, the taxpayer may know that there is some income and gains in the account but be unclear about how much. Alternatively, they may know the amount but not for which years. They may therefore choose to designate an amount (D) which is higher than their estimate of the likely income and gains actually in the account. In many cases it may be cheaper for them to do so than to commission a full analysis.

(d) We suggest that such a situation should not be problematic. HMRC should simply accept that 12% of D is slightly higher than the amount strictly due. But like the provisions of s809C (which by allowing nominated income to be of any amount, effectively permit a voluntarily chosen rate of tax) the effect should be that the amount of tax actually paid just represents an effectively higher rate of tax on the actual income and gains.

(e) We strongly caution – see Appendix 3 paragraph 3– that the mistake made in the 2017 cleansing provisions (where an over-nomination made the entire exercise ineffective) is not repeated here.

8.7 Multiple designations should be possible

(a) We recommend that it should be possible to make a further designation (for the same account) after the first one is made.

(b) This will typically be the case where the taxpayer realises that they may need more funds in the UK than they at first thought. Or it may cover situations where the taxpayer has under-calculated the amount of their FIG.

(c) On the basis that the designation process will largely take place as part of the self-assessment tax return, we do not envisage that multiple designations should be problematic – effectively there should be no more than two (one for 25/26 and one for 26/27).

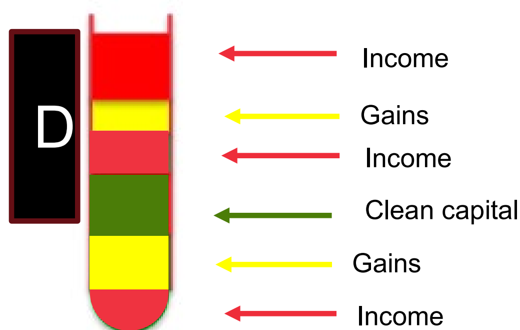
(d) We again caution against the mistakes made in the 2017 cleansing provisions in this respect – see Appendix 3 paragraph 2

8.8 What remains after a partial designation is exhausted?

(a) What is the position if:

(i) A taxpayer only partially designates – for instance assume that there is 1000 of FIG in a mixed-fund, but the taxpayer designates only 750 of it.

(ii) Having remitted the first 750, the taxpayer then makes further remittances (after the 2-year period, or during that period but without a further designation)? What is left in the mixed-fund in relation to that later remittance?



(iii) In this example, there is a mixed fund with income, gains and capital of different years. The taxpayer nominates an amount D that is less than the total amount of income and gains in the account. After the taxpayer has remitted D, it is necessary to know what any further remittances are. But which years' income and gains have been designated? And has income or gains been so designated? And which types of income?

(b) We would suggest in this situation that taxpayers should be free:

(i) To designate exactly which slices of income and gains fall within D and which do not; and

(ii) Should not have to make that slice-by-slice decision at the outset. The decision would only need to be made by the time of the first tax return after remittances have exceeded D.

(c) The obvious objection to this is that allowing taxpayers to choose which slices are selected will naturally encourage them to choose slices of income as being designated and leave gains (or income subject to UK or foreign tax) undesignated. This is indeed likely. The counter argument to it is that the TRF has already adopted a rough and ready 12% rate of tax – which is less generous to gains than it is to income. This may simply be the price of a simpler set of rules.

(d) We also note that in many cases, taxpayers may simply not have the records to distinguish income and gains (particularly where investments may have produced offshore income gains as well) or different types of income. One possible "stick" (see below) that could be used here is that, where taxpayers lack records, any amount of FIG not included in D will automatically be subject to income tax rates[10].

(e) While it would be possible to design a more prescriptive approach (e.g. requiring D to relate to gains ahead of income or to relate to later years ahead of earlier years), we suggest that such an approach is likely to lead to complexity for those who will often lack records. Any lack of simplicity in the design is likely to mean that RBUs simply do not bother with the TRF. It is for this same reason that we strongly recommend that the slice-by-slice decision need not be taken at the outset, but only as and when a remittance in excess of D is made.

8.9 Further additions to / transfers from assets which have been designated

(a) What happens if further assets are later added – either during the two year period or after it – to an asset/account which contains designated funds?

(b) Some thought will be needed here, but in principle we believe our suggestion already caters for this. Essentially the designated amount (D) will "float" at the top of the mixed-fund and will remain floating there irrespective of further additions or transfers:

(i) Further additions will sit below D but (being of a later year) above other funds in the account. It will not be necessary to specify which of the 9 categories of income and capital they represent. They will simply be a single category of "post 6/4/2025 funds".

(ii) Offshore transfers should, in principle, continue to involve a vertical-slice approach – see Appendix 1 paragraph 2.4– which would in principle therefore take a pro-rata slice of the "floating funds" (D) across to the recipient account It may be desirable, however, to allow the individual to change their Designation Records so that the full amount of D remains in situ. (This is a detail that can be clarified in due course.)

[10] There is some precedent for this in that dividend income remitted in a later year does not benefit from dividend rates.

(iii) Onshore transfers should, in principle, come from the funds floating at the top of the account and so should be treated as a remittance of D. There may be limited cases where an individual would prefer to leave D floating on top of the account and remit the funds just below it instead (paying full-rate tax accordingly). (Again this is a detail that can be clarified in due course.)

8.10 Assets already in the UK

(a) Obviously, in most cases FIG will currently be situated outside the UK. But in some cases FIG (or assets deriving from it) may already be in the UK – albeit untaxed. Examples would include:

(i) Investments made using Business Investment Relief

(ii) Exempt property under s809X being:

(A) Property subject to the public access rule;

(B) Clothing, jewellery, footwear and watches for personal use[11]

(C) Property in the UK for repair

(D) Property temporarily in the UK for less than 275 days;

(E) Chattels where the amount otherwise remitted is below £1,000.

(iii) There may be other, more obscure cases.

(b) For Business Investment Relief, we believe that the TRF should allow the RBU to designate the FIG that is "in" that investment should they wish to do so.

(c) The same option should be available for property subject to public access rule, in the UK for repair, or temporarily in the UK.

(d) For clothing, jewellery, footwear and watches for personal use and other chattels, we recommend:

(i) If below £1,000 or already owned before 6 April 2024 (or before 6 March 2024) then the rule should be abolished and they can be brought to the UK without a remittance (and without having to pay the TRF)[12];

(ii) For newly acquired items[13], the TRF should allow them to be designated, even if they are in the UK already.

(e) Further thought needs to be given to the situations in s809Y (property lost, stolen or destroyed…compensation monies etc) and to chargeable gains accruing on the disposal of such exempt property (s809YD).

8.11 Difficult cases – an LDF-type facility to negotiate with HMRC

(a) As outlined at 3.7(d) and Appendix 2 there are a number of difficult issues with the current remittance and mixed-fund rules.

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[11] The categories of clothing, jewellery, watches and footwear was a somewhat arbitrary choice in 2008 designed to cover expensive items with other chattels having to be below £1,000. Arguably handbags, pens and wallets might sensibly also be included.

[12] Chattels pose a drafting issue because, although currently exempt, the effect of exemption is that they are deemed not to have been remitted. This means that if they are taken outside the UK and then brought back (which will be common for the types listed in s809Z2) they are remitted again – if this is after 6 April 2025 the abolition of the remittance basis would otherwise mean that they are then taxable. Items under £1,000 was designed to cover things such as e.g. gold-fillings!

[13] While it would be possible also to exempt these, the fear is that RBUs may simply convert their unremitted FIG into expensive jewellery or watches and then bring that into the UK without tax.

(b) We believe that our proposal for a designation system should, in practice, help solve a number of these issues. By allowing taxpayers simply to designate a global amount (D) and then treating remittances up to that amount as tax-free, we hope that many RBUs will simply designate a sufficiently large number that it will never be reached. This will hopefully avoid the necessity of undertaking the difficult compliance issues.

(c) However, while our proposal may provide a rough-and-ready solution in many cases, we do not pretend that difficult cases will not remain. Some taxpayers will entirely lack records (particularly if their FIG goes back many years and includes pre-2008 FIG). Currency gains before 2012 will be a further issue in many cases. Others may have had periods of non-residence in between resident periods and may be unsure what was remitted during those non-resident periods. Issues around losses, collateral and reliefs and issues involving other relevant persons may mean that anomalies remain.

(d) With this in mind, we therefore further propose that there should be a facility ("**Settlement Opportunity**") (perhaps modelled along the lines of the Liechtenstein Disclosure Facility) where taxpayers can approach HMRC to agree a global settlement in relation to past FIG.

(e) The exact terms of the Settlement Opportunity should be flexible, but could include requirements along the following lines:

   (i) The taxpayer should be shown to have made a good faith effort to calculate their unremitted FIG as best they can.

   (ii) Given that the TRF applies equally to income and gains, this need not involve establishing exactly what is income and what is gains but could – for instance – involve demonstrating an overall increase in the person's foreign assets across their period of residence.

   (iii) The taxpayer would be required to designate and pay 12% tax on the figure agreed.

   (iv) There could be a de minimis amount to prevent HMRC being tied up in agreeing small but complex settlements. While this de minimis could be a fixed figure (say £1m of FIG), we would suggest that it would be better for HMRC to give an indicative minimum but have the flexibility to allow easy-to-agree cases below that figure but refuse hard-to-agree cases just above that figure. Perhaps the guideline should be based upon a projected analysis of the ratio of likely additional tax yield compared to likely internal costs (say a 5:1 ratio?) ("**yield ratio**").

   (v) It would be for discussion whether the Settlement Opportunity only applied if the taxpayer agreed to clean up the entirety of their FIG. While there is something to be said for a single global agreement covering all FIG, we can see that there could also be cases where a taxpayer has one very defined amount of FIG and another very messy amount of FIG[14] and where insisting on a global settlement might be counter-productive. Our feeling is that it would be better simply to allow HMRC to specify their own parameters in individual cases based solely upon the likely yield ratio. In such cases, HMRC could agree what remained unremitted.

   (vi) It might be appropriate to tie the Settlement Opportunity together in some way with some of the proposed "sweeteners" set out at section 9 below – for instance exempting pre-2008 FIG and/or pre 2012 currency gains.

[14] For instance they may have a valuable foreign chattel clearly purchased using foreign income; and also several investment portfolios, regularly reinvested, where the amount of FIG is unclear.

(vii) The taxpayer should commit to transparency and further disclosure (for instance if further FIG were subsequently discovered) as a condition for entering the Settlement Opportunity.

(viii) With regard to time limits, we suggest that the taxpayer should be required to enter the Settlement Opportunity on or before 5 April 2027, but that agreement should be capable of being reached after the period. If HMRC or the taxpayer pulled out of negotiations after 5 April 2027, a further period (say 6 months) should be allowed by way of extension to the normal TRF period.

9 ADDITIONAL POINTS FOR CONSIDERATION

9.1 The previous sections have looked at what we consider to be the essential features in the design of the TRF, particularly as regards mixed-funds.

9.2 While the following suggestions are not essential, we suggest that HMRC should give active consideration to them. We believe that they will enhance the TRF, enable and encourage greater uptake of it, and make the rules easier to operate in practice.

9.3 **Consider extending the two-year time-limit**

(a) We obviously note that the Chancellor specifically announced a two year time limit for the TRF and that this may therefore be an immovable feature. However, we would note the following.

(b) Firstly, two years will, in practice, prove to be considerably shorter. The experience in 2017 around the mixed-fund cleansing opportunity showed that two years eventually became little more than one year in practice – see Appendix 3 paragraph 5– due to delays in legislation and guidance. Admittedly in this case the 2 year period does not start until April 2025. But given uncertainties around the General Election and whether a future government will commit to the TRF (and in what form), we fear that the same could apply again. We suggest that there should ideally be a commitment to two years from the point that legislation is final.

(c) Secondly, a two year period may be just about acceptable if our proposals for a designation system and a Settlement Opportunity are accepted. But if the system requires actual remittances and accurate calculations of mixed-funds then two years will simply not be long enough in many cases to do the work involved. RBUs will simply opt not to use the TRF in this case.

(d) Third, we have suggested two ways in this paper in which we believe the two year limit should in practice be extended:

(i) If our proposals for a designation system apply then the time limit will in practice be the filing deadline for 2026/27 – i.e. 31 January 2028[15]. This would allow the two year period to remain while taking some of the sting out of the timing.

(ii) Our proposals for a Settlement Opportunity suggest that the Opportunity merely needs to be started within the 2 year period.

(e) Fourth, we believe that there is merit in having a longer TRF period, but in later years involving a stepped increase in the rate of tax. For instance, the first two years could be at 12% and the next two years at 20%. At present, on speaking to clients about the TRF, our experience is that many are asking why they would choose 12% when the alternative is to keep their FIG unremitted and pay 0%. Having a stepped-system over a longer period would give the (perhaps unspoken) message that the system will go on getting worse into the future, so taxpayers should take advantage of the TRF while they can. We think this would likely increase uptake.

9.4 **Special rules for pre-2008 FIG**

(a) While we obviously do not have accurate figures, we suspect that the amount of tax projected to be raised (in the absence of the TRF) from the remittance of pre-2008 FIG is likely to be minimal. Such FIG has, by definition, been unremitted for at least 16 years so the chances of it being needed in the UK are low.

[15] Potentially extendable to 31 January 2029 allowing for the normal year under s9ZA TMA 1970 to amend returns.

(b) If this is the case – and given also that records dating back this far are likely to be very patchy – we think that there is a good case for applying special rules to pre-2008 FIG.

(c) Potentially this special rule could simply abolish the remittance basis entirely for such amounts – without the need to apply the TRF to it at all.

(d) Alternatively, the rule could be that if all post-2008 FIG is designated, then pre-2008 FIG in the same mixed-fund is then exempted. While this might seem to come at a cost to the Exchequer (12% of the pre-2008 FIG), in practice a well-advised taxpayer could achieve this outcome anyway by designating the post-2008 FIG, remitting that amount, and then using the pre-2008 transitional rules[16] - for instance a gift to spouse – to clean and remit the remaining pre-2008 monies. As such, we do not think that significant tax-yield is lost by such a proposal.

(e) We suggest that a proposal along the above lines would act as a further incentive for taxpayers to choose to designate all their post-2008 FIG rather than simply designating part of it. It would also have the advantage that funds could be entirely cleared up and the 2008 transitional rules could then be taken off the statute book. It would also significantly reduce the compliance costs in trying to establish the actual amounts of pre-2008 FIG in a situation where records will be very difficult to access in many cases.

(f) Alternatively, some sort of exemption for pre-2008 FIG could be tied together with our proposal for a Settlement Opportunity at section 8.11 above.

9.5 Currency Gains before 2012

(a) Since 6 April 2012, gains on foreign currency bank accounts have been exempt from capital gains tax. However, such gains before that date may still not have been remitted to the UK. This causes significant complications in calculating the amount of FIG in foreign bank accounts.

(b) We suggest that it should be possible to exempt foreign currency gains before that date as part of the TRF. Ideally this would be universal, but it could potentially be linked to taking up the TRF opportunity and/or the Settlement Opportunity at section 8.11 above.

9.6 Special rule for losses if person agrees to pay TRF on entire remaining FIG

(a) One problematic issue with the current remittance basis – as we identify at Appendix 2 paragraph 4 – is that a person's FIG may be greater than the sum of their foreign assets. For instance, if a person earns and invests 100 of FIG, but the investment falls in value to 70, the investment still derives from 100 of FIG. A remittance of 70 might therefore cause tax on 100.

(b) While the legal basis for this situation is relatively clear, it is a counter-intuitive result and causes particular difficulties where only part of the proceeds are remitted and/or when the investment was funded with a mixture of FIG and clean capital. Applying the strict rule here also acts as a disincentive to designate assets standing at a loss. For instance if a person bought a foreign home using £5m of FIG, but the asset has now fallen in value to £2m, paying 12% on the full £5m feels to the individual like an effective rate of 36%

(c) Dealing with this issue while allowing partial designation would be difficult. This would also require complicated rules if an asset gained in value again.

[16] paras 86-91 schedule 7 FA 2007.

(d) However, we suggest that – as an additional incentive for RBUs to use the TRF to clean up the whole of their foreign assets – it would be possible to deal with this issue.

(e) The process would simply be for the individual to identify all their clean capital – and agree to pay the TRF on the balance. This process could be negotiated as part of the proposed Settlement Opportunity (see section 8.11).

9.7 Retain other exemptions

(a) The Budget Technical Note suggests that, aside from Business Investment Relief, other remittance exemptions will be abolished.

(b) While we can see the attraction of removing a large chunk of legislation (from s809UA to s809Z10) from the statute book, we think that it will be necessary to consider each relief separately.

(c) We comment at section 8.10 above regarding exempt property.

(d) s809UA and s809V (payment of £30k and £60k charge using FIG) will naturally fall away eventually. But there will be some cases where these charges are paid late, so we suggest that they should be retained until the latest possible date by which a discovery assessment could be made.

(e) s809W (consideration for services relating mainly to property outside the UK) will also need considering. The rationale for it has always been that intangible services of consultants and advisers (e.g. lawyers or accountancy fees) are location-agnostic. If a remittance is caused by paying a UK consultant, then the RBU will obtain the same service from a non-UK consultant. s809W therefore ensures a level playing-field between UK and non-UK consultants/advisers. As such, while there is some attraction in removing this from the statute book, we suggest that it should be retained.

(f) In this last regard, we note that RBUs are likely to require considerable professional help to navigate these changes. In our view it is surely better (both for them, for HMRC and for the wider UK economy) that they get that help from well-qualified UK professionals rather than from providers outside the UK.

9.8 Consider abolishing the rules on "nominated income" (s809C and s809I ITA 2007)

(a) We recommend that the nominated income rules in s809I should be abolished for all years back to 2008.

(b) s809C ITA 2007 currently provides a complex mechanism for payment of the £30,000 or £60,000 remittance basis charge. An amount of income or gains has to be nominated for the purposes of this charge and an implied tax-rate is then applied to the amount nominated, such that the outcome proves to be either £30,000 or £60,000 as the case may require.

(c) This slightly strange mechanism (which can create an implied tax of up to six million percent if £1 is nominated!) was adopted in 2008 in an attempt to ensure that credit for foreign taxes could only be claimed against the nominated income – but that the remittance basis charge was still a "tax" rather than a "levy" for tax-treaty purposes.

(d) In order to achieve this, the legislation incentivises taxpayers to nominate only a small amount (ideally £1) so that only minimal tax credits can be claimed. The incentive to nominate only a small amount comes about as a result of s809I which results in a penal re-ordering of mixed-fund rules if nominated income is ever remitted to the UK.

(e) The penal nature of s809I has led to many taxpayers having to open separate bank accounts just to contain their "nominated income" – at great administrative cost to banks in setting up systems to deal with this[17] - and often misunderstood in practice by those dealing with the filing of tax returns. The provisions were slightly relaxed in 2012 by allowing up to £10 of nominated income to be remitted to the UK without triggering the penal provisions of s809I.

(f) Nonetheless, there will still be nominated income from before 2012 and (potentially) larger nominations than £10 after that date to which s809I could still apply.

(g) Given:

(i) that the nominated income rules will, in any event, be removed from 6 April 2025,

(ii) that in many cases only small amounts will have been nominated;

(iii) the general lack of understanding and compliance with the existing rules;

(iv) that it is unlikely at this distance of time that significant foreign tax credits could be claimed on remittance of larger amounts of nominated income (even if taxpayers have nominated larger amounts)

we suggest that it would not be too complex or costly simply to abolish the nominated income rules entirely. This would considerably simplify the position and avoid s809I from complicating the mixed-fund position further.

9.9 Sticks as well as carrots

(a) As we have mentioned elsewhere, the TRF currently appears to offer taxpayers the choice between 12% tax… or not remitting and paying 0% tax. In initial conversations with clients, they often ask the question, therefore, why they would bother paying 12% when they have the alternative of paying nothing. They have, by definition, not needed the funds in the UK to date and in the majority of cases that will typically remain the case.

(b) We therefore fear that, without further provisions, the TRF will be limited to those few who will definitely need funds in the UK and, perhaps, others choosing to use the TRF for only a relatively small proportion of their funds (as an "emergency fund").

(c) The result, in our view, is therefore likely to be considerable funds remaining unremitted, and the mixed-fund and remittance rules needing to remain permanently on the statute-book after 2027.

(d) To avoid this we think it is vital that thought is given to both "carrots" and "sticks" to encourage greater take-up of the TRF.

(e) We have suggested possible "carrots" earlier in this section 9.

(f) Possible sticks (some of which we have also mentioned) might include:

(i) A stepped-increase in the TRF rate (e.g. from 12% for the first 2 years to 20% for the next 2 years) – perhaps coupled with an unspoken threat that the rate might go on rising thereafter;

[17] We are aware of one bank which had to spend at least £500,000 in internal costs just to allow its systems to credit interest on 5 April rather than 30 April in order to be able to set up such accounts.

(ii) Increasing the tax rate on gains remitted after 2027 – perhaps eventually aligning it with income tax rates (as is currently the case where dividend income is taxed at full rates if remitted later);

(iii) Applying some form of supplementary charge to FIG remitted after a particular date. (This could be 2027, but we suggest that it should be slightly later, perhaps 2028 or 2029, to give a final opportunity[18].)

(iv) Removal of the pre-2008 transitional rules after a certain date. 6 April 2028 might be an appropriate date, being one year after the end of the TRF period and tying in with the 20 year period in para 90(4)(c) schedule 7 Finance Act 2008.

(v) A long-stop date (see next section).

(vi) Other "sticks" could no doubt be conceived.

(g) While we have suggested a number of possible "sticks", we would counsel that any such "stick" should be combined with some sort of matching "carrot". Applying one without the other is likely to be ineffective if the aim is to encourage widespread take-up.

9.10 A long-stop date?

(a) Our final suggestion it that the TRF should have a long-stop date of some description – after which all pre-2025 legislation should be able to be removed from the statute book.

(b) We suggest that this date needs to be sufficiently far into the future that it does not immediately cause an exodus, but allows more than sufficient time for planning in the meantime. The period should therefore be at least 10 years and ideally longer. There is good precedent for a 20-year period in paragraph 90(4)(c) schedule 7 Finance Act 2008. A 20-year period also has the advantage that any taxpayer who is a minor child today will by definition be an adult by that date.

(c) What happens on that long-stop date would need to have more detailed consideration.

(d) One tentative possibility – but CIOT raise this simply for discussion purposes and without endorsing it– is to deem all unremitted FIG to be remitted on the final date (say 6 April 2045).

(e) Such a proposal may seem draconian (and it would definitely require the longer 20 year period rather than a shorter one in our view), but a number of points can be made:

(i) Taxpayers have had the opportunity of the TRF in the meantime – ideally on a longer stepped-basis, so have had an obvious escape route;

(ii) Taxpayers will also have had other escape routes in the meantime:

(A) Going non-resident (and as non-domiciliaries by definition they will intend to leave the UK one day[19])

[18] We suggest that this should be modelled on s91 TCGA. The USA has more penal provisions where undistributed net income (UNI) of non-grantor trusts exceeds distributed net income (DNI). Broadly these provisions apply the rate of interest applicable to unpaid tax, on a compounded basis - potentially increasing the tax rate eventually to 100% (where it is capped out). We would NOT recommend the USA's approach here as there needs to be a balance between incentivising early remittance but not making something so penal that it results in complete inaction.

[19] Admittedly some may have FIG from a previous period, but may subsequently changed their intentions and thereby acquired a domicile of choice in the UK.

(B) If the taxpayer dies before the end of the period, their FIG will in any event cease to be taxable[20]

(C) The taxpayer could make gifts of their FIG to non-relevant persons (e.g. adult children)

(iii) While taxing past FIG on 6 April 2045 might seem like a retrospective tax charge, a case can be made that it is not. The FIG has always been taxable – the remittance basis has merely deferred that tax charge. So it is not a new tax charge, it is the end of that deferral.

(iv) Clearly such a proposal would require further thought. However, it should definitely act as an encouragement for taxpayers to take up the TRF in our view.

(f) Given the draconian nature of such a proposal, it would need significant counter-balances:

(i) Widespread publicity to avoid individuals missing the TRF opportunity.

(ii) Pre 6/4/2008 FIG should be excluded (see 9.4) not least because of lack of records – and there would be a case to exclude all FIG before, say, 6/4/2017 too.

(iii) There would definitely need to be a Settlement Opportunity so that the amounts involved could be negotiated in the meantime – see 8.11.

(iv) Credit should be given for remittance basis charges paid;

(v) The other "escape routes" mentioned above would need to apply

(vi) The period would need to be at the 20 year end of the scale.

(g) Counter-arguments to such a proposal would include:

(i) A lack of record-keeping by the end-date

(ii) Potential hardship cases at the end-date.

(h) If such a long-stop date were considered too draconian, an alternative might be for the government simply to announce that they are considering one (but will decide once they have evidence of how successful the TRF has been).

[20] See RDRM 33600

10 OTHER ISSUES NOT COVERED

10.1 While we have attempted in this paper to provide a relatively comprehensive overview of the likely issues involved in the TRF and mixed-funds, inevitably the complexity of the current rules means that there will be a large number of issues which need detailed consideration and careful statutory drafting.

10.2 Issues we have not attempted to cover (or at least not in detail) in this paper include:

(a) Employment income and the rules in s809RA

(b) Automatic RBUs who do not need to make a claim (s809D and s809E)

(c) Remittances under conditions C and D (see s809L(4) and (5))

(d) Offshore Income Gains

(e) Foreign tax credits and treaty reliefs

(f) Interaction with 2017 mixed-fund cleansing rules (i.e. situations where the RBU has used those provisions). In principle presumably such situations should just follow the end result of that cleansing in the normal way, but there may be some other interactions which need thought.

(g) Joint accounts.

Appendix 1 – Mixed Funds

1 INTRODUCTION

1.1 The mixed-fund rules – s809Q to s809S ITA 2007 – were introduced in 2008 alongside the general tightening of the remittance rules in FA 2007. They deal with the obvious question of how to identify what has been remitted where different types of income, gains and capital have been mixed together – either in a single bank account (perhaps the paradigm example) or in the purchase of a non-UK investment or other asset.

1.2 The rules replaced a patchwork of pre-2008 case-law. This older case-law had generally deemed income to be remitted first – but was unclear on a number of other issues including: credit for foreign tax; whether UK income was remitted ahead of foreign income; and which year's income was remitted.

1.3 The case-law also made it clear (unhelpfully) that a capital gain is indistinguishable from other capital – making it impossible to segregate capital gains. For instance, if an asset was bought for 60 and sold for 100, it is not possible to transfer the 40 of gain to a separate account. Each part of the 100 consists 60% of capital and 40% of gain[21]. This inability to segregate gains persisted in the drafting of the mixed-fund rules.

1.4 In line with the prior treatment of income, the 2008 legislation broadly followed the model of "worst first" – i.e. the higher taxed items are remitted before lower taxed items – and extended this to capital gains as well as income. However, it also (helpfully) adopted a last-in first-out (LIFO) approach so that income, gains and capital of later tax years are remitted before those categories of earlier years.

2 DIAGRAMATIC REPRESENTATION

2.1 A helpful way to represent the mixed-fund rules is to think of them as a test-tube containing various different layers of income, gains and capital. As income, gains and capital of future years are added, they form the topmost layer in the test-tube. And as and when a remittance to the UK takes place, the test tube is tipped up and whatever is at the top of the tube comes into the UK first.

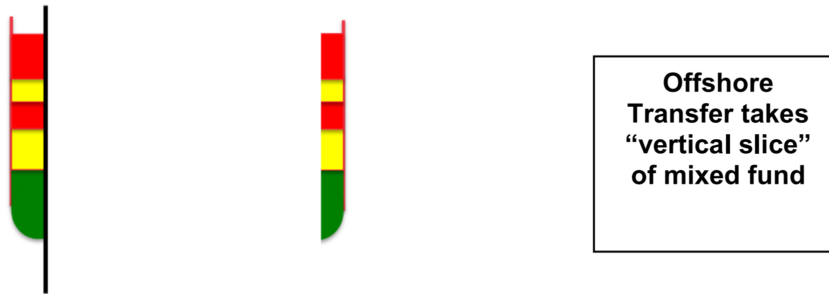
2.2 For instance if an account was originally funded with capital in 2018/19, then had income added in 2019/20, further capital added in 2020/21, and both income and gains of 2021/22, it might be represented as follows.

2.3 In the above example, it would be the income of 2021/22 which would be the first to be remitted to the UK, followed by the gains of 2021/22, followed by the capital of 2020/21 and so on.

2.4 However, a transfer from one non-UK mixed-fund to another account or asset (and "offshore transfer") does not skim the topmost item. Such an offshore transfer instead includes a proportion of everything in the mixed-fund before the transfer. An offshore

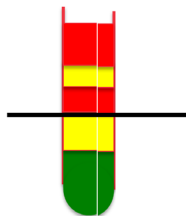
[21] Meaning that if 40 were transferred to a separate account, that 40 would consist of 24 of capital and 16 of gain. This leaves the original 60 consisting of 36 of capital and 24 of gain.

transfer can, diagrammatically therefore be thought of as a vertical slice of whatever is in the account.



2.5 In practice, offshore transfers happen frequently – particularly if the mixed fund is actively invested. In such a case offshore transfers may happen daily (or in some cases even more frequently) as the mixed fund is invested and reinvested. This makes tracking the composition of non-UK investments very difficult if not practically impossible in many cases.

2.6 However, it is worth noting that two anti-avoidance rules prevent an offshore transfer being used to reduce the quantum of a remittance. For instance, in the above diagram assume that the individual wished to remit half the account balance to the UK. The normal remittance order would treat this as being the top-half of the account (consisting entirely of income and gains in this example



whereas first making an offshore transfer of half the account (as in the diagram at 2.4) would include a proportion of the (green) clean capital in the account.

To prevent this s809R(5) and (6) only treat something as an offshore transfer if, on the basis of the best estimate that can then be made, it is not intended to bring the transferred funds into the UK.

A further rule (s809S) also seeks to disapply the mixed-fund ordering rules if there are any arrangements one of the main purposes of which is to secure an income tax or CGT advantage. In such a case the mixed fund is treated as containing such amounts of income, gains and capital as is just and reasonable.

2.7 While the point of these anti-avoidance rules is well-intentioned, they complicate the mixed-fund analysis considerably. When combined with an actively invested portfolio (where it is unclear whether a transfer is an offshore or an onshore transfer until the end of the tax year), it becomes actually impossible in some cases to track exactly where income, gains and capital exist.

Appendix 2– Problems with Existing Mixed-Fund rules

The following are examples – by no means comprehensive – of some of the issues caused by the existing mixed-fund rules:

1 SAME FIG EXISTS IN DIFFERENT PLACES AT THE SAME TIME

1.1 The "derivation" rule in condition B of s809L(3) means that FIG can potentially be located in more than one place at the same time.

1.2 An example of this would be an RBU who lends their FIG to another relevant person (for instance to a non-UK close company). The assets now in the company clearly derive from the FIG (and so would cause a remittance if the company brings those assets to the UK). But the debt created by the loan also derives from the FIG. So if the loan is repaid (say with other monies) then that repayment also derives from the FIG and would also cause a tax charge if remitted.

1.3 Seemingly the FIG therefore exists in more than one place at the same time.

1.4 It seems relatively clear that if the FIG is remitted from one of its locations and thereby taxed, it cannot be taxed again. But it is unclear whether this is because of s809P(12) (no duplication of charge) or whether the asset in the other locations ceases to derive from the FIG. This could affect the mixed-fund ordering and sequencing rules and other matters such as offshore transfers.

2 SAME FIG FALLS INTO MORE THAN ONE CATEGORY

2.1 A similar issue is the characterisation of the FIG where it is in the hands of a related person.

2.2 For instance assume that taxpayer (T) has relevant foreign earnings. T gives those earnings (in the same year they are earned) to relevant person (R). R – who is also a remittance basis user - mixes that amount with R's own foreign chargeable gains (of the same year).

2.3 From T's point of view, the relevant foreign earnings are in category (b)[22] and therefore higher in the ordering than foreign capital gains (category (e)). But from R's point of view the gift is capital and therefore in category (i), lower than R's foreign capital gains.

2.4 If R remits from this account, it is unclear how the ordering works.

3 ONE REMITTANCE – MORE THAN ONE TAX CHARGE

3.1 There are a number of ways in which this issue can arise, but the following example illustrates.

3.2 Assume that RBU has subscribed 100 of unremitted income (X) to a non-UK close company in return for shares. Later they lend a further 100 of unremitted income (Y) to the same company.

3.3 Later the company repays the loan (Z), but the funds the company uses to do so can be traced to X.

3.4 Z (the loan-repayment proceeds) in the hands of the RBU now derives both from Y (the monies originally lent) and from X (the monies used to repay the loan).

3.5 There is academic debate about the correct analysis here, but HMRC seem to take the view that in this situation, bringing Z into the UK will remit both X and Y. HMRC do not view this as double taxation – merely that the taxation of both X and Y have been triggered by a single remittance.

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[22] s809Q(4)

4 LOSSES

4.1 Assume, by way of example, that an RBU has 100 of FIG which they use (outside the UK) to purchase some shares. The shares fall in value to 30 and are sold.

4.2 If the proceeds of sale are brought to the UK, HMRC take the view that – although only 30 are brought to the UK, that 30 "derives from" 100 of FIG – so the tax charge is on 100.

4.3 The position is more complex if a mixed-fund is created. Say in the above example that 65 of FIG (of 2022/23) and 35 of clean capital (of 2023/24) are used to purchase the 100 shares. The shares fall in value to 50.

4.4 If the full proceeds are brought to the UK then the rules appear to apply as in 4.2. But if less than the full proceeds (say 40) are brought to the UK, it appears that mixed fund ordering rules apply – in which case the first 35 would be the clean capital from a later tax year and only the balance of 5 is FIG. (It is then unclear whether the remaining 10 derives fully from the remaining 60 of unmatched FIG).

5 PORTFOLIOS

5.1 It is often unclear how the mixed-fund rules apply to non-UK portfolios. For instance a single account with a bank might contain, cash and many different shares or other securities.

5.2 Is each share a separate mixed fund? Or can the whole account (including cash balances) be considered to be a single mixed-fund?

5.3 James Kessler[23] suggests that HMRC will agree any sensible view consistently adopted – but we are unaware that HMRC have confirmed this in any published statement.

5.4 The difficulty here comes from the definition of "mixed fund" in s809Q(7) which simply refers to "*money or other property which…contains or derives from more than one of the kinds of income and capital…."*

6 CGT SHARE POOLING RULES

6.1 The CGT share pooling rules (chapter 1 part IV TCGA 1992) treat all shares (or other fungible assets) of the same class acquired by the same person in the same capacity as a single asset or "pool".

6.2 This can cause issues where an RBU has multiple portfolios, perhaps with different banks. For instance, an RBU might own Microsoft shares in her HSBC portfolio and also in her UBS portfolio.

6.3 A disposal of (say) the HSBC Microsoft shares would, seemingly, be treated as a part disposal of the single pool. If the UBS shares are part of a mixed-fund, it is unclear how the rules operate where part of that mixed-fund is seemingly disposed of by an unrelated transaction.

7 FOREIGN CURRENCY ISSUES

7.1 Where FIG arises in a foreign currency, HMRC's view appears to be that the currency conversion to sterling does not take place until such time as a remittance occurs. However, multiple other transactions (such as offshore transfers) may take place before this – making it difficult if not impossible to apply this approach: you cannot tell what is in the mixed fund until a remittance is made, but you cannot tell if a (taxable) remittance is made until you can constitute the mixed fund.

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[23] ibid chapter 20.2.2

Appendix 3 – Why the 2017 mixed-fund cleansing was largely ineffective

Although the mixed-fund cleansing provisions (part 4 schedule 8 Finance (No 2) Act 2017) were well-intentioned, a number of issues in the drafting of these provisions meant that for most clients, it proved largely ineffective.

We base this observation on anecdotal experience of clients. It is possible that HMRC have better data on the take-up of the provisions, although as the "nomination" process did not require any notification to be made to HMRC we suspect that HMRC also have limited evidence.

We suggest that the following factors contributed to this:

1 The provisions assumed – see our comments at 3.7(a) – that a mixed fund consisted of the paradigm case of a **bank account containing money**. See paras 44(2)(b) and 44(2)(c) schedule 8 FA(2) 2017 which require that money is transferred from account A to account B.

   This focus on "accounts" and "money" may have simplified the drafting, but it significantly restricted the ability for most RBUs to make use of the provisions. RBUs rarely keep their FIG as cash in a bank account. Like all individuals, they will typically reinvest that cash into other, more productive investments.

2 Only **one transfer from account A to account B could be nominated** – see para 44(2)(e). This led to three issues:

   (a) First – because the legislation used "(account B)" as a definition of "another account", it was unclear whether this mean that nominated transfers from account A could only be to one other account (B) or whether nominated transfers could be made to accounts B1, B2, B3 etc. While this was subsequently clarified, the time before HMRC clarified this significantly shortened the available 2 year period.

   (b) Second, it was similarly unclear whether a single recipient account (account B) could receive nominated transfers from multiple transferor accounts (A1, A2, A3 etc.). While this was slightly clearer on the drafting of the legislation, there were again delays before HMRC clarified this.

   (c) Third, and most importantly, this meant that those who wished to use the facility had only one shot at doing so. Had this requirement been more relaxed, we would have seen more clients making a provisional transfer (of known FIG) potentially followed by a top-up transfer (once more accurate calculations had been done). In only allowing transfers where calculations were completed, many missed the opportunity. (This also couples with the issue at paragraph 3 below.)

3 The most significant problem with the 2017 drafting was the requirement (para 44(5)) that "**an amount of…income or capital specified under sub-paragraph (4) may not exceed the amount of that kind** which is in the mixed fund immediately before the transfer".

   The initial reading of this provision (and, we suggest, the expected reading) is simply that the transferee account (account B) cannot end up with more clean capital[24] in it than came across from the transferor account.

   However, HMRC interpreted this provision[25] to mean that a nomination which exceeded the amount of clean capital (or of FIG) in account A <u>was entirely ineffective</u>.

   So for instance assume that someone believes they have 100 of clean capital in account A. They transfer 100 to account B and nominate that 100 as clean capital. However, if they made a slight mistake in their computations and only had 99 of clean capital in

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[24] Assuming that the nomination was of clean capital. But similarly if the nomination was of income or gains, that account B could not end up with more income or gains than were in account A.

[25] Given the reference to "specified under sub-paragraph (4)", HMRC may be strictly correct on a literal interpretation of the wording. But we cannot see what policy intent was served by applying the strict wording here.

account A, then on HMRC's interpretation the cleansing was entirely ineffective and they would instead have made an "offshore transfer" (consisting of a pro-rata slice of everything in account A across to account B – thus making the position even messier than it was).

A much more natural interpretation in such a case would be that the nomination was effective as to 99, but ineffective as to the (mistaken excess) of 1.

Worse still, a person might nominate 100 of clean capital, but actually have 99 of clean capital and 1 of already taxed UK income in the account. The 1 would also be "clean" (i.e. remittable), but because it was not separately described in the nomination the whole nomination (on HMRC's view) would again be entirely ineffective.

4 More generically, the above illustrates that a key problem with the 2017 cleansing provisions was **their unduly harsh application by HMRC**. In part this was due to the drafting of the legislation, but we suggest that it also stems in part from HMRC's view that the remittance basis (and mixed fund rules) are anti-avoidance legislation and that the provisions should therefore be strictly applied. We suggest that it is important that the new TRF be coupled with some ability for HMRC to apply some leniency in hard (but otherwise obviously meritorious) cases – coupled with a clear understanding on HMRC's part as to the objectives of the TRF (see section 3).

5 Finally, we would note that – given the 2017 General Election – the legislation for mixed fund cleansing was contained in the second Finance Act and did not become law until 16 November 2017 – thereby eating up more than 7 of the 24 months for which it was intended to apply. HMRC did not issue guidance until 31 January 2018 and further changes meant that the guidance was not in final form until 9 March 2018. In short almost **half the 2 year period was wasted**.

Appendix 4 – Combined Mixed Funds

The following example is designed to illustrate our proposal at 8.3(e) that individuals should be able either to designate individual assets, or to designate multiple assets as a single mixed-fund ("**Combined Mixed Fund**").

Assume that an RBU has the following 4 assets outside the UK.

	Asset	FIG[26]	Clean Capital	Total
W.	Portfolio 1	3,000	2,000	5,000
X.	Portfolio 2	2,500	7,500	10,000
Y.	Foreign House	500	Nil	500
Z.	Painting in foreign house	80	20	100

Our base proposal – see 4.1(d)(i) - is that the RBU should be able to designate each asset (W or X or Y or Z) separately if they wish. And within each asset they can designate either the whole of their FIG contained in that asset or only part of it – see 4.1(d)(ii).

If, say, they designated 2,000 of FIG in W but none of their other assets, then they could remit up to 2,000 from W without further tax. But they could not remit from X, Y or Z. Their Designation Records – see 8.1(a)(iii) – would keep sufficient detail to identify from where a remittance is made.

Our further proposal at 8.3(e) is that designation could be of a Combined Mixed Fund across multiple assets. For instance, the RBU might wish to designate W and X as a Combined Mixed-Fund (WX)[27] comprising:

	Asset	FIG	Clean Capital	Total
WX.	Combined Portfolios	5,500	9,500	15,000

and designate say 4,000 of FIG. This would allow them to remit up to 4,000 (in aggregate) from either W or X without further tax. If the 4,000 were exhausted then WX would have to remain a single mixed-fund thereafter (containing the remaining 1,500 of FIG and 9,500 of clean capital) ordered according to years and category as would be the case if it had throughout been a single mixed-fund.

While this may seem to add some complication to the rules, in practice we do not think it is any different to the current situation where a single portfolio can effectively be treated as a single mixed-fund – see Appendix 2 paragraph 5. It would be for taxpayers to keep their own records of this (as now).

The advantage of allowing Combined Mixed Funds is that it hopefully encourages RBUs to make a single larger designation of a global amount (hopefully increasing take-up of the TRF) and simplifies administration for them considerably.

[26] For ease of illustration the years in which FIG arose and the mixed-fund ordering is ignored. We also ignore future gains which might be realised on sale of the various assets – on the basis that such gains will be taxed in any event and so will simply add to the pool of "clean" funds.

[27] Alternatively the individual could nominate any other combination as a Combined Mixed Fund (WY, WZ, XY, XZ, YZ, WXY, WXZ, WYZ, XYZ, WXYZ) if they wished to do so.