



HM Revenue  
& Customs

# Raising the stakes on tax avoidance

## **Summary of Responses and Draft Legislation**

January 2014

Closing date for comments on draft legislation is 24 February 2014

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# Foreword

Aggressive tax avoidance is unacceptable. The majority of hardworking people in this country pay the right amount of tax and they quite rightly expect everyone else to do the same. But the behaviour of a small minority – both those who seek to avoid and those who devise and promote tax avoidance schemes – undermines the honesty of the majority.

As a key part of our long term economic plan, this government has taken significant strides to make the UK's tax system one of the most modern and competitive in the world. To maintain the integrity of this tax system, it must apply fairly and consistently to everyone.

We have made good progress. We have introduced a General Anti-Abuse Rule, and where there is a specific problem we have taken assertive action.

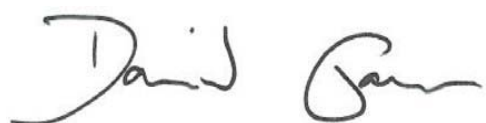
Increasingly the schemes that HMRC sees have little or no prospect of achieving their aim of avoiding tax. Our consultation *"Raising the Stakes on Tax Avoidance"* heralded a significant new development in the way we approach avoidance by proposing measures that specifically tackle both the supply of and demand for tax avoidance schemes.

I am grateful to all those who took the time to respond to the consultation document or attend meetings with HMRC. Careful thought has been given to the written responses and points raised in meetings and many interesting and useful suggestions were made.

I am particularly grateful that professional and representative bodies, businesses and individuals were willing to work constructively with HMRC on the proposals in the consultation contributing their own ideas on how to tackle tax avoidance.

Following the consultation we will be taking forward almost all of the proposals in the consultation which have been improved by suggestions in the responses. We are publishing draft legislation for further comments, with a view to implementation this year.

Our work against tax avoidance is continuing. For many tax avoiders, one of the key attractions of a scheme is not necessarily the actual tax saving, but the opportunity to retain the tax saving during the course of the investigation and any subsequent legal challenge. In order to bear down on this advantage and to demonstrate our continued commitment to fight tax avoidance we are consulting on how users of avoidance schemes can be made to pay the tax in dispute up front.

A handwritten signature in black ink, appearing to read 'David Gauke'.

**David Gauke MP**  
**Exchequer Secretary to the Treasury**

# 1. Executive Summary

- 1.1 The “Raising the Stakes on Tax Avoidance” consultation included proposals for high-risk promoters, for encouraging users of failed avoidance schemes to settle with HMRC and for improving the information provided when a disclosure is made under the Disclosure of Tax Avoidance Schemes (DOTAS) rules. It also gave an update on the work HMRC has been doing on mis-selling. This programme of work supports the Government’s approach to ensuring fairness in the tax system by tackling the behaviour of high-risk promoters and tax avoiders. The key issues included in the consultation were:
- forcing high-risk promoters of avoidance schemes to provide details of their products to HMRC using suitable information powers and penalties;
  - ensuring that users of high-risk promoters’ schemes appreciate the risks they are running and understand the consequences;
  - raising the standard of reasonable excuse and reasonable care for high-risk promoters and the users of their avoidance schemes;
  - encouraging users of avoidance schemes to settle their tax affairs after similar cases have lost in court; and
  - amending the Disclosure of Tax Avoidance Schemes (DOTAS) regime to make sure the right information gets to HMRC at the right time.
- 1.2 In general the responses to the consultation supported the aims of the policy and were constructive in suggesting ways that the policy could be improved.
- 1.3 A more detailed analysis of the responses is provided below.

## 2. Introduction

### Raising the Stakes on Tax Avoidance

- 2.1 This consultation ran from 12 August to 4 October 2013 and focused on two major areas:
- the issue of high-risk promoters; and
  - a requirement to encourage users of avoidance schemes to settle their tax affairs after similar cases have lost in court or tribunal with a penalty if the taxpayer fails to make the required adjustment to their return.
- 2.2 In addition the consultation proposed a change to the Disclosure of Tax Avoidance Schemes (DOTAS) rules and gave an update on recent HMRC work on mis-selling.
- 2.3 The Government in the consultation recognised that the vast majority of taxpayers in the UK fully comply with their tax obligations but there is a minority of taxpayers who use artificial arrangements to try to dodge their tax bills. It also recognised the valuable service provided by tax advisers in the administration of the tax system and the invaluable support they provide to taxpayers in complying with their tax obligations.
- 2.4 The high-risk promoter proposals were developed from an idea in the “Lifting the Lid” consultation<sup>1</sup> from 2012 for a DOTAS hallmark based on the behaviour of promoters.
- 2.5 The “Raising the Stakes” proposals for high-risk promoters included:
- identifying a high-risk promoter – with two possible approaches;
  - processes for the high-risk promoter regime including an appeal right;
  - potential information powers and sanctions that could apply to a high-risk promoter including the extent to which these should be extended to intermediaries; and
  - obligations for the users of their products.
- 2.6 The proposals to encourage users of avoidance schemes to settle their tax affairs included:
- a new penalty if the taxpayer fails to make the required adjustment to their return;
  - suggestions on how the proposals would work in practice;
  - identifying suitable failed schemes; and
  - administering the proposals.
- 2.7 The DOTAS proposals were limited to changes to the prescribed information to be provided on disclosure. It was proposed that more

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<sup>1</sup> [Lifting the Lid on Tax Avoidance Schemes Consultation Document](#)

detailed information should be provided and asked if the information should be provided automatically on disclosure or following a request from HMRC.

### General responses

- 2.8 HMRC received 31 responses to the consultation including written responses and also comments during meetings. A breakdown of the capacities in which respondents made their comments is below:
- 10 from representative bodies
  - 5 from consultants
  - 7 from accountancy firms
  - 4 from law firms
  - 4 from individuals
  - 1 from a trade union
- 2.9 A list of respondents to the consultation, excluding individuals, is in Annex A.
- 2.10 The Government wishes to thank all of those who responded to the consultation document and recognises the time and effort that went into the comments and contributions.
- 2.11 This document summarises the responses received during the consultation and provides an update on current anti-avoidance strategy.



# 3. Responses - Identifying a High-Risk Promoter

## Background

- 3.1 The high-risk promoter proposals in the “Raising the Stakes on Tax Avoidance” consultation<sup>2</sup> were a development of the proposed promoter hallmark in the “Lifting the Lid on Tax Avoidance Schemes” consultation. The responses<sup>3</sup> to “Lifting the Lid” revealed that as well as not being transparent with HMRC some promoters exhibited behaviour that disrupted the relationship between a taxpayer and their tax adviser - for example by encouraging their clients to enter into tax avoidance schemes but to keep the scheme confidential from their tax adviser.
- 3.2 Chapters three and four of this document summarise the responses on high-risk promoters in the “Raising the Stakes” consultation.
- 3.3 The key objectives of the consultation were to:
- deter the use of avoidance schemes from the outset;
  - change the behaviour of high-risk promoters and those that are potentially high-risk;
  - force high-risk promoters to provide details of their products to HMRC;
  - require high-risk promoters to inform their clients of the consequences of their high-risk designation;
  - establish a higher threshold for reasonable excuse and reasonable care; and
  - ensure that the clients of high-risk promoters understand the risks and consequences of engaging in avoidance schemes.

## Details of the consultation

- 3.4 The consultation made a number of proposals for high-risk promoters, specifically it considered:
- whether an approach based solely on objective criteria (Approach One) or an approach that combined objective criteria with other factors to form an overall view of the promoter’s business (Approach Two) was preferable;
  - the objective criteria and factors that could be used in identifying a high-risk promoter including the inclusion of associated and successor entities;
  - a framework for the regime including how a promoter is designated and its appeal rights;

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<sup>2</sup> [Raising the Stakes on Tax Avoidance Consultation Document](#)

<sup>3</sup> [Lifting the Lid on Tax Avoidance Schemes Responses Document](#)

- the type of information powers to be applied to high-risk promoters;
- the level of penalties to be applied to high-risk promoters if they do not comply with the information powers;
- the extent to which such information powers and penalties should be extended to intermediaries;
- naming high-risk promoters; and
- whether a higher standard of reasonable excuse and reasonable care should apply to high-risk promoters and their clients, and for high-risk promoters, whether this should be extended to other tax obligations.

## Consultation on draft legislation

3.5 Draft legislation for the high-risk promoter regime can be found from page 52. If you would like to comment on the draft legislation or meet to discuss your comments please use the contact details in Chapter 9.

3.6 The consultation on the draft legislation ends on 24 February 2014.

## General responses on high-risk promoters

3.7 The majority of responses on these proposals supported the Government's aim of tackling the behaviour of high-risk promoters and shared Government concerns:

*"...appreciates the concerns HMRC has about working with those 'who have chosen to work outside the professional standards HMRC expects of mainstream advisers' (para 2.5), who can taint by association the professionalism of the vast majority of competent and well informed tax agents and advisers."*

*"We appreciate that the High-Risk Promoter regime is intended to combat the small minority of advisers who promote certain types of tax avoidance arrangements and who also fail to comply with the Disclosure of Tax Avoidance Schemes (DOTAS) regime."*

3.8 However, general approval was tempered by the view that the proposals need to be carefully targeted:

*"Our main concern is to ensure that the processes and safeguards which will govern the identification and designation of such promoters are sufficiently well-defined and robust so that reputable and compliant promoters are not inadvertently caught by the regime."*

*"Our single greatest concern about the proposals is that they will prove to be a 'sledgehammer to crack a nut'; i.e. that either they will have an impact on accountancy and legal firms beyond their intended scope, or they will be prevented from doing so by administrative forbearance on the part of HMRC rather than by the clear wording of the legislation."*

- 3.9 Approximately one third of the responses were against the proposal to introduce a high-risk promoter regime.

*“The paper has somewhat of the feeling of an intimidation package, and appears designed to scare users away from such ‘high-risk promoters’, with little consideration as to whether a particular ‘scheme’ actually works.”*

- 3.10 Some of the positive responses included suggestions on how the high-risk promoter regime could work or how it could be administered. For example suggestions included:
- ways to narrow the existing objective criteria;
  - new objective criteria; and
  - a different structure for the regime, for example two tiers of offences.

These are discussed in the detailed responses below.

### Government response

- 3.11 The Government has made it absolutely clear that it is determined to crack down on tax avoidance. The vast majority of taxpayers pay the right tax at the right time and should not have to subsidise those who avoid tax. One part of this strategy is to tackle the behaviour of high-risk promoters.
- 3.12 Requiring high-risk promoters to provide information to HMRC about their products and clients will allow HMRC to take early targeted action. Naming high-risk promoters will put their customers and the general public on warning that the behaviour of those promoters is unacceptable and that anyone who uses their avoidance schemes will find their tax affairs being closely examined by HMRC.

### Options for identifying a high-risk promoter

- 3.13 The consultation proposed a set of objective criteria to be used to identify and designate a high-risk promoter (Approach One). An alternative approach (Approach Two) was also proposed in which the objective criteria were combined with a number of other factors. The consultation posed the following six questions.

**Question 1 - Do you think that the objective criteria in Approach One are, on their own, sufficient to identify high-risk promoters or do you agree that the second approach would be more effective?**

**Question 2 - Do you consider that the suggested objective criteria would provide effective reassurance for advisers who are not high-risk promoters?**

- 3.14 The responses as a whole suggest that a robust, specific, targeted set of objective criteria together with a prudent exercise of HMRC discretion will

be the preferred approach (Approach Two). Some modification will be needed to the proposals to achieve that aim.

- 3.15 Many of the responses agreed that the objective criteria in Approach One would be effective in identifying high risk promoters; however they shared HMRC's concern that Approach One would automatically designate promoters who would not otherwise be high-risk. Consequently the overwhelming majority of the responses favoured Approach Two because it allows HMRC the flexibility to take into account a number of other factors such as the type of product sold by the promoter, the promoter's transparency with HMRC and the way that the promoter sells its product. Indeed some responses suggested that the objective criteria will work most effectively as part of Approach Two.

*"...of the two approaches set out in the condoc the second option, which builds on option one, is more likely to be effective as the factors listed in paragraph 3.17 (condoc) are more flexible and yet still consistent with the hallmarks of high-risk anti-avoidance."*

*"So it is important that HMRC has a degree of flexibility to ensure only genuinely abusive behaviour is caught. Obviously that flexibility needs to be exercised appropriately to ensure it is not used to capture situations which would otherwise not lead to a promoter being labelled 'high-risk'."*

- 3.16 Some respondents observed that the objective criteria may, on analysis, prove to be subjective, for example in the objective criterion - *the promoter has designed, sold or implemented an avoidance scheme that is caught or appears to be caught by the GAAR* - the phrase 'appears to be caught by the GAAR' was seen as too subjective.

- 3.17 Many of the responses agreed that the criteria would provide some reassurance to promoters who are transparent with HMRC. Some responses suggested that the criteria in themselves were not sufficient to provide this reassurance because a promoter may inadvertently breach one of the objective criteria. Several respondents stated that the second approach must have a detailed statutory framework. Whilst the need for some HMRC discretion was recognised some thought that the objective criteria were too widely drafted:

*"The objective criteria identified would not be appropriate on their own (especially in terms of providing reassurance to other advisers). They appear in that respect potentially too wide, and lacking proper checks and safeguards."*

## **Government response to questions 1 and 2**

- 3.18 The Government welcomes the consensus that Approach Two is preferable to Approach One but notes the concerns about ensuring that the criteria are objective. The Government intends to implement these

proposals using a revised version of Approach Two as the foundation of the high-risk promoter regime.

- 3.19 After an objective criterion has been triggered, the approach will provide for HMRC to issue a “conduct notice”, setting out the expected behaviours from the promoter around, for example, ensuring the promoter gives a clear explanations of the risks when marketing its products and being transparent with HMRC. Only where the promoter continues the high-risk behaviour and fails to comply with a conduct notice would they be designated as high-risk by the issue of a “monitoring notice” and the new information powers and penalties will then apply to the promoter. The intention is to ensure that there is no automatic designation simply because a promoter has hit one of the objective criteria indicating they may be high-risk, but to provide a clear and objective path from there to encourage the promoter to move away from high-risk behaviours or, where they fail to do so, to be designated as high-risk. Further detail on the design of the regime is set out in paragraphs 3.49 to 3.60 below.
- 3.20 The suggestions to improve the objective criteria have been noted and some will be used to ensure that the objective criteria are appropriate and allow HMRC to identify successfully high-risk promoters while at the same time reassuring other promoters.
- 3.21 The Government will also introduce a power to allow the objective criteria to be updated by statutory instrument. This will help to counteract attempts by potential high-risk promoters to avoid designation by marginally changing their behaviour.

**Question 3 - In relation to the objective criterion based on disciplinary proceedings, do you think it is necessary to narrow the criterion to specific disciplinary matters?**

- 3.22 Most respondents thought that the matter must be relevant to tax; some went as far as to say relevant to tax avoidance.

*“We would suggest that there should be some nexus between the nature of the offence and the behaviour HMRC is trying to counteract.”*

- 3.23 Other responses were that all disciplinary matters could be relevant, in so far as “bad behaviour” in one area could imply a heightened risk of “bad behaviour” in another. One response was concerned that this criterion could apply before the disciplinary proceedings were concluded and so would apply before the promoter’s bad conduct had been established. Another suggested that the criterion should include a time limit so that historic disciplinary proceedings that had lapsed some time before were not taken into account.

## Government response

- 3.24 The Government is grateful for the constructive comments on how to improve this objective criterion. The Government notes that some professional bodies have specific professional standards for tax advice such as the Chartered Institute of Taxation's standard "Professional Conduct in relation to Taxation".
- 3.25 The criterion will apply to the promoter's responsibilities to its clients under the relevant professional standards, particularly for tax advice. The criterion will only apply if the promoter is found by the professional body to have violated its professional standards.

## Question 4 - Are there any other objective criteria you would suggest?

- 3.26 There were a number of additional objective criteria suggested which focused on four themes:
- the promoter's avoidance schemes have been defeated in the courts;
  - the previous history of directors, partners and proprietors of promoters could be taken into account, for example, criminal tax offences and bankruptcy or director disqualification;
  - non-compliance with DOTAS obligations;
  - misleading marketing material.
- 3.27 One response suggested criteria based on new powers for HMRC to obtain statements from the Tribunal that:
- the promoter has refused to co-operate with HMRC's enquiries; and
  - the promoter's arrangements have relied on misdescription or concealment to work.

It was also suggested as an objective criterion that the promoter is not a member of a professional law, accountancy or tax institute.

## Government response

- 3.28 The Government is grateful for the suggestions of new objective criteria and has incorporated some of the suggestions into the draft legislation, for example suggestions for criteria based around the deliberate tax defaulter and dishonest agent conduct notice rules and criminal tax offences.
- 3.29 In addition the Government has included three new objective criteria in the legislation. The first is based on the factor consulted on in Approach Two for confidentiality clauses. The second new objective criterion has two legs:
- the promoter requires clients to contribute to a fighting fund; and



- requires the client not to settle independently with HMRC.
- 3.30 The third new objective criterion links the high-risk promoter regime with the penalties for other users of failed schemes. At the same time that HMRC notifies users of a scheme that their avoidance scheme is within the “other users of failed schemes” legislation a notice would be issued to the promoter. The notice to the promoter would give the promoter a time within which it should stop promoting that scheme. If the promoter fails to stop promoting the scheme then they will have triggered an objective criterion.
- 3.31 The Government would like to canvass views on the suggestion that an objective criterion could be based on the history of the promoter’s avoidance schemes in the courts. If a promoter’s schemes are consistently defeated in the courts then this may be an indication that the promoter poses a high-risk to its clients because its schemes do not work technically or are poorly implemented.
- 3.32 The Government would like to establish if others are of the view that this could be an effective objective criterion, if there are any circumstances where a defeat in the courts should not be included in this criterion and any suggestions on whether there should be a minimum number of defeats or a consistent pattern before the objective criterion was triggered.
- 3.33 The Government will not, at the moment, be taking forward the suggestion that the Tribunal should have new powers to make the statements suggested. The Tribunal is currently free to include such statements in its judgment if it considers it appropriate.
- 3.34 The Government agrees that a promoter that is regulated by one of the professional tax or accountancy institutes is less likely to be high-risk, however membership of such bodies cannot be seen as conclusive either way.

### **Question 5 - Are there any other factors you would suggest for the second approach?**

- 3.35 The majority of responses did not propose new factors but used this question to clarify their views on the second approach which have already been summarised above.

Several respondents suggested new factors as follows:

- a factor based around whether or not the promoter had mis-sold a financial product whether actively or by using misleading advisory or marketing material;

- taking into account the processes that a promoter has in place to ensure compliance; and
- the use of multiple or cloned entities within the same product framework.

### **Government response**

3.36 The Government is grateful for the suggestions of additional factors that could be taken into account when determining whether or not a promoter is high-risk.

### **Q6 – Are there any other circumstances when you think it would be appropriate for an immediate high-risk designation?**

3.37 Most respondents felt strongly that the potentially adverse effect of high-risk promoter designation should preclude immediate or automatic high-risk promoter designation. However, a few respondents suggested some circumstances where this immediate designation was necessary, these include:

- where a promoter has a relevant past criminal tax conviction;
- where the GAAR has been contravened;
- when the promoter has a past history of designing failed avoidance schemes;
- when the promoter has aggressively marketed products;
- where the promoter is known for constantly re-inventing themselves;
- where a DOTAS notification is made for a scheme that is already closed; and
- where a promoter falsely claims that their products are “HMRC approved”

### **Government response**

3.38 The Government is mindful of the adverse consequences of an immediate high-risk designation. On balance and in the light of the final process described below at the response to question nine we have decided not to proceed with immediate designation.



## Procedures for the high-risk promoter regime

### Q7 – Should a high-risk designation apply from the date of designation or the date that any appeal against the designation is dismissed?

- 3.39 An overwhelming majority of respondents strongly believed that high-risk promoter designation should only apply after appeal. Most cited the negative impact that high-risk promoter designation would have on a business as reason enough that there must be a right to appeal designation before it applies.

*“Given that businesses may effectively be destroyed by being branded by the Revenue as ‘high-risk’, the discretion which it is suggested should be afforded to HMRC in determining whether a business should be categorised in this way is a serious concern, particularly given the length of time it may take for an appeal against such a designation to be heard by the Tribunal. We would urge that the designation should not apply until after the appeal has been lost.”*

- 3.40 A minority view was that the designation must apply immediately so as to improve the efficacy of the high-risk promoter regime, another respondent suggested that the designation must stand but “pending appeal” as in other judgments.

## Government response

- 3.41 The Government recognises that striking the correct balance between the robust operation of its counter-avoidance policy and safeguards for those subject to its operation can be challenging. Once a high-risk promoter is designated as high-risk by the issue of a monitoring notice HMRC will want to obtain early relevant information about its products and clients to target its compliance action. However naming a promoter as high-risk before they have presented their case against designation before the Tribunal seems premature.
- 3.42 Taking the responses into account the Government has decided that a designation should stand “pending appeal”. HMRC will not be able to name a promoter until the Tribunal has determined that the designation and the issue of the monitoring notice is justified but HMRC will be able to use the associated information powers.

### Q8 – Do you think that these safeguards are sufficient to ensure that only promoters that are genuinely high-risk will be designated as such?

- 3.43 The consensus is that there must a robust, fast-tracked appeals system with the final decision being made by an impartial judicial or quasi-judicial body. Some respondents suggested that this appeal of a decision could be made an ancillary role of the General Anti-Abuse Rule Advisory Panel

or that a new but similar panel should be set up. Other respondents suggest an expedited appeals process to tribunal.

*“While the proposed safeguards are welcome, the facility for appeal to the courts before a designation is made is vital. It will otherwise be impossible to put right the consequences of an erroneous or unjustified designation.”*

- 3.44 Another concern raised in response to this question was that there must be a sufficient amount of guidance with regard to how high-risk promoter designation will be made, so that promoters can ensure that they do not fall foul of the regime. Continuing with this theme one response suggests that a small team within HMRC deal with the high-risk promoter regime to ensure consistency with designation.

### Government response

- 3.45 The Government is grateful for the suggestions made in the responses to this question and agrees that there must be a robust fast-track appeals system for promoters being designated as high-risk. HMRC is liaising with the Ministry of Justice on the appropriate appeal process.
- 3.46 While the Government understands the attractions of having an independent panel it believes that the First-tier Tax Tribunal is the appropriate forum for an appeal. Where an independent panel is used, for example the GAAR panel, there is still a right of appeal even after the panel has given its opinion; having such a panel for high-risk promoters therefore, may delay the final decision on the designation by the Tribunal and courts. In addition the First-tier Tribunal decides on question of fact and whether or not a promoter is high-risk will be such a question.
- 3.47 In response to the other points made, HMRC will be publishing draft guidance on the high-risk promoter regime for comment in 2014. HMRC also intends that the operation of the high-risk promoter regime will be confined to a small number of individuals with relevant experience. Designation will only be made and monitoring notices issued by a specially authorised officer of HMRC.

### Q9 – Do you have any suggestions to improve the process?

- 3.48 Most respondents used this question to repeat previous comments, the need for a robust and immediate appeal system and clear, objective statutory criteria. One respondent suggested there should be an annual review of designation, another suggested requiring promoters to have a nominated senior officer within HMRC who would then effectively take responsibility for the scheme.

## Government response

- 3.49 The Government welcomes the suggestions to improve the process for designating a high-risk promoter and action post designation. Within the consultation document there was already a proposal that the high-risk promoter could ask for a review of the designation after a certain period and this, in combination with continued communication between HMRC and the high-risk promoter, has led the Government to conclude that an automatic annual review and a nominated senior officer are not necessary.
- 3.50 The Government does not want the time the process takes to be overextended so that the behaviour of the promoter is not addressed in a timely way. The final process will therefore be shorter than the process included in the consultation. This will better support the Government's policy of changing the behaviours of promoters who are potentially high-risk whilst at the same time ensuring that those who are recalcitrant can still be designated. There will still be opportunities for promoters to engage with HMRC before and after designation.
- 3.51 The final process will involve a new step – the issue of a conduct notice to the promoter after the promoter has triggered one of the objective criteria and is potentially high risk.
- 3.52 Each conduct notice will vary depending on which objective criteria has been triggered, but it could, for example, require a promoter to improve its behaviours around explaining products and risk to customers or providing information to HMRC.
- 3.53 Importantly, a conduct notice will not be issued if the objective criterion triggered was for failure to comply with an information power or a DOTAS obligation and the failure was insignificant. Additionally a conduct notice will not be issued if the tax at stake, in relation to the promoter's products, is not substantial. Some responses to the consultation expressed the view that the other factors that HMRC could take into account when considering the promoter's behaviour (Approach Two) should be in legislation. These two filters will be specifically included in the legislation as an additional safeguard.
- 3.54 If a conduct notice is necessary then HMRC will contact the promoter to notify them. At this stage the promoter can choose to discuss with HMRC the content of the conduct notice before its issue. This will be an important opportunity for the promoter to engage with HMRC. After those discussions the conduct notice will be issued by HMRC.
- 3.55 Should a promoter decline to discuss the contents of the conduct notice with HMRC prior to issue, HMRC will move directly to issue the conduct notice.

- 3.56 A conduct notice may run for up to two years. If the promoter's behaviour improves during the period of the conduct notice then the conduct notice may be amended or all or part of it withdrawn to reflect that improved behaviour. HMRC will have a power to monitor the promoter to ensure that it is complying with the conduct notice. If a promoter does not comply with a conduct notice then it will be designated as high-risk through the issue of a monitoring notice.
- 3.57 This approach will not include the opportunity to enter into a voluntary undertaking but, as with the voluntary undertaking, the promoter will have a full opportunity discuss the necessary improvements in its behaviour before any action is taken by HMRC.
- 3.58 The Government has considered whether in addition to designation for breach of a conduct notice there should be a monetary penalty. On balance the Government has decided not to include a monetary penalty in the draft legislation, however if there is evidence that designation is not a sufficient deterrent then the Government will reconsider its position.
- 3.59 Should failure to comply with a conduct notice result in a promoter being designated as high risk through the issue of a monitoring notice, the promoter can appeal against this designation. There will be full opportunity to enter into discussions with HMRC on the content of a conduct notice, and the Government does not want to open up opportunities for recalcitrant promoters unacceptably to delay the process by mounting successive appeals. The draft legislation does not therefore include an appeal right against the issue or content of a conduct notice. We would welcome comments on whether or not such an appeal right should exist and how it could be crafted to guard against the opportunity for some promoters unacceptably to delay the effectiveness of the high risk promoters provisions by making multiple appeals.
- 3.60 In summary the final process will be as follows:

The triggering of an objective criteria

If the tax at stake is not substantial or the breach of information and obligation criteria is not significant then the promoter will not proceed any further in the process.

Issue of the conduct notice

This will be for up to two years and it can be amended or withdrawn in whole or part to reflect improvements in promoter behaviour. Compliance with the conduct notice would mean that the promoter does not proceed further in the process and is not designated as high-risk. Breach of the conduct notice will lead to the promoter being designated as high-risk.

Designation

A promoter will be designated as high-risk by an authorised officer of HMRC issuing a monitoring notice. A promoter will be designated only if they breach a conduct notice.

#### Appeal

The promoter will have a right to appeal against designation.

#### Re-categorisation

If at any point HMRC agrees that the promoter is no longer high-risk its designation may be removed.

### Who should be included in the high-risk promoter regime?

#### **Q10 – Do you think that it is reasonable to include in the objective criteria or factors for designating a promoter high-risk the fact that an entity is a successor entity or associated entity of an existing high-risk promoter?**

- 3.61 Most respondents agreed with this principle. One respondent went so far as to describe it as an “*absolute requirement*” in order to ensure that those promoters targeted don’t just hide under a new entity. However, most believe that there should not be an immediate high-risk designation of the associated or successor entity and suggested the need for a statutory right of appeal.

*“Automatic continuity of such entities within the regime should therefore follow, subject to a timely right of appeal...”*

- 3.62 One respondent was concerned that this principle will be self perpetuating, so that a high-risk promoter will only attract as clients those with an appetite for risk and who want the kind of scheme that may have led to the promoter being designated high-risk. One respondent commented that there must be safeguards in place for those promoters that have truly reformed.

### Government response

- 3.63 The Government agrees that including associated and successor entities in the high-risk promoter regime is vital and will implement this proposal. An associated entity will be defined in terms of common interests such as shareholding or the involvement of the same individuals. A successor entity will be defined in terms of succession to all or part of the high-risk promoter’s business.
- 3.64 The Government also agrees that there will be a process whereby high-risk promoters who have changed their behaviour can have the designation removed.

## Q11 – Do you think that whether or not an entity is a successor or associated entity could be established through key individuals?

- 3.65 The effect that this proposal could have on an individual's employability was commented on by some respondents and several responses suggest that there must be rigorous safeguards in place.
- 3.66 A few responses highlight that the term "key individual" must be closely defined. One response stated that control must be the significant factor, whilst another suggested that it is essential to look beyond just ownership and control. Another respondent suggested implementing a test materially similar to the directing mind test.

*"The regime should not, however, prevent a key-individual in a high-risk promoter from moving to another firm that does not carry out any high-risk promoter activities...It would therefore be crucial to consider the extent of the movement of the high-risk promoter's business activities, employees as well as key employees when deciding whether an entity is a 'successor entity'."*

### Government response

- 3.67 The Government considers that using a key individual to determine whether entities are associated or successor entities is vital in ensuring that potential high-risk promoters are identified and reviewed by HMRC. In doing so it is essential to look beyond ownership and control. The Government is grateful for the suggestions on how to define a key individual.

## 4. Responses -The High-Risk Promoter Regime

- 4.1 The consultation raised a number of questions on the application of the high-risk promoter regime.

### Information powers

- 4.2 The consultation proposed two information powers, first that the high-risk promoter should provide information in response to a specific request from HMRC. The second was that there should be a continuing information power so that the promoter automatically provides information on its products and clients – similar to the DOTAS rules.

### **Q12 - Do you think that the proposed information powers will be both appropriate and sufficient to provide HMRC with the information necessary to understand the promoter's products and trace its intermediaries and users?**

- 4.3 The responses are generally supportive of the proposed information powers; some suggest incorporating the new information powers into DOTAS:

*“DOTAS could therefore be extended for high-risk promoters only; perhaps high-risk promoters should be forced to enter into pre-clearance procedures with HMRC.”*

- 4.4 Some responses highlighted that the information requested by the power is not likely to be readily available in the case of bespoke arrangements whilst a five- day window to provide the information may be too short. Most who supported the arrangement considered it should be on request rather than as a general rule due to the administrative burden of compliance. A few responses questioned whether HMRC requires new powers and suggested existing powers should be fully tested to prove that they are inadequate and that new powers are needed.

### Government response

- 4.5 The Government is grateful for the responses on this question. There is a need for information powers specifically aimed at high-risk promoters because HMRC's current information powers do not adequately address the behaviours of high-risk promoters. The new powers will mean HMRC will be able to get complete information about a high-risk promoter's products and customers so that HMRC's compliance efforts can be effectively targeted.



- 4.6 The specific information power will be on request from HMRC and so it will not automatically apply to a high-risk promoter. In some circumstances this specific information power will be sufficient to obtain the information that HMRC requires and so there may be no need to use the continuing information power. However one characteristic of high-risk promoters is their unwillingness to volunteer information. The Government recognises that the continuing information power will be more burdensome for high-risk promoters, but it considers that the use of such a power to be proportionate to counter the effect of HMRC not having the relevant information at an early stage.
- 4.7 The Government therefore intends to implement the proposals for the information powers.

**Q13 - Are there any other information powers that it would be useful to apply to high-risk promoters?**

- 4.8 There were few responses to this question and of those who did respond most had no additional suggestions. One respondent suggested that there should be a pre-approval process for the products of high-risk promoters which would require the high-risk promoter to inform HMRC of the product before it is marketed. HMRC would then be able to restrict promotion of the product by a high-risk promoter and obtain information about the product before it is promoted in order to judge whether it is or is not abusive.

**Government response**

- 4.9 While the Government is grateful for the responses on this question it intends at the moment to implement the information powers as proposed in the consultation. The suggestion on the pre-approval process is close to a regulatory regime for products offering a tax advantage; while it appreciates that there are advantages to this the Government does not, at this point in time, intend to regulate such products.

**Naming high-risk promoters**

**Q14 - Do you agree that naming high-risk promoters will serve to put their intermediaries, users and the public on notice of their high-risk status and the consequences?**

- 4.10 The majority of responses supported the naming of high-risk promoters to facilitate the goal of warning individuals about their existence and activities. Some concerns were raised regarding the proposals that high-risk promoters must ensure intermediaries pass on their designation. These respondents consider that the promoter's obligation should end with informing the intermediary. Many responses showed concern that the message itself will not get through to the general public because most people are unlikely to check the HMRC website and will trust their advisers.



- 4.11 One innovative idea to raise the profile of the message was that high-risk promoters should be obliged to post the wording on their websites; another was to have an “information button” on the online tax return system which provides a list of high-risk promoters when clicked:

*“In addition HMRC should consider adding a feature to its on-line tax return system... There could be an ‘information button’ on the on-line submission form which states, for example, ‘click here for a list of high-risk promoters’. The ‘click through’ could then list the names of the high-risk promoters, their reference numbers and details of the penalties that the taxpayer may incur if they do not include the number in their tax returns.”*

- 4.12 A few raised concerns that naming high-risk promoters would legitimise them, or be treated as a ‘badge of honour’.
- 4.13 Some respondents turned to the specifics and commented on the wording that the high-risk promoter should use to warn their clients and intermediaries of their high-risk designation:

*“It is important that it should not go beyond a statement of the strict legal and factual position. If, for example it states that the scheme (and the remainder of the taxpayer’s affairs) are likely to be subject to particular scrutiny by HMRC, that will no doubt be correct. If it states that the scheme is unlikely to be effective, that is simply a matter of opinion, and an interference with the promoter’s legitimate (if not entirely admirable) commercial activity.”*

## Government response

- 4.14 The Government appreciates the responses on this question and agrees that naming a promoter is a powerful tool. The Government intends to name high-risk promoters once their appeal rights against designation have been exhausted. The naming will initially be publicised on the HMRC website with the promoter required to inform all its clients that it is high-risk. If the client is an intermediary then the intermediary will be obliged to pass the warning on to its clients that have used the high-risk promoter’s products. Alongside the designated promoter’s name, the publication will note which aspects of the conduct notice the promoter failed to comply with, so that prospective customers have more information about why the promoter has been listed, and are able to use this to inform their choices.
- 4.15 To make sure that the correct message is given by the high-risk promoter the Government intends to introduce a power to make a statutory instrument that prescribes the words to be used by the high-risk promoter as well as the form and size of the warning. This will not only cover

providing the information in a paper format but also through other media. There will be a consultation in 2014 on a draft statutory instrument.

- 4.16 The Government is also grateful for the other suggestions on how to publicise that a promoter is high-risk; HMRC will be incorporating any warnings into its processes and contact with customers as appropriate.

#### **Q15 - What safeguards should be provided?**

- 4.17 All but one of those who responded on this point would like a full appeal process prior to any public designation with one suggesting the only safeguard should be an opportunity to talk to HMRC prior to designation. Some respondents specified the tribunal for this purpose whilst others left this open for possibly another independent body. Several respondents also suggested that the appeals process could be expedited to make designation quicker.

#### **Government response**

- 4.18 The Government has noted that the responses on this question were similar to those for question eight and is responding in a similar vein. The Government agrees that there must be a robust fast-track appeals system for promoters designated as high-risk.
- 4.19 While the Government understands the attractions of having an independent panel it believes that the First-tier Tax Tribunal is the appropriate forum for an appeal. The Government will ensure that HMRC names a high-risk promoter only when its appeal rights against designation are exhausted.

#### **Intermediaries and users**

#### **Q16 - Are there any issues with the proposed obligations on the intermediary?**

- 4.20 Of the responses received most had comments on the obligations of intermediaries. Many wanted more certainty about what was meant by the term “intermediary” and to whom it would apply. In particular it was thought that someone just referring a third party to a high-risk promoter without any knowledge of the arrangements that they may enter into should not be an intermediary subject to the high-risk promoter regime.
- 4.21 Issues were also raised over whether the high-risk promoter regime would impose obligations on intermediaries retrospectively. This is because an intermediary may not have kept records of clients in sufficient detail to supply the information required. A related concern was that intermediaries may not have sufficient information about the products offered by the high-risk promoter. A further comment was that having

information requirements on high-risk promoters and their intermediaries may also lead to a duplication of information, with intermediaries passing on information already received from the high-risk promoter.

### Government response

- 4.22 The Government found the responses to this question very useful. The objective of the information obligation on the intermediary is to ensure that HMRC can obtain information about clients from the links in the chain between the promoter and the client. If the promoter cannot supply the information about the client then the intermediary or intermediaries that are the links between the promoter and the client should be obliged to provide the information.
- 4.23 The Government agrees that the concept “intermediary” will need to be carefully framed to exclude those who merely pass on the contact details of a high-risk promoter to a third party without knowing anything about the high-risk promoter’s products.
- 4.24 The Government does not intend to apply information obligations on intermediaries for the high-risk promoter’s products or clients who have used such a product prior to the date that the high-risk promoter is designated. However if the client of an intermediary uses or is using the product of a promoter when they are designated as high-risk then intermediary may need to provide details of that client to HMRC.
- 4.25 HMRC intends to minimise the opportunity for duplication of information by carefully managing the use of information powers on high-risk promoters and intermediaries.

### Q17 - Are there any further obligations that should be imposed on an intermediary acting for a high-risk promoter?

- 4.26 Almost all of the responses made no suggestions of further obligations. Of the two that were received, one suggested obliging the intermediary not to engage in mis-selling or mis-description and the other raised the possibility of including the names of intermediaries on public documents stating that they are known to offer high-risk products.

### Government response

- 4.27 One of the outcomes of the designation of a promoter as high-risk is that it offers the intermediary the opportunity to review whether or not it will continue its relationship with the high-risk promoter. If the intermediary does continue its relationship with the high-risk promoter then it will be subject to the new information powers and penalties, the application of which may cause the intermediary to terminate its relationship with the high-risk promoter. Against these expectations the Government currently

has no intention of increasing the pressure on intermediaries for high-risk promoters through naming.

#### **Q18 - Should there be any further safeguards provided for an intermediary acting for a high-risk promoter?**

- 4.28 Most who responded pointed back towards previous answers on the obligations for the intermediary that would need to be addressed. That is, a better definition of intermediary, obligations not applying retrospectively and recognition that all the information required may not be available to the intermediary. Some respondents also stated the need for a full appeal process for intermediaries against information powers if they deem them to be unreasonable.

#### **Government response**

- 4.29 The Government welcomes the suggestion that there be an appeal process for information powers and intermediaries. To implement this suggestion the Government intends to apply the appeal provisions of Schedule 36 Finance Act 2008 (Information and Inspection Powers), as suitably adapted, to the high-risk promoter regime.

#### **Q19 - Do you agree that the user of a product marketed or implemented by a high-risk promoter should be required to declare to HMRC that they have done so?**

- 4.30 Most responses agreed with this proposal and many suggested the obligation should be similar to, or included under, DOTAS obligations. Some concerns were raised in cases where the user had not been informed of the high-risk status by the promoter or HMRC. In this circumstance it is suggested that there should not be a penalty charged to the user. One respondent also argued that many users were totally reliant on their tax adviser due to the complexity of their tax affairs and should not face a penalty for the actions that their adviser has taken.

*“However care will be needed around where the burden of proof lies. If the high-risk promoter or the intermediary does not notify the user of their high-risk status then it may not be reasonable to require them to declare the use of such a scheme.”*

#### **Government response**

- 4.31 The Government intends to implement the proposal that the user of the high-risk promoter's products should inform HMRC as described in the consultation. This is similar to the scheme reference number process under DOTAS. The penalty for failing to comply with this requirement will be set at £5000 per offence. If the client has not received the reference number for the high-risk promoter then they can, as appropriate, argue

that they have a reasonable excuse for not supplying it or have taken reasonable care when completing their tax return.

4.32 In addition the Government consider that there should be an additional obligation placed on the client of a high-risk promoter – this will mirror the changes to DOTAS made in Finance Act 2013. The client will be obliged to provide to the promoter their:-

- national insurance number; and
- unique taxpayer reference; or
- an assurance that they have neither.

4.33 The high-risk promoter will be obliged to pass this information to HMRC and it can be used to target HMRC's compliance efforts.

#### **Q20 - Do you think it is reasonable that users of products marketed or implemented by high-risk promoters should be subject to extended time limits for assessing?**

4.34 The responses to this question were split, with approximately half of those responding being opposed to additional time limits and the other half in favour, though some suggested that the 20-year limit would be too long. Of those that were opposed many pointed out the existing powers under section 36 TMA 1970 to raise an assessment for carelessness within a six-year time limit.

4.35 Some responses suggested that an extended time limit should not apply to those individuals who were not informed of the need to disclose or of the high-risk promoter designation by their adviser/high-risk promoter, arguing that it would be unfair to punish people for the failings of their advisers.

#### **Government response**

4.36 The Government has considered the differing opinions on this question and has decided to implement the 20 year extended time limit for assessments as proposed in the consultation. The Government does not consider it unfair that a client of a high-risk promoter should be subject to a 20-year extended time limit for assessments; this should be one of the risks that the client of a high-risk promoter should consider before using its products.

#### **Q21 - Is this proposal to create a specific rule that will allow intermediaries and users to disclose information to HMRC reasonable?**

4.37 The purpose of this proposal was to allow clients of high-risk promoters to contact HMRC about the products they have used or about the high-risk promoter without being constrained by any confidentiality or non-disclosure clause in their contract with the high-risk promoter.

4.38 In general the responses were in favour of the proposal:-

*“We approve of the proposal to legislate that disclosing information to HMRC is not a breach of a confidentiality clause.”*

4.39 A few responses suggested that the proposal should be extended to allow the client to disclose information to their tax adviser so that they could obtain adequate advice on the risks of the product. There were some concerns that this proposal could be used by a disenchanted client to launch a spurious attack on the promoter. Also of concern was the interaction of this proposal with legal professional privilege.

4.40 There was also some opposition on the grounds that information powers currently available under Schedule 36 Finance Act 2008 or DOTAS already allow for disclosures to be made, and that therefore, a new law would be unnecessary.

### **Government response**

4.41 The Government has considered the responses to this proposal. The proposal will allow the client to talk to HMRC, at their own behest, before HMRC uses or is in a position to use an information power. Such an approach by a client may even negate the need to use an information power against that client. The Government is mindful of the interaction of this proposal with legal professional privilege but does not think this will make the proposal unworkable. If the promoter has given up their legal professional privilege or the client itself holds legal professional privilege on the advice then they are entitled to share the advice with HMRC.

4.42 The Government has therefore decided to implement the proposal for both clients and intermediaries.

### **Q22 - What would this legislation need to achieve to be effective? Do you think it will achieve its aim of improving transparency and encouraging users to provide information to HMRC?**

4.43 Of those that responded and are not opposed to the legislation, there was general accord that the legislation would need to be clear enough to reassure anyone who made a disclosure that they would be sufficiently protected. Some responses suggested that those who do disclose should face reduced penalties or no penalties at all as an enticement to disclosure and to prevent penalties acting as a disincentive to disclosure. One also suggested it would be necessary to prevent disclosure from being used as a means for disgruntled customers to attack high-risk promoters or advisers.



## Government response

- 4.44 The Government appreciates the responses on this question and it agrees that there is a need to ensure that clients are sufficiently protected. HMRC currently has guidance in its Compliance Handbook on mitigating penalties for an unprompted disclosure and if the client is subject to a penalty then the guidance will apply.

## Penalties for high-risk promoters, intermediaries and users

### Q23 - Is this level of penalties appropriate for high-risk promoters?

### Q24 - Do you have any other suggestions on the level of penalty appropriate for high-risk promoters?

- 4.45 The majority of responses generally agreed with both the need for and level of penalties. Most responses, however, suggested allowing HMRC some discretion to determine the level of penalty by either the tax at risk, or the fees charged by the promoter. One respondent disagreed in principle with the notion of fixed penalties without the scope for mitigation, whilst another raised the idea that those subject to a penalty should be able to appeal a penalty that is viewed as disproportionately high.
- 4.46 One response was that penalties should be based on the fees earned by the promoter involved in the scheme rather than fixed at an arbitrary level.

## Government response to questions 23 and 24

- 4.47 The Government is reassured by the general agreement on the level of penalties and notes that the comments centre on how the amount of a penalty should be determined. The suggestions in the responses are similar to the matters that are to be taken into account in setting a DOTAS penalty under section 98C Taxes Management Act 1970, see in particular subsections (2ZB) and (2ZC). The Government thinks that similar provisions should apply to the £1 million penalty for failure to comply with an information power under the high-risk promoter regime.
- 4.48 The Government has also taken note of the comments that the daily penalty should not be a flat rate of £10,000 nor should the penalty for failing to warn a client be a flat rate of £5000. The Government agrees that these penalties should be changed to “up to” those amounts.
- 4.49 The Government will implement these penalty provisions as described for high-risk promoters and intermediaries.

4.50 In addition the Government considers that two penalties need to be introduced for the client of a high-risk promoter to ensure that the client is encouraged to meet their obligations to:

- notify HMRC of the high-risk promoter reference number; and
- inform the high-risk promoter of their national insurance number or unique taxpayer reference.

4.51 The Government considers that to be effective the penalty on the client for failing to do either of the above should be up to £5000 per offence.

#### **Q25 - Do you foresee any issues with imposing the higher standard for reasonable excuse and reasonable care?**

4.52 This proposal generated some interesting responses, and most respondents were opposed to it. Two main issues were identified.

4.53 The first was that reasonable care and reasonable excuse already have established definitions and changing the definition risks 'mission creep' and further confuses the issue. A standard of what is 'reasonable' for people of 'higher skill' already exists in case law and could easily be applied to high-risk promoters.

4.54 Some felt that HMRC should provide evidence to match the existing definitions rather than changing the definitions. If the new standards for reasonable excuse and reasonable care were to be implemented, many highlighted the need to distinguish between the user of a scheme, who may not understand the higher standard of reasonable excuse, and a promoter or intermediary who should be able to understand this.

*"We think that there needs to be a distinction between the taxpayer and his adviser, the intermediary. The taxpayer should be able to rely on his adviser giving appropriate advice in all the relevant circumstances. They are unlikely to have relevant technical expertise so they will depend on their advisers to make sure the advice provided is correct and accurate, taking into account all the facts of the particular case."*

4.55 The second tranche of objections centred on the inadmissibility of assumptions. It was thought that making assumptions inadmissible as evidence may prove unworkable. Nearly all advice on avoidance schemes will be based on some assumptions and if there is to be a higher standard it should apply only to advice that is found to be based on unreasonable assumptions.

*"We wonder whether HMRC might prefer to adopt the approach that little or no weight can be attached to reliance on advice which is incomplete having regard to the actual facts of the case, compared with the assumptions on which the advice proceeds."*



- 4.56 In particular respondents were opposed to applying the higher standard to the users of the schemes on the grounds that unsophisticated users are unlikely to be able to judge whether an assumption is reasonable or not and will likely trust the opinion that they have given.

*“Fundamentally on this point, it is the promoter’s responsibility to market a product responsibly. It should be enough from the end user’s perspective that the promoter has confirmed it has either complied or has taken formal advice that it is not required to do so.”*

#### **Q26 - Is it reasonable to extend the higher standard to other circumstances for high-risk promoters?**

- 4.57 Most who responded argued that, if the higher standard is applied, it may be reasonable to apply it to other circumstances for high risk promoters. Some more specific responses suggested that it could apply to the DOTAS regime.

#### **Government response on questions 26 and 27**

- 4.58 The Government found the responses on these questions interesting and informative and is grateful particularly where responses provided views on how the proposals could be made to work. The Government has given the responses careful consideration but has decided, despite the objections, to implement the proposals for the higher standard for the defences of reasonable excuse and reasonable care for high-risk promoters. The Government does not consider that requiring a high-risk promoter to demonstrate to the Tribunal that the advice it is relying on reflects the facts and does not make unreasonable assumptions makes the defences of reasonable excuse and reasonable care confusing. On the contrary, allowing the Tribunal to satisfy itself on these points ensures that the advice is directly applicable to the penalty proceedings.
- 4.59 The Government agrees that the proposal as drafted needs revision and it is grateful for suggestions on how to do this. Taking these into account the Government proposes that when considering any advice submitted by the high-risk promoter to the Tribunal for the defence of reasonable excuse or reasonable care, the Tribunal must be satisfied that the advice:-
- is complete having regard to the facts of the case;
  - does not make any assumptions that are material to the case; and
  - reaches a conclusion that is reasonable.
- 4.60 After due consideration the Government has decided not to extend the higher standard of reasonable excuse and reasonable care to promoter’s own tax affairs or to clients. However it still wants to ensure that clients do not blindly rely on advice provided by a high-risk promoter for the

defences of reasonable excuse and reasonable care. The Government has identified a different way to address the issue for clients.

- 4.61 Instead of applying the same standard for reasonable excuse and reasonable care to clients that applies to high-risk promoters the Government wants to encourage clients of high-risk promoters to get independent advice before relying on the defences of reasonable excuse and reasonable care.
- 4.62 The Government has therefore decided to implement a rule that a client of a high-risk promoter can only rely on the defences of reasonable excuse and reasonable care against a penalty when they have taken independent advice about the high-risk promoter's product.

## 5. Responses - Penalties for Other Users of 'Failed Schemes'

### Background

- 5.1 Buyers of tax avoidance schemes will submit their returns to HMRC on the assumption that the schemes will reduce their tax liability. Where a tax avoidance scheme is mass-marketed, as they often are, HMRC is presented with a large number of returns all based on the same assumption that the scheme will have reduced the person's tax liability in a particular way. Where HMRC holds that the scheme does not work, it follows that it will argue that any returns based on that scheme are incorrect.
- 5.2 When faced with large numbers of very similar cases, it is sometimes most efficient for HMRC to investigate "representative cases", taking them to litigation if necessary. However, when HMRC wins a representative case in the courts, other taxpayers who have used the same or very similar schemes sometimes see little incentive to settle their cases with HMRC. When HMRC pursues litigation in a number of very similar cases the Tribunal rules allow for the cases to be heard together in certain circumstances, but this only applies to cases which have been notified to the Tribunal. To get to this stage HMRC has to investigate these cases to litigation standard and close the tax enquiry. This uses up the Tribunal's resources, places a strain on HMRC's compliance resources, often delaying the collection of the right tax.

### Details of the consultation

- 5.3 The consultation sought views on proposals that taxpayers who use an avoidance scheme that has been shown to fail in another party's litigation, and where HMRC has opened an enquiry into their return, should either:
- Confirm to HMRC that they accept that the judgement also applies to them and amend their return accordingly to reflect the additional tax due, or
  - If they believe the litigated case does not apply to their circumstances they should tell HMRC why they think it is not relevant. If they do not respond to HMRC within the time required, or it is subsequently found that the scheme they used rested on the same point of law as the representative case, there will be a penalty for failing to comply with the obligation.

- 5.4 The consultation was an opportunity for HMRC to discuss with stakeholders in respect of how the proposals may work in practice and to understand any concerns.
- 5.5 HMRC received 31 responses to the consultation including written responses and also comments during meetings.

### General comments

- 5.6 There was a mixture of responses; some addressed each of the questions in the consultation document directly, others only addressing certain questions directly. Other responses made only general comments.
- 5.7 The responses received were mostly understanding of HMRC's position and the majority of respondents either supported or were accepting of HMRC's proposals. However, a significant minority of respondents either disagreed with the overall aim of the proposals or felt that the aims could be achieved by HMRC amending or more fully utilising existing powers.
- 5.8 The following points were made in a number of responses:
- The proposed measure will need to be carefully targeted
  - A decision of at least the Upper Tribunal should be required before HMRC could issue a notice requiring a taxpayer to amend a return.
  - Concerns were expressed that HMRC would have the power to require a return to be amended even where the appellant in the representative case chose not to further litigate for reasons unconnected to the technical issues associated with their case or simply chose not to litigate further when others may have chosen to.
  - Concerns were expressed that HMRC may use the proposed powers when it was not sufficiently clear that the scheme used by a "follower" taxpayer was sufficiently similar to the representative case.
  - There was no consensus as to when a taxpayer may safeguard their rights where HMRC requires them to amend returns. Some respondents suggested taxpayers should be able to appeal against HMRC's decision to issue a notice requiring them to amend their return; others suggested the right to appeal should only occur when a penalty was charged.
- 5.9 Only one response addressed HMRC's request in paragraph 5.10 of the consultation document which asked for comment on whether the proposed measures could be used for indirect taxes, particularly VAT. The response thought it was possible the proposals could be used for VAT.

*"Where a scheme has been defended to all reasonable lengths...then the 'follower cases' should either amend their returns or otherwise provide a reasonable reason why their scheme is different"*

## Question 27: Should there be a statutory limit for the period that HMRC allows for taxpayers to amend their returns?

- 5.10 Fewer than half of the responses addressed this question.
- 5.11 Of those, most said there should be a statutory time limit allowed for taxpayers to amend their return. This would ensure consistency between taxpayers, allow sufficient time to consult advisers on whether their case is sufficiently similar to the representative case and address the problem of taxpayers' reluctance to settle their cases where the Tribunal supports HMRC's view.
- 5.11 One suggestion was made to make the statutory period allowed to amend a return not less than 2 months, another 3 months, and another at least 6 months. One respondent requested that any statutory time limit commence from the point at which the affected taxpayer's legal rights had been exhausted.
- 5.12 Other respondents said there should be no time limit. One suggested time limits would be inflexible; another disagreed with introducing legislation to set a limit of amending a return on the grounds that existing legislation requires any amendment to a return to be made within 12 months of the filing date of the return.

*"This would be helpful. Without this, it is difficult to see how HMRC could expedite the process and may potentially allow the user to 'drag their feet'."*

*"We would recommend that any statutory limit should be at least 60 days following notification to the taxpayer of the required amendment. This should be subject to there being no on-going dispute, appeal or judicial review as to whether there was a reasonable basis for the taxpayer to have concluded that the litigated case was not relevant to their circumstances".*

## Government response

- 5.13 Having considered these responses the Government considers that a statutory time limit should apply to the period in which a taxpayer is required to amend their return. One of the aims of the proposal is to reduce delays in collecting tax properly due. If there was no statutory time limit then this aim would not be achieved.
- 5.14 The Government proposes to set the statutory time limit at 90 days by which point a taxpayer who has been issued with a scheme failure notice must amend their return. The time limit begins on the day the scheme failure notice is issued.

- 5.16 If a review of the scheme failure notice is requested by the taxpayer but the review upheld the decision to issue the notice then the period by which the return should be amended is within 30 days of the date the review conclusion was issued, or within 90 days of the date on which the scheme failure notice was issued if later.

**Question 28: Alternatively should there be a statutory minimum period which could be extended at HMRC's discretion?**

- 5.17 Again fewer than half of the responses answered this question.
- 5.18 All but one respondent agreed that any statutory minimum period could be extended. This would allow taxpayers to fully consider whether their case was sufficiently similar or dissimilar to the lead case in order to agree whether any amendment was required to their return.
- 5.19 One respondent felt that to allow extensions would only offer opportunities for followers to further delay settlement and that the best approach would be a generous but inflexible deadline.
- 5.20 One respondent said the power to grant an extension should not be left to the discretion of HMRC.

**Government response**

- 5.21 The Government has considered the responses and concluded that there is sufficient time within the suggested statutory time limits suggested above to enable a taxpayer to consider whether their case is sufficiently similar to the case cited by HMRC in the scheme failure notice. Therefore the Government does not propose any discretion to extend the period by which a taxpayer must amend their return.

**Question 29: Should HMRC be able to impose this requirement if they win a case at any point at a Tribunal or court where the taxpayer does not appeal further, or is there a minimum level in the court hierarchy that should be reached before the requirement can be imposed?**

- 5.22 There were a number of direct responses to this question.
- 5.23 Most respondents agreed that HMRC should only be able to impose a requirement to amend a return when the representative case is exhausted, but some respondents did not state when they viewed the litigation process as being exhausted. There was general agreement that a decision of the First-tier Tribunal was not appropriate as its decisions are not binding on other tribunals or courts. Some said the Court of Appeal would be an appropriate level.
- 5.24 There was a concern expressed by some respondents about the fairness of requiring "follower" taxpayers to amend returns when the

representative case is not appealed to a given court because of reasons other than the technical merits of their position; for example, ill-health or a change of ownership for a corporate entity.

- 5.25 One respondent said HMRC should not be able to require taxpayers to amend their return in any circumstances.

*“The minimum level should be the Upper Tribunal. The First-tier Tribunal is not a superior court and so does not establish precedent.”*

## Government response

- 5.26 Despite the strong preference from respondents that taxpayers should be required to amend their returns only where the representative case reaches the Upper Tier Tribunal or higher, the Government has decided that the requirement should be triggered where a representative case is found in HMRC’s favour at the First-tier Tribunal or higher and is not appealed further. Taxpayers involved in marketed and mass-use schemes very often do not pursue litigation beyond the First-tier Tribunal and so setting the minimum level above this would restrict the application of the measure and reduce its effectiveness. This would prevent the measure being limited in its scope. Taxpayers who receive a notice to amend their return but have reason to believe the First-tier Tribunal decision is either incorrect or does not apply to them will have a right to appeal against the penalty charge.

**Question 30: Would defining a scheme as “any scheme or arrangement for which it would be reasonable to conclude that the obtaining of a tax advantage was the sole or main purpose” capture the tax avoidance schemes that this measure is intended to catch?**

- 5.27 Approximately one third of responses answered this question.
- 5.28 There was a range of responses which may reflect a lack of clarity in the consultation document concerning the types of arrangements that HMRC is looking to target. This led to questions and concerns as to whether the proposals were primarily aimed at mass marketed, bespoke, or egregious avoidance schemes, or a mixture.
- 5.29 One respondent felt the definition of a scheme was too wide so would cast HMRC’s net wider than mass marketed avoidance schemes. One respondent felt the definition of avoidance scheme in the new GAAR would enable HMRC to address the most egregious schemes. Another felt the definition was reasonable but felt a narrower definition should be used, for example confining the measure to schemes discloseable under the DOTAS regime.
- 5.30 One respondent felt the definition was too narrow leaving opportunities for customers to argue the proposed measures did not apply to them as



the scheme was linked to a commercial transaction. They suggested the measure should focus on the tax advantage being the main or one of the main purposes.

- 5.31 One respondent expressed a concern that HMRC would look to litigate weak cases and apply any findings in its favour to cases which may not be sufficiently similar. Another felt the proposed definition was too wide and could catch two different bespoke planning structures which used the same relief but which had genuine technical differences.

*“It is important that the term is narrowly defined, rather than for example widening it to any tax dispute”*

*“Where schemes devised by different promoters have points of similarity, there will be a legitimate question as to whether the decision as regards one scheme should be binding as regards another”*

### **Question 31: Are there any other suitable criteria that could be applied?**

- 5.32 There were a number of responses to this question.
- 5.33 One respondent felt the criteria should make it clear that arrangements carried out for bona fide commercial reasons are not captured by the proposed obligations to amend returns.
- 5.34 Another respondent suggested reference to the GAAR could be included so the requirement to amend returns applied to cases where courts found the GAAR applied.
- 5.35 Other than the two responses above all other responses confirmed there were no additional suggestions.

*“As an additional or alternative test, you could include a test around the GAAR, for example, a ‘scheme’ could be one to which the GAAR has been found to apply in court”*

### **Government response on questions 30 and 31**

- 5.36 The Government is grateful for the responses and wants to ensure that any definition is properly focused on the target population of “follower cases”. Therefore the definition of eligible cases will be based on the key principles underpinning the DOTAS and GAAR legislation but not limiting it solely to abusive cases covered by the GAAR. This existing legislation will provide the basis for definitions of tax arrangements and tax advantage to ensure that the measure is properly targeted.

### **Question 32: Do you agree that once notified that the avoidance scheme they have used has been proven to fail in litigation, other users of the**



## **scheme should be required to amend their self-assessments to negate the tax advantage they had gained?**

5.37 Almost half of the responses dealt with this question.

5.38 The consensus amongst respondents was that users of schemes should only be required to amend their returns when it was clear that the principles established in the representative case applied to the other users.

*“Provided that the scheme in question has failed, then we have no problem with the other users of that same scheme being subject to this requirement”*

5.39 Concern was expressed that HMRC may require taxpayers to amend their returns where the other users of the scheme had circumstances which differed from the lead case.

5.40 One response asked if any requirement to amend a return following failed litigation by a taxpayer in the representative case would infringe any rights under the Human Rights Act where the litigation in the lead case had not been exhausted.

## **Government response**

5.41 The Government is grateful for these responses and understands the concerns expressed by respondents that there may be occasions when it is difficult to determine the extent to which a scheme which has been proven to fail in litigation applies to another taxpayer. HMRC will carefully consider whether a case is sufficiently similar to the scheme that has failed in litigation before issuing a scheme failure notice and decisions will be subject to a governance process. However, for the majority of cases it will be clear that the failed litigation case is sufficiently similar or is “on all fours” with the schemes used by other taxpayers and a scheme failure notice will be issued.

5.42 The Government is satisfied that the proposals comply with human rights legislation.

## **Question 33: Are there other ways to bring the tax to account without offering scheme users further opportunities to delay settlement?**

5.43. There were a few responses to this question.

5.44 Two respondents suggested the proposals already made were adequate to bring tax to account timeously.

- 5.45 Two respondents suggested that alternatively HMRC could look to use the penalty structure suggested in the consultation document in 2011 on High Risk Avoidance Schemes.
- 5.46 Another respondent suggested HMRC could make use of s.55 TMA, concerning the recovery of tax not postponed during an appeal.

### **Government response**

- 5.47 HMRC thanks respondents for their suggestions on other ways to bring tax to account.
- 5.48 However section 55 TMA cannot be used in these circumstances as this provision relates to cases already in litigation. The proposals within this consultation relate to “follower” cases which are not yet the subject of any appeal.
- 5.49 The Government does not think there is merit in using a penalty structure similar to that suggested within the consultation of High Risk Avoidance Schemes as this proposed a regime of relatively small, fixed penalties which would be unlikely to act as sufficient incentive for customers to comply with a notification to amend their return.

### **Question 34: Do you agree that a penalty should work in this way to encourage taxpayers to comply with these obligations?**

- 5.50 There were a few responses to this question.
- 5.51 All respondents agreed that the penalty should work in a way to encourage compliance with their obligations. One respondent sought clarification on what was meant by “encourage”.

### **Government response**

- 5.52 The Government found these responses helpful and considers that by offering a set period for a taxpayer to amend a return or make representations to HMRC, before a penalty becomes chargeable, the proposal would see penalties charged only when these opportunities to comply with their obligations are exhausted. Once an amendment notice expires and the taxpayer becomes liable to a penalty, HMRC intend to offer reductions to penalties to reflect the extent to which taxpayers comply with the notice subsequently.

### **Question 35: Do you have any further comments on how this new requirement and penalty should work in detail?**

- 5.53 There was one response to this question.

- 5.54 The response suggested that there should be a provision requiring HMRC to repay any penalty where it can be shown the taxpayers had a reasonable basis to conclude that the judgment in the litigation case did not apply to them.
- 5.55 More generally, some respondents expressed a preference for taxpayers to be notified individually that a scheme which has failed in litigation applies to them also and that they are required to amend their returns. The alternative, that HMRC publicise such cases and requirements via other media, such as the internet, was not supported by any respondents.

### **Government response**

- 5.56 The Government is satisfied that the proposal in the consultation for a safeguard that if a taxpayer demonstrates to HMRC's satisfaction or on appeal to the Tribunal that their scheme was sufficiently different to the scheme proven to fail in litigation then the penalty issued by HMRC would be cancelled.
- 5.57 Under the proposal HMRC intend to issue individual notifications to taxpayers that there has been a qualifying judgment and that they are required to amend their returns.

### **Question 36: Are there any other penalty models or structures which you believe would work more effectively?**

- 5.58 There were 6 direct responses to this question and the following suggestions were made:
- The penalty structure could be based on that suggested in the consultation document issued in 2011 on High Risk Avoidance Schemes consultation document published in 2011.
  - Rather than concentrating on the users of the schemes, the measure should focus on high-risk promoters of schemes who should be issued with financial penalties depending on the quality of the schemes they sold to users.
  - Charging a higher rate of interest on users of avoidance schemes. The quicker the taxpayer settles with HMRC the lower the overall interest paid.
  - One respondent suggested any penalty should take account of the length of time the taxpayer failed to amend their return after receiving a notice from HMRC against which they did not appeal.

### **Government response**

- 5.59 The Government has considered these suggestions in detail. The consultation of 2011 proposed simple penalty structures reflecting the

obligations proposed in that consultation for reporting a listed avoidance scheme. The Government does not believe the simple 15% penalty proposed in that consultation would be suitable for this more sophisticated measure.

- 5.60 High-risk promoters are the subject of another part of this consultation. Interest is not used to encourage compliance with obligations but merely recompenses whichever party has been denied the funds to which they were entitled. The Government has no current plans to apply higher rates of interest based on behaviours.
- 5.61 By offering reductions to a penalty to encourage taxpayers to settle their cases even once a penalty has been incurred, the proposal will take into account the length of time a taxpayer delays complying with the notice.

### Closed Enquiries

- 5.62 Since the consultation, HMRC has undertaken further analysis of the legacy avoidance cases and it has become clear that in a significant number of cases the enquiry has been closed or there was no enquiry and discovery assessments have been raised. Taxpayers have launched appeals against these amendments and assessments.
- 5.63 The aim of this proposed measure is to discourage taxpayers from delaying settlement of their cases when HMRC believe them to be similar to cases which have been settled by the Tribunal or courts. This aim would be frustrated if the measure did not include taxpayers for whom the enquiry is closed or who have received a discovery assessment.
- 5.64 We have therefore developed the proposed measure so that it can be applied to encourage taxpayers to settle their case when a taxpayer has appealed against a closure notice or discovery assessment and there has been a relevant ruling in another party's case.
- 5.65 Draft legislation can be found at page 92. If you would like to comment on the draft legislation or meet to discuss your comments please use the contact details in Chapter 9.

## 6. Responses - DOTAS – Prescribed Information

**Q37 – Do you think it is reasonable for the prescribed information to include all material provided to prospective users of an arrangement, sample copies of all documents signed by users, a full analysis of the tax advantage that the arrangement is designed to obtain and an explanation of how the arrangement produces the tax advantage?**

- 6.1 There was a mixed response to this proposal. One common issue raised amongst respondents was that products are often bespoke and consequently the information required may not exist in the form described in the consultation. It was considered that the proposal for further prescribed information would work best for mass-marketed schemes.
- 6.2 Several responses raised the issue of legal professional privilege, which could legitimately lead to some of the prescribed information being withheld. One response questions what is meant by a “full” analysis. Several responses stated that not all of the prescribed information would have been available at the time of disclosure – for instance documents signed by the user.

**Q38 – Alternatively do you think that the material should only be provided following a specific request from HMRC.**

- 6.3 The responses to this question were mixed, with some responses arguing that this information should only be provided upon request due to the burdensome nature of the extra compliance, the “anonymising” of data and the high cost of legal advice that will likely be necessary. Conversely a few responses were in agreement that the information should be provided as a matter of course with DOTAS notification.

### **Government response to questions 37 and 38**

- 6.4 The Government is grateful for the responses on these questions. On reflection the Government has decided that the additional prescribed information should only be provided on request by HMRC and not automatically as part of the initial information on the avoidance scheme. This will enable HMRC to filter those schemes where no further information is necessary and to specifically tailor its information requests for bespoke schemes.
- 6.5 The deadline for provision of the information will be 10 working days. The draft legislation for the DOTAS changes is at page 125. If you would like to comment on the draft legislation or meet to discuss your comments please use the contact details in Chapter 9.

## 7. Responses – Assessment of Impacts

- 7.1 Only seven responses were received that commented on any of the Assessment of Impact questions.

### **Q39 – Do you think that the high risk promoter and follower penalty proposals will have a wider impact on individuals and households than that already identified?**

- 7.2 One respondent suggested that the high-risk promoter regime may affect those taxpayers entering into employment schemes when not knowing what they are. Another respondent suggested that the implementation of the high-risk promoter regime may lead to a reduction in investment through mechanisms including the EIS, VCT and BPRA. The only other impact suggested was that on the taxpayer having to share some of the extra compliance costs that their accountant would incur as a result of the high-risk promoter regime.

### **Q40 – Do you have any comments on the equality impact for either proposal?**

- 7.3 There were no responses to this proposal, other than the suggestion that the high-risk promoter scheme will inherently lead to inequalities between those within the regime and those outside.

### **Q41 – The high-risk promoter proposals will only impact a small number of promoters some of which may change their behaviour to avoid being designated high-risk. The impact of the proposals on promoters designated high risk will vary depending on the type of information power and level of penalties to which the promoter is subject. What do you think will be the cost to the high-risk promoter of the following?**

#### **a) Providing information under the specific information power**

- 7.4 Of the few that responded most agreed that there will be significant monetary and labour costs of providing information in response to the use of such powers. Further to this responses agreed that legal advice would understandably be sought when such a power is invoked and that this in itself was costly. Some respondents - whilst agreeing that there may be a cost incurred - believe that it was correct that the high-risk promoter should bear the cost of the extra compliance. One respondent suggested that if a high-risk promoter wished to mitigate the anticipated extra cost under the high-risk promoter regime then they could modify their behaviour.

#### **b) Providing information under the general information power**

- 7.5 No responses distinguished between the use of general and specific information powers, so the response above also stands for this.

### **c) Informing intermediaries and users of their high-risk designation**

- 7.6 Only a few responses were made to this question, this requirement though, was not seen as being onerous in terms of extra cost. However, one respondent suggested that the cost incurred by the high-risk promoter could be a loss of reputation.

### **Q42 – What changes in cost will businesses face in complying with the follower penalty proposal compared to the current situation? Please refer to compliance cost not potential penalties and tax settlements.**

- 7.7 Amongst the responses there was a common theme that the financial costs incurred would be not insignificant, one respondent commented that the accompanying legal costs would be “large”, whilst others just referred to “greater” or “significant” extra compliance cost. One respondent commented that the extra compliance costs would be insignificant for “the reputable tax adviser”.

### **Government response to questions 39-42**

- 7.8 The Government is grateful for these responses and acknowledges the points made. The responses have been used to validate the figures in the Tax Impact and Information Note for these proposals.



## 8. Next steps

### High-risk promoters, penalties for other users of failed schemes and DOTAS

- 8.1 The majority of the draft legislation to be included in the Finance Bill 2014 is published in this document. The new legislation will apply from Royal Assent and the associated statutory instruments will be made later in 2014.
- 8.2 HMRC will be able to issue amendment notices to users of failed schemes where there has been a qualifying judgment before Royal Assent

### Accelerated payments

- 8.2 Draft legislation has been published for comments on 24 January with a view to inclusion in the Finance Bill for 2014.

### Guidance

- 8.3 HMRC will publish draft guidance for these measures later on this year.

## 9. The Consultation Process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

- Stage 1 Setting out objectives and identifying options.
- Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
- Stage 3 Drafting legislation to effect the proposed change.
- Stage 4 Implementing and monitoring the change.
- Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 3 of the process. The purpose of the consultation is to seek views on draft legislation in order to confirm, as far as possible, that it will achieve the intended policy effect with no unintended effects.

### How to respond

Responses should be sent by 24 February 2014, by e-mail to

[aag.consultation@hmrc.gsi.gov.uk](mailto:aag.consultation@hmrc.gsi.gov.uk) - please note that the mailbox will not accept e-mails larger than 10mb.

Responses can also be sent by post to:

Oliver Mathers  
HM Revenue and Customs  
Room 3C/03  
100 Parliament Street  
London  
SW1A 2BQ

Telephone enquiries: 03000 578883

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from [HMRC Inside Government](#). All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

## Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs (HMRC).

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

## Consultation Principles

This consultation is being run in accordance with the Government's Consultation Principles. [If you wish to explain your choice of consultation period, this is the place. Also, if you are holding additional meetings or using alternative means of engaging, please mention this here].

The Consultation Principles are available on the Cabinet Office website: <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

If you have any comments or complaints about the consultation process please contact:

Paul Miller, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: [hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk](mailto:hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk)

Please do not send responses to the consultation to this address.

# Annex A: List of Stakeholders Consulted

Association of Accounting Technicians  
Association of Chartered Certified Accountants  
Association for Financial Markets in Europe  
British Bankers' Association  
BDO LLP  
Chartered Institute of Taxation  
Clifford Chance  
Confederation of British Industry  
Deloitte  
DWF LLP  
Eaves & Co  
EDF Tax Ltd  
Ernst & Young LLP  
Grant Thornton  
Harcourt Capital LLP  
The Institute of Chartered Accountants in England and Wales  
The Institute of Chartered Accountants of Scotland  
Ingenious Media Ltd  
KPMG LLP  
The Law Society of England and Wales  
London Society of Chartered Accountants  
Moore Stephens  
OneE Consulting Limited  
The Public and Commercial Services Union  
PricewaterhouseCoopers LLP  
Reynolds Porter Chamberlain LLP  
Thomas Eggar LLP

Plus four individual responses.

# Promoters of Tax Avoidance Schemes and DOTAS

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## Who is likely to be affected?

The measure will affect promoters who are designated as high-risk under the measure, the intermediaries that continue to represent the promoter after designation commenced and clients using the designated promoter's products.

## General description of the measure

The measure will allow HMRC to issue conduct notices to promoters and designate promoters who breach a conduct notice. Promoters will be designated through issue of a monitoring notice and subject to new information powers and penalties, which will also apply to intermediaries that continue to represent them after designation. The designated promoter will be named by HMRC (the naming details will include information on why the conduct notice was breached) and required to inform its clients that it has been designated and is being monitored by HMRC. Clients of designated promoters will also be subject to certain obligations (which have a penalty for non-compliance) and extended time limits for assessments. The measure also includes a new requirement under the Disclosure of Tax Avoidance Schemes (DOTAS) for further information to be provided by a promoter when requested by HMRC.

## Policy objective

The measure is part of the Government's strategic response to avoidance and is to deter the use of avoidance schemes through influencing the behaviour of promoters, their intermediaries and clients. It is aimed at changing the behaviour of promoters of tax avoidance who potentially could be designated. A designated promoter will be subject to new information powers so HMRC obtains better information about their products and clients and can use that information to target its compliance work in combating avoidance. Naming a designated promoter should deter intermediaries from acting for them and clients and potential clients from using their products. Including the reason the conduct notice was breached will also act to inform clients and potential clients of the risks posed by using the designated promoter's schemes. The DOTAS aspects of the measure are to ensure that HMRC has adequate information to allow it to analyse schemes disclosed under DOTAS.

## Background to the measure

This measure was announced in Budget 2013.

A consultation called *Raising the Stakes on Tax Avoidance* ran from 12 August until 4 October 2013.

## Detailed proposal

### Operative date

The measure will have effect from the date that Finance Bill 2014 receives Royal Assent.

It will allow promoters to be designated after that date.

## **Current law**

Currently there are obligations on promoters of avoidance schemes to provide details of their schemes under the Disclosure of Tax Avoidance Scheme (DOTAS) rules in Part 7 of Finance Act 2004. DOTAS operates by using certain criteria, known as “hallmarks” to identify the schemes that need to be disclosed to HMRC. Some hallmarks are generic others are specific to particular taxes. If a scheme is discloseable then the promoter has to provide HMRC with information on the avoidance scheme and their clients that have used that scheme.

## **Proposed revisions**

Firstly, the measure allows HMRC to request further information on schemes disclosed under DOTAS in addition to the information already disclosed. Secondly, legislation will be introduced to tackle the behaviour of certain promoters. A promoter who triggers a threshold condition may be issued with a conduct notice with a period of up to two years. Breach of the conduct notice may lead to the promoter being designated as high-risk through the issue of a monitoring notice. The designated promoter will have a right of appeal. A designated promoter will be subject to specific information powers and penalties for non-compliance of up to £1 million. In addition HMRC will have the power to name the designated promoter and require it to inform its intermediaries and clients. The naming details will include information on why the conduct notice was breached. A higher standard for the defences of reasonable excuse and reasonable care will apply to the designated promoter.

Intermediaries who continue to act for a designated promoter will be subject to the same information powers and penalties. Clients of a designated promoter will be supplied by the promoter with a reference number that they have to report to HMRC so that they can be identified and compliance action by HMRC accurately targeted. Clients of a designated promoter will also be subject to an extended assessing period of 20 years if any tax is lost because they fail to pass on the reference number and a penalty. The measure will be introduced in Finance Bill 2014.

## Summary of impacts

<b>Exchequer impact (£m)</b>	2013-14	2014-15	2015-16	2016-17	2017-18
	nil	+5	+35	+35	+35
	These figures are set out in Table 2.1 of Budget 2013 and have been certified by the Office of Budget Responsibility. More details can be found in the policy costings document published alongside Budget 2013.				
<b>Economic impact</b>	The measure is not expected to have any significant economic impacts.				
<b>Impact on individuals and households</b>	The measure will mainly impact on those individuals who are, or work for, designated promoters. There may also be an impact on the users of avoidance schemes. Individuals who use avoidance schemes will generally be higher rate taxpayers.				
<b>Equalities impacts</b>	HMRC does not hold information about the projected characteristics of designated promoters but there is no reason to suppose that there is any particular equality impact. It is not expected that the measure would impact adversely or disproportionately on equality groups.				
<b>Impact on business including civil society organisations</b>	HMRC estimates that there are approximately 20 businesses that potentially could be designated. The measure is to encourage behavioural change and so some businesses will not incur any additional compliance or administrative costs under this measure.  It will impose some additional reporting obligations on those firms subject to the information powers. For the businesses affected it is expected that the impact will be negligible.				
<b>Operational impact (£m) (HMRC or other)</b>	Dealing with the additional information and reporting of information will have negligible impact on HMRC.				
<b>Other impacts</b>	<u>Small and Micro-Business assessment (SMBA)</u> : businesses of any size develop market and use tax avoidance schemes. We expect this measure will have little, if any impact on small businesses either in absolute terms (considering the overall effect on them) or in relative terms (considering the effect on specific businesses).  Other impacts have been considered and none have been identified.				

## Monitoring and evaluation

The measure will be monitored using information collected from the limited population of designated promoters and their users.



# Consultation draft

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Schedule 1 — The threshold conditions

## PART 1

### PROMOTERS OF TAX AVOIDANCE SCHEMES

#### *Introduction*

#### **1 Meaning of “relevant proposal” and “relevant arrangements”**

- (1) “Relevant proposal” means a proposal for arrangements which (if entered into) would be relevant arrangements (whether the proposal relates to a particular person or to any person who may seek to take advantage of it).
- (2) Arrangements are “relevant arrangements” if they –
  - (a) enable, or might be expected to enable, any person to obtain a tax advantage, and
  - (b) the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage.
- (3) “Tax advantage” includes –
  - (a) relief or increased relief from tax,
  - (b) repayment or increased repayment of tax,
  - (c) avoidance or reduction of a charge to tax or an assessment to tax,
  - (d) avoidance of a possible assessment to tax,
  - (e) deferral of a payment of tax or advancement of a repayment of tax, and
  - (f) avoidance of an obligation to deduct or account for tax.
- (4) “Arrangements” includes any agreement, scheme, arrangement or understanding of any kind, whether or not legally enforceable, involving a single transaction or two or more transactions.

#### **2 Meaning of “promoter”**

- (1) “Promoter” means a person who is a promoter –
  - (a) in relation to a relevant proposal (see subsection (2)), or
  - (b) in relation to relevant arrangements (see subsection (4)).
- (2) A person (“P”) is a promoter in relation to a relevant proposal at any time when P meets any of the conditions in subsection (3).
- (3) The conditions are that, in the course of a business P –
  - (a) is to any extent responsible for the design of the proposed arrangements;
  - (b) makes, or has made, a firm approach to another person (“C”) in relation to the relevant proposal with a view to P making the proposal available for implementation by C or another person;

- (c) makes, or has made, the relevant proposal available for implementation by other persons.
- (4) A person is a promoter in relation to relevant arrangements at any time when it meets either of the following conditions –
  - (a) the person is, by virtue of subsection (3)(b) or (c), a promoter in relation to a relevant proposal which is implemented by the arrangements;
  - (b) the person is responsible to any extent for the design, organisation or management of the arrangements in the course of a business.
- (5) For the purposes of this Part a person makes a firm approach to another person in relation to a relevant proposal if –
  - (a) the person communicates information about the relevant proposal to the other person at a time when the proposed arrangements have been substantially designed,
  - (b) the communication is made with a view to that other person or any other person entering into transactions forming part of the proposed arrangements, and
  - (c) the information communicated includes an explanation of the tax advantage that might be expected to be obtained from the proposed arrangements.
- (6) For the purposes of subsection (5) proposed arrangements have been substantially designed at any time if by that time the nature of the transactions to form part of them has been sufficiently developed for it to be reasonable to believe that a person who wished to obtain the tax advantage mentioned in subsection (5)(c) might enter into –
  - (a) transactions of the nature developed, or
  - (b) transactions not substantially different from transactions of that nature.

### 3 Meaning of “intermediary”

For the purposes of this Part a person is an intermediary in relation to a relevant proposal if –

- (a) that person communicates information about the relevant proposal to another person in the course of a business,
- (b) the communication is made with a view to that other person, or any other person, entering into transactions forming part of the proposed arrangements, and
- (c) that person is not a promoter in relation to the relevant proposal.

### 4 Meaning of “client”

- (1) For the purposes of this Part, a person is a client at a particular time –
  - (a) in relation to a promoter of a relevant proposal if, at that time, the person is a person to whom the promoter provides services in connection with the proposal,
  - (b) in relation to a promoter of relevant arrangements if, at that time, the person is a person to whom the promoter provides services in connection with the arrangements, or
  - (c) in relation to a person who is an intermediary in relation to a relevant proposal if, at that time, the person is a person to whom the intermediary provides services in connection with the proposal.

- (2) A person who is an intermediary in relation to a relevant proposal may be a client –
  - (a) in relation to the promoter of the relevant proposal;
  - (b) in relation to another person who is an intermediary in relation to the proposal.

### *Conduct notices*

## **5 Duty to give conduct notice**

- (1) This section applies to a person (“P”) at any time when –
  - (a) P is a promoter in relation to a relevant proposal or relevant arrangements,
  - (b) no conduct notice has effect in relation to P, and
  - (c) P has, in the period of 3 years ending with that time and while P was a promoter, met one or more of the threshold conditions (see Schedule 1).
- (2) The Commissioners must determine whether, in view of the purposes of this Part, P’s meeting of the condition (or all the conditions) mentioned in subsection (1)(c) –
  - (a) should, or
  - (b) should not,be regarded as insignificant.
- (3) The Commissioners must give P a conduct notice if they –
  - (a) make the determination mentioned in subsection (2)(b), and
  - (b) do not determine that, having regard to the significance (or lack of significance) of the impact that P’s activities as a promoter are likely to have on the collection of tax, it is inappropriate to give P a conduct notice.
- (4) The Commissioners may not reach the conclusion mentioned in subsection (2)(a) if the condition mentioned in subsection (1)(c) is (or all the conditions mentioned in subsection (1)(c) are) in any of the following paragraphs of Schedule 1 –
  - (a) paragraph 2 (deliberate tax defaulters);
  - (b) paragraph 3 (breach of Banking Code of Practice);
  - (c) paragraph 4 (dishonest tax agents);
  - (d) paragraph 6 (persons charged with certain offences);
  - (e) paragraph 7 (opinion notice of GAAR Advisory Panel).

## **6 Contents of a conduct notice**

- (1) A conduct notice is a notice requiring the person to whom it has been given (“the recipient”) to comply with conditions specified in the notice.
- (2) Before deciding on the terms of conduct notice, the Commissioners must give the person to whom the notice is to be given an opportunity to comment on the proposed terms of the notice.
- (3) A notice may include only conditions that it is reasonable to impose for any of the following purposes –

- (a) to ensure that the recipient provides adequate information to its clients about relevant proposals, and relevant arrangements, in relation to which the recipient is a promoter,
  - (b) to ensure that the recipient provides adequate information about relevant proposals in relation to which it is a promoter to persons who are intermediaries in relation to those proposals;
  - (c) to ensure that the recipient does not fail to comply with any duty under a specified disclosure provision;
  - (d) to ensure that the recipient does not discourage others from complying with any obligation to disclose to HMRC information of a description specified in the notice;
  - (e) to ensure that the recipient does not enter into an agreement with another person (“C”) which relates to a relevant proposal or relevant arrangements in relation to which the recipient is a promoter, on terms which impose a contractual obligation on C which falls within paragraph 11(2) or (3) of Schedule 1 (contractual terms restricting disclosure);
  - (f) to ensure that the recipient does not promote relevant proposals or relevant arrangements which rely on, or involve a proposal to rely on, one or more contrived or abnormal steps to produce a tax advantage;
  - (g) to ensure that the recipient does not fail to comply with any stop notice which has effect under paragraph 12 of Schedule 1.
- (4) References in subsection (3) to ensuring the adequacy of information about proposals or arrangements include –
  - (a) ensuring the adequacy of the description of the arrangements or proposed arrangements;
  - (b) ensuring that the information includes an adequate assessment of the risk that the arrangements or proposed arrangements will fail;
  - (c) ensuring that the information does not falsely state, and is not likely to create a false impression, that HMRC have (formally or informally) considered, approved or expressed a particular opinion in relation to the proposal or arrangements.
- (5) In subsection (3)(c) “specified disclosure provision” means a disclosure provision that is specified in the notice; and for this purpose “disclosure provision” means any of the following –
  - (a) section 308 of FA 2004 (disclosure of tax avoidance schemes: duties of promoter);
  - (b) section 312 of FA 2004 (duty of promoter to notify client of number);
  - (c) sections 313ZA and 313ZB of FA 2004 (duties to provide details of clients and certain others);
  - (d) Part 1 of Schedule 36 to FA 2008 (duties to provide information and produce documents).
- (6) The Treasury may by regulations amend the definition of “disclosure provision” in subsection (5).
- (7) In subsection (4)(b) “fail”, in relation to arrangements or proposed arrangements, means not result in a tax advantage which the arrangements or (as the case may be) proposed arrangements might be expected to result in.

## **7 Section 6: supplementary**

- (1) The following provisions have the following meanings in section 6.
- (2) “Adequate” means adequate having regard to what it might be reasonable for a client or (as the case may be) an intermediary to expect; and “adequacy” is to be interpreted accordingly.
- (3) “Promote”, in relation to a relevant proposal and the recipient mentioned in section 6(3)(f), means –
  - (a) take part in designing the proposal,
  - (b) make a firm approach to a person in relation to the proposal with a view to making the proposal available for implementation by that person or another person, or
  - (c) make the proposal available for implementation by persons (other than the recipient).
- (4) “Promote”, in relation to relevant arrangements, means take part in designing, organising or managing the arrangements.

## **8 Amendment or withdrawal of conduct notice**

- (1) This section applies where a conduct notice has been given to a person under section 5.
- (2) The Commissioners may at any time amend the notice.
- (3) The Commissioners –
  - (a) may withdraw the notice if they think it is not necessary for it to continue to have effect, and
  - (b) in considering whether or not that is necessary must take into account the person’s record of compliance, or failure to comply, with the conditions in the notice.

## **9 Duration of conduct notice**

- (1) A conduct notice has effect from the date specified in it as its commencement date.
- (2) A conduct notice ceases to have effect –
  - (a) at the end of the period of two years beginning with its commencement date, or
  - (b) if an earlier date is specified in it as its termination date, at the end of that day,(and ceases to have effect if withdrawn by the Commissioners under section 8).

### *Monitoring notices: procedure and publication*

## **10 Monitoring notices**

- (1) This section applies where a conduct notice has effect in relation to a person and an authorised officer determines that the person has failed to comply with a condition in the notice.



- (2) The officer must give the person a notice stating that the person's activities as a promoter are to be monitored under this Part.
- (3) Subsection (2) does not apply if –
  - (a) the condition that the person has failed to comply with was imposed under subsection (3)(a), (b) or (c) of section 6, and
  - (b) the authorised officer considers that the failure is so minor that it should be disregarded for the purposes of this section.
- (4) A notice under subsection (2) is referred to in this Part as a “monitoring notice”.
- (5) A monitoring notice must –
  - (a) state the reasons for the decision under subsection (1) and must, in particular, state which condition the officer has determined that the person has failed to comply with;
  - (b) explain the effect of the monitoring notice and specify the date from which it takes effect;
  - (c) inform the person of the right to appeal under section 11 and of the right to request the withdrawal of the monitoring notice under section 12.
- (6) The date specified under subsection (5)(b) must not be earlier than the date on which the monitoring notice is given.
- (7) A person in relation to whom a monitoring notice has effect is referred to in this Part as a “monitored promoter”.

## **11 Appeal against monitoring notice**

- (1) A person may appeal against a determination under section 10(1) that the person has failed to comply with a condition in a conduct notice (“the monitoring determination”).
- (2) Notice of appeal must be given –
  - (a) in writing to the authorised officer who made the monitoring determination, and
  - (b) within the period of 30 days beginning with the day on which the monitoring notice was given.
- (3) The notice of appeal –
  - (a) must state the grounds of appeal, and
  - (b) may include a statement that in the view of the appellant it was not reasonable to include the condition mentioned in subsection (1) in the conduct notice.
- (4) Subsection (5) and subsection (6) or (as the case requires) (7) apply where an appeal under this section is notified to the tribunal.
- (5) The tribunal may confirm or set aside the monitoring determination.
- (6) If the notice of appeal includes a statement under subsection (3)(b), the tribunal must set aside the determination if it is satisfied that it was not reasonable to include the condition mentioned in subsection (1) in the conduct notice (but see subsection (7)).

- (7) If the notice of appeal includes a statement under subsection (3)(b) and the monitoring determination is a determination that the person has failed to comply with more than one condition in the conduct notice –
  - (a) subsection (6) does not apply, and
  - (b) in making the determination under subsection (5), the tribunal is to assume, in the case of any condition that the tribunal considers it was not reasonable to include in the conduct notice, that the person did not fail to comply with that condition.
- (8) Subject to this section, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to an appeal under this section.

## **12 Withdrawal of monitoring notice**

- (1) A person in relation to whom a monitoring notice has effect may, on or after the date mentioned in subsection (2), request that the notice should cease to have effect.
- (2) That date is the later of –
  - (a) the last day of the period of 13 months beginning with the day on which the monitoring notice takes effect, or
  - (b) in cases where an appeal is made under section 11, the last day of the period of 12 months beginning with the day on which the appeal is finally determined, withdrawn or otherwise disposed of.
- (3) A request under this section is to be made in writing to HMRC.
- (4) Where a request is made under this section, an authorised officer must within 30 days beginning with the day on which the request is received determine either –
  - (a) that the monitoring notice is to cease to have effect, or
  - (b) that the request is to be refused.
- (5) The matters to be taken into account by an authorised officer in making a determination under subsection (4) include –
  - (a) whether or not the person subject to the monitoring notice has, since the notice took effect, engaged in behaviour of a sort that conditions included in a conduct notice in accordance with section 6(3) could be used to regulate;
  - (b) whether or not it appears likely that the person will in the future engage in such behaviour.
- (6) If the authorised officer makes a determination under subsection (4)(a), the officer must also determine that the person is, or is not, to be given a follow-on conduct notice.
- (7) “Follow-on conduct notice” means a conduct notice taking effect immediately after the monitoring notice ceases to have effect.

## **13 Notification of determination under section 12**

- (1) Where an authorised officer makes a determination under section 12(4), that officer, or an officer of Revenue and Customs with that officer’s approval, must notify the person who made the request of the determination.

- (2) If the determination is that the monitoring notice is to cease to have effect, the notice must –
  - (a) specify the date from which the monitoring notice is to cease to have effect, and
  - (b) inform the person of the determination made under section 12(6).
- (3) If the determination is that the request is to be refused, the notice must inform the person who made the request –
  - (a) of the reasons for the refusal, and
  - (b) of the right to appeal under section 14.

#### **14 Appeal against refusal to withdraw monitoring notice**

- (1) A person may appeal against a refusal by an authorised officer of a request that a monitoring notice should cease to have effect.
- (2) Notice of appeal must be given –
  - (a) in writing to the officer who gave the notice of the refusal under section 12, and
  - (b) within the period of 30 days beginning with the day on which notice of the refusal was given.
- (3) The notice of appeal must state the grounds of appeal.
- (4) On an appeal that is notified to the tribunal, the tribunal may –
  - (a) confirm the refusal, or
  - (b) direct that the monitoring notice is to cease to have effect.
- (5) Subject to this section, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to an appeal under this section.

#### **15 Publication by HMRC**

- (1) An authorised officer may publish the fact that a person (“P”) is a monitored promoter.
- (2) Publication under subsection (1) may also include the following information about the monitored promoter –
  - (a) its name (including any trading name, previous name or pseudonym);
  - (b) its business address or registered office;
  - (c) the nature of the business it carries on;
  - (d) any other information that the authorised officer considers it appropriate to publish in order to make clear the monitored promoter’s identity.
- (3) Publication under subsection (1) may also include a statement of which of the conditions in a conduct notice it has been determined that the person has failed to comply with.
- (4) Publication may not take place –
  - (a) before the end of the 30-day period for making an appeal under section 11, or
  - (b) if an appeal is made under section 11, until that appeal has been finally determined, withdrawn or otherwise disposed of.

- (5) If an authorised officer publishes the fact that a person is a monitored promoter and the monitoring notice is withdrawn, the officer must publish the fact of the withdrawal in the same way as the officer published the fact that P was a monitored promoter.
- (6) Publication under this section is to be in such manner as the authorised officer thinks fit; but see subsection (5).

## **16 Publication by promoter**

- (1) A person who is given a monitoring notice (“P”) must give the persons mentioned in subsection (3) a notice stating –
  - (a) that it is a monitored promoter, and
  - (b) which of the conditions in a conduct notice it has been determined that the person has failed to comply with.
- (2) But if P makes an appeal under section 11, subsection (1) does not apply until that appeal is finally determined, withdrawn or otherwise disposed of.
- (3) The persons to whom a notice must be given under subsection (1) are –
  - (a) any person who is the monitored promoter’s client at the time the monitoring notice takes effect, and
  - (b) any person who becomes its client while the monitoring notice has effect.
- (4) Notice under subsection (1) must be given –
  - (a) within the period of 40 days beginning with the day on which the monitoring notice takes effect, or
  - (b) in a case where subsection (2) applies, within the period of 10 days beginning with the day on which the appeal is finally determined, withdrawn or otherwise disposed of.
- (5) But in the case of a person falling within subsection (3)(b), notice under subsection (1) may be given within the period of 10 days beginning with the day on which the person first became a client of the promoter if that period would expire at a later date than whichever is the relevant period under subsection (4).
- (6) Notification under this section is to be in such form and manner as is prescribed.
- (7) Regulations under subsection (6) may require publication on the internet.

### *Allocation and distribution of promoter reference number*

## **17 Monitored promoter to be given reference number**

- (1) Where a monitoring notice is given to a person (“the monitored promoter”) HMRC must (but only after the relevant date) –
  - (a) allocate a reference number to that person, and
  - (b) notify the person of that number.
- (2) “The relevant date” is the later of –
  - (a) the last day of the period of 30 days beginning with the day on which the monitoring notice was given under section 10, and

- (b) in a case where an appeal is made under section 11, the day on which the appeal is finally determined, withdrawn or otherwise disposed of.
- (3) The duty in subsection (1) does not apply if the monitoring notice is set aside following an appeal under section 11.
- (4) A number allocated to a person under this section is referred to in this Part as a “promoter reference number”.

## **18 Duty of monitored promoter to notify clients of number**

- (1) This section applies where a person (“P”) is notified under section 17 of a promoter reference number.
- (2) P must, within 30 days beginning with the day of that notification, notify P’s current clients of the promoter reference number.
- (3) P’s “current clients” are those persons who were clients in relation to P at any time in the period –
  - (a) beginning with the day on which the monitoring notice took effect, and
  - (b) ending with the day on which the notification mentioned in subsection (1) occurred.
- (4) If any other person becomes a client in relation to P during the time when the monitoring notice in relation to P has effect, P must within 30 days of the relevant date notify that person of P’s promoter reference number.
- (5) The “relevant date” is the earliest of the following –
  - (a) the date on which P first makes a firm approach to the person in relation to a relevant proposal,
  - (b) the date on which P makes a relevant proposal available for implementation by the person,
  - (c) the date on which P first becomes aware of the person entering into any transaction forming part of any relevant arrangements in relation to which P is a promoter, or
  - (d) the date on which P first takes part in organising or managing arrangements which are relevant arrangements to which the person is a party.

## **19 Duty to notify others of number**

- (1) In this section “notified person” means a person who is notified of a promoter reference number under section 18.
- (2) A notified person must within 30 days of being notified as described in subsection (1), provide the promoter reference number to any other person who the notified person might reasonably be expected to know is, or is likely to be, at that time a client in relation to the monitored promoter concerned.
- (3) Where the notified person is an intermediary in relation to the monitored promoter concerned, the notified person must also, within 30 days, provide the promoter reference number to any person who, at that time, falls within subsection (4).
- (4) A person falls within this subsection if the person is a client in relation to the notified person by reason of section 4(1)(c) and –

- (a) the relevant proposal concerned is a proposal of the monitored promoter to which the promoter reference number relates, or
- (b) the notified person might reasonably be expected to know that the person has entered into, or is likely to enter into, transactions forming part of relevant arrangements in relation to which that monitored promoter is a promoter.

## **20 Duty of persons to notify the Commissioners**

- (1) If a person (“N”) is notified of a monitored promoter’s promoter reference number under section 18 or 19, N must notify the Commissioners of that number if N expects to obtain a tax advantage from relevant arrangements in relation to which that monitored promoter is the promoter.
- (2) Notification under this section must be made –
  - (a) in each tax return made by N for a period for which the arrangements enable N to obtain a tax advantage, or
  - (b) if no tax return falls within paragraph (a), in such form and manner and containing such information and within such time as is prescribed.
- (3) Where N expects to obtain the tax advantage referred to in subsection (1) in respect of stamp duty land tax, stamp duty reserve tax or petroleum revenue tax, notification under this section in respect of that tax must be in such form and manner and containing such information and within such time as is prescribed.
- (4) In this section “tax return” means any of the following –
  - (a) a return under section 8 of TMA 1970 (income tax and capital gains tax: personal return);
  - (b) a return under section 8A of TMA 1970 (income tax and capital gains tax: trustee’s return);
  - (c) a return under section 12AA of TMA 1970 (income tax and corporation tax: partnership return);
  - (d) a company tax return under paragraph 3 of Schedule 18 to the FA 1998 (company tax return);
  - (e) an account delivered under section 216 of IHTA 1984;
  - (f) a return under section 159 or 160 of FA 2013 (returns and further returns for annual tax on enveloped dwellings).

### *Obtaining information and documents*

## **21 Meaning of “monitored proposal” and “monitored arrangements”**

- (1) For the purposes of this Part a relevant proposal in relation to which a person (“P”) is a promoter is a “monitored proposal” in relation to P if any of the following dates fell on or after the date on which a monitoring notice took effect –
  - (a) the date on which P first made a firm approach to another person in relation to the relevant proposal;
  - (b) the date on which P first made the relevant proposal available for implementation by any other person;
  - (c) the date on which P first became aware of any transaction forming part of the proposed arrangements being entered into by any person.

- (2) For the purposes of this Part relevant arrangements in relation to which a person (“P”) is a promoter are “monitored arrangements” in relation to P if –
- (a) P was by virtue of section 2(3)(b) or (c) a promoter in relation to a relevant proposal which was implemented by the arrangements and any of the following fell on or after the date on which the monitoring notice took effect –
    - (i) the date on which P first made a firm approach to another person in relation to the relevant proposal;
    - (ii) the date on which P first made the relevant proposal available for implementation by any other person;
    - (iii) the date on which P first became aware of any transaction forming part of the proposed arrangements being entered into by any person,
  - (b) the date on which P first took part in designing, organising or managing the arrangements fell on or after the date on which a monitoring notice took effect, or
  - (c) the arrangements enable, or are likely to enable, the person who has entered into transactions forming them to obtain the tax advantage by reason of which they are relevant arrangements, at any time on or after the date on which a monitoring notice took effect.

## **22 Power to obtain information and documents**

- (1) An authorised officer, or an officer of Revenue and Customs with the approval of an authorised officer, may by notice in writing require any person (“P”) to whom this section applies –
- (a) to provide information, or
  - (b) to produce a document,
- if the information or document is reasonably required by the officer for any of the purposes in subsection (3).
- (2) This section applies to –
- (a) any person who is a monitored promoter, and
  - (b) any person who is a relevant intermediary in relation to a monitored proposal of a monitored promoter,
- and in either case that monitored promoter is referred to below as “the relevant monitored promoter”.
- (3) The purposes mentioned in subsection (1) are –
- (a) considering the possible consequences of implementing a monitored proposal of the relevant monitored promoter for the tax position of persons implementing the proposal,
  - (b) checking the tax position of any person who the officer reasonably believes has implemented a monitored proposal of the relevant monitored promoter, or
  - (c) checking the tax position of any person who the officer reasonably believes has implemented monitored arrangements of the relevant monitored promoter.
- (4) A person is a “relevant intermediary” in relation to a monitored proposal if the person meets the conditions in section 3(a) to (c) (meaning of “intermediary”) in relation to the proposal at any time after the person has been notified of a



promoter reference number of a person who is a monitored promoter in relation to the proposal.

- (5) In this section “checking” includes carrying out an investigation or enquiry of any kind.
- (6) In this section “tax position”, in relation to a person, means the person’s position as regards any tax, including the person’s position as regards—
  - (a) past, present and future liability to pay any tax,
  - (b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax,
  - (c) claims, elections, applications and notices that have been or may be made or given in connection with the person’s liability to pay any tax,
  - (d) deductions or repayments of tax, or of sums representing tax, that the person is required to make—
    - (i) under PAYE regulations, or
    - (ii) by or under any other provision of the Taxes Acts, and
  - (e) the withholding by the person of another person’s PAYE income (as defined in section 683 of ITEPA 2003).
- (7) In this section the reference to the tax position of a person—
  - (a) includes the tax position of a company that has ceased to exist and an individual who has died, and
  - (b) is to the person’s tax position at any time or in relation to any period.
- (8) A notice under subsection (1) may specify or describe the information or documents to be provided or produced.
- (9) Information or a document required as a result of a notice under subsection (1) must be provided or produced within—
  - (a) the period of 10 days beginning with the day on which the notice was given, or
  - (b) such longer period as the officer who gives the notice may direct.

## **23 Tribunal approval for certain uses of power under section 22**

- (1) An officer of Revenue and Customs may not, without the approval of the tribunal, give a notice under section 22 that requires a person to provide information or produce a document which relates (in whole or in part) to a person other than the person to whom the notice under that section is given.
- (2) An officer of Revenue and Customs may apply for the approval of the tribunal to give a notice described in subsection (1); and an application for approval may be made without notice.
- (3) The tribunal may approve the giving of the notice only if—
  - (a) the application for approval is made by, or with the agreement of, an authorised officer,
  - (b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,
  - (c) the person to whom the notice is to be given has been informed that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs, and

- (d) the tribunal has been given a summary of any representations made by that person.
- (4) Where a notice is given under section 22 with the approval of the tribunal, it must state that it is given with that approval.
- (5) Paragraphs (c) and (d) of subsection (3) do not apply to the extent that the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax.
- (6) A decision of the tribunal under this section is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).

## **24 Ongoing duty to provide information following HMRC notice**

- (1) An authorised officer, or an officer of Revenue Customs with the approval of an authorised officer, may give a notice to a person (“P”) in relation to whom a monitoring notice has effect.
- (2) A person to whom a notice is given under subsection (1) must provide prescribed information and produce prescribed documents relating to—
  - (a) all the monitored proposals and all the monitored arrangements in relation to which the person is a promoter at the time of the notice, and
  - (b) all the monitored proposals and all the monitored arrangements in relation to which the person becomes a promoter after that time.
- (3) The duty under subsection (2)(b) does not apply in relation to any proposals or arrangements in relation to which the person first becomes a promoter after the monitoring notice ceases to have effect.
- (4) A notice under subsection (1) must specify the time within which information must be provided or a document produced and different times may be specified for different cases.

## **25 Duty of person dealing with monitored promoter outside United Kingdom**

- (1) This section applies where a monitored promoter who is resident outside the United Kingdom has failed to comply with a duty under section 22 or 24 to provide information about a monitored proposal or monitored arrangements.
- (2) An authorised officer, or an officer of Revenue and Customs with the approval of an authorised officer, may give a notice to any person who is an intermediary in relation to the monitored proposal concerned which—
  - (a) specifies or describes the information which the monitored promoter has failed to provide, and
  - (b) requests that the person to whom the notice is given provides the information.
- (3) If there is no person who is an intermediary in relation to the monitored proposal concerned, an authorised officer or an officer of Revenue and Customs with the approval of an authorised officer, may give a notice to any person who has implemented the proposal which—
  - (a) specifies or describes the information which the monitored promoter has failed to provide, and
  - (b) requests that the person to whom the notice is given provides the information.

- (4) If the duty mentioned in subsection (1) relates to monitored arrangements, an authorised officer or an officer of Revenue and Customs with the approval of an authorised officer, may give a notice to any person who has entered into any transaction forming part of the monitored arrangements concerned which—
  - (a) specifies or describes the information which the monitored promoter has failed to provide, and
  - (b) requests that the person to whom the notice is given provides the information.
- (5) A notice under this section may be given only if the officer giving the notice reasonably believes that the person to whom the notice is given is able to provide the information requested.
- (6) Information required as a result of a notice under this section must be provided within—
  - (a) the period of 10 days beginning with the day on which the notice was given, or
  - (b) such longer period as the officer who gives the notice may direct.

## **26 Duty to provide information about clients**

- (1) An authorised officer, or an officer of Revenue Customs with the approval of an authorised officer, may give notice to a person (“P”) in relation to whom a monitoring notice has effect.
- (2) A person to whom a notice is given under subsection (1) must within 30 days of the end of the calendar quarter in which the notice is received, and of each subsequent calendar quarter, give the officer who gave the notice a return containing the information set out in subsection (6) in respect of—
  - (a) in the case of the first return, any person who—
    - (i) is or has been a client of P at any time during the relevant period, or
    - (ii) is a person falling within subsection (4), or
  - (b) in the case of any other return, any person who has become a new client of P in the quarter to which the return relates.
- (3) The duty under subsection (2)(b) does not apply in relation to any calendar quarter that begins after the monitoring notice ceases to have effect.
- (4) A person falls within this subsection if the person has entered into transactions forming relevant arrangements and those arrangements—
  - (a) at any time during the relevant period, enable the person to obtain a tax advantage, and
  - (b) are either relevant arrangements in relation to which P is or was a promoter, or implement a relevant proposal in relation to which P was a promoter.
- (5) In this section, the “relevant period” is the period beginning with the day on which the monitoring notice takes effect and ending immediately before the beginning of the calendar quarter in which the notice was received.
- (6) The information mentioned in subsection (2) is—
  - (a) the person’s name and address, and
  - (b) such other information about the person as may be prescribed.
- (7) Each return must also state—

- (a) the current address of the promoter, and
  - (b) the calendar quarter or other period to which it relates.
- (8) A person becomes a new client of P in a calendar quarter or other period if, during that period—
  - (a) P first becomes aware of the person entering into a transaction forming part of a relevant proposal or relevant arrangements of P, or
  - (b) P notifies the person of P's promoter reference number.
- (9) A return under subsection (2)(b) must include information in relation to a person even if the person has not become a new client in the quarter concerned if the information about that person which was included on a previous return (whether under subsection (2)(a) or (2)(b)) is incomplete or no longer accurate.

## **27 Enquiry following provision of client information**

- (1) This section applies where—
  - (a) a monitored promoter ("P") has made a return under section 26 which contains information about a person ("C") to whom P has provided services in connection with a particular relevant proposal or particular relevant arrangements, and
  - (b) an authorised officer suspects that a person not included in the return—
    - (i) has at any time been, or is likely to be, a party to transactions implementing the proposal, or
    - (ii) is a party to a transaction forming (in whole or in part) particular relevant arrangements.
- (2) The authorised officer may by notice in writing require the monitored promoter to provide prescribed information in relation to any person (not included in the return) whom the monitored promoter might reasonably be expected to know—
  - (a) has been, or is likely to be, a party to transactions implementing the proposal, or
  - (b) is a party to a transaction forming (in whole or in part) the relevant arrangements.
- (3) The monitored promoter must comply with a requirement under subsection (2) within—
  - (a) 10 days of the notice, or
  - (b) such longer period as the authorised officer may direct.

## **28 Information required for monitoring compliance with conduct notice**

- (1) This section applies where a conduct notice has effect in relation to a person ("P").
- (2) An authorised officer, or an officer of Revenue and Customs with the approval of an authorised officer, may (as often as is necessary for the purpose mentioned below) by notice in writing require P—
  - (a) to provide information, or
  - (b) to produce a document,if the information or document is reasonably required for the purpose of monitoring whether and to what extent the person is complying with the conditions in the conduct notice.

## **29 Failure to provide information: application to tribunal**

- (1) This section applies where –
  - (a) a monitored promoter (“P”) has provided information or produced a document in purported compliance with section 22, 24, 25, 26, 27 or 28, but
  - (b) an authorised officer suspects that P has not provided all the information or produced all the documents required under the section concerned.
- (2) The authorised officer, or an officer of Revenue and Customs with the approval of the authorised officer, may apply to the tribunal for an order requiring P to –
  - (a) provide specified information about persons who are its clients for the purposes of the section to which the application relates,
  - (b) provide specified information, or information of a specified description, about a monitored proposal or monitored arrangements,
  - (c) produce specified documents relating to a monitored proposal or monitored arrangements.
- (3) The tribunal may make an order under subsection (2) in respect of information or documents only if satisfied that the officer has reasonable grounds for suspecting that the information or documents –
  - (a) are required under section 22, 24, 25, 26, 27 or 28, (as the case may be), or
  - (b) will support or explain information required by the section concerned.
- (4) A requirement by virtue of subsection (2) is to be treated as part of P’s duty under section 22, 24, 25, 26, 27 or 28 (as the case may be).
- (5) Information or a document required as a result of subsection (3) must be provided, or the document produced, within the period of 10 days beginning with the day on which the order under subsection (3) was made.
- (6) An authorised officer may, by direction, extend the 10 day period mentioned in subsection (5).

## **30 Duty of client to provide information to promoter**

- (1) This section applies where a person has been notified of a promoter reference number under section 18 or 19.
- (2) The person notified (“P”) must within 10 days notify the person whose promoter reference number it is of –
  - (a) P’s national insurance number (if P has one), and
  - (b) P’s unique tax reference number (if P has one).
- (3) If P has neither a national insurance number nor a unique tax reference number P must within 10 days inform the person whose promoter reference number it is of that fact.
- (4) A unique tax reference number is an identification number allocated to a person by HMRC.

*Obtaining information and documents: appeals***31 Appeals against notices imposing information etc requirements**

- (1) This section applies where a person is given a notice under section 22, 24, 25, 26, 27 or 28.
- (2) The person to whom the notice is given may appeal against the notice or any requirement under the notice.
- (3) Subsection (2) does not apply –
  - (a) to a requirement to provide any information or produce any document that forms part of the person's statutory records, or
  - (b) if the tribunal has approved the giving of the notice under section 23.
- (4) For the purposes of this section, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of –
  - (a) the Taxes Acts, or
  - (b) any other enactment relating to a tax.
- (5) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in subsection (4) has expired.
- (6) Notice of appeal must be given –
  - (a) in writing to the officer who gave the notice, and
  - (b) within the period of 30 days beginning with the day on which the notice was given.
- (7) The notice of appeal must state the grounds of the appeal.
- (8) On an appeal that is notified to the tribunal, the tribunal may –
  - (a) confirm the notice or a requirement under the notice,
  - (b) vary the notice or such a requirement, or
  - (c) set aside the notice or such a requirement.
- (9) Where the tribunal confirms or varies the notice or a requirement, the person to whom the notice was given must comply with the notice or requirement –
  - (a) within such period as is specified by the tribunal, or
  - (b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal's decision.
- (10) A decision of the tribunal on an appeal under this section is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).
- (11) Subject to this section, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to an appeal under this section.

*Obtaining information and documents: supplementary*

**32 Form and manner of providing information**

- (1) The Commissioners may specify the form and manner in which information required to be provided or documents required to be produced by sections 22 to 29 must be provided or produced if the provision is to be complied with.
- (2) The Commissioners may specify that a document must be produced for inspection –
  - (a) at a place agreed between the person and an officer of Revenue and Customs, or
  - (b) at such place (not being a place used solely as a dwelling) as an officer of Revenue and Customs may reasonably specify.
- (3) The production of a document in compliance with a notice under this Part is not to be regarded as breaking any lien claimed on the document.

**33 Production of documents: compliance**

- (1) Where the effect of a notice under section 22, 24 or 28 is to require a person to produce a document, the person may comply with the requirement by producing a copy of the document, subject to any conditions or exceptions as may be prescribed.
- (2) Subsection (1) does not apply where –
  - (a) the effect of the notice is to require the person to produce the original document, or
  - (b) an authorised officer, or an officer of Revenue and Customs with the approval of an authorised officer, subsequently makes a request in writing to the person for the original document.
- (3) Where an officer requests a document under subsection (2)(b), the person to whom the request is made must produce the document –
  - (a) within such period, and
  - (b) at such time and by such means (if any),as is reasonably requested by the officer.

**34 Exception for certain documents or information**

- (1) Nothing in this Part requires a person to provide or produce –
  - (a) information that relates to the conduct of a pending appeal relating to tax or any part of a document containing such information,
  - (b) journalistic material (as defined in section 13 of the Police and Criminal Evidence Act 1984) or information contained in such material, or
  - (c) personal records (as defined in section 12 of the Police and Criminal Evidence Act 1984) or information contained in such records (but see subsection (2)).
- (2) But the effect of a notice under this Part may require a person to –
  - (a) produce documents, or copies of documents, that are personal records, omitting any information whose inclusion (whether alone or with other information) makes the original documents personal records (“personal information”), and

- (b) to provide any information contained in such records that is not personal information.

### **35 Limitation on duty to produce documents**

Nothing in this Part requires a person to produce a document –

- (a) which is not in the possession or power of that person, or
- (b) if the whole of the document originates more than 6 years before the requirement to produce it would, if it were not for this section, arise.

### **36 Legal professional privilege**

- (1) Nothing in this Part requires any person to disclose to HMRC any privileged information.
- (2) “Privileged information” means information with respect to which a claim to legal professional privilege by the person who would (ignoring the effect of this section) be required to disclose it, could be maintained in legal proceedings.
- (3) In the case of legal proceedings in Scotland, the reference in subsection (2) to legal professional privilege is to be read as a reference to confidentiality of communications.

### **37 Confidentiality**

- (1) No duty of confidentiality or other restriction on disclosure (however imposed) prevents the disclosure by a relevant person to HMRC of relevant information.
- (2) A “relevant person” is a person who is a client or intermediary in relation to the promoter, proposal or arrangements about which the disclosure relates.
- (3) “Relevant information” is information –
  - (a) about a monitored promoter, or
  - (b) about the relevant proposals or relevant arrangements in relation to which the monitored promoter is a promoter (even if the relevant person is not a client or intermediary in relation to the proposal or arrangements).

### *Supplemental*

### **38 Regulations under this Part**

- (1) Regulations under this Part are to be made by statutory instrument.
- (2) Apart from an instrument to which subsection (3) applies, a statutory instrument containing regulations made under this Part is subject to annulment in pursuance of a resolution of the House of Commons.
- (3) A statutory instrument containing (whether alone or with other provision) regulations made under –
  - (a) section 6(6), or
  - (b) paragraph 13 of Schedule 1,



may not be made unless a draft of the instrument has been laid before and approved by a resolution of the House of Commons.

- (4) Regulations under this Part –
  - (a) may make different provision for different purposes;
  - (b) may include transitional provision and savings.

### **39 Interpretation of this Part**

- (1) In this Part –
  - “arrangements” has the meaning given by section 1(4);
  - “the Commissioners” means the Commissioners for Her Majesty’s Revenue and Customs;
  - “HMRC” means Her Majesty’s Revenue and Customs;
  - “firm approach” has the meaning given by section 2(5);
  - “monitored promoter” has the meaning given by section 10(7);
  - “monitored proposal” and “monitored arrangements” have the meaning given by section 21;
  - “monitoring notice” has the meaning given by section 10(4);
  - “prescribed” means prescribed, or of a description prescribed, in regulations made by the Commissioners;
  - “promoter reference number” has the meaning given by section 17(4);
  - “relevant arrangements” has the meaning given by section 1(2);
  - “relevant proposal” has the meaning given by section 1(1);
  - “tax” means –
    - (a) income tax,
    - (b) capital gains tax,
    - (c) corporation tax,
    - (d) petroleum revenue tax,
    - (e) inheritance tax,
    - (f) stamp duty land tax,
    - (g) stamp duty reserve tax, or
    - (h) annual tax on enveloped dwellings;
  - “tax advantage” has the meaning given by section 1(3);
  - “Taxes Acts” means –
    - (a) TMA 1970,
    - (b) the Tax Acts, and
    - (c) TCGA 1992 and all other enactments relating to capital gains tax;
  - “the tribunal” means the First-tier Tribunal or, where determined by or under the Tribunal Procedure Rules, the Upper Tribunal.
- (2) A reference in a provision of this Part to an authorised officer is to an officer of Revenue and Customs who is, or is a member of a class of officers who are, authorised by the Commissioners for the purposes of that provision.

## EXPLANATORY NOTE

### CLAUSES 1-39: PROMOTERS OF AVOIDANCE SCHEMES

#### SUMMARY

1. These clauses and the related Schedule introduce new legislation applying to certain promoters of tax avoidance schemes. In broad outline, the provisions define promoters of avoidance schemes, identify when they have triggered “threshold” conditions targeting specified behaviours, and provide for a “conduct” notice to be applied to these promoters. Those who fail to comply with a conduct notice may be issued with a “monitoring” notice, which can be appealed. Names of promoters subject to a monitoring notice will be published by HMRC, including details of how the conduct notice was breached, and the promoter will be required to publish its monitored status to clients. Information requirements will apply to monitored promoters, and intermediaries and clients of monitored promoters.

#### DETAILS OF THE CLAUSES

2. Clause 1 is the first of a series of clauses defining terms in the legislation. It deals with the types of schemes - “relevant arrangements” and “relevant proposal” falling within the scope of the provisions. “Relevant arrangements” enable, or might be expected to enable, someone to obtain a tax advantage. Obtaining the tax advantage must be the main benefit or one of the main benefits of entering into the arrangements. “Tax advantage” is defined in subsection (3). “Arrangements” is widely defined to include agreements, schemes, arrangements and understanding, whether or not they are legally enforceable. “Relevant proposal” is a proposal for something which, if entered into, would be relevant arrangements and may relate to a single person or to a number of people.
3. Clause 2 defines “promoter” in similar terms to sections 306 and 308 Finance Act 2004 (Disclosure of Tax Avoidance Schemes), but is not restricted to providers of tax or banking services. A person is a promoter only in respect of relevant proposals and relevant arrangements. Subsections (2) and (3) provide that a person is a promoter in respect of a relevant proposal if, at any time, the person is responsible for the design of the proposed arrangements makes a “firm approach” to someone either with a view to making the proposal available for implementation, or makes the relevant proposal available for implementation by others.
4. Subsection (4) of clause 2 defines a promoter in relation to relevant arrangements as a person who at any time is a promoter for a relevant proposal which becomes the relevant arrangements, or is responsible for the design, organisation or management of the arrangements.

5. Subsection (5) of clause 2 defines “firm approach”. This is concerned with communicating information about the relevant proposal, at a stage when it has been “substantially designed” and includes an explanation of the expected tax advantage, to another person with a view to that person entering into the arrangements.
6. Subsection (6) of clause 2 explains when proposed arrangements have been “substantially designed”. This is when the transactions forming part of the proposed arrangements have been sufficiently developed, so that someone wanting to obtain the tax advantage could enter into those or similar transactions.
7. Clause 3 defines intermediary for the purposes of these provisions. Again, this is concerned with information communicated to someone else with a view to the other person entering into transactions that are part of the proposed arrangements. Anyone who does this is an intermediary unless they are also a promoter. A person who communicates information about a scheme to someone else will only be a promoter under clause 2 (3) (b) where the communication includes an explanation of the tax advantage that the scheme is expected to provide.
8. Clause 4 defines client, a client is the person to whom the promoter or intermediary provides services in connection with a proposal or arrangements. An intermediary can be a client of both a promoter and an intermediary.
9. Clause 5 describes the circumstances under which the Commissioners can issue a conduct notice. A conduct notice can be issued if the promoter has, within the previous three years, triggered a threshold condition, and there is not an extant conduct notice. The threshold conditions are described in the related Schedule. Subsections (2) and (3) allow the Commissioners to ignore insignificant breaches of threshold conditions or cases where little tax is at risk. However a breach of a threshold condition cannot be considered “insignificant” if it is one of those listed in subsection (4).
10. Clause 6 is concerned with the contents of the conduct notice. When a conduct notice is issued the recipient must comply with the conditions specified in the notice (subsection (1)). Subsection (2) allows the potential recipient an opportunity to comment on the proposed terms of the notice. Subsection (3) lists the purposes for which issues can be included as conditions in the conduct notice. Each conduct notice will be tailored to the promoter. For example, if the promoter does not provide sufficient information about its proposals and arrangements to its clients there may be a condition in the conduct notice that it does so. If the promoter requires clients to enter into confidentiality agreements or contribute to a fighting fund while preventing them from settling their cases independently with HMRC, then a condition to address that may be included in the conduct notice.
11. Subsection (4) of clause 6 defines whether or not information provided to clients and intermediaries is adequate. One of the purposes in subsection (3) is ensuring that duties under “specified disclosure provisions” are complied with. Subsection (5) lists these provisions and provides for the list to be amended by regulations – subsection (6).

12. Clause 7 provides definitions of “adequate” and “promote”.
13. If a promoter abides by its conduct notice so that some conditions are no longer required or there is evidence that the underlying reason for the conduct notice has been addressed, clause 8 gives the Commissioners the power to amend or withdraw the conduct notice. Clause 9 provides that the maximum length for a conduct notice is two years.
14. If a promoter fails to comply with a conduct notice then clause 10 allows HMRC to issue a monitoring notice. If the breach of the conduct notice related to the provision of information to customers or intermediaries, or to the promoter’s duty to supply information to HMRC then a monitoring notice need not be issued if the breach is insignificant (subsection (2)). The monitoring notice will state the reasons for its issue, in particular the condition in the conduct notice that the promoter breached. An effect of a monitoring notice is that the promoter may be subject to specific information notices with penalties for non-compliance.
15. Clause 11 contains the appeal right against a monitoring notice. The appeal must be given in writing within thirty days. Subsection (3) allows the monitored promoter to include in its grounds of appeal its view that a condition in the conduct notice was unreasonable. The tribunal can only confirm or set aside the monitoring notice (subsection (5)). If the tribunal decides that a condition is unreasonable subsections (6) and (7) operate so that a monitoring notice cannot be upheld for a breach of *only* that condition. If the monitoring notice identifies a breach of more than one condition of the conduct notice then the monitoring notice can only be set aside if the tribunal holds that all of the conditions are unreasonable (assuming it is accepted that there was a breach on the facts).
16. Clause 12 allows monitored promoters the right to request that the monitoring notice should be withdrawn. For example the promoter may consider that it now satisfies the conditions of the monitoring notice and the preceding conduct notice, so that the monitoring notice is no longer necessary. Subsection (2) ensures that a monitoring notice runs for at least 12 months (where it has not been overturned on appeal). HMRC has 30 days to respond to the request and when considering whether or not to reject the request, the authorised officer must take into account the behaviour of the promoter while it was being monitored (subsection (5)). In addition the authorised officer can, when deciding to withdraw the notice, decide to issue a follow-on conduct notice so that the promoter continues to be subject to some supervision.
17. The notification of the authorised officer’s decision on withdrawal of the monitoring notice is made under clause 13. The authorised officer may decide to accept or reject the request for withdrawal, but if the latter they must give their reasons. A right to appeal against a refusal to withdraw a monitoring notice is in clause 14.
18. Clause 15 allows HMRC to publish the fact that a person is a monitored promoter. Publication can include the promoter’s name, address, the nature of its business and other appropriate information, including the conditions in the conduct notice that the promoter breached. A promoter’s details cannot be published until their appeal rights have been exhausted (subsection (4)).

Additionally if a monitoring notice is withdrawn it is incumbent on HMRC to publish the fact of the withdrawal in the same way.

19. Clause 16 complements clause 15 by requiring a promoter to publish to its clients that it is a monitored promoter and which of the condition in the conduct notice it has breached. The monitored promoter only has to publish this information once its appeal rights are exhausted (subsection (2)). Subsections (4) and (5) give the time limits for providing this information to its clients. Publication will be in a form and manner prescribed in regulations and may include publication on the internet.
20. Once a monitored promoter's appeal rights are exhausted, clause 17 requires HMRC to issue it with a promoter reference number. The promoter reference number will enable HMRC to identify the monitored promoter's clients so that its compliance efforts can be suitably directed. Within thirty days of receipt of the promoter reference number from HMRC, clause 18 requires the promoter to pass on the promoter reference number to its clients. There are two time limits for passing on the promoter reference number depending on whether or not the client is a current client or a new client of the promoter.
21. Clause 19 requires clients of a promoter, within thirty days of receiving the promoter reference number, to pass on the promoter reference number to anyone who they know, or might reasonably be expected to know, is likely to be a client of the monitored promoter. This obligation also applies to intermediaries. This requirement will ensure that as many clients or people likely to be clients are given the promoter reference number.
22. Clause 20 requires the person notified of the promoter reference number to report the number to HMRC if they expect to obtain a tax advantage from the monitored promoter's relevant arrangements. If the person makes a tax return then the promoter reference number should be included on the return. If the person does not make a tax return or the tax advantage arises in respect of stamp duty land tax, stamp duty reserve tax or petroleum revenue tax then the promoter's reference number should be notified to HMRC in the form and manner prescribed in regulations. Notification of the promoter reference number will enable HMRC to track taxpayers who have used the monitored promoter's products and to target their compliance efforts accordingly.
23. Clause 21 defines "monitored proposals" and "monitored arrangements" for the purposes of the information requirements that apply to monitored promoters. Monitored proposals and arrangements are those where certain actions take place after the date that the monitoring notice comes into effect. For example subsection (1) partly defines monitored proposals as proposals for which the promoter makes a firm approach to another person after the date that the monitoring notice took effect. In addition to where the specified actions take place after that date, arrangements may be monitored arrangements where the tax advantage they generate arises on or after the date that the monitoring notice took effect (subsection (2) (c)). These provisions ensure that the promoter only has to provide information on its monitored proposals and arrangements while being monitored and not for any prior period.
24. Clause 22 is the targeted information power for monitored promoters and relevant intermediaries. It is to be operated by, or with the approval of,

authorised HMRC officers only and applies only if the information or documents are requested in writing. The information or documents requested must be reasonably required to meet certain purposes, specified in Subsection (3), which includes considering the tax consequences of implementing a monitored proposal and to check the “tax position” of any person who is reasonably believed to have implemented monitored proposals or monitored arrangements. Only intermediaries who, having been notified of the promoter’s reference number, continue to communicate the promoter’s proposals are subject to the information requirement (subsection (4)). “Tax position” is widely defined in subsections (6) and (7). The time limits for providing the information or documents is a minimum of ten days but may be longer as directed by the officer giving the notice.

25. If an HMRC officer wished to use clause 22 to obtain information which related to a person other than a monitored promoter or their intermediary, clause 23 requires the officer to obtain prior approval of the tribunal. This is similar to paragraph 3 of Schedule 36 to Finance Act 2008.
26. Clause 24 provides for the ongoing duty of the monitored promoter to provide information to HMRC. It takes effect once HMRC has notified the monitored promoter. This enables HMRC to obtain information about all monitored proposals and monitored arrangements that were in existence at the time the monitoring notice comes into effect and throughout the period that the promoter is monitored. Unlike DOTAS, which relies on identifying proposals or arrangements using hallmarks, this power is not limited to specific proposals or arrangements. The time limit for provision of the information and documents is variable and will be specified in the notification from HMRC.
27. If the monitored promoter is offshore and has failed to provide the information required under clauses 22 and 24 about monitored proposals or monitored arrangements then HMRC may approach the intermediary to provide the information clause 25. In the absence of an intermediary then HMRC may require the person who has implemented the monitored proposal or all or part of the monitored arrangements to provide the information. The minimum period for the provision of the information is ten days.
28. Clause 26 is concerned with the provision of information about the clients of the monitored promoter. HMRC may serve a notice under this clause, after which time the monitored promoter has to make returns supplying names and addresses for its clients (as well as other prescribed information) on a quarterly basis. The first return must contain details about current clients, and thereafter there is an on-going duty to file returns with details of clients. The clients are those that have entered into relevant arrangements for which the monitored promoter was the promoter or which implement a relevant proposal of the monitored promoter (subsection (4)). Whether a client is “current” or “new” depends on when the individual first became a client and when the monitoring notice was issued. The information provided by the monitored promoter can be cross-checked against its client’s returns and notifications to HMRC for compliance purposes. Once the HMRC notice has been issued the duty to make returns continues until the promoter is no longer monitored.
29. Clause 27 only applies where a client return has been provided under clause 26 and an authorised officer suspects that a person not included in the return is

party to transactions implementing a proposal or arrangement. In these circumstances the officer can require the monitored promoter to provide prescribed information about that person. This will allow the officer to confirm or dismiss relevant suspicions. The minimum time for the provision of the information is ten days.

30. Clause 28 is the final information requirement on promoters; it applies to promoters who are subject to a conduct notice. The clause allows HMRC to request information or documents that are reasonably required to enable HMRC to monitor the conduct notice. Any information or documents provided under clause 28 may provide evidence to support the amendment or withdrawal of the conduct notice.
31. If a promoter provides information under clauses 22, 24, 25, 26, 27 or 28 but an authorised officer suspects that not all of the information or documents has been provided then clause 29 enables the authorised officer to apply to the tribunal for an order requiring the promoter to provide specified information or documents. The tribunal needs to be satisfied that the authorised officer has reasonable grounds for suspecting that the information or documents are reasonably required or will support or explain information already required.
32. Clause 30 is equivalent to a similar DOTAS provision requiring a client to provide the promoter with their national insurance number and unique taxpayer reference. This will enable the promoter to provide this information to HMRC if required to do so under clause 26 and will assist HMRC in tracking the promoter's clients. Appeal rights against the information notices are provided for in clause 31. The time limit for an appeal is thirty days and the tribunal can confirm or vary the notice or its requirement or set aside the notice.
33. Clauses 32 to 35 are administrative provisions for the information notice clauses 22 to 29. They are equivalent to similar provisions in Schedule 36 Finance Act 2008. Clause 32 allows the Commissioners to specify the form and manner in which information and documents are to be provided. Clause 33 allows the person who has received the notice to provide a copy of a document unless required to provide the original. Clause 34 exempts certain documents from the information notice and clause 35 limits the production of documents to those in the person's possession or power and excludes certain old documents.
34. Clause 37 enables clients and intermediaries to ignore any non-disclosure agreement they have with the monitored promoter if they want to provide information to HMRC. The information can be about the monitored promoter itself or its relevant proposals and relevant arrangements. The information is not restricted to proposals and arrangements that the client or intermediary have used or communicated about; it can be information about other proposals or arrangements of the monitored promoter.
35. Clause 38 allows regulations to be made for the purposes of the legislation. Apart from statutory instruments to make regulations to add new disclosure provisions to section 6 or to make changes to the threshold conditions in the Schedule, which are made under the affirmative procedure, all other regulations are made under the negative procedure. Finally clause 39 provides a number of definitions to support the clauses.

## SCHEDULES

### SCHEDULE 1

Section 5

#### THE THRESHOLD CONDITIONS

##### *Meaning of “threshold condition”*

- 1 Each of the conditions described in paragraphs 2 to 12 is a “threshold condition” (and references in this Part to meeting a threshold condition are to be read accordingly).

##### *Deliberate tax defaulters*

- 2 A person meets this condition if the Commissioners publish information about the person in reliance on section 94 of FA 2009 (publishing details of deliberate tax defaulters).

##### *Breach of the Banking Code of Practice*

- 3 A person meets this condition if the person is named in a report under section [The Code of Practice on Taxation for Banks: HMRC to publish reports] as a result of the Commissioners determining that the person breached the Code of Practice on Taxation for Banks.

##### *Dishonest tax agents*

- 4 A person meets this condition if the person is given a conduct notice under paragraph 4 of Schedule 38 to FA 2012 (tax agents: dishonest conduct) and either –
  - (a) the time period during which a notice of appeal may be given in relation to the notice has expired, or
  - (b) an appeal against the notice has been made and the tribunal has confirmed the determination referred to under sub-paragraph (1) of paragraph 4 of that Schedule.

##### *Non-compliance with Part 7 of FA 2004*

- 5 (1) A person meets this condition if the person fails comply with any of the following provisions of Part 7 of FA 2004 (disclosure of tax avoidance schemes) –
  - (a) section 308(1) and (3) (duty of promoter in relation to notifiable proposals and notifiable arrangements);
  - (b) section 309(1) (duty of person dealing with promoter outside the United Kingdom);
  - (c) section 310 (duty of parties to notifiable arrangements not involving promoter);



- (d) section 313ZA (duty of promoter to provide details of clients).
- (2) The reference in sub-paragraph (1) to failure to comply includes cases where a person had a reasonable excuse for not doing the thing required to be done (despite section 118(2) of TMA 1970).

*Criminal offences*

- 6 (1) A person meets this condition if the person is charged with a relevant offence.
- (2) The fact that a person has been charged with an offence is disregarded for the purposes of this paragraph if –
  - (a) the person has been acquitted of the offence, or
  - (b) the charge has been dismissed or the proceedings have been discontinued.
- (3) An acquittal is not taken into account for the purposes of sub-paragraph (2) if an appeal has been brought against the acquittal and has not yet been disposed of.
- (4) “Relevant offence” means any of the following –
  - (a) an offence at common law of cheating in relation to the public revenue;
  - (b) an offence under section 17(1) of the Theft Act 1968 or section 17 of the Theft Act Northern Ireland) 1969 (c. 16 (NI)) (false accounting);
  - (c) an offence under section 106A of TMA 1970 (fraudulent evasion of income tax);
  - (d) an offence under section 107 of TMA 1970 (false statements: Scotland);
  - (e) an offence under any of the following provisions of CEMA 1979 –
    - (i) section 50(2) (improper importation of goods with intent to defraud or evade duty);
    - (ii) section 170 (fraudulent evasion of duty);
    - (iii) section 170B (taking steps for the fraudulent evasion of duty);
  - (f) an offence under any of the following provisions of VATA 1994 –
    - (i) section 72(1) (being knowingly concerned in the evasion of VAT);
    - (ii) section 72(3) (false statement etc);
    - (iii) section 72(8) (conduct involving commission of other offence under section 72);
  - (g) an offence under section 1 of the Fraud Act 2006 (fraud).

*Opinion notice of GAAR Advisory Panel*

- 7 A person meets this condition if –
  - (a) arrangements in relation to which the person is a promoter are referred to the GAAR Advisory Panel under Schedule 43 to FA 2013,
  - (b) one or more opinion notices are given in relation to the arrangements under paragraph 11(3)(b) of that Schedule (opinion of sub-panel of GAAR Advisory Panel that arrangements not reasonable), and
  - (c) the notice, or the notices taken together, either –

- (i) state the joint opinion of all the members of the sub-panel arranged under paragraph 10 of that Schedule, or
- (ii) state the opinion of two or more members of that sub-panel.

*Disciplinary action by a professional body*

- 8 (1) A person meets this condition if a professional body determines that the person is guilty of misconduct other than misconduct in matters (such as the payment of fees) that relate solely or mainly to the person's relationship with the professional body.
- (2) But a determination is to be disregarded for the purposes of sub-paragraph (1) unless each of the following is prescribed for the purposes of this paragraph –
- (a) the matter to which the misconduct relates;
  - (b) the action taken by the professional body in relation to the conduct;
  - (c) the penalty imposed by the professional body.
- (3) A "professional body" means –
- (a) the Institute of Chartered Accountants in England and Wales;
  - (b) the Institute of Chartered Accountants of Scotland;
  - (c) the Bar Standards Board;
  - (d) the Solicitors Regulation Authority;
  - (e) any other prescribed body with functions relating to the regulation of a trade or profession.

*Disciplinary action by a regulatory authority*

- 9 (1) A person meets this condition if a regulatory authority imposes a relevant sanction on the person.
- (2) A "relevant sanction" is a sanction which is –
- (a) imposed in relation to misconduct other than misconduct in matters (such as the payment of fees) that relate solely or mainly to the person's relationship with the regulatory authority, and
  - (b) prescribed.
- (3) The following are regulatory authorities for the purposes of this paragraph –
- (a) the Financial Conduct Authority;
  - (b) the Financial Services Authority;
  - (c) any other authority that may be prescribed.
- (4) Only authorities that have functions relating to the regulation of financial institutions may be prescribed under sub-paragraph (3)(c).

*Exercise of information powers*

- 10 A person meets this condition if the person fails to comply with an information notice given under any of paragraphs 1, 2, 5 and 5A of Schedule 36 to FA 2008.

*Restrictive contractual terms*

- 11 (1) A person (“P”) meets this condition if P enters into an agreement with another person (“C”) which relates to a relevant proposal or relevant arrangements in relation to which P is a promoter, on terms which –
- (a) impose a contractual obligation on C which falls within sub-paragraph (2) or (3), or
  - (b) impose on C both obligations within sub-paragraph (4) and obligations within sub-paragraph (5).
- (2) A contractual obligation falls within this sub-paragraph if it prevents or restricts the disclosure of information relating to the proposals or arrangements by C to –
- (a) HMRC, or
  - (b) C’s tax advisers,
- whether or not by referring to a wider class of persons.
- (3) A contractual obligation falls within this sub-paragraph if it requires C to impose on any tax adviser to whom C discloses information relating to the proposals or arrangements a contractual obligation which prevents or restricts the disclosure of that information to HMRC by the adviser.
- (4) A contractual obligation falls within this sub-paragraph if it requires C to –
- (a) meet (in whole or in part) the costs of, or contribute to a fund to be used to meet the costs of, any proceedings relating to arrangements in relation to which P is a promoter (whether or not implemented by C), or
  - (b) take out an insurance policy insuring against the risk of having to meet costs connected with proceedings relating to arrangements in relation to which P is a promoter which C has implemented.
- (5) A contractual obligation falls within this paragraph if it requires C to obtain the consent of P before –
- (a) entering into any agreement with HMRC regarding arrangements in relation to which P is a promoter which C has implemented, or
  - (b) withdrawing or discontinuing any appeal against any decision regarding such arrangements.
- (6) In sub-paragraph (5)(b), the reference to withdrawing or discontinuing an appeal includes any action or inaction which results in an appeal being discontinued.
- (7) In this paragraph –
- “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in court), whether commenced or contemplated;
  - “tax adviser” means a person appointed to give advice about the tax affairs of another person (whether appointed directly by that person or by another tax adviser of that person).

*Continuing to promote certain arrangements*

- 12 (1) A person (“P”) meets this condition if P has been given a stop notice and after the end of the notice period P –

- (a) makes a firm approach to another person (“C”) in relation to an affected proposal with a view to making the affected proposal available for implementation by C or another person, or
  - (b) makes an affected proposal available for implementation by other persons.
- (2) “Affected proposal” means a relevant proposal that is in substance the same as the relevant proposal specified in the stop notice in accordance with sub-paragraph (4)(c).
- (3) The Commissioners may give a person (“P”) a notice (a “stop notice”) if each of these conditions is met –
  - (a) a person has been given a failure notice under paragraph 1 of Schedule [*Consequences of failing to take account of relevant judicial rulings*] in relation to particular relevant arrangements;
  - (b) P is a promoter in relation to a relevant proposal that is implemented by those arrangements;
  - (c) 90 days have elapsed since the failure notice was given and –
    - (i) the failure notice has not been withdrawn, and
    - (ii) if representations objecting to the failure notice were made under paragraph 7 of Schedule [*Consequences of failing to take account of relevant judicial rulings*], HMRC have confirmed the failure notice.
- (4) A stop notice must –
  - (a) specify the arrangements which are the subject of the failure notice mentioned in sub-paragraph (3)(a),
  - (b) specify the judicial ruling identified in that failure notice,
  - (c) specify a relevant proposal in relation to which the condition in sub-paragraph (3)(b) is met, and
  - (d) explain the effect of the stop notice.
- (5) The Commissioners may determine that a stop notice given to a person is to cease to have effect.
- (6) If the Commissioners make a determination under sub-paragraph (5) they must give the person written notice of the determination.
- (7) The notice must specify the date from which it takes effect, which may be earlier than the date on which the notice is given.
- (8) In this paragraph –
  - “the notice period” means the period of 30 days beginning with the day on which a stop notice is given;
  - “judicial ruling” means a ruling of a court or tribunal.

#### *Power to amend*

- 13 The Treasury may by regulations –
  - (a) vary or remove any of the conditions set out in paragraphs 2 to 12;
  - (b) add new conditions.

## EXPLANATORY NOTE

### SCHEDULE 1: THE THRESHOLD CONDITIONS

#### SUMMARY

This clause introduces Schedule 1 which sets out the conditions which have to be met before a promoter can be considered for a conduct notice.

#### DETAILS OF THE SCHEDULE

1. If a promoter has met any one of the 11 conditions in Schedule 1 in the last 3 years it is to be considered for a conduct notice.
2. Paragraphs 2 to 12 set out the 11 conditions.
3. Paragraph 2 sets out the first condition which relates to the publication of information about the promoter as a deliberate tax defaulter.
4. Paragraph 3 sets out the second condition which relates to the promoter being named in a report for a breach of the Code of Practice on Taxation for Banks.
5. Paragraph 4 sets out the third condition which relates to the promoter receiving a conduct notice as a dishonest tax agent.
6. Paragraph 5 sets out the fourth condition which is that the person has failed in an obligation either to disclose a tax avoidance scheme or to provide details of clients to HMRC. Sub-paragraph (2) provides that the condition is met even if the person had a reasonable excuse for failing to meet the obligation.
7. Paragraph 6 sets out the fifth condition which that the promoter has been charged with a specified tax offence. Sub-paragraphs (2) and (3) make provision about acquittals and similar matters. Sub-paragraph (4) sets out the offences which are to be taken into account.
8. Paragraph 7 sets out the sixth condition which is that a majority of a sub-panel of the General Anti-Abuse Rule Advisory Panel has given an opinion that entering into one of the promoter's tax avoidance schemes is not a reasonable course of action.
9. Paragraph 8 sets out the seventh condition which is that the promoter has been found guilty of misconduct by a professional body. Sub-paragraph (2) requires HM Revenue & Customs (HMRC) to specify the misconduct and sanctions to which the paragraph applies. Sub-paragraph (3) lists relevant professional bodies and allows HMRC to add to the list.
10. Paragraph 9 sets out the eighth condition which is that a regulatory authority has imposed a sanction on the promoter. Sub-paragraph (2)

requires HMRC to specify the sanctions to which the paragraph applies. Sub-paragraph (3) lists relevant regulatory authorities and allows HMRC to add to the list. Sub-paragraph (4) limits the type of regulatory authority that can be added to the list.

11. Paragraph 10 sets out the ninth condition which is that the promoter has failed to comply with an information notice issued by HMRC.
12. Paragraph 11 sets out the tenth condition which is that the promoter has required a client to keep the details of a tax avoidance scheme confidential or to contribute to a fighting fund. Sub-paragraphs (2) and (3) set out the circumstances in which a person is regarded as having required a client to keep details of a scheme confidential. Sub-paragraph (4) sets out what is meant by requiring a client to contribute to fighting fund and includes requiring a client to take out an insurance policy. Sub-paragraph (5) provides that the condition is only met in respect of a contribution to a fighting fund if the client is also prevented from settling with HMRC without the promoter's permission. Sub-paragraphs (6) and (7) contain definitions.
13. Paragraph 12 sets out the eleventh condition which is that the promoter has continued to market or make available a tax avoidance scheme after being given a notice to stop following a judicial ruling. Sub-paragraph (2) explains which tax avoidance schemes are affected. Sub-paragraph (3) explains when a stop notice may be given. Sub-paragraph (4) sets out what a stop notice must contain. Sub-paragraphs (5) and (6) make provision for the withdrawal of a stop notice. Sub-paragraph (7) makes provision about when a stop notice takes effect. Sub-paragraph (8) gives the meaning of terms used.
14. Paragraph 13 allows HMRC to amend any of the conditions or to add new ones.

## **BACKGROUND NOTE**

15. This legislation is designed to tackle the particular behaviours which have been identified amongst certain promoters of tax avoidance schemes (e.g. failure to comply with DOTAS or respond to HMRC information notices) and in doing so improve the transparency of certain promoters with HMRC with appropriate sanctions of the promoter does not wish to comply voluntarily.
16. The "Raising the Stakes" consultation in summer 2013, made proposals to tackle the behaviour of high-risk promoters. These clauses are the outcome of the consultation and the responses.
17. If you have any questions about this change, or comments on the legislation, please contact Lesley Hamilton on 03000 585670 (email: [lesley.hamilton@hmrc.gsi.gov.uk](mailto:lesley.hamilton@hmrc.gsi.gov.uk)) by 24 February 2014.

**1 Amendment of return to take account of relevant judicial ruling**

Schedule 1 contains provision about the consequences of failing to take account of relevant judicial rulings relating to tax.

## SCHEDULE 1

## Section 1

## CONSEQUENCES OF FAILING TO TAKE ACCOUNT OF RELEVANT JUDICIAL RULINGS

## PART 1

## CONSEQUENCES OF FAILING TO TAKE ACCOUNT OF RELEVANT JUDICIAL RULINGS

*Cases where a failure notice can be given*

- 1 (1) HMRC may give a notice (a “failure notice”) to a person (“P”) if Conditions A to D are met.
  - (2) Condition A is that –
    - (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
    - (b) P has made a tax appeal but that appeal has not yet been determined by the tribunal or court to which it is addressed, or abandoned or otherwise disposed of.
  - (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage (“the asserted advantage”) results from particular tax arrangements (“the applied arrangements”).
  - (4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the applied arrangements.
  - (5) Condition D is that no previous failure notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements and judicial ruling.
  - (6) A failure notice may not be given after the end of the period of 12 months beginning with the later of –
    - (a) the day on which the judicial ruling mentioned in Condition C is made, and
    - (b) the day the return or claim to which sub-paragraph (2)(a) refers was received by HMRC or (as the case may be) the day the tax appeal to which sub-paragraph (2)(b) refers was made.
  - (7) See paragraph 5 for further provision about failure notices.

*“Relevant tax”, “tax advantage” and “tax arrangements”*

- 2 (1) This paragraph applies for the purposes of this Part of this Schedule.
  - (2) “Relevant tax” means –
    - (a) income tax,
    - (b) capital gains tax,
    - (c) corporation tax, including any amount chargeable as if it were corporation tax or treated as if it were corporation tax,
    - (d) inheritance tax,



- (e) stamp duty land tax, and
  - (f) annual tax on enveloped dwellings.
- (3) “Tax advantage” includes –
  - (a) relief or increased relief from tax,
  - (b) repayment or increased repayment of tax,
  - (c) avoidance or reduction of a charge to tax or an assessment to tax,
  - (d) avoidance of a possible assessment to tax,
  - (e) deferral of a payment of tax or advancement of a repayment of tax, and
  - (f) avoidance of an obligation to deduct or account for tax.
- (4) Arrangements are “tax arrangements” if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.
- (5) “Arrangements” includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable).

#### *Tax enquiries, returns and tax appeals*

- 3 (1) This paragraph applies for the purposes of this Part of this Schedule.
- (2) “Tax enquiry” means –
- (a) an enquiry under section 9A or 12AC of TMA 1970 (enquiries into self-assessment returns for income tax and capital gains tax), including an enquiry by virtue of notice being deemed to be given under section 9A of that Act by virtue of section 12AC(6) of that Act,
  - (b) an enquiry under paragraph 5 of Schedule 1A to that Act (enquiry into claims made otherwise than by being included in a return),
  - (c) an enquiry under paragraph 24 of Schedule 18 to FA 1998 (enquiry into company tax return for corporation tax etc), including an enquiry by virtue of notice being deemed to be given under that paragraph by virtue of section 12AC(6) of TMA 1970,
  - (d) an enquiry under paragraph 12 of Schedule 10 to FA 2003 (enquiries into SDLT returns), or
  - (e) an enquiry under paragraph 8 of Schedule 33 to FA 2013 (enquiries into the annual tax for enveloped dwellings returns).
- (3) The period during which an enquiry is in progress is the period –
- (a) beginning with the day on which notice of enquiry is given, and
  - (b) ending with the day on which the enquiry is completed.
- (4) Sub-paragraphs (2) and (3) are subject to sub-paragraph (6).
- (5) In the case of inheritance tax, each of the following is to be treated as a return –
- (a) an account delivered by a person under section 216 or 217 of IHTA 1984 (including an account delivered in accordance with regulations under section 256 of that Act);
  - (b) a statement or declaration which amends or is otherwise connected with such an account produced by the person who delivered the account;

- (c) information or a document provided by a person in accordance with regulations under section 256 of that Act;  
 and such a return is to be treated as made by the person in question.
- (6) There is a tax enquiry in progress in relation to a return to which sub-paragraph (5) applies from the time the account is delivered or (as the case may be) statement, declaration, information or document is produced until such time as the person has been issued with a certificate of discharge under section 239 of that Act in respect of the return (at which point the enquiry is to be treated as completed).
- (7) “Tax appeal” means –
  - (a) an appeal under section 31 of TMA 1970 (income tax: appeals against amendments of self-assessment, amendments made by closure notices under section 28A or 28B of that Act, etc), including any appeal under that section by virtue of regulations under Part 11 of ITEPA 2003 (PAYE),
  - (b) an appeal under paragraph 9 of Schedule 1A to TMA 1970 (income tax: appeals against amendments made by closure notices under paragraph 7(2) of that Act, etc),
  - (c) an appeal under paragraph 34(3) or 48 of Schedule 18 to FA 1998 (corporation tax: appeals against amendment of a company’s return made by closure notice, assessments other than self-assessments, etc),
  - (d) an appeal under paragraph 35 of Schedule 10 to FA 2003 (stamp duty land tax: appeals against amendment of self-assessment, discovery assessments, etc),
  - (e) an appeal under paragraph 35 of Schedule 33 to FA 2013 (annual tax on enveloped dwellings: appeals against amendment of self-assessment, discovery assessments, etc), or
  - (f) a further appeal against any determination of an appeal within paragraphs (a) to (e) or any further appeal within this paragraph.

*“Judicial ruling” and circumstances in which it is “relevant”*

- 4 (1) This paragraph applies for the purposes of this Part of this Schedule.
- (2) “Judicial ruling” means a ruling of a court or tribunal on one or more issues.
- (3) A judicial ruling is “relevant” to the applied arrangements if –
  - (a) it relates to tax arrangements,
  - (b) the principles laid down in the ruling would, if applied to the applied arrangements, deny the asserted advantage, or a part of that advantage, and
  - (c) it is a final ruling.
- (4) A judicial ruling is a “final ruling” if it is –
  - (a) a ruling of the Supreme Court, or
  - (b) a ruling of any other court or tribunal in circumstances where –
    - (i) no appeal may be made against the ruling,
    - (ii) if an appeal may be made against the ruling with permission, the time limit for applications has expired and either no application has been made or permission has been refused,

- (iii) if such permission to appeal against the ruling has been granted or is not required, no appeal has been made within the time limit for appeals, or
  - (iv) if an appeal was made, it was abandoned or otherwise disposed of before it was determined by the court or tribunal to which it was addressed.
- (5) Where a judicial ruling is final by virtue of sub-paragraph (ii), (iii) or (iv) of sub-paragraph (4)(b), the ruling is treated as made at the time when the sub-paragraph in question is first satisfied.

#### *Content of failure notices*

- 5 (1) A failure notice must—
- (a) identify the judicial ruling in respect of which Condition C in paragraph 1 is met,
  - (b) explain why HMRC considers that the ruling meets the requirements of paragraph 4(3), and
  - (c) set out the requirements, and explain the effect, of paragraphs 6 to 9 and 13.
- (2) A failure notice given by virtue of paragraph 1(2)(a) (notice given during an enquiry) must also—
- (a) specify the amount of the accelerated payment for the purposes of paragraph 20 (accelerated payment of disputed tax), and
  - (b) set out the requirements, and explain the effect of, paragraphs 19 to 21.
- (3) “The accelerated payment” means such amount as a designated HMRC officer may determine, to the best of that officer’s information and belief, as the additional amount that would become due and payable in respect of tax on the assumption that—
- (a) the explanation given under sub-paragraph (1)(b) is correct, and
  - (b) the necessary corrective action is taken under paragraph 6(2)(a) in respect of what that officer so determines as the denied advantage.
- (4) A failure notice given by virtue of paragraph 1(2)(b) (notice given pending determination of an appeal), in the case of an initial appeal (rather than a further appeal), must also specify the amount of any charge to tax arising in consequence of—
- (a) the amendment or assessment appealed against, or
  - (b) where the appeal is against a conclusion stated by a closure notice, that conclusion,
- which, in the opinion of HMRC, is required to ensure the counteraction of the denied advantage.
- (5) In this Part of this Schedule “the denied advantage” means the asserted advantage (see paragraph 1(3)), or the part of that advantage, denied by the application of the principles laid down in the relevant judicial ruling.

#### *Effect of giving a failure notice*

- 6 (1) This paragraph applies where P has been given a failure notice and that notice has not been withdrawn.

- (2) P must—
  - (a) take the necessary corrective action in respect of the denied advantage, and
  - (b) give HMRC a notice which—
    - (i) states that P accepts that the judicial ruling is relevant and has taken the necessary corrective action, and
    - (ii) specifies the denied advantage and (where different) the additional amount which has or will become due and payable in respect of tax by reason of the necessary corrective action being taken.
- (3) But if P makes representations to HMRC in accordance with paragraph 7, sub-paragraph (2) ceases to apply until HMRC notifies P that the failure notice has been confirmed (with or without amendment) under that paragraph.
- (4) For the purposes of sub-paragraph (2), P takes the necessary corrective action in respect of the denied advantage if (and only if) —
  - (a) in the case of a failure notice given by virtue of paragraph 1(2)(a), P amends a return or claim before the end of the tax enquiry to counteract the denied advantage;
  - (b) in the case of a failure notice given by virtue of paragraph 1(2)(b), P takes all necessary steps to enter into an agreement with HMRC (in writing) for the purpose of relinquishing the denied advantage.
- (5) For the purposes of determining the additional amount which has or will become due and payable in respect of tax for the purposes of sub-paragraph (2)(b)(ii), in a case where P takes all those necessary steps it is to be assumed the agreement is entered into.
- (6) No enactment which limits the time during which amendments may be made to returns or claims operates to prevent an amendment of a return or claim being made in accordance with this paragraph.
- (7) See paragraph 22 (appeals against final rulings made out of time) for circumstances in which the duty in sub-paragraph (2) is suspended.
- (8) No appeal may be brought, by virtue of a provision mentioned in sub-paragraph (9), against an amendment made by a closure notice in respect of a tax enquiry to the extent that the amendment takes into account an amendment made by P to a return or claim in accordance with this paragraph.
- (9) The provisions are—
  - (a) section 31(1)(b) or (c) of TMA 1970,
  - (b) paragraph 9 of Schedule 1A to TMA 1970,
  - (c) paragraph 30(3) or 34(3) of Schedule 18 to FA 1998,
  - (d) paragraph 35(1)(b) of Schedule 10 to FA 2003, and
  - (e) paragraph 35(1)(b) of Schedule 33 to FA 2013.

*Request for reconsideration by HMRC of a failure notice*

- 7 (1) Where a failure notice is given, P has 90 days beginning with the day the notice is given to send representations to HMRC objecting to the notice on the grounds that—

- (a) Condition A, B or D in paragraph 1 was not met, or
  - (b) the judicial ruling specified in the notice is not one which is relevant to the applied arrangements.
- (2) HMRC must consider any representations made in accordance with sub-paragraph (1).
- (3) Having considered the representations, HMRC must—
  - (a) confirm the failure notice (with or without amendment), or
  - (b) withdraw the failure notice,and notify P.

*Penalty for failure to take the necessary corrective action*

- 8
- (1) This section applies where a failure notice has been given and not withdrawn.
  - (2) P is liable to pay a penalty in the following cases.
  - (3) The first case is where—
    - (a) no representations objecting to the failure notice are made by P in accordance with paragraph 7 during the 90 day post-notice period, and
    - (b) P fails to comply with paragraph 6(2) before the end of that period.
  - (4) The second case is where—
    - (a) P makes representations in accordance with paragraph 7 objecting to the failure notice,
    - (b) the notice is confirmed under that paragraph (with or without amendment), and
    - (c) P fails to comply with paragraph 6(2) before the later of—
      - (i) the end of the 90 day post-notice period, and
      - (ii) the end of the 30 day post-representations period.
  - (5) In this Part of this Schedule—
    - “the 90 day post-notice period” means the period of 90 days beginning with the day on which the failure notice is given;
    - “the 30 day post-representations period” means the period of 30 days beginning with the day on which P is notified of HMRC’s determination under paragraph 7(3).

*The amount of the paragraph 8 penalty*

- 9
- (1) The penalty under paragraph 8 is X% of the value of the denied advantage.
  - (2) Where, before the relevant time, P—
    - (a) amends a return or claim to counteract part of the denied advantage only, or
    - (b) takes all necessary steps to enter into an agreement with HMRC (in writing) for the purposes of relinquishing part of the denied advantage only,in sub-paragraph (1) the reference to the denied advantage is to be read as a reference to the remainder of the denied advantage.
  - (3) “The relevant time” means—

- (a) in a case within paragraph 8(3), the end of the 90 day post-notice period, and
  - (b) in a case within paragraph 8(4), the later of –
    - (i) the end of the 90 day post-notice period, and
    - (ii) the end of the 30 day post-representations period.
- (4) See paragraphs 10 to 13 for provision about the value of the denied advantage for the purposes of calculating penalties under this paragraph.

*Value of denied advantage: normal rule*

- 10 (1) For the purposes of calculating penalties under paragraph 9, the value of the denied advantage is the additional amount due or payable in respect of tax as a result of counteracting the denied advantage.
- (2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to –
- (a) an amount payable to HMRC having erroneously been paid by way of repayment of tax, and
  - (b) an amount which would be repayable by HMRC if the denied advantage were not counteracted.
- (3) The following are ignored in calculating the value of the denied advantage –
- (a) group relief, and
  - (b) any relief under section 458 of CTA 2010 (relief in respect of repayment etc of loan) which is deferred under subsection (5) of that section.
- (4) This paragraph is subject to paragraphs 11 and 12.

*Value of denied advantage: losses*

- 11 (1) To the extent that the denied advantage has the result that a loss is wrongly recorded for purposes of direct tax and the loss has been wholly used to reduce the amount due or payable in respect of tax, the value of the denied advantage is determined in accordance with paragraph 10.
- (2) To the extent that the denied advantage has the result that a loss is wrongly recorded for purposes of direct tax and the loss has not been wholly used to reduce the amount due or payable in respect of tax, the value of the denied advantage is –
- (a) the value under paragraph 10 of so much of the denied advantage as results from the part (if any) of the loss which is used to reduce the amount due or payable in respect of tax, plus
  - (b) 10% of the part of the loss not so used.
- (3) Sub-paragraphs (1) and (2) apply both –
- (a) to a case where no loss would have been recorded but for the denied advantage, and
  - (b) to a case where a loss of a different amount would have been recorded (but in that case sub-paragraphs (1) and (2) apply only to the difference between the amount recorded and the true amount).
- (4) To the extent that a denied advantage creates or increases an aggregate loss recorded for a group of companies –

- (a) the value of the denied advantage is calculated in accordance with this paragraph, and
  - (b) in applying paragraph 10 in accordance with sub-paragraphs (1) and (2), group relief may be taken into account (despite paragraph 10(3)).
- (5) To the extent that the denied advantage results in a loss, the value of it is nil where, because of the nature of the loss or P's circumstances, there is no reasonable prospect of the loss being used to support a claim to reduce a tax liability (of any person).

*Value of denied advantage: delayed tax*

- 12 (1) To the extent that the denied advantage is a deferral of tax, the value of that advantage is –
  - (a) 25% of the amount of the deferred tax for each year of the deferral, or
  - (b) a percentage of the amount of the deferred tax, for each separate period of deferral of less than a year, equating to 25% per year, or, if less, 100% of the amount of the deferred tax.
- (2) This paragraph does not apply to a case to the extent that paragraph 11 applies.

*Reduction of paragraph 8 penalty for co-operation*

- 13 (1) Where –
  - (a) P is liable to pay a penalty under paragraph 8 of the amount specified in paragraph 9(1),
  - (b) the penalty has not yet been assessed, and
  - (c) P has co-operated with HMRC,HMRC may reduce the amount of that penalty to reflect the quality of that co-operation.
- (2) In relation to co-operation, “quality” includes timing, nature and extent.
- (3) In sub-paragraph (1), the reference to P having co-operated with HMRC is to P having done one or more of the following –
  - (a) counteracted the denied advantage;
  - (b) provided HMRC with information enabling corrective action to be taken by HMRC;
  - (c) provided with information enabling HMRC to enter an agreement with P for the purposes of paragraph 6(4);
  - (d) provided reasonable assistance to HMRC in quantifying the tax advantage;
  - (e) allowed HMRC to access tax records for the purpose of ensuring that the denied advantage is fully counteracted.
- (4) But nothing in this paragraph permits HMRC to reduce a penalty to less than Y% of the value of the denied advantage.

*Assessment of penalties*

- 14 (1) Where a person is liable for a penalty under paragraph 8, HMRC may assess the penalty.
- (2) Where HMRC assess the penalty, HMRC must –

- (a) notify the person who is liable for the penalty, and
  - (b) state in the notice a tax period in respect of which the penalty is assessed.
- (3) A penalty under paragraph 8 must be paid before the end of the period of 30 days beginning with the day on which the person is notified of the penalty under sub-paragraph (2).
- (4) An assessment—
  - (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
  - (b) may be enforced as if it were an assessment to tax, and
  - (c) may be combined with an assessment to tax.
- (5) No penalty under paragraph 8 may be notified under sub-paragraph (2) later than—
  - (a) in the case of a failure notice given by virtue of paragraph 1(2)(a) (tax enquiry in progress), the end of the period of 90 days beginning with the day the tax enquiry is completed, and
  - (b) in the case of a failure notice given by virtue of paragraph 1(2)(b) (tax appeal pending), the end of the period of 90 days beginning with the earliest of—
    - (i) the day on which P takes the necessary corrective action in accordance with paragraph 6(2),
    - (ii) the day on which a ruling is made on the appeal, or any further appeal, which is a final ruling (see paragraph 4(4)), and
    - (iii) the day on which the appeal, or any further appeal, is abandoned or otherwise disposed of before it is determined by the court or tribunal to which it is addressed.
- (6) In this paragraph—
  - (a) “tax period” means a tax year, accounting period or other period in respect of which tax is charged, and
  - (b) a reference to an assessment to tax, in relation to inheritance tax, is to a determination.

### *Aggregate penalties*

- 15 (1) This paragraph applies where—
- (a) two or more penalties are incurred by the same person and fall to be determined by reference to an amount of tax with which that person is chargeable,
  - (b) one of those penalties is incurred under paragraph 8, and
  - (c) the remaining penalties are incurred under a relevant penalty provision.
- (2) The aggregate of the amounts of those penalties, so far as determined by reference to that amount of tax, must not exceed—
- (a) the relevant percentage of that amount, or
  - (b) in a case where at least one of the penalties is under paragraph 5(2)(b) or 6(3)(b), (4)(b) or (5)(b) of Schedule 55 to FA 2009, £300 (if greater).



- (3) In the application of section 97A of TMA 1970 (multiple penalties) no account is to be taken of a penalty under paragraph 8.
- (4) “Relevant penalty provision” means –
  - (a) Schedule 24 to FA 2007,
  - (b) Schedule 41 to FA 2008, or
  - (c) Schedule 55 to FA 2009.
- (5) “The relevant percentage” means –
  - (a) 200% in a case where at least one of the penalties is determined by reference to the percentage in –
    - (i) paragraph 4(4)(c) of Schedule 24 to FA 2007,
    - (ii) paragraph 6(4)(a) of Schedule 41 to FA 2008, or
    - (iii) paragraph 6(3A)(c) of Schedule 55 to FA 2009,
  - (b) 150% in a case where paragraph (a) does not apply and at least one of the penalties is determined by reference to the percentage in –
    - (i) paragraph 4(3)(c) of Schedule 24 to FA 2007,
    - (ii) paragraph 6(3)(a) of Schedule 41 to FA 2008, or
    - (iii) paragraph 6(3A)(b) of Schedule 55 to FA 2009,
  - (c) 140% in a case where neither paragraph (a) nor paragraph (b) applies and at least one of the penalties is determined by reference to the percentage in –
    - (i) paragraph 4(4)(b) of Schedule 24 to FA 2007,
    - (ii) paragraph 6(4)(b) of Schedule 41 to FA 2008,
    - (iii) paragraph 6(4A)(c) of Schedule 55 to FA 2009,
  - (d) 105% in a case where none of paragraphs (a), (b) and (c) applies and at least one of the penalties is determined by reference to the percentage in –
    - (i) paragraph 4(3)(b) of Schedule 24 to FA 2007,
    - (ii) paragraph 6(3)(b) of Schedule 41 to FA 2008,
    - (iii) paragraph 6(4A)(b) of Schedule 55 to FA 2009, and
  - (e) in any other case, 100%.
- (6) When determining the relevant percentage under sub-paragraph (5), any reduction of a penalty by HMRC is to be ignored.

#### *Alteration of assessment*

- 16 (1) After the notification of an assessment has been given to a person under paragraph 14(2), the assessment may not be altered except in accordance with this paragraph or on appeal.
- (2) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the value of the denied advantage.
- (3) An assessment or supplementary assessment may be revised as necessary if it operated by reference to an overestimate of the denied advantage; and, where more than the resulting assessed penalty has already been paid by the person to HMRC, the excess must be repaid.

*Appeals against a penalty under paragraph 8*

- 17 (1) P may appeal against a decision of HMRC that a penalty is payable by P under paragraph 8.
- (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P under paragraph 8.
- (3) An appeal under this paragraph must be made within the period of 30 days beginning with the day on which notification of the penalty is given under paragraph 14(2).
- (4) An appeal under this paragraph is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC's review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).
- (5) Sub-paragraph (4) does not apply –
- (a) so as to require a person to pay a penalty before an appeal against the assessment of the penalty is determined, or
  - (b) in respect of any other matter expressly provided for by this Schedule.
- (6) In this paragraph a reference to an assessment to tax, in relation to inheritance tax, is to a determination.
- 18 (1) On an appeal under paragraph 17(1), the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 17(2), the tribunal may –
- (a) affirm HMRC's decision, or
  - (b) substitute for HMRC's decision another decision that HMRC had power to make.
- (3) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 17(4)).

*Representations about HMRC's determination of the amount of disputed tax*

- 19 (1) This paragraph applies where a failure notice has been given and not withdrawn.
- (2) P has 90 days, beginning with the day the notice is given, to send representations to HMRC objecting to the amount specified in the notice under paragraph 5(2)(a) or (4).
- (3) HMRC must consider any representations made in accordance with sub-paragraph (2).
- (4) Having considered the representations, HMRC must –
- (a) confirm the amount specified in the notice, or
  - (b) determine that a different amount ought to have been specified and amend the notice accordingly,
- and notify P.

*Accelerated payment on account where failure notice given and tax unpaid*

- 20 (1) This paragraph applies where a failure notice –
- (a) has been given by virtue of paragraph 1(2)(a) (notice given during an enquiry), and
  - (b) has not been withdrawn,
- (and applies whether or not P is liable to a penalty under paragraph 8).
- (2) P must pay to HMRC the accelerated payment specified in the failure notice under paragraph 5(2)(a).
- (3) The accelerated payment is to be treated as a payment on account of the additional amount of tax which would become due and payable by P on the assumption that –
- (a) the explanation given in the failure notice under paragraph 5(1)(b) is correct, and
  - (b) the necessary corrective action is taken under paragraph 6(2)(a).
- (4) The accelerated payment must be made before –
- (a) the end of the payment period, or
  - (b) if later, the date on which that additional amount in respect of tax would become due and payable.
- (5) “The payment period” means –
- (a) if P made no representations under paragraph 19, the 90 day post-notice period, and
  - (b) if P made such representations, whichever of the following periods ends later –
    - (i) the 90 day post-notice period;
    - (ii) the period of 30 days beginning with the day on which P is notified under paragraph 19 of HMRC’s determination.
- (6) See paragraph 22 (appeals against final rulings made out of time) for circumstances in which the duty in sub-paragraph (2) is suspended.

*Penalty for failure to make accelerated payment on time*

- 21 (1) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.
- (2) If any amount of the accelerated payment is unpaid after the end of the period of 5 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.
- (3) If any amount of the accelerated payment is unpaid after the end of the period of 11 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.
- (4) “The penalty day” means the day immediately following the end of the payment period.
- (5) Paragraphs 9 to 18 (other than paragraph 11(5)) of Schedule 56 to FA 2009 (provisions which apply to penalties for failures to make payments of tax on time) apply, with any necessary modifications, to a penalty under this paragraph in relation a failure by P to pay the accelerated payment as they

apply to a penalty under that Schedule in relation to a failure by a person to pay an amount of tax.

*Appeals against final judicial rulings out of time*

- 22 (1) This paragraph applies where a final judicial ruling is the subject of an appeal by reason of a court or tribunal granting leave to appeal out of time.
- (2) If a failure notice has been given identifying the judicial ruling under paragraph 5(1)(a), the notice is suspended until such time as HMRC notify P that—
  - (a) the appeal has resulted in a judicial ruling which is a final ruling, or
  - (b) the appeal has been abandoned or otherwise disposed of (before it was determined).
- (3) Accordingly the period during which the notice is suspended does not count towards the periods mentioned in paragraph 8(5) or 20(5)(b)(ii).
- (4) When a failure notice is suspended under sub-paragraph (2), HMRC must notify P as soon as reasonably practicable.
- (5) If the final ruling resulting from the appeal is not a judicial ruling which is relevant to the applied arrangements (see paragraph 4(3)), the failure notice ceases to have effect at the end of the period of suspension.
- (6) In any other case, the failure notice continues after the suspension and, in a case within sub-paragraph (2)(a), is treated as if it were in respect of the final ruling resulting from the appeal.
- (7) The notice given under sub-paragraph (2) must—
  - (a) state whether sub-paragraph (5) or (6) applies, and
  - (b) where sub-paragraph (6) applies in a case within sub-paragraph (2)(a), make any amendments to the failure notice required to reflect the new final ruling.
- (8) No new failure notice may be given in respect of the judicial ruling which is the subject of the appeal, unless the appeal has been abandoned or otherwise disposed of before it is determined by the court or tribunal to which it is addressed.
- (9) Nothing in this paragraph prevents a failure notice being given in respect of a new final ruling resulting from the appeal.
- (10) Where the appeal is abandoned or otherwise disposed of as mentioned in sub-paragraph (8), for the purposes of the ruling mentioned in sub-paragraph (1) the period beginning when leave to appeal out of time was granted and ending when the appeal is disposed of does not count towards the period of 12 months mentioned in paragraph 5(1).

*Partnership: introduction*

- 23 (1) Paragraphs 24 to 29 make special provision about partners and partnerships.
- (2) In those paragraphs and this paragraph—
 

“partnership failure notice” means a failure notice given by reason of—

  - (a) a tax enquiry being in progress into a partnership return, or

- (b) an appeal having been made in relation to an amendment of a partnership return or against a conclusion stated by a closure notice in relation to a tax enquiry into a partnership return;

“partnership return” means a return in pursuance of a notice under section 12AA(2) or (3) of TMA 1970;

“the representative partner”, in relation to a partnership return, means the person who was required by a notice served under or for the purposes of section 12AA(2) or (3) of TMA 1970 to deliver the return;

“relevant partner”, in relation to a partnership return, means a person who was a partner in the partnership to which the return relates at any time during the period in respect of which the return was required;

and references to a “successor”, in relation to the representative partner are to be construed in accordance with section 12AA(11) of TMA 1970.

#### *Giving of failure notices in relation to partnership returns*

- 24 (1) If the representative partner in relation to a partnership return is no longer available, for the purposes of paragraph 1 the return, or an appeal in respect of the return, is to be regarded as made by the person who is for the time being the successor of that partner (if that would not otherwise be the case).
- (2) Where, at any time after a partnership failure notice is given to P, P is no longer available, any reference in this Part of this Schedule (other than paragraph 1 and this sub-paragraph) to P is to be read as a reference to the person who is, for the time being, the successor of the representative partner.
- (3) For the purposes of paragraph 1(3) a partnership return, or appeal in respect of a partnership return, is made on the basis that a particular tax advantage results from particular tax arrangements if –
- (a) it is made on the basis that an increase or reduction in one or more of the amounts mentioned in section 12AB(1) of TMA 1970 (amounts in the partnership statement in a partnership return) results from those tax arrangements, and
  - (b) that increase or reduction results in that tax advantage for one or more of the relevant partners.
- (4) For the purposes of Condition D in paragraph 1(5) –
- (a) a notice given to a person in the person’s capacity as the representative partner of a partnership, or a successor of that partner, and a notice given to that person otherwise than in that capacity are not to be treated as given to the same person, and
  - (b) all notices given to the representative partner and successors of that partner, in that capacity, are to be treated as given to the same person.
- (5) In this paragraph references to a person being “no longer available” have the same meaning as in section 12AA(11) of TMA 1970.

#### *Accelerated payments and partnership failure notices*

- 25 (1) Where HMRC give a partnership failure notice, paragraphs 5(2) to (4) and 19 to 21 (which make provision for accelerated payments by P) do not apply in relation to the notice.

- (2) But see paragraph 28 and 29 for provision about partner payment notices and accelerated partner payments in such cases.

*Effect of a partnership failure notice*

- 26 In the application of paragraph 6 in relation to a partnership failure notice –
- (a) references to the denied advantage are to be read as references to the increase or reduction in an amount in the partnership statement mentioned in paragraph 24(2), and
  - (b) in sub-paragraph (2)(b)(ii) the words from “and (where different)” to the end are to be ignored.

*Penalty for failure to take the necessary corrective action: partnership failure notice*

- 27 (1) This paragraph applies in relation to a partnership failure notice.
- (2) Paragraph 8(2) applies as if the reference to P were to each relevant partner.
- (3) Paragraph 9 applies subject to the following modifications –
- (a) the total amount of the penalties under paragraph 8 for which the relevant partners are liable is Z% of the value of the denied advantage,
  - (b) the amount of the penalty for which each relevant partner is liable is that partner’s appropriate share of that total amount, and
  - (c) the value of the denied advantage for the purposes of calculating the total amount of the penalties is –
    - (i) in the case of a notice given under paragraph 1(2)(a), the net amount of the amendments required to be made to the partnership return to counteract the denied advantage, and
    - (ii) in the case of a notice given under paragraph 1(2)(b), the net amount of the amendments that have been made to the partnership return to counteract the denied advantage,
 (and, accordingly, paragraphs 10 to 12 do not apply).
- (4) For the purposes of sub-paragraph (3) a relevant partner’s appropriate share is –
- (a) the same share as the share in which any profits or loss for the period to which the return relates would be apportioned to that partner in accordance with the firm’s profit-sharing arrangements, or
  - (b) if HMRC do not have sufficient information from P to establish that share, such share as is determined for the purposes of this paragraph by an officer of HMRC.
- (5) Where –
- (a) the relevant partners are liable to pay a penalty under paragraph 8 (as modified by this paragraph),
  - (b) the penalties have not yet been assessed, and
  - (c) P has co-operated with HMRC,
- paragraph 13(1) does not apply, but HMRC may reduce the total amount of the penalties determined in accordance with sub-paragraph (3)(a) to reflect the quality of that co-operation.
- Paragraph 13(2) and (3) apply for the purposes of this sub-paragraph.

- (6) Nothing in sub-paragraph (5) permits HMRC to reduce the total amount of the penalties to less than Y% of the value of the denied advantage (as determined in accordance with sub-paragraph (3)(c)).
- (7) For the purposes of paragraph 15, a penalty imposed on a relevant partner by virtue of sub-paragraph (2) is to be treated as if it were determined by reference to such additional amount of tax as is due and payable by the relevant partner as a result of the counteraction of the denied advantage.
- (8) The right of appeal under paragraph 17 extends to –
  - (a) a decision that penalties are payable by the relevant partners by virtue of this paragraph, and
  - (b) a decision as to the total amount of those penalties payable by those partners,but not to a decision as to the appropriate share of, or the amount of a penalty payable by, a relevant partner.
- (9) Paragraph 18(1) applies to an appeal by virtue of sub-paragraph (8)(a), and paragraph 18(2) to an appeal by virtue of sub-paragraph (8)(b).
- (10) An appeal by virtue of sub-paragraph (8) may be brought only by the representative partner or, if that partner is no longer available, the person who is for the time being the successor of that partner.

#### *Partner payment notices*

- 28 (1) Where HMRC give a partnership failure notice, HMRC must, at the same time, give each relevant partner (other than an excluded partner) a notice (a “partner payment notice”).
- (2) The partner payment notice given to a relevant partner must –
  - (a) specify the amount of the accelerated partner payment for the purposes of paragraph 29, and
  - (b) set out the requirements, and explain the effect of, this paragraph and paragraph 29.
- (3) “The accelerated partner payment”, in relation to a relevant partner, means such amount as a designated HMRC officer may determine, to the best of the officer’s information and belief, as the additional amount that would become due and payable by that partner in respect of tax on the assumption that –
  - (a) the explanation given in the partnership failure notice under paragraph 5(1)(b) is correct, and
  - (b) what that officer may so determine as the denied advantage is counteracted to the extent that it is reflected in a return or claim of the partner.
- (4) A partner is “excluded” if the amount of the accelerated partner payment in respect of the partner is nil.
- (5) Paragraph 19 (representations about HMRC’s determination of the amount of disputed tax) applies in relation to an partner payment notice given to a relevant partner as it applies in relation to a failure notice given to P.

*Payment of accelerated partner payments*

- 29 (1) This paragraph applies where an partner payment notice has been given to a relevant partner and not withdrawn.
- (2) The relevant partner must pay to HMRC the accelerated partner payment specified in the notice under paragraph 28(2)(a).
- (3) The accelerated partner payment is to be treated as a payment on account of the additional amount of tax which would become due and payable by the relevant partner on the assumptions mentioned in paragraph 28(3).
- (4) The accelerated partner payment must be made before –
- (a) the end of the payment period, or
  - (b) if later, the date on which that additional amount in respect of tax would become due and payable.
- (5) “The payment period” means –
- (a) if the relevant partner made no representations under paragraph 19 (as applied by paragraph 28(5)), the period of 90 days beginning with the day on which the partner payment notice is given;
  - (b) if the relevant partner made such representations –
    - (i) the period mentioned in paragraph (a), or
    - (ii) the period of 30 days beginning with the day on which the relevant partner is notified under paragraph 19 of HMRC’s determination,
 whichever ends later.
- (6) Paragraph 21 (penalty for failure to make accelerated payment on time) applies to accelerated partner payments as if –
- (a) references in that paragraph to the accelerated payment were to the accelerated partner payment,
  - (b) references to P were to the relevant partner, and
  - (c) “the payment period” had the meaning given in sub-paragraph (5).
- (7) Where a partnership failure notice is suspended under paragraph 22 (appeals against final rulings made out of time) –
- (a) any partner payment notice given in relation to that notice is also suspended and, accordingly, the period during which the notice is suspended does not count towards the periods mentioned in sub-paragraph (5)(a) or (b)(ii), and
  - (b) HMRC must give a copy of any notice given under paragraph 22 to each relevant partner who has been given a partner payment notice.

*Interpretation of Part 1*

- 30 In this Part of this Schedule –
- “the applied arrangements” has the meaning given in paragraph 1(3);
  - “arrangements” is defined in paragraph 2(5);
  - “the asserted advantage” has the meaning given in paragraph 1(3);
  - “the denied advantage” is defined in paragraph 5(5);
  - “designated HMRC officer” means an officer of Revenue and Customs who has been designated by the Commissioners for the purposes of this Part of this Schedule;



“failure notice” has the meaning given in paragraph 1(1);  
“HMRC” means Her Majesty’s Revenue and Customs;  
“judicial ruling” and “relevant”, in relation to a judicial ruling, are defined in paragraph 4;  
“relevant tax” is defined in paragraph 2(2);  
“tax advantage” is defined in paragraph 2(3);  
“tax appeal” is defined in paragraph 3(7);  
“tax arrangements” is defined in paragraph 2(4);  
“tax enquiry” is defined in paragraph 3(2) (but see also paragraph 3(6));  
“P” has the meaning given in paragraph 1(1);  
“the 30 day post-representations period” has the meaning given in paragraph 8(5);  
“the 90 day post-notice period” has the meaning given in paragraph 8(5).

## PART 2

### EXTENSION OF PART 1 TO OTHER TAXES

- 31 (1) The Treasury may by order amend the definition of “relevant tax” in paragraph 1 so as to extend the application of Part 1 of this Schedule to any other tax.
- (2) An order under this paragraph may include –
- (a) consequential and supplemental provision (including amendments of Part 1 of this Schedule or any other enactment whenever passed or made), and
  - (b) transitional and transitory provision and savings.
- (3) The power to make orders under this paragraph is exercisable by statutory instrument.
- (4) An order under this paragraph may only be made if a draft of the instrument containing the order has been laid before and approved by a resolution of the House of Commons.
- (5) In this paragraph “tax” includes duty.

## PART 3

### CONSEQUENTIAL AMENDMENTS

#### *Taxes Management Act 1970*

- 32 TMA 1970 is amended as follows.
- 33 In section 9B (amendment of return by relevant person during enquiry), in subsection (1), after “relevant person” insert “, or Part 1 of Schedule 1 to the Finance Act 2014 (amendment of return following failure notice),”.
- 34 In section 55 (recovery of tax not postponed), after subsection (8A) insert –
- “(8B) Subsections (8C) and (8D) apply where a person has been given a failure notice under Part 1 of Schedule 1 to FA 2014 (consequences of

failing to take account of relevant judicial rulings) and that notice has not been withdrawn.

- (8C) Nothing in this section enables the postponement of the payment of –
- (a) an amount due under paragraph 20 of that Schedule by reason of the failure notice (accelerated payment on account where failure notice given and tax unpaid), or
  - (b) an amount of tax identified in the failure notice in accordance with paragraph 5(4) of that Schedule or, where that notice has been amended under paragraph 19 of that Schedule, the amended notice.
- (8D) Accordingly, if the payment of an amount of tax within subsection (8C)(b) is postponed by virtue of this section, immediately before the failure notice is given, it ceases to be so postponed with effect from the time the failure notice is given, and the tax is due and payable –
- (a) if no representations were made under paragraph 19 of that Schedule in respect of the failure notice, no later than the end of the 90 day post-notice period (within the meaning of Part 1 of that Schedule), and
  - (b) if representations were so made, no later than the end of whichever of the following periods ends later –
    - (i) the 90 day post-notice period;
    - (ii) the period of 30 days beginning with the day on which HMRC’s determination in respect of those representations is notified under paragraph 19 of that Schedule.”

35 In section 56 (payment of tax where there is a further appeal), after subsection (3) insert –

- “(3A) Subsection (3B) applies where –
- (a) a failure notice has been given to a party to the appeal under Schedule 1 to FA 2014 (consequences of failing to take account of relevant judicial rulings) and not withdrawn, and
  - (b) the assessment has effect, or partly has effect, to counteract the whole or part of the asserted advantage (within the meaning of paragraph 1(3) of that Schedule) by reason of which the notice was given.
- (3B) If, on the application of HMRC, the relevant court or tribunal considers it necessary for the protection of the revenue, it may direct that subsection (2) does not apply so far as the tax relates to the counteraction of the asserted advantage, and –
- (a) give permission to withhold all or part of any payment or repayment, or
  - (b) require the provision of adequate security before a payment or repayment is made.
- (3C) “Relevant court or tribunal” means the tribunal or court from which permission or leave to appeal is sought.”

*Finance Act 2003*

- 36 (1) Schedule 10 to FA 2003 (SDLT: returns, enquiries, assessments and appeals) is amended as follows.
- (2) In paragraph 39 (direction by the tribunal to postpone payment) after sub-paragraph (8) insert—
- “(9) Sub-paragraphs (10) and (11) apply where a person has been given a failure notice under Part 1 of Schedule 1 to FA 2014 (consequences of failing to take account of relevant judicial rulings) and that notice has not been withdrawn.
- (10) Nothing in this paragraph enables the postponement of the payment of—
- (a) an amount due under paragraph 20 of that Schedule by reason of the failure notice (accelerated payment on account where failure notice given and tax unpaid), or
- (b) an amount of tax identified in the failure notice in accordance with paragraph 5(4) of that Schedule or, where that notice has been amended under paragraph 19 of that Schedule, the amended notice.
- (11) Accordingly, if the payment of an amount of tax within sub-paragraph (10)(b) is postponed by virtue of this paragraph, immediately before the failure notice is given, it ceases to be so postponed with effect from the time the failure notice is given, and the tax is due and payable—
- (a) if no representations were made under paragraph 19 of that Schedule in respect of the failure notice, no later than the end of the 90 day post-notice period (within the meaning of Part 1 of that Schedule), and
- (b) if representations were so made, no later than the end of whichever of the following periods ends later—
- (i) the 90 day post-notice period;
- (ii) the period of 30 days beginning with the day on which HMRC’s determination in respect of those representations is notified under paragraph 19 of that Schedule.”
- (3) In paragraph 40 (agreement to postpone payment of tax), after sub-paragraph (3) insert—
- “(4) Paragraph 39(9) and (10) applies for the purposes of this paragraph as it applies for the purposes of paragraph 39.”
- (4) In paragraph 43 (payment of stamp duty land tax where there is a further appeal), after sub-paragraph (2) insert—
- “(3) Sub-paragraph (4) applies where—
- (a) a failure notice has been given to a party to the appeal under Schedule 1 to FA 2014 (consequences of failing to take account of relevant judicial rulings) and not withdrawn, and
- (b) the assessment to which the appeal relates has effect, or partly has effect, to counteract the whole or part of the

asserted advantage (within the meaning of paragraph 1(3) of that Schedule) by reason of which the notice was given.

- (3) If, on the application of HMRC, the relevant court or tribunal considers it necessary for the protection of the revenue, it may direct that sub-paragraph (1) does not apply so far as the stamp duty land tax relates to the counteraction of the asserted advantage, and –
- (a) give permission to withhold all or part of any payment or repayment, or
  - (b) require the provision of adequate security before payment or repayment is made.
- (4) “Relevant court or tribunal” means the tribunal or court from which permission or leave to appeal is sought.”

#### *Finance Act 2007*

- 37 In paragraph 12 of Schedule 24 to FA 2007 (penalties for errors: interaction with other penalties), after sub-paragraph (2) insert –
- “(2A) In sub-paragraph (2) “any other penalty” does not include a penalty under Schedule 1 to FA 2014 (penalty for failure to comply with failure notice).”

#### *Finance Act 2008*

- 38 In paragraph 15 of Schedule 41 to FA 2008 (penalties: failure to notify: interaction with other penalties), after sub-paragraph (1) insert –
- “(1A) In sub-paragraph (2) “any other penalty” does not include a penalty under Schedule 1 to FA 2014 (penalty for failure to comply with failure notice).”

#### *Finance Act 2009*

- 39 In paragraph 17 of Schedule 55 to FA 2009 (penalty for failure to make returns etc: interaction with other penalties), in sub-paragraph (2), after paragraph (b) insert “; or
- (c) a penalty under Schedule 1 to FA 2014 (penalty for failure to comply with failure notice).”

#### *Finance Act 2013*

- 40 (1) Schedule 33 to FA 2013 (annual tax on enveloped dwellings: returns, enquiries, assessments and appeals is amended as follows).
- (2) In paragraph 48 (application for payment of tax to be postponed) after sub-paragraph (8) insert –
- “(8A) Sub-paragraphs (10) and (11) apply where a person has been given a failure notice under Part 1 of Schedule 1 to FA 2014 (consequences of failing to take account of relevant judicial rulings) and that notice has not been withdrawn.
- (8B) Nothing in this paragraph enables the postponement of the payment of –

- (a) an amount due under paragraph 20 of that Schedule by reason of the failure notice (accelerated payment on account where failure notice given and tax unpaid), or
  - (b) an amount of tax identified in the failure notice in accordance with paragraph 5(4) of that Schedule or, where that notice has been amended under paragraph 19 of that Schedule, the amended notice.
- (8C) Accordingly, if the payment of an amount of tax within sub-paragraph (8B)(b) is postponed by virtue of this paragraph, immediately before the failure notice is given, it ceases to be so postponed with effect from the time the failure notice is given, and the tax is due and payable –
  - (a) if no representations were made under paragraph 19 of that Schedule in respect of the failure notice, no later than the end of the 90 day post-notice period (within the meaning of Part 1 of that Schedule), and
  - (b) if representations were so made, no later than the end of whichever of the following periods ends later –
    - (i) the 90 day post-notice period;
    - (ii) the period of 30 days beginning with the day on which HMRC’s determination in respect of those representations is notified under paragraph 19 of that Schedule.”
- (3) In paragraph 49 (agreement to postpone payment of tax), after sub-paragraph (3) insert –

“(4) Paragraph 39(9) applies for the purposes of this paragraph as it applies for the purposes of paragraph 39.”
- (4) In paragraph 53 (payment of tax where there is a further appeal), after sub-paragraph (2) insert –

“(3) Sub-paragraph (4) applies where –

  - (a) a failure notice has been given to a party to the appeal under Schedule 1 to FA 2014 (consequences of failing to take account of relevant judicial rulings) and not withdrawn, and
  - (b) the assessment to which the appeal relates has effect, or partly has effect, to counteract the whole or part of the asserted advantage (within the meaning of paragraph 1(3) of that Schedule) by reason of which the notice was given.

(3) If, on the application of HMRC, the relevant court or tribunal considers it necessary for the protection of the revenue, it may direct that sub-paragraph (1) does not apply so far as the tax relates to the counteraction of the asserted advantage, and –

  - (a) give permission to withhold all or part of any payment or repayment, or
  - (b) require the provision of adequate security before payment or repayment is made.

(4) “Relevant court or tribunal” means the tribunal or court from which permission or leave to appeal is sought.”

PART 4

COMMENCEMENT AND TRANSITIONAL PROVISION

- 41 (1) The amendments made by Part 1 of this Schedule have effect in relation to judicial rulings whenever made.
- (2) But, in the case of judicial rulings made before the day on which this Act is passed, Part 1 of this Schedule has effect as if for paragraph 1(6) there were substituted –
- “(5) A failure notice may not be given after –
- (a) the end of the period of 24 months beginning with the day on which this Act is passed, or
- (b) the end of the period of 12 months beginning with the day the return or claim to which sub-paragraph (2)(a) refers was received by HMRC or (as the case may be) the day the tax appeal to which sub-paragraph (2)(b) refers was made, whichever is later.”
- (3) Accordingly, the reference in paragraph 22(10) to the period of 12 months includes a reference to the period of 24 months mentioned in the version of paragraph 1(6) set out in sub-paragraph (2) above.

## EXPLANATORY NOTE

### CLAUSE 1 SCHEDULE 1: CONSEQUENCES OF FAILING TO TAKE ACCOUNT OF RELEVANT JUDICIAL RULINGS

#### SUMMARY

1. Clause 1 and Schedule 1 introduce a new requirement for users of certain tax arrangements to amend their returns to relinquish the asserted tax advantage obtained by applying those arrangements when notified to do so by HM Revenue & Customs (HMRC). HMRC may issue such a notification when those tax arrangements have been shown in a relevant judicial ruling not to give the asserted tax advantage if applied to those tax arrangements. The measure provides for a penalty to be charged on those taxpayers who fail to make the required amendment or to satisfy HMRC that no such amendment is necessary. Taxpayers have a right of appeal against the penalty.

Taxpayers in receipt of a notice to amend their returns will also be notified of a requirement to pay the amount of the tax advantage to HMRC. This amount will only be payable if the taxpayer fails to amend the relevant return and pay the additional tax liability.

The measure applies to Income Tax (IT); Capital Gains Tax (CGT); Corporation Tax (CT); Inheritance Tax (IHT); Stamp Duty Land Tax (SDLT); and the Annual Tax on Enveloped Dwellings (ATED). The clause provides for further taxes to be added to the measure by Treasury Order.

#### DETAILS OF THE SCHEDULE

2. Paragraph 1 defines the conditions which must apply for HMRC to issue a failure notice to a person.
3. Paragraph 1(2) provides the first condition that there is an open tax enquiry into that person's return, or the person has made a tax appeal.
4. Paragraph 1(3) provides the second condition that the return or claim subject to the enquiry or to the appeal is made on the basis that the person obtains a tax advantage from the use of tax arrangements.
5. Paragraph 1(4) provides the third condition that there has been a judicial ruling relevant to the person's return, claim or appeal.
6. Paragraph 1(5) provides the fourth condition, that no previous failure notice has been given to the person in respect of the same tax arrangements and tax advantage, unless it was withdrawn.

#### *Tax Advantage and Tax Arrangements*

7. Paragraph 2(3) defines a tax advantage to include relief from or repayment of tax, avoidance or reduction of a charge or assessment to tax or a tax obligation, and a deferral of payment or an advance of repayment of tax.

### *Tax Returns and Enquiries*

8. Paragraph 3(5) provides that certain defined statements, accounts and documents are to be treated as returns for the purposes of Inheritance Tax (IHT).
9. Paragraph 3(6) states that an IHT tax enquiry is deemed to be in progress from the time an account is delivered or other document produced, until the person is issued with a certificate of discharge.

### *Relevant Judicial Ruling*

10. Paragraph 4(3) provides that a judicial ruling in another party's litigation is relevant to a person if the ruling relates to tax arrangements, the ruling lays down principles which, if applied to those arrangements, deny that advantage or part of it, and it is a final ruling.
11. Paragraph 4(4) defines a ruling as final if it is made by the Supreme Court, or if made by a lower court or tribunal, no appeal is made against it, permission to appeal is refused or if an appeal is made but is abandoned or otherwise disposed of before it was determined.

### *Failure Notices*

12. Paragraph 5(1) provides that a failure notice must identify the judicial ruling on which it is based, explain why HMRC consider it is relevant to the person's tax arrangements, and set out what the person is required to do as a result of the notice.
13. Paragraph 5(2) provides that a failure notice will also notify the taxpayer of the amount of the "accelerated payment" which is due under paragraph 20, and explain the payment due date and the consequences of not making the payment.
14. Paragraph 5(3) provides that the amount of the accelerated payment will be that amount which is properly due, on the assumption that there is a relevant judicial ruling and the taxpayer takes the required corrective action (e.g. in amending the return). In effect it is the amount of additional tax HMRC maintains is due for the return now that the asserted tax advantage has been shown not to accrue as a result of the relevant judicial ruling. This subparagraph also provides that only a "designated" officer is authorised to determine the amount payable.
15. Paragraph 6(2)(a) provides that a person who is issued with a failure notice must take the required action correct the tax position.
16. Paragraph 6(2)(b) provides that the person notify HMRC when he has taken the corrective action and that he accepts the judicial ruling is relevant, and that he must notify HMRC of the amount of the asserted tax advantage and the tax that has now become payable.



17. Paragraph 6(4) defines the action required by the person as amending his return or claim to counter the tax advantage claimed if the failure notice is in respect of an open tax enquiry, or taking all necessary steps to reach agreement with HMRC to relinquish the denied advantage if the failure notice is issued in respect of a tax appeal.
18. Paragraph 6(6) provides that any time limit applied to prevent a taxpayer amending his return or claim is disregarded for the purposes of this measure.
19. Paragraphs 6(8) and (9) provides that a taxpayer may not appeal against a notice closing an enquiry into his return or claim where that notice gives effect to any amendment made by the taxpayer in response to a failure notice.

#### *Request for Reconsideration by HMRC of a Failure Notice*

20. Paragraph 7 provides that a person may make representations to HMRC within 90 days of a failure notice being issued. The person may object to a failure notice either because there is no open tax enquiry or appeal or no tax advantage was obtained by the return or claim; that he has already been given a failure notice in respect of the tax arrangements or tax advantage; or that the judicial ruling is not relevant to his circumstances. HMRC must consider the representations and notify the person that the failure notice is confirmed or amended, or withdrawn.

#### *Penalties for Failure to Comply with Failure Notices*

21. Paragraph 8(3) states that a person becomes liable to a penalty if he fails to comply with a failure notice within 90 days and makes no representations to HMRC.
22. Paragraph 8(4) states that when a person makes representations to HMRC about a failure notice he becomes liable to a penalty if he subsequently fails to comply with a failure notice within 30 days of HMRC amending or confirming it, or if later, within 90 days of the original date of the failure notice.
23. Paragraph 9 provides that if a person becomes liable to a penalty it will be charged at [X%] of the tax advantage claimed, or of that part of it remaining if the person complies in part with the notice before becoming liable to a penalty.

#### *Value of Denied Advantage*

24. Paragraph 10(1) defines the value of denied advantage as the additional amount of tax that would be due or payable if the advantage were counteracted.
25. Paragraph 10(3) excludes group relief and relief in respect of repayment of loans when calculating denied advantage in respect of Corporation Tax.
26. Paragraph 11(2)(b) provides that 10 per cent of any part of a loss not used to reduce the amount of tax due and payable shall be included in the value of denied advantage.

27. Paragraph 11(4) amends the calculation of denied advantage for groups of companies (for corporation tax) where the group has an overall loss, to the extent that a denied advantage results in an understatement of profit in one group company, the denied advantage is calculated in accordance with paragraph 10(1) and (2).
28. Paragraph 11(5) says that where the nature of the loss is, or the person's circumstances are, such that there is no reasonable prospect of the loss being used to reduce a tax liability of any person, there will be no penalty.
29. Paragraph 12 provides that where tax arrangements claim to result in tax being deferred, the denied advantage is calculated at 25% of the tax deferred for each year of deferral, or a proportionately reduced percentage if the deferment is less than a year.

#### *Reductions for Co-operation*

30. Paragraph 13(1) provides that before the penalty has been charged, HMRC may reduce the penalty if the taxpayer co-operates with HMRC to resolve the matter.
31. Paragraph 13(3) sets out the how the taxpayer must act to provide the co-operation required for HMRC to reduce the penalty. The penalty can be reduced if the taxpayer:
- Acts to counter the tax advantage;
  - Provides sufficient information for HMRC to act to counter the tax advantage or to reach agreement with the taxpayer to relinquish the tax advantage;
  - Gives reasonable help to HMRC to quantify the tax advantage; or
  - Gives HMRC access to his records to allow them to ensure the advantage is countered.
32. Paragraph 13(4) sets the minimum rate of penalty at Y%.

#### *Assessment of Penalties*

33. Paragraph 14(2) requires HMRC to notify the taxpayer when a penalty is assessed and that the notice must state the tax period to which the penalty relates.
34. Paragraph 14(5)(a) provides that in the case of a Failure Notice issued in respect of an open tax enquiry, the penalty must be notified no later than 90 days after the enquiry is closed.
35. Paragraph 14(5)(b) provides that in the case of a Failure Notice issued in respect of a pending appeal case, the penalty must be notified no later than 90 days after the taxpayer takes the necessary action to agree his case with HMRC or withdraws his appeal. If the litigation proceeds, the penalty must be issued within 90 days of the final ruling being made.

### *Aggregate Penalties*

36. Paragraph 15(1) sets out that when a taxpayer becomes liable to both a penalty under this regime and also to a penalty calculated by reference to the same tax amount but assessed under different legislation, paragraph 15 will apply.
37. Paragraph 15(2)(a) sets the maximum amount at which penalties may be aggregated.
38. Paragraph 15(2)(b) applies if one of the penalties applying is issued under Schedule 55 to Finance Act 2009 (Penalty for Failure to Make Returns) because a return is more than 6-months or 12-months outstanding. In such cases the maximum amount of penalties aggregated under this section must not exceed the “relevant percentage”, or £300 if greater.
39. Paragraph 15(5) sets the “relevant percentage” applicable in each case by reference to the penalty provision under which the other penalty is imposed reflecting the seriousness of the default and whether the penalty concerns an off-shore matter.

### *Alteration of Assessment*

40. Paragraph 16(2) provides that a supplementary penalty assessment may be issued if the earlier one was based on too low an amount of denied advantage.
41. Paragraph 16(3) provides that penalty assessments and supplementary assessments may be recalculated if they were based on too high an amount of advantage and that HMRC must repay any excess that the taxpayer has already paid.

### *Appeals*

42. Paragraph 17(1) provides that a person may appeal against HMRC’s decision that a penalty is payable.
43. Paragraph 17(2) provides that a person may appeal against the amount of penalty charged.
44. Paragraph 17(5) states that a person is not required to pay a penalty before the appeal against it is determined.
45. Paragraph 18(1) provides that a tribunal may affirm or cancel HMRC’s decision that a penalty is payable.
46. Paragraph 18(2) provides that a tribunal may confirm the amount of the penalty charged, or vary it by changing any decision made by HMRC to any other that HMRC has the power to make.

### *Representations about HMRC’s determination of the amount of disputed tax*

47. Paragraph 19 provides for the taxpayer to make representations about the amount of the accelerated payment or the additional amount of tax due. This includes, for example, circumstances relating to other reliefs and allowances

that might affect the final amount of tax due, to the extent that they have not already been taken into account against other liabilities.

#### *Accelerated payment on account*

- 48. Paragraph 20 provides the rules regarding the payment of the accelerated payment.
- 49. Paragraph 20(3) explains that the accelerated payment is to be treated as a payment on account of the tax liability that will be determined on final resolution of the tax dispute.
- 50. Paragraph 20(4) ensures that the accelerated payment does not become due and payable before the time that the tax liability on which it is based would ordinarily become due and payable.
- 51. Paragraph 20(5) links the 'payment period' to the time limit for the taxpayer to take the necessary corrective action in response to the 'failure notice'.

#### *Penalty for failing to make accelerated payment*

- 52. Paragraph 21 provides for a penalty which will be applied to any part of the accelerated payment that is not received by the due date. The amount of the penalty will reflect the degree to which the payment is late, and is based on the amount remaining unpaid.
- 53. Paragraph 21(6) imports the effect of a number of provisions in Schedule 56 to FA 2009. This includes the rule that where HMRC has agreed a structured 'time to pay' agreement, payment will be regarded as satisfied for the purposes of the late payment penalty, provided that agreement is being met.

#### *Out-of-Time Appeals Against Final Rulings*

- 54. Paragraph 22(2) provides for a failure notice to be suspended if an appeal is accepted by a court out of time in respect of a relevant ruling, until HMRC notifies the taxpayer that the appeal has been abandoned or has reached a final ruling.
- 55. Paragraph 22(3) states that the limits of 90 days, or where appropriate 30 days, for the taxpayer to comply with a failure notice take no account of the period that a notice is suspended. This also applies to the 'payment period' for an accelerated payment.
- 56. Paragraph 22(5) states that if the appeal results in a ruling which no longer applies to the circumstances of the taxpayer in receipt of the failure notice, the notice no longer has effect once the period of suspension is over.
- 57. Paragraph 22(6) provides that if sub-paragraph 22(5) does not apply, a failure notice continues once HMRC notifies the taxpayer that the suspension is over and if relevant that the new judicial ruling is now the final one for the purposes of the notice.

58. Paragraph 22(7)(b) requires HMRC to include in a notice issued under paragraph 22(2) any changes to the final notice needed to take account of a new final ruling.
59. Paragraph 22(8) prevents the issue of further failure notices being issued to other taxpayers in respect of the matter under appeal, unless that appeal is abandoned or otherwise disposed of before it is determined.
60. Paragraph 22(10) provides that when such an appeal is abandoned, the period between when the person was given leave to appeal and the abandonment of the appeal does not count towards the limit of 12 months from the date of the final ruling for HMRC to issue a failure notice.

#### *Special Provision about Partnership Returns*

61. Paragraph 24(3) states that in respect of partnership returns, a tax advantage arises from tax arrangements if the arrangements increase or reduce any of the items required to be included in a partnership return, and result in a tax advantage for at least one of the partners.
62. Paragraph 24(4)(a) provides that any failure notice given to a representative partner or his successor is not treated as a notice given to that person in any other capacity.
63. Paragraph 24(4)(b) provides that a representative partner and his successor are to be treated as the same person in respect of any failure notice given to them in that capacity.
64. Paragraph 25 disapplies certain provisions in the case of partnerships and instead substitutes paragraphs 28 and 29.
65. Paragraph 27(2) provides that a penalty for failing to comply with a failure notice is payable by each relevant partner.
66. Paragraph 27(3)(a) states that the total amount of penalties charged to relevant partners is Z% of the denied advantage.
67. Paragraph 27(3)(b) provides that each partner's share of the total penalty is the appropriate share.
68. Paragraph 27(4) defines the appropriate share as the same as the share of profits or losses apportioned to that partner in the accounting period but if that information is not available to HMRC, any such share as an officer of HMRC may determine.
69. Paragraph 27(5) provides that any reduction to the penalty for co-operation under paragraph 13 is calculated and applied to the total amount of penalties issued to the partners.
70. Paragraph 27(7) provides that for the purposes of applying the maximum sum of aggregated penalties under paragraph 15, a penalty charged to a relevant partner is to be treated as if it were calculated by reference to the amount of tax due from the partner as a result of counteracting the tax advantage.

71. Paragraph 27(8) states that an appeal may be made against a decision that the partners are liable to penalties or against the sum total of those penalties.
72. Paragraphs 28 and 29 apply the accelerated payment provisions to members of a partnership, with necessary modifications. These provisions apply to the partners individually and not to the partnership as a whole, except to the extent that the partner's tax liability results from matters determined at the partnership level.
73. Paragraph 28(4) provides that an 'excluded partner' is a partner who will have no additional tax liability that warrants an accelerated payment, for example, due to their residence status.

## **Part 2**

### *Extension to Other Taxes*

74. Paragraph 31 provides for the Treasury to make an order to add other taxes to the scope of the measure by statutory instrument.

## **Part 3**

### *Consequential amendments*

75. Paragraph 34 provides that in circumstances where a taxpayer has postponed the tax amount which is the subject of an accelerated payment, or might normally expect to be able to do so, that taxpayer will no longer be able to postpone the tax. Thus the position of taxpayers who are subject to a failure notice will be the same, regardless of where they are in the enquiry process.
76. Paragraph 35 provides that, whilst HMRC will normally repay any disputed tax it has received if the taxpayer is successful in litigation at any stage, they will not be obliged to do so if there is reason to think the revenue may be at risk and the matter is being appealed further.
77. Paragraphs 36 and 40 fulfil the same function as paragraphs 34 for the other taxes covered by this legislation.
78. Paragraph 37 disapplies the interaction provision in Schedule 24 to Finance Act 2007, penalties for errors, so that a penalty under that schedule is not reduced by the amount of a penalty charged under this schedule calculated by reference to the same amount of tax..
79. Paragraph 38 \_disapplies the interaction provision in Schedule 41 to Finance Act 2008, penalties for failure to notify and certain VAT and excise wrongdoings, so that a penalty under that schedule is not reduced by the amount of a penalty charged under this schedule calculated by reference to the same amount of tax..
80. Paragraph 39 disapplies the interaction provision in Schedule 55 to Finance Act 2009, penalties for failure to make returns, so that a penalty under that

schedule is not reduced by the amount of a penalty charged under this schedule calculated by reference to the same amount of tax.

## **Part 4**

### *Commencement and Transitional Provision*

81. Paragraph 41(2) provides that where a judicial ruling was made before the date the Act was passed, a failure notice may be issued no later than a date two years from the day the Act was passed or one year from the day the return or claim was submitted or appeal made, if later.

## **BACKGROUND NOTE**

HMRC sometimes have to deal with a large number of taxpayers' returns that claim a tax advantage from the same or similar tax arrangements, or large numbers of appeals against HMRC's conclusion that the arrangements do not work. This measure has been introduced to encourage users of marketed or widely used avoidance schemes to settle their case with HMRC once a Tribunal or court has concluded in another party's litigation that the scheme does not work as asserted.

At the same time it removes the benefit for users of tax avoidance schemes in terms of the time value of money. Given the existence of a judicial precedent, the balance of the argument that the tax is due and payable tips significantly towards the Exchequer, even though the taxpayer continues to dispute the effectiveness of the tax scheme.

If you have any questions about this change, or comments on the legislation, please contact Pete Woodham on 03000 586533 (email:[peter.woodham@hmrc.gsi.gov.uk](mailto:peter.woodham@hmrc.gsi.gov.uk)) or David Edney on 03000 585985 (email:[david.edney@hmrc.gsi.gov.uk](mailto:david.edney@hmrc.gsi.gov.uk)) by 24 February 2014.

## **1 Disclosure of tax avoidance schemes: information powers**

- (1) Part 7 of FA 2004 (disclosure of tax avoidance schemes) is amended as set out in subsections (2) to (4).
- (2) After section 310 insert –

### **“310A Duty to provide further information requested by HMRC**

- (1) This section applies where –
  - (a) a person has provided the prescribed information about notifiable proposals or arrangements in compliance with section 308, 309 or 310, or
  - (b) a person has provided information in purported compliance with section 309 or 310 but HMRC believe that the person has not provided all the prescribed information.
- (2) HMRC may require the person to provide –
  - (a) further specified information about the notifiable proposals or arrangements (in addition to the prescribed information under section 308, 309 or 310);
  - (b) documents relating to the notifiable proposals or arrangements.
- (3) Where HMRC impose a requirement on a person under this section, the person must comply with the requirement within –
  - (a) the period of 10 working days beginning with the day on which HMRC imposed the requirement, or
  - (b) such longer period as HMRC may direct.

### **310B Failure to provide information under section 310A: application to the Tribunal**

- (1) This section applies where HMRC –
  - (a) have required a person to provide information or documents under section 310A, but
  - (b) believe that the person has failed to provide the information or documents required.
- (2) HMRC may apply to the tribunal for an order requiring the person to provide the information or documents required.
- (3) The tribunal may make an order under subsection (2) only if satisfied that HMRC have reasonable grounds for suspecting that the information or documents will assist HMRC in considering the notifiable proposals or arrangements.
- (4) Where the tribunal makes an order under subsection (2), the person must comply with it within –
  - (a) the period of 10 working days beginning with the day on which the tribunal made the order, or
  - (b) such longer period as HMRC may direct.”
- (3) In section 316(2) (meaning of the “information provisions”), after “310,” insert “310A,”.
- (4) In section 318(1) (interpretation of Part 7), at the end insert –

““working day” means a day which is not a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday under the



Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

- (5) Section 98C of TMA 1970 (notification under Part 7 of FA 2004) is amended as set out in subsections (6) to (10).
- (6) In subsection (1)(a)(i), for “or (c)” substitute “, (c) or (ca)”.
- (7) In subsection (2), after paragraph (c) insert –
  - “(ca) section 310A (duty to provide further information requested by HMRC),”.
- (8) In subsection (2ZA), at the end of the table add –

“A failure to comply with section 310A	The first day after the end of the period within which the person must comply with section 310A.”
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- (9) In subsection (2ZB) –
  - (a) in paragraph (a) –
    - (i) for “person’s” substitute “promoter’s”;
    - (ii) after “(3)” insert “or section 310A”;
    - (iii) for “person” substitute “promoter”;
  - (b) in paragraph (b) –
    - (i) before “person’s” insert “relevant”;
    - (ii) for “or 310” substitute “, 310 or 310A”;
    - (iii) before “person” insert “relevant”.
- (10) After subsection (2ZB) insert –
  - “(2ZBA) In subsection (2ZB) –
    - (a) “promoter” has the same meaning as in Part 7 of the Finance Act 2004, and
    - (b) “relevant person” means a person who enters into any transaction forming part of notifiable arrangements within the meaning of that Part.”
- (11) Section 310A of FA 2004 applies to a person who provides the prescribed information about notifiable proposals or arrangements in compliance or purported compliance with section 308, 309 or 310 on or after the day on which this Act is passed.

## **EXPLANATORY NOTE**

### **CLAUSE 1: DISCLOSURE OF TAX AVOIDANCE SCHEMES INFORMATION POWERS**

#### **SUMMARY**

1. This clause gives HM Revenue & Customs (HMRC) further powers to obtain information about tax avoidance schemes.

#### **DETAILS OF THE CLAUSE**

2. Paragraph 2 adds section 310A to Finance Act 2004 (section 310A) which provides that where a person has disclosed a tax avoidance scheme HMRC may require that person to provide documents or more information about the scheme.
3. Paragraph 2 also adds section 310B to Finance Act 2004 (section 310B) which provides that where a person has failed to provide information or documents required under section 310A HMRC may ask the tribunal for an order requiring the information or documents to be provided.
4. Paragraph 3 amends section 316(2) of Finance Act 2004 so that information required under section 310A has to be provided in the form and manner specified by HMRC.
5. Paragraph 4 adds a definition of “working day” to section 318(1) of Finance Act 2004 for the purposes of determining when information or documents have to be provided under section 310A or section 310B.
6. Paragraphs 5 to 10 amend section 98C of Taxes Management Act 1970 to provide for penalties where a person has failed to provide information or documents required under section 310A.
7. Paragraph 11 contains the commencement provisions.

#### **BACKGROUND NOTE**

8. The disclosure of tax avoidance schemes legislation in Part 7 of Finance Act 2004 (Part 7) is designed to give HMRC early warning of tax avoidance schemes, giving it opportunity to consider changes in the law to close loopholes or challenge schemes that it does not believe work.
9. Part 7 requires a person, usually the person who designs and sells a tax avoidance scheme, to disclose details of certain descriptions of schemes to HMRC.

10. Where a disclosure is made the existing information power in section 308A of Finance Act 2004 is limited to obtaining information or documents related to what should have been included in the disclosure.
11. This clause amends Part 7 to enhance the ability of HMRC to obtain information or documents to better understand and analyse the tax effect of a disclosed tax avoidance scheme. It would, for example, enable HMRC to obtain sample copies of the documents used in implementing the scheme and a full analysis of how the scheme achieves the expected tax advantage. It also broadens HMRC's ability to deal with incomplete compliance with a person's disclosure obligations under sections 309 and 310.
12. Following consultation the Government has decided that documents and additional information will not have to be provided in every case, but only when HMRC specifically request them.
13. The legislation also provides for a penalty for failing to comply with the new information power under section 310A of £600 a day, or of up to £1 million if that is considered necessary to deter future failures to comply.
14. If you have any questions about this change, or comments on the legislation, please contact Lesley Hamilton on 03000 585670 (email: [lesley.hamilton@hmrc.gsi.gov.uk](mailto:lesley.hamilton@hmrc.gsi.gov.uk)) by 24 February 2014.