Notice 799: disclosure of tax avoidance schemes for VAT and other indirect taxes

Contents

Foreword

Parts of this notice that explain the form and manner of both disclosure and of the provision of other information have force of law under Finance (No. 2) Act 2017, Schedule 17, paragraph 34. Those parts are placed in a box.

Example:

The following rule has the force of law

You must notify HMRC on form DASVOIT1.

Other notices and guidance on this and related subjects

Notice 700/8 Disclosure of VAT avoidance schemes

Disclosure of Tax Avoidance Schemes (DOTAS)

Serial Tax Avoidance

1. Introduction

1.1 What this notice is about

This notice is about what to do if you promote or use arrangements (including any scheme, transaction or series of transactions) from 1 January 2018 that will or are intended to provide the user with a VAT or other indirect tax advantage when compared to adopting a different course of action. It includes information on:

• what arrangements must be disclosed to HM Revenue and Customs (HMRC) (notifiable proposals and notifiable arrangements)

• who has responsibility to disclose notifiable proposals or arrangements to HMRC (paragraph 3.1)

• deciding if you're a promoter of notifiable proposals or arrangements (paragraph 3.2)

• deciding if you're an introducer of a notifiable proposal (paragraph 3.3)

• what your obligations are as a promoter of notifiable proposals or arrangements

• what your obligations are as an introducer of a notifiable proposal

• what your obligations are as a user of notifiable arrangements including when you have responsibility to disclose the arrangements to HMRC (section 11, paragraphs 3.9.1-3.9.4 and 8.4.1 – 8.4.3)

• how to make a disclosure to HMRC (section 9)

Save for the following paragraph, this guidance doesn't include advice on revoked, repealed or superseded legislation.

1.2 VAT Notice 700/8: disclosure of VAT avoidance schemes

The guidance on the rules for disclosing arrangements relating to VAT set out in VAT Notice 700/8: disclosure of VAT avoidance schemes doesn't apply where those arrangements are notifiable under DASVOIT which is in force from 1 January 2018.

Arrangements or a proposal for arrangements may not be notified under the voluntary registration scheme described in section 9 of VAT Notice 700/8 on or after 1 January 2018.

However, subject to the paragraph above, the guidance in Notice 700/8 continues to apply to arrangements which were entered into before 1 January 2018.

1.3 The indirect taxes covered in this notice

This notice covers the following:

VAT

Insurance Premium Tax

General betting duty

Pool Betting Duty

Remote Gaming Duty

Machine Games Duty

Gaming Duty

Lottery Duty

Bingo Duty

Air Passenger Duty

Hydrocarbon oils duty

Tobacco products duty

Duties on spirits, beer, wine, made-wine and cider

Soft Drinks Industry Levy

Aggregates Levy

Landfill Tax

Climate Change Levy

Customs duties

1.4 The status of this notice

The parts of this notice (detailed in paragraph 1.5.3 below) that specify the form and manner for providing prescribed information have the force of law. This is tertiary legislation and is identified in this notice by text boxed in with a heading 'The following has force of law'.

The remainder of this notice is not a substitute for the relevant legislation. Whilst you can rely on this notice as an accurate explanation of how HMRC will apply the legislation, it doesn't cover every possible issue that may arise.

1.5 The law this notice covers

1.5.1 Primary legislation

Section 66 and Schedule 17 of the Finance (No. 2) Act 2017.

1.5.2 Secondary legislation

The Indirect Taxes (Disclosure of Avoidance Schemes) Regulations 2017 (SI 2017/1215).

The Indirect Taxes (Notifiable Arrangements) Regulations 2017 (SI 2017/1216).

1.5.3 Tertiary legislation

The following requirements have force of law

The information required under the provisions described below must be provided in the following form and manner:

• Finance (No. 2) Act 2017, Schedule 17, paragraphs 11(1) and 12(1)

- form DASVOIT1 (Notification by scheme promoter)

• Finance (No. 2) Act 2017, Schedule 17, paragraph 17(1)

- form DASVOIT2 (Notification by scheme user where promoter is outside the UK)

• Finance (No. 2) Act 2017, Schedule 17, paragraph 18(2)

- form DASVOIT3 (Notification by scheme user where there is no promoter, or the scheme is promoted by a lawyer who is unable to make a full notification)

• Finance (No. 2) Act 2017, Schedule 17, paragraphs 26(1) and (3)(a) and (3)(b)

- form DASVOIT4 (Notification of scheme reference number by scheme user)

• Finance (No. 2) Act 2017, Schedule 17, paragraphs 23(2) and 24(3)

- form DASVOIT5 (Notification of scheme reference number)

When sending the following to HMRC by post, they should be sent to the address at paragraph 1.7:

• form DASVOIT1

• form DASVOIT2

• form DASVOIT3

• form DASVOIT4

• the client list

Warning: The above specified form and manner for providing required information has the force of law and there are penalties for not complying with this. See section 13 for information about penalties.

1.6 Terminology

In this notice:

- ‘arrangements’ includes any scheme, transaction or series of transactions

- ‘DASVOIT’ means the Disclosure of Tax Avoidance Schemes: VAT and Other Indirect Taxes rules

- ‘Indirect taxes’ means the taxes, duties and levies listed at paragraph 1.3

- ‘Hallmarks’ are the descriptions of notifiable arrangements set out in parts 2 and 3 of The Indirect Taxes (Notifiable Arrangements) Regulations 2017

- ‘Notifiable arrangements’ has the same meaning given by paragraph 3(1) of Schedule 17

- ‘Notifiable proposal’ means a proposal for arrangements which, if entered into, would be notifiable arrangements (whether the proposal relates to a particular person or to any person who may seek to take advantage of it

- ‘Schedule 17’ means Schedule 17, Finance Act (No. 2) 2017

- ‘Scheme user’ means a person who used a notifiable proposal or notifiable arrangements

- ‘The Disclosure of Avoidance Schemes Regulations’ means The Indirect Taxes (Disclosure of Avoidance Schemes) Regulations 2017 (SI 2017/1215)

- ‘The Notifiable Arrangements Regulations’ means The Indirect Taxes (Notifiable Arrangements) Regulations 2017 (SI 2017/1216)

- ‘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 UK

1.7 Postal address for disclosures (and other information)

This is the address to use where specified in this notice:

HM Revenue and Customs

DASVOIT disclosures S0483

Newcastle

NE98 1ZZ

1.8 Help and advice

If you're concerned about any arrangement or proposal that is being marketed to you, or you would like to discuss any aspect of the guidance in this notice, you can:

- contact HMRC for VAT

- contact HMRC for other indirect taxes

2. An overview of the disclosure rules

2.1 Objectives

The objectives of the disclosure rules are to obtain:

- early information about indirect tax arrangements and how they work
- information about who may be involved with them

2.2 The effect of disclosure

Disclosure under DASVOIT has no effect on the tax position of any person who uses the arrangements. However, a disclosed arrangement may be challenged by HMRC or may be rendered ineffective by legislative action by Parliament.

2.3 Scope and summary of the disclosure rules

2.3.1 Scope

DASVOIT applies to notifiable arrangements or notifiable proposals relating to the taxes listed at paragraph 1.3.

This includes arrangements that have been implemented and those proposed but not yet implemented.

Under the rules, an arrangement may need to be disclosed even if HMRC is already aware of it or you don't consider it to be avoidance.

2.3.2 Summary

Any arrangements or a proposal for arrangements are notifiable and must be disclosed to HMRC where:

• they enable, or might be expected to enable any person to obtain a tax advantage in relation to indirect taxes (see paragraph 4.2)

• that tax advantage is, or might be expected to be, the main benefit or one of the main benefits (see paragraph 4.3)

• they fall within any description (the 'hallmarks') prescribed in the Notifiable Arrangements Regulations – see paragraphs 4.4 and 4.5 and section 7

In most situations the responsibility for disclosure lies with the promoter of the arrangements. However in some circumstances the user of the arrangements is responsible. See section 3 of this notice for information about who must disclose and section 8 for information about when they must disclose.

Where arrangements produce a tax advantage in more than one indirect tax only one disclosure need be made but it must identify all tax advantages.

Once arrangements have been disclosed, HMRC will normally issue the person who has made the disclosure, and any co-promoters, with a scheme reference number. This number must then be notified to clients and, if appropriate, to further clients until the final user of the arrangements has received it.

The scheme user must report their use of the arrangements to HMRC at the outset and then annually for as long as they use the arrangements. There is more about what to do when you receive a scheme reference number in section 11.

A promoter must also provide HMRC with periodic lists of persons ('clients') to whom they're required to issue a scheme reference number (see section 10).

2.4 Commencement and 'Grandfathering'

The DASVOIT rules are designed so that they don't catch existing arrangements that have already been implemented or are already well-known. This approach is known as 'grandfathering'.

This has been done by excluding from disclosure:

(a) Arrangements where a promoter has made the proposal for those arrangements available to another person before 1 January 2018;

(b) Arrangements where a promoter made the proposal available for implementation by another person before 1 January 2018; and

(c) Arrangements where a promoter becomes aware of any transactions which are part of those arrangements before 1 January 2018.

HMRC will interpret the rules to apply where the arrangements are the same or are substantially the same as those previously made available or implemented.

You should note that the previous VAT disclosure rules continue to apply to arrangements which were first entered into before 1 January 2018, even if the disclosure trigger point under those rules doesn't arise until after that date. Penalties under those rules will also continue to apply to arrangements which should have been disclosed but were not. More information on the VAT disclosure rules before 1 January 2018 are in Notice 700/8.

3. Who should disclose

This section tells you who must disclose a notifiable proposal or arrangements to HMRC. Section 8 of this notice explains when the disclosure must be made and section 9 tells you how to make a disclosure.

3.1 Who has the duty to disclose?

The duty to disclose normally falls on the promoter of the notifiable proposal or arrangements (see paragraph 3.2 for guidance on who is a promoter). However special rules apply when:

• a non-UK based promoter doesn't disclose the arrangements – here the client of the promoter is responsible for disclosure (see paragraph 3.9.1)

• the promoter is a lawyer and legal professional privilege prevents them from providing all or part of the prescribed information to HMRC – here the lawyer's client must disclose the arrangements (see paragraph 3.9.2)

• there is no promoter (for example the arrangements are devised 'in-house' for use within that entity or a corporate group to which it belongs) – here the arrangements must be disclosed by the user of the arrangements (see paragraph 3.9.3)

Warning: Penalties can apply if notifiable proposals or arrangements are not disclosed accurately and at the right time (see section 13).

3.2 Who is a promoter?

A person is a promoter, in relation to a notifiable proposal, if in the course of a 'relevant business' they:

• are to any extent responsible for the design of the proposed arrangements

• make a firm approach to another person with a view to making proposed arrangements available for implementation by that person or others (see paragraph 3.6)

• make proposed arrangements available for implementation by others (see paragraph 3.5)

A person is a promoter in relation to notifiable arrangements, if in the course of a 'relevant business' they:

• are a promoter in relation to a notifiable proposal which is implemented

• are to any extent, responsible for the design, organisation or management of the arrangements

A ‘relevant business’ is:

• a business involving the provision of services relating to tax

• a business carried on by a bank or a securities house

Both UK and non-UK based promoters are subject to the disclosure rules but they only apply to the extent that the arrangements enable or are expected to enable a UK tax advantage to be obtained.

Employees of a promoter are not generally treated as if they’re personally promoters of a notifiable proposal or arrangements promoted by their employer.

However, where there are no other promoters of notifiable arrangements resident in the UK, and a UK resident employee of any of the promoters carries on any of the activities described above, that employee is regarded as a promoter in relation to those arrangements.

As a result, any employee regarded as a promoter in relation to arrangements will be responsible for complying with the obligations that DASVOIT imposes on promoters and will be liable for penalties if those obligations are not complied with.

3.3 Who is an introducer?

An ‘introducer,’ is someone who helps to market arrangements on behalf of a promoter but whose role doesn’t extend to that of a promoter (see paragraph 3.2 above). ‘Introducer’ is defined in paragraph 9 of Schedule 17 as a person who ‘makes a marketing contact’ in relation to a notifiable proposal.

For example, if your accountant makes a marketing contact with you and facilitates an introduction between you and the tax adviser promoting arrangements (whether or not for a fee), they’re an ‘introducer’ for the purposes of these rules. You’ll find further guidance on making a marketing contact in paragraph 3.6.1.

However, if a person who otherwise might be regarded as an introducer is responsible to any extent for organising or managing the implementation of particular arrangements, this might mean they become a promoter in relation to the arrangements and so become subject to the duties of a promoter (see paragraph 3.7).

The disclosure rules don’t impose any automatic reporting obligations on an introducer. However an introducer can be required to provide HMRC with information in response to an information notice from HMRC (see paragraph 12.2.3).

3.4 Scheme designers

A person who is only involved in the design of a notifiable proposal or arrangements, and doesn't make them available for implementation by others or organise or manage them, is not a promoter if any one of the following 3 tests is passed. These are the:

- benign test (see paragraph 3.4.1)
- non-advisor test (see paragraph 3.4.2)
- ignorance test (see paragraph 3.4.3)

3.4.1 The benign test

The benign test applies where, in the course of providing indirect tax advice, the person is not responsible for the design of any element of the arrangement or proposal (including the way in which it is structured).

For example, a promoter may seek advice from an accounting firm on whether 2 companies are 'connected' for any purpose of the VAT Act 1994. Provided the advice goes no further than explaining the interpretation of words used in tax legislation, it would be benign.

On the other hand, if the advice given seeks to highlight opportunities to exploit the relevant provisions then it is not benign advice.

Where the advice recommends some alteration to 'a taxpayer's affairs', then whether the advice is benign will depend on the expected tax outcomes of any transactions entered into as a result of the advice.

3.4.2 The non-adviser test

The non-adviser test applies where a person who, although involved in the design of a notifiable proposal or arrangements, doesn't contribute any tax advice. This test does not apply to a bank or securities house.

This might typically happen where:

• a promoter consults a law firm (which has a business that includes giving tax advice) in relation to company law. - the law firm won't become a promoter as long as it provides no tax advice (other than benign advice) in the course of carrying out its responsibilities

• a promoter asks a solicitor to draw up contracts to support the transactions involved in the arrangements - the solicitor won't become a promoter as long as they provide no tax advice in the course of carrying out their responsibilities

3.4.3 The ignorance test

The ignorance test applies when a person couldn't reasonably be expected to have either:

- sufficient information to enable them to know whether or not the proposal or arrangements are notifiable
- sufficient information so as to enable that person to comply

This test might apply where, for example, a person has insufficient knowledge of the overall arrangements to know whether the 'benign' or 'non-adviser' tests, described in paragraphs 3.4.1 and 3.4.2 above, are failed.

3.5 Who makes a notifiable proposal or arrangements available for implementation by others?

This is one of the criteria relevant to establishing if a person is a 'promoter' in relation to a notifiable proposal or notifiable arrangements (see paragraph 3.2).

A person makes a proposal or arrangements available for implementation if:

- the arrangements are fully designed
- they're capable of implementation in practice
- they communicate information about a proposal or arrangements to others suggesting that they consider entering into transactions forming part of the arrangements

The arrangements will be capable of implementation in practice only when the elements of the design have been put into place 'on the ground'.

Arrangements can be made available by more than one person such as a scheme designer or someone who provides the arrangements under a scheme licensing agreement with the designer. Each such person may be a promoter for disclosure purposes and have obligations as described in this guidance. Paragraph 8.2.2 describes when a co-promoter is exempt from making disclosure. However, co-promoters are not exempt from other obligations, such as providing their client with the relevant scheme reference number (see paragraph 11.2) or providing client lists.

A person who acts solely as an intermediary between a promoter and a potential scheme user is not a promoter. But see paragraph 3.3 for information about 'introducers'.

3.6 Who makes a firm approach to another person with a view to making proposed arrangements available for implementation by that person or others?

There are 3 tests to determine whether or not a person (P) meets this leg of the 'promoter' definition.

3.6.1 The first test – P makes a marketing contact with C

P makes a marketing contact with C if:

- P communicates information about the proposed arrangements to C
- the communication is made with a view to C or any other person entering into transactions forming part of the proposed arrangements
- the information communicated includes an explanation of the tax advantage that might be expected to be obtained from the proposed arrangements

For a marketing contact to be made it is not necessary for the information communicated to explain how the arrangements work.

A person who makes a marketing contact may be either a promoter of the proposed arrangements or merely an introducer; and C may be the potential user, an introducer, or a co-promoter. A person who makes a marketing contact will be a promoter if all 3 of the tests described in paragraph 3.6.1, 3.6.2 and 3.6.4 are met.

A person who makes a marketing contact with a view to introducing clients to another person (the promoter) who will make the arrangements available to them is an introducer. That person won't be a promoter because they will not meet the third test described below at paragraph 3.6.4. An introducer may still be required to provide information to HMRC leading to the identification of the promoter (see paragraphs 3.3 and 12.2.3) or of a potential user of the arrangements.

Example:

A tax adviser makes a presentation at a conference with attendees that may include other tax advisers and corporate tax directors, and the presentation includes a description of arrangements and their tax advantages. The adviser won't be an introducer as they have not made a marketing contact. Whilst they may have met the first and third bulleted points above, they have not met the second point as their communication is not made with a view to another person, or any other person, entering into transactions forming part of the proposed arrangements. However, if the intended result of the presentation is that the set of arrangements will be taken up by those in the audience, then all the 3 bulleted points above would be met. There would be a marketing contact.

3.6.2 The second test – the proposed arrangements are substantially designed

Proposed arrangements are substantially designed at any time if the nature of the transactions to form part of the arrangements have been sufficiently developed so that it would be reasonable to believe that a person who wishes to obtain the tax advantage communicated might enter into either:

- transactions of the nature developed
- transactions not substantially different from those developed at the time

3.6.3 In determining if the tests are met certain factors are not relevant

It doesn't matter whether:

- the detailed design is communicated to potential clients
- the arrangements are eventually implemented in that form
- potential clients choose not to enter the arrangements for reasons unconnected with the design.
- the arrangements are capable of being implemented in practice (see paragraph 3.5) at this time

3.6.4 The third test – does P make, or intend to make the proposed arrangements available for implementation, by clients, or any other persons?

The test can be met where for example, a person makes a marketing contact with a view to obtaining clients who will buy the proposed arrangements from them.

A person who is simply an introducer won't meet this test and will not be a promoter because an introducer solicits clients for another person (the promoter).

3.7 Organisers and managers

A person who organises or manages notifiable arrangements in the course of a relevant business (see paragraph 3.2 above) is regarded as a promoter whether or not they designed or made the arrangements available for implementation, even if they're not connected with a person that has marketed or designed the arrangements or similar arrangements or made such arrangements available.

They will often be co-promoters of the arrangements with the person or persons who designed, marketed or made them available (see paragraph 8.2.2). The person organising or managing the arrangements is responsible for complying with the obligations that DASVOIT imposes on promoters, including co-promoters, and so may be liable for penalties if those obligations are not complied with.

3.8 Corporate groups

A group company that provides tax services to other companies within the same group is not a promoter. This ensures that arrangements devised within a group for its own use are disclosed in the same way as those devised by a single company 'in-house' for its own use – see paragraph 3.9.3

For these purposes a company is a group company as defined by section 170 of the Taxation of Chargeable Gains Act 1992 (TGCA) modified by paragraph 8(7) of Schedule 17. That modification is firstly that where section 170 of TGCA refers to a 75% subsidiary a figure of 51% must be substituted. Secondly subsections (3)(b) and subsections (6) to (8) of TGCA 1992 must be ignored.

3.9 Circumstances where a user of notifiable arrangements has a duty to disclose

3.9.1 Notifiable arrangements marketed by promoters outside the UK

If you're a client of a non-UK promoter and you're a user of notifiable arrangements, for which the promoter has not let you know the reference number allocated to it by HMRC, you'll be required to disclose the arrangements yourself unless there:

• is a non-UK promoter which has one or more employees who are a resident in the UK and are performing any of the activities of a promoter (see paragraph 3.2)

• are one or more other persons in the UK who come within the meaning of a promoter, for example a financial adviser who is responsible to any extent for the organisation or management of the arrangements (see paragraph 3.7)

In that case they're required to disclose the arrangements marketed or designed or made available by the non-UK promoter. A non-UK promoter who has disclosed arrangements under DASVOIT must provide their clients with the 8-digit reference number issued by HMRC. This obligation falls onto any person in the UK who is a promoter in relation to the arrangements.

Paragraph 8.4.1 gives details about the time when a user who carries a duty to disclose in these circumstances must make their disclosure.

3.9.2 Notifiable arrangements promoted by lawyers

Where a lawyer who would ordinarily be a promoter is prevented by reason of legal professional privilege from providing any of the information needed to make a full disclosure, that lawyer has no obligation to make a disclosure. Unless there is another promoter who has an obligation to disclose the arrangements, it must be disclosed by any person in the UK who enters into any transaction forming part of it.

If the client of the lawyer waives any right to legal professional privilege, the lawyer is required to disclose.

Any waiver must be made within sufficient time to enable the lawyer to disclose within 30 days of the relevant date set out in paragraph 8.2.1. Otherwise the client must make the disclosure within 5 working days starting after the day the first transaction forming part of the notifiable arrangements is entered into (see paragraph 8.4.2)

Where a lawyer is 'marketing' proposed arrangements, as described at paragraph 3.6, the lawyer can't assert legal professional privilege. This means that such marketing is subject to the disclosure obligation and the lawyer should disclose the proposed arrangements (providing the other conditions are met) in the normal way.

Paragraph 8.4.2 gives details about the time when a user who carries a duty to disclose in these circumstances must make their disclosure.

3.9.3 Arrangements with no promoter, including 'in-house' arrangements

Where there is no person who is a 'promoter' in respect of notifiable arrangements, it must be disclosed by any person in the UK who enters into any transaction forming part of those arrangements. These rules apply to any individual, partnership, trust or company.

For notifiable arrangements with no promoter, disclosure only applies to arrangements that have been implemented.

Paragraph 8.6 gives details about the time when a user who carries a duty to disclose in these circumstances must make their disclosure.

3.9.4 Further assistance

If you're a user of such arrangements and are unsure whether these rules apply to you can contact HMRC for advice – see paragraph 1.8.

3.10 Overriding any duty of confidentiality

No duty of confidentiality or other restrictions on disclosure imposed by a promoter or by any other person prevents any person from voluntarily disclosing information or documents to HMRC if they have reasonable grounds for

suspecting the information or documents will help HMRC determine whether any person has not complied with their obligations under DASVOIT.

4. Notifiable arrangements - general

Any arrangements or a proposal for arrangements are notifiable and must be disclosed to HMRC where all the following criteria are met:

• they will, or might be expected to, enable any person to obtain a tax advantage (see paragraph 4.2)

• that tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangements (see paragraph 4.3)

• they're arrangements that fall within any description (the 'hallmarks') prescribed in the Notifiable Arrangements Regulations (see paragraphs 4.4 and 4.5 and section 7)

The tests explained below are used to determine whether these criteria are met.

4.1 The tests

The following paragraphs set out 5 tests that apply across all indirect taxes to determine if there are arrangements that should be notified to HMRC (subject to any grandfathering as explained in paragraph 2.4).

4.2 Test 1: Are there arrangements that enable an indirect tax advantage to be obtained?

4.2.1 Meaning of 'arrangements'

'Arrangements' includes any scheme, transaction or series of transactions.

4.2.2 Meaning of 'tax advantage'

There are different meanings of 'tax advantage' for VAT and for other indirect taxes that take into account the way the different indirect taxes work. These are described in paragraphs 5.1 (VAT) and 6.1 (other indirect taxes) below.

'Tax' includes any tax, duty or levy listed in paragraph 1.3 above.

4.3 Test 2: Is the tax advantage a main benefit of the arrangements?

The tax advantage is one of the main benefits of the arrangements if it is a significant or important element of the benefits and not incidental or insubstantial.

The following general points can be made as to when a tax advantage will be regarded as one of the main benefits:

• those who plan arrangements fully understand the tax advantage such arrangements are intended to achieve, therefore it will be obvious (with or without detailed explanation) to any potential client the relationship between the tax advantage and any other financial benefits of the product they may be involved in

• the test is objective and considers the arrangements, or features of it, in terms of the value of the expected tax advantage compared to the value of any other benefits likely to be enjoyed

• avoidance can involve overlaying on, or inserting into, an underlying genuine commercial transaction certain commercially unnecessary features whose aims are primarily that of acquiring a tax advantage - those features need to be assessed individually as to whether a tax advantage is a main benefit

We can't set out in detail how this test should operate as it is primarily a matter of judgement for the person responsible for disclosure. The test focuses on objective outcomes rather than the purpose of an arrangement – does the outcome appear to provide a significant tax advantage which is not simply either an incidental or minor benefit from a commercial arrangement which happens to provide a better tax outcome?

4.4 Test 3: Is there a promoter of the arrangements?

The purpose of this test is to distinguish between arrangements that are promoted and those that are designed 'in-house' for use by the business that devised them.

Arrangements are promoted arrangements even where the user is required to disclose the details of them to HMRC as a result of the promoter being either:

• outside the UK and failing to disclose the arrangements to HMRC – see paragraph 3.9.1

• a lawyer who is prevented by legal professional privilege from providing all of the prescribed information to HMRC – see paragraph 3.9.2

4.5 Tests 4 and 5: The hallmark tests

Which hallmarks apply differ according to whether there is a promoter or if they are 'in-house' arrangements (see test 3 in paragraph 4.4 above). They also differ according to whether the arrangements relate to VAT or to other indirect taxes.

• Test 4 relates to hallmarks where there is a promoter and is described in paragraph 5.2.1 for VAT and paragraph 6.2.1 for other indirect taxes

• Test 5 relates to the hallmarks for ‘in-house’ arrangements and is described in paragraph 5.2.2 for VAT and 6.2.2 for other indirect taxes

5. Notifiable arrangements for VAT

The general tests set out in section 4 apply to VAT as well as to other indirect taxes but there are differences in the detailed application of some of those tests. Where these differences arise, in tests 1, 4 and 5, this section explains their application in relation to VAT.

5.1 Meaning of ‘tax advantage’ for VAT

In determining test 1 set out in paragraph 4.2.2 above, ‘Are there arrangements that enable an indirect tax advantage to be obtained?’ the meaning of ‘tax advantage’ for VAT is as follows.

A person ‘P’ obtains a tax advantage for VAT if:

(a) in any prescribed accounting period, the amount by which the output tax accounted for by P exceeds the input tax deducted by P is less than it would otherwise be,

(b) P obtains a VAT credit when P would otherwise not do so, or obtains a larger credit or obtains a credit earlier than would otherwise be the case,

(c) in a case where P recovers input tax as a recipient of a supply before the supplier accounts for the output tax, the period between the time when the input tax is recovered and the time when the output tax is accounted for is greater than would otherwise be the case,

(d) in any prescribed accounting period, the amount of P’s non-deductible VAT is less than it otherwise would be,

(e) P avoids an obligation to account for VAT, or

(f) P is not a taxable person and P’s non-refundable VAT is less than it otherwise would be.

5.2 Hallmarks for VAT arrangements

5.2.1 Test 4: The hallmarks for VAT arrangements where there is a promoter

When there is a promoter of the arrangements, they are notifiable arrangements if tests 1 and 2 described above in paragraphs 4.2 and 4.3 are met and any one of the following hallmarks applies:

• hallmark 1(a): Confidentiality from other promoters – see paragraph 7.2.1

• hallmark 1(b): Confidentiality from HMRC – see paragraphs 7.2.2 to 7.2.5

• hallmark 3: Premium fee – see paragraph 7.4

• hallmark 4: Standardised tax products – see paragraph 7.5

• hallmark 5: Retail supplies - splitting and value shifting – see paragraph 7.6

• hallmark 6: Offshore supplies - insurance and finance – see paragraph 7.7

• hallmark 7: Offshore supplies - relevant business person – see paragraph 7.8

• hallmark 8: Options to tax - disapplication – see paragraph 7.9

5.2.2 Test 5: The hallmarks for 'in-house' VAT arrangements

When the arrangements are designed 'in-house', they are notifiable arrangements if tests 1 and 2 described above (paragraphs 4.2 and 4.3) are met and any one of the following hallmarks applies. Hallmark 2 below only applies when the person who is either a party to the arrangements (or is likely to be a party) or uses the arrangements (or is likely to use them) is not a small or medium enterprise (see paragraph 7.3 below):

• hallmark 2: Confidentiality from HMRC – see paragraphs 7.3

• hallmark 3: Premium fee – see paragraph 7.4

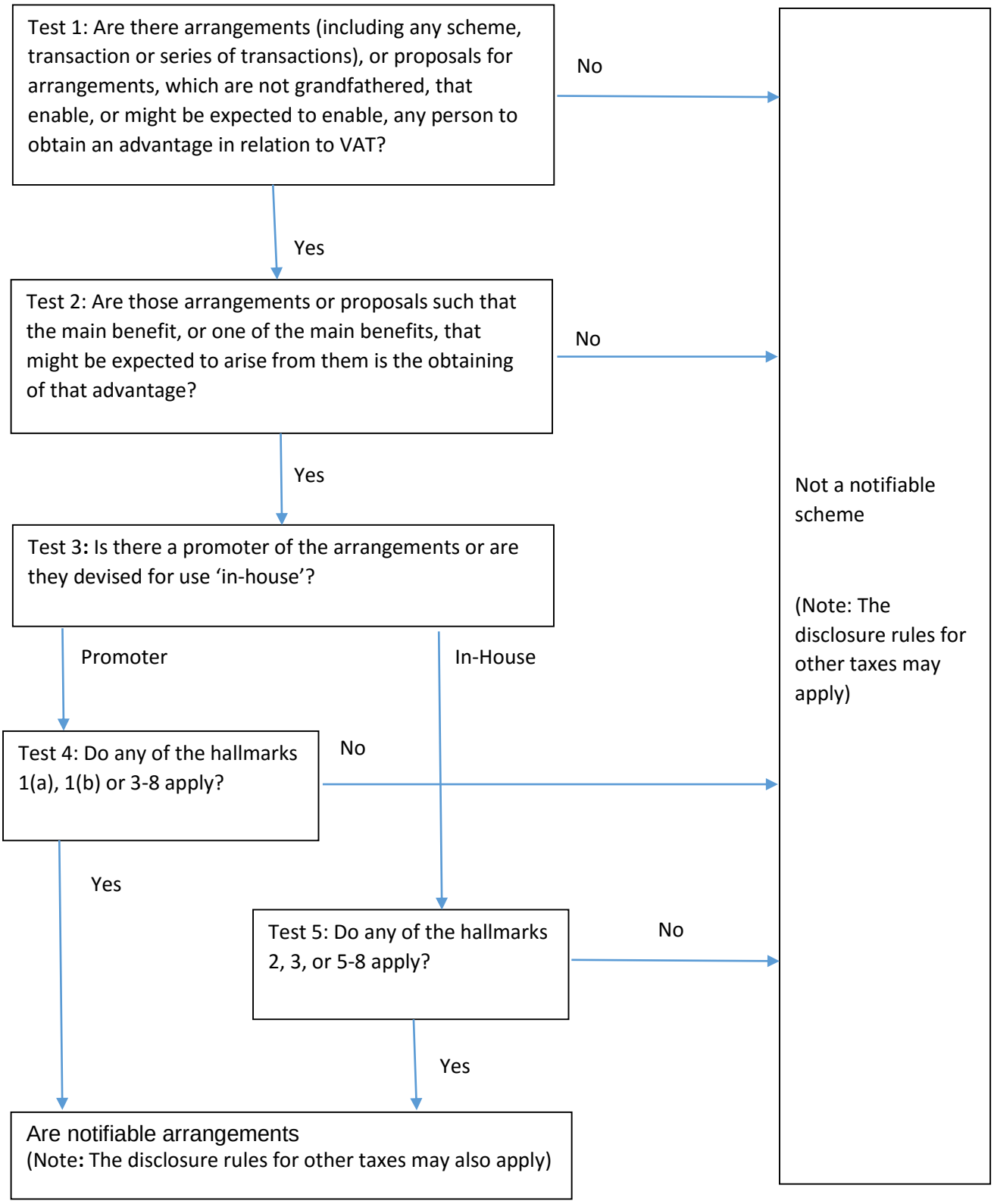
• hallmark 5: Retail supplies - splitting and value shifting – see paragraph 7.6

• hallmark 6: Offshore supplies - insurance and finance – see paragraph 7.7

• hallmark 7: Offshore supplies - relevant business person – see paragraph 7.8

• hallmark 8: Options to tax - disapplication – see paragraph 7.9

5.3 Determining notifiable arrangements for VAT – flow chart



6. Notifiable arrangements for indirect taxes other than VAT

The general tests set out in section 4 apply to VAT as well as to other indirect taxes but there are differences in the detailed application of some of those tests. Where these differences arise, in tests 1, 4 and 5, this section explains their application in relation to indirect taxes other than VAT.

6.1 Meaning of 'tax advantage' for indirect taxes other than VAT.

'Tax advantage' means:

(a) relief or increased relief from tax,

(b) repayment or increased repayment of tax,

(c) avoidance or reduction of a charge to tax, an assessment of tax or a liability to pay tax,

(d) avoidance of a possible assessment to tax or liability to pay tax,

(e) deferral of a payment of tax or advancement of a repayment of tax, or

(f) avoidance of an obligation to deduct or account for tax.

6.2 Hallmarks for indirect tax other than VAT arrangements

6.2.1 Test 4: The hallmarks for arrangements where there is a promoter

When there is a promoter of the arrangements, they are notifiable arrangements if tests 1 and 2 described above in paragraphs 4.2 and 4.3 are met and any one of the following hallmarks applies:

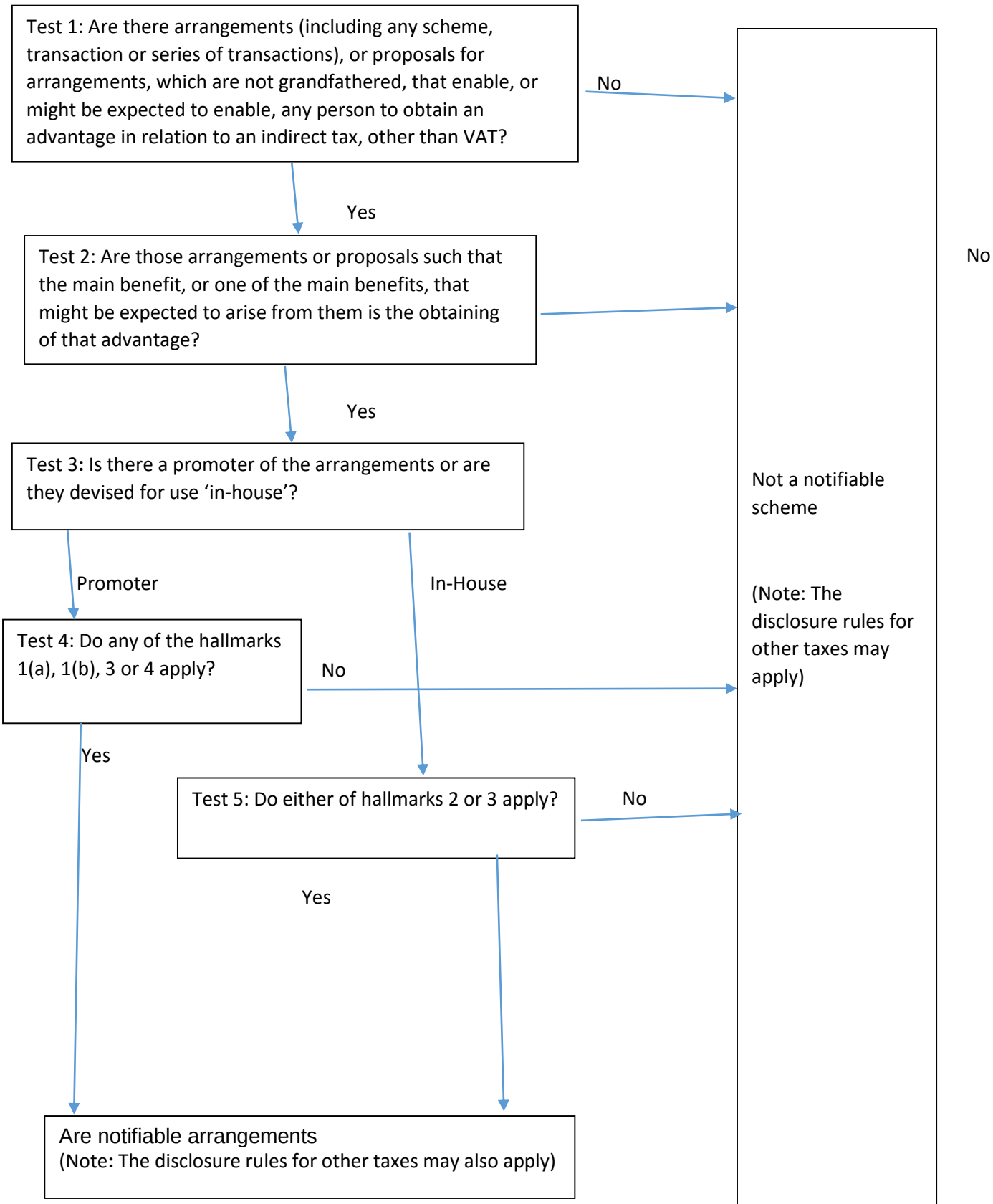
- hallmark 1(a): Confidentiality from other promoters – see paragraph 7.2.1
- hallmark 1(b): Confidentiality from HMRC – see paragraphs 7.2.2 to 7.2.5
- hallmark 3: Premium fee – see paragraph 7.4
- hallmark 4: Standardised tax products – see paragraph 7.5

6.2.2 Test 5: The hallmarks for 'in-house' arrangements

When the arrangements are designed 'in-house', they are notifiable arrangements if tests 1 and 2 described above in paragraphs 4.2 and 4.3 are met and any one of the following hallmarks applies. Hallmark 2 below only applies when the person who is either a party to the arrangements (or is likely to be a party) or uses the arrangements (or is likely to use them) is not a small or medium enterprise (see paragraph 7.3 below):

- hallmark 2: Confidentiality from HMRC – see paragraphs 7.3
- hallmark 3: Premium fee – see paragraph 7.4

6.3 Determining notifiable arrangements indirect taxes other than VAT – flow chart



7. The hallmarks

7.1 About the hallmarks

The legislation sets out a number of descriptions of arrangements that are referred to as ‘hallmarks’ in this guidance.

Examples given in this section are to illustrate the principles involved and should not be taken as the ‘right’ answer in any situation. It is up to the person responsible to decide whether or not proposals or arrangements fall to be disclosed to HMRC.

Hallmarks 1(a), 1(b), 2, 3 and 4 apply across all the indirect taxes including VAT (see paragraphs 7.2. to 7.5). Hallmarks 5, 6, 7 and 8 apply only to VAT (see paragraphs 7.6 to 7.9).

The hallmarks are not mutually exclusive – an arrangement may be a hallmarked arrangement by virtue of one or more of the hallmarks.

The absence of a hallmark for particular arrangements should not be regarded as an indicator that the arrangements constitute practices that are acceptable to HMRC.

Arrangements are notifiable only if they meet all the conditions of paragraph 3 of Schedule 17, namely arrangements which:

• fall within any description prescribed by the Treasury by regulations (hallmarks)

• enable, or might be expected to enable, any person to obtain a tax advantage in relation to any indirect tax that is so prescribed in relation to arrangements of that description (see paragraph 4.2), and

• are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that tax advantage (see paragraph 4.3)

Hallmarks 1(a), 1(b), 2, 3 and 4 apply across all the indirect taxes including VAT

7.2 Hallmarks 1(a) and 1(b): Confidentiality where a promoter is involved

These hallmarks apply to all the indirect taxes, including VAT, as listed in 1.3.

7.2.1 Hallmark 1(a): Confidentiality from competitors

Legal reference:

Regulation 9, the Indirect Taxes (Notifiable Arrangements) Regulations 2017.

This hallmark only applies where there is a promoter of the arrangements (see paragraph 4.4 that helps determine if there is a promoter).

The test requires the person with a prima facie duty to disclose the arrangements to ask themselves the hypothetical question:

• 'might it reasonably be expected that any promoter of the arrangements would wish the way in which any element of those arrangements (including the way in which they are structured) gives rise to and secures, or might secure, the expected tax advantage to be kept confidential from any other promoter

• at any time following the material date?' (see paragraph 7.2.4)

For example, if an element of the arrangements was new and innovative it would be reasonable to expect that a promoter would want the details to remain secret in order to maintain their competitive advantage and ability to earn fees. In this case the test would be met.

When applying the test a promoter should first consider its own position and if it concludes that it would want to keep the arrangements confidential from another promoter then the arrangements are within the hallmark. If the promoter concludes that it wouldn't want to keep the arrangements confidential from another promoter it must then consider if it might reasonably be expected that another, hypothetical, promoter with the same knowledge and information would wish to keep the arrangements confidential. If so, the arrangements are within the hallmark.

The use of an explicit confidentiality agreement before revealing full details of the arrangements to a client by advisers who don't normally use such agreements may indicate that the test is met.

However, even if certain sectors promoting the arrangements would routinely insist on an explicit confidentiality agreement from their clients, HMRC would accept the test is not met if the arrangements are reasonably well known in the tax community. This can be evidenced from, for example, articles in the tax press, textbooks or case law.

7.2.2 Hallmark 1(b): Confidentiality from HMRC

Legal reference:

Regulation 9, the Indirect Taxes (Notifiable Arrangements) Regulations 2017.

This hallmark only applies where there is a promoter of the arrangements (see paragraph 4.4).

The test is whether it might be reasonably expected that a promoter would want to keep arrangements or an element of the arrangements confidential from HMRC.

The test requires the person with a prima facie duty to disclose the arrangements to ask themselves the hypothetical questions:

• 'might it reasonably be expected that any promoter of the arrangements would wish the way in which any element of those arrangements (including the way in which they are structured) gives rise to and secures, or might secure, the expected tax advantage to be kept confidential from HMRC

• at any time following the material date?' (see paragraph 7.2.4)

• 'is a reason for doing so to facilitate the repeated or continued use of that element, or substantially the same element, in the future?' (This may be, for example, in order to secure fee income in the future. There is more on 'repeated and continued use' at paragraph 7.2.5)

When applying the test the promoter should only attribute to the hypothetical promoter the knowledge and information that the promoter itself holds and should not attribute any other knowledge or information. In addition the promoter should assume that the hypothetical promoter takes a reasonable view of their obligations to disclose.

For example if an element of the arrangements was new and innovative, it would be reasonable to expect that a promoter would want the details to remain secret in order to facilitate repeated or continued use of the arrangements or any element of the arrangements.

The hallmark will also be met if the promoter doesn't provide, or discourages the user from retaining, any promotional materials, data or written professional advice for those arrangements and it might reasonably be expected that the reason for doing so is to keep the arrangements confidential from HMRC so as to facilitate repeated or continued use of the any element of the arrangements.

Where there is a promoter but the person with a duty to disclose the arrangements is the user of the arrangements, he must ask themselves the question:

• do I wish to keep confidential from HMRC the way any element of the arrangements (including the way they are structured) gives rise to and secures, or might secure, the expected tax advantage (see paragraph 7.2.3)

• at any time following the material date? (see paragraph 7.2.4)

In either case the relevant question(s) must be answered at the time the relevant trigger for disclosure arises. (See also paragraph 7.2.4).

HMRC will expect promoters and users to answer the test fairly and act in accordance with the decision they make.

There doesn't need to be an explicit confidentiality agreement between the promoter and user about the arrangements before the test is met.

If HMRC discover arrangements that have not been disclosed we will examine all the evidence and form a balanced view as to why they were not disclosed. Indicative factors include:

• how new, innovative and aggressive the scheme is

• whether a promoter imposes an obligation upon potential clients, in writing or orally, to keep the details of the arrangements confidential from third parties including HMRC. This factor wouldn't be considered if the agreement is a general agreement

• whether a promoter doesn't provide, or otherwise prevents or discourages the user from retaining, promotional materials, data or written professional advice so that such information can't be provided by the user to HMRC

• whether confidentiality agreements, general or specific, between a promoter and client allow the client to disclose information to HMRC without referral to the promoter

• the use of explicit warnings in marketing material or other communications to a client to the effect that the arrangements may have a limited 'shelf life' because Parliament may act to close it once it becomes known

• the degree of co-operation to requests for information from HMRC concerning specific arrangements and the reasons for not providing information

7.2.3 Hallmark 1(b): 'Any element' of the arrangements

The hallmark asks whether the promoter or the user of the arrangements (as applicable) wants to keep any element of those arrangements confidential from HMRC. This could include part of bespoke arrangements where the totality of the arrangements won't be repeated.

7.2.4 Hallmark 1(b): Confidential 'at any time following the material date'

The hallmark asks whether the promoter or the user of the arrangements (as applicable) wants to keep an element of the arrangements (including the way it is structured) confidential from HMRC at any point in time after the requirement to disclose the arrangements has been triggered (see paragraph 8.3). It is not relevant if it is wished that the arrangements be kept confidential before this time.

7.2.5 Hallmark 1(b): Repeated and continued use of the element

The hallmark asks, where applicable, whether the promoter wants to keep an element of the arrangements (including the way it is structured) confidential from HMRC in order to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

'Repeated use' – the test examines whether the key element that achieves the tax advantage is being kept confidential in order to insert it into further arrangements used by either other clients or the same client.

‘Continued use’ – the test examines whether the element that seeks to achieve the tax advantage is being kept confidential in order to allow the tax advantage to accrue over time or the arrangements to run their course.

7.3 Hallmark 2: confidentiality where no promoter involved

This hallmark applies to all the indirect taxes including VAT.

7.3.1 The legislation

Hallmark 2 is prescribed by regulation 11 to the Indirect Taxes (Notifiable Arrangements) Regulations 2017 (SI 2017/1216):

7.3.2 Confidentiality from HMRC

This hallmark only applies to arrangements devised for use ‘in-house’. It doesn’t apply where the person intended to obtain the tax advantage is a small or medium enterprise.

A business is a small or medium enterprise if, during the relevant period, it has a turnover of less than £50 million and employs fewer than 250 people. The relevant period is either the accounting period for the business in accordance with the indirect tax concerned, or if there is no such accounting period, the 12 month period ending at the point immediately before the arrangements commenced.

In calculating the turnover and the number of employees you must include in the calculation the turnover and employees of any associated business or anybody corporate that would be eligible for VAT grouping with you.

Information about VAT grouping eligibility is provided in Notice 700/2.

This hallmark requires the in-house person to consider whether or not the in-house user or a hypothetical user would reasonably be expected to wish to keep the arrangements confidential from HMRC. If the in-house user would wish to keep any element of the arrangements confidential from HMRC then that is sufficient to meet the test. If not then the in-house user must consider if any other user would wish to keep the arrangements confidential from HMRC.

When applying the test the in-house user should assume that the hypothetical user takes a reasonable view of their obligations to disclose arrangements under DASVOIT.

So the test for a person using in-house arrangements, having entered into a transaction forming part of the arrangements, is to ask at any time following the material date (see paragraph 7.2.4):

• ‘do I wish to keep this confidential from HMRC?

• would another user wish to keep this confidential from HMRC?

• 'do I or would another user wish to keep confidential from HMRC the way any element of the arrangements (including the way they are structured) gives rise to and secures the expected tax advantage … (see paragraph 7.2.3)?

• 'is a reason for wishing to keep this confidential to:

  - facilitate the repeated or continued use of that element, in the future?' This applies in the same way as in hallmark 1(b) read in the context of a person using the arrangements (see paragraph 7.2.5).
  - reduce the risk that HMRC might investigate or examine any return, claim or declaration made to HMRC?
  - reduce the risk that HMRC might withhold some or all of a claim made from HMRC?

The guidance on this at paragraph 7.2.2 applies equally here.

As for hallmark 1(b), if HMRC discover arrangements that have not been disclosed we will examine all the evidence and form a balanced view as to why they were not disclosed. Indicative factors include:

• how new, innovative or aggressive the arrangements are

• the degree of co-operation with requests for information from HMRC concerning specific arrangements and the reasons for not providing that information

• whether a taxpayer imposes an obligation upon other parties to the arrangements, whether in writing or verbally, to keep the details of the arrangements confidential from HMRC

HMRC will expect users to answer the test fairly and act in accordance with the decision they make.

Warning: If you don't apply these tests correctly and fail to disclose notifiable arrangements that should have been disclosed under DASVOIT then you may be liable to a penalty (see section 13).

7.3.3 The timing rule

Where no promoter is involved the timing rule is by reference to the date on which the arrangements are implemented. The issue is whether there is a wish to keep the details confidential at any point after this time. It is also irrelevant whether the details would be disclosed on a return.

7.4 Hallmark 3: premium fee

This hallmark applies to all the indirect taxes including VAT.

7.4.1 The legislation

Hallmark 3 is prescribed by regulation 12 to the Indirect Taxes (Notifiable Arrangements) Regulations 2017 (SI 2017/2016).

7.4.2 About Hallmark 3

This hallmark applies to both promoted and 'in-house' arrangements.

The hallmark test doesn't require a premium fee to have actually been received. It contains a hypothetical test that considers whether in the absence of the DASVOIT regime a premium fee could be obtained by a promoter or another person which relates to an avoidance arrangement.

Because it is a hypothetical test the fact that a promoter doesn't charge a premium fee is not conclusive, though the hallmark would be met if they do.

A 'premium fee' is a fee which is:

• reasonably expected to be obtained from a person experienced in receiving services of the type provided by the promoter or another person

• significantly attributable to the tax advantage obtained or which may be obtained, by any part of the arrangement, and

• to some extent contingent on, the tax advantage obtained

'Fee' for these purposes includes amounts paid directly or indirectly to the promoter.

7.4.3 Is the fee attributable to, or contingent on, the advantage?

When applying the hallmark you need to consider whether a fee could be charged in respect of any element of the arrangement such that it would to a significant extent be attributable to, or contingent upon, the expected tax advantage.

A 'premium fee' for the purpose of this hallmark is limited to a fee that is to a significant extent attributable to the tax advantage.

To be a premium fee it also has to be to some extent contingent upon a tax advantage being obtained, because the tax analysis underpinning the arrangements is correct.

A fee is not a premium fee solely on account of factors such as the:

• adviser's location – for example fees could be expected to be higher in London

• urgency of the advice – a fee that is higher due to the adviser having to give the advice urgently is not a premium fee for that reason alone

• size of the transaction – if a large amount is at stake on a deal, the tax adviser may wish to increase their fee to reflect the greater level of exposure

• number of users who sign up for a particular arrangements – for example where the size of the fee depends upon the number of people who take up the arrangements

7.5 Hallmark 4: Standardised tax products

This hallmark applies to all the indirect taxes including VAT.

7.5.1 The legislation

Hallmark 4 is prescribed by regulation 13 to the Indirect Taxes (Notifiable Arrangements) Regulations 2017 (SI 2017/2016).

7.5.2 About Hallmark 4

This hallmark only applies where there is a promoter of the arrangements (see paragraph 4.4).

The fundamental characteristic of such arrangements is their ease of replication rather than the volume of take-up or how they're made available. Essentially, all the client purchases is a prepared tax product that requires little, if any, modification to suit their circumstances. To adopt it wouldn't require them to receive significant additional professional advice or services.

The hallmark is met when the tests below are met.

7.5.3 Test 1 – are the arrangements made available generally?

The manner in which arrangements caught by this hallmark are promoted can vary enormously. The promoter of the arrangements could enter into a proactive campaign or aggressive marketing strategy; or they could simply react to a casual enquiry for 'ideas' from a potential client or offer them a product having identified a potential need, such as whilst carrying out consultancy work. This test is not based on how or why arrangements are promoted but how available they are to potential users – for example whether or not they're bespoke.

Subject to the other tests, the hallmark will apply to any 'tax product' that a promoter makes available for 2 or more persons to implement.

7.5.4 Informed Observer

Each of the remaining tests are considered by reference to how they might be applied by a hypothetical informed observer. It requires the promoter or other person with a potential duty to notify HMRC about the arrangements to consider whether an independent informed observer, who has studied the arrangements and taken all relevant circumstances into account, could reasonably be expected to conclude that all of the tests are met. If this condition is met, then the hallmark covers the arrangements.

The informed observer should be presumed to have access to all of the information that is available to the promoter of the arrangements.

The scope of 'all relevant circumstances' will vary according to the nature of the standardised tax product, but circumstances that it may be relevant for the informed observer to take into account include:

• commercial factors such as what commercial benefits distinct from the tax advantages are expected to arise from the arrangements

• the terms of the documentation and the substance of the product

• HMRC guidance

7.5.5 Test 2 – are the arrangements standardised?

In order for the hallmark to apply: the arrangements will have standardised, or substantially standardised, documentation which enables a person to implement the arrangements; the form of the documentation will have been determined by the promoter; and the substance of the documentation won't require tailoring to any material extent to the individual circumstances of the person or persons implementing the arrangements to enable them to do so.

As a minimum this will mean that standardised contracts, agreements or other written understandings between the parties to the arrangements are provided by the promoter to the person or persons implementing the arrangements.

In order for this hallmark to apply, the arrangements will commit users to enter into either a specific standardised (or substantially standardised) transaction, or more usually a number of specific transactions, comprising the arrangements. For example, a person entering into the arrangements may be required to enter a lease with a specified business, insert specific clauses into contracts or take out a specific loan from a specific provider etc.

This test applies by reference to the way the informed observer would regard the substance of the documentation used and the transactions entered into. If a number of persons are entering into transactions that are substantially the same incidental or immaterial differences in the wording of each user's documentation wouldn't prevent the informed observer from being reasonably expected to conclude that the documentation is substantially standardised.

7.5.6 Test 3 – are the arrangements a tax product?

There are 2 tests to determine if the arrangements are a tax product covered by the hallmark:

• the main purpose of the arrangements is to enable a person to obtain a tax advantage

• it is unlikely that a person would enter into the arrangements were it not that the person or another person may obtain a tax advantage

Only one of these tests needs to be met in order for the arrangements to be a tax product.

Under the first of these tests it is not enough for the obtaining of a tax advantage to be only one of the main purposes of the arrangements. Obtaining that advantage must be their main purpose.

The tests don't cover all standardised arrangements which might enable a person to obtain a tax advantage. In cases of ordinary business or investment decision making HMRC accepts that it would be reasonable to expect an informed observer to conclude that a standardised product may be likely to be marketable without the tax advantages it offers and as such is not a standardised tax product caught by this hallmark. That is because in these situations it couldn't be said that the arrangements wouldn't have been entered into without the tax advantage.

7.5.7 Arrangements HMRC does not regard as notifiable standardised tax products

For the avoidance of doubt, where HMRC has given a published view on the tax liability of arrangements which may appear to involve a standardised tax product, then there should be no disclosure requirement if the arrangements merely achieve the outcome accepted by HMRC. An example might be a 'design and build' contract as referred to in HMRC Guidance VCONST02720.

7.5.8 Examples

The following examples are illustrative and not all the features describing the scenarios need to apply for a scheme to be notifiable. The tests detailed above (paragraphs 7.5.3 – 7.6.6) must be applied to any given scenario to determine if this hallmark description is met.

Company A wishes to sell its business to a third party and enters into a transaction to sell its business assets as a transfer of a going concern (TOGC). One of the assets is a building on which the option to tax has been exercised. In order that the sale can be VAT-free – in accordance with TOGC rules – the sale contract, prepared by legal advisers, includes a clause requiring the purchaser to exercise the option to tax the building. The business sale contract is not a standardised tax product, and neither is the clause requiring the purchaser to exercise the option to tax. This is because the main aim is not to obtain a tax advantage, but is to sell the business and its assets.

Company Z is a retailer and approached by a tax adviser with a structure that would enable it to avoid taxing a pre-determined percentage of its sales. The adviser has prepared a set of contracts and papers which establish the necessary companies and relationships to achieve this aim. The documents are standard ones which need little or no adaptation for Company Z's own situation. The only benefit arising out of this structure is that Company Z will improve its profitability and competitiveness as a result of the VAT saving; there is no other commercial rationale for doing it. This is a standardised tax product and would require disclosure since it is clear that the main aim is to obtain the tax advantage and the documentation is of a standard format requiring little change for individual clients.

Hallmarks 5, 6, 7 and 8 apply only to VAT.

7.6 Hallmark 5: VAT - Retail Supplies – splitting and value shifting

This hallmark applies only to VAT and not to other indirect taxes.

7.6.1 The legislation

Hallmark 5 is prescribed by regulation 4 to the Indirect Taxes (Notifiable Arrangements) Regulations 2017 (SI 2017/1216).

7.6.2 About Hallmark 5

This hallmark is intended to capture arrangements that split up a supply to a retail customer to benefit from a different VAT treatment for one or more of those split supplies.

7.6.3 The test

Where:

• a business agrees to supply goods or services to a retail customer – supply 1

• the same business or another person agrees to supply other goods or services to the same retail customer – supply 2

if conditions 1 or 2 are met in addition to condition 3 (see paragraphs 7.6.4, 7.6.5 and 7.6.6 respectively) then the arrangements are notifiable.

‘Retail customer’ means a private final consumer of a supply of goods or services. It is not confined to supplies made in retail outlets, but can include other supplies made to a private final consumer, for example supplies of building services to the owner of a private house.

7.6.4 Condition 1

This condition covers arrangements where a supply that would otherwise be a single supply liable to a positive rate of VAT is treated as 2 separate supplies, one or more of those supplies being taxed at a lower rate or exempt of VAT.

This condition is met where:

• if supply 1 and supply 2 were part of a single supply to the retail customer that supply would be liable to tax at the standard or reduced rate of VAT, and

• supply 1 or 2, or both, are:

- taxable at the reduced rate of VAT
- a zero-rated supply
- an exempt supply (except a supply that is liable to Insurance Premium Tax at the higher rate)

7.6.5 Condition 2

This condition covers arrangements where a supply that would otherwise be a single exempt supply is treated as 2 separate supplies, at least one of which is a taxable (including reduced rated or zero-rated) supply.

This condition is met where:

• were supply 1 and supply 2 made as a single supply (or part of a single supply) to the retail customer, that single supply would be an exempt supply, and

• supply 1 or 2, or both, are:

- taxable at the standard or reduced rate of VAT
- a zero-rated supply

7.6.6 Condition 3

This condition is met if it would be reasonable to conclude that 2 or more of the following apply, where A is the supplier of supply 1 to retail customer C, and either A or another person B, is the supplier of supply 2 to C:

• C wouldn’t agree to receive supply 1 without also agreeing to receive supply 2

• where supply 2 is made to C by B, B makes the supply with the agreement of A

• supply 1 and supply 2 would be made as a single supply or part of a single supply to C were it not for a VAT advantage which is obtained, or which may be obtained, by making those supplies separately to C

• the business model of A or B (or both) assumes that:

- only A will make supply 1 to C
- only A or B (as the case may be) will make supply 2 to C
- the agreements to make supply 1 and supply 2 will be entered into with C at or about the same time

• of supply 1 and supply 2, one is dependent on the other

• were supply 1 and supply 2 made as a single supply or part of a single supply to C, that supply would be made at or about the same price as the price of both supply 1 and supply 2 are made to C

• a higher profit is generated from whichever of supply 1 or supply 2 is the supply which obtains the greater VAT advantage

7.6.7 'Reasonable to conclude'

Condition 3, described in paragraph 7.6.6 above, is met if it would be 'reasonable to conclude' that 2 or more of the listed statements apply.

The promoter or other person with a potential duty to notify HMRC about the arrangements needs to consider whether it would be reasonable to expect an independent informed observer, who has studied the arrangements and taken all relevant circumstances into account, to conclude that 2 or more of the listed statements apply. In addition, they should consider whether there is an element of orchestration between some or all of the parties in order to put the arrangements into effect. There would be no disclosure if the tax advantage arose simply by chance.

7.6.8 Examples

The following examples are illustrative and not all the features describing the scenarios need to apply for a scheme to be notifiable. The tests detailed above (paragraphs 7.6.3 – 7.6.7) must be applied to any given scenario to determine if this hallmark description is met.

Example 1

An operator of a holiday park provides residential facilities to holiday-makers for a standard weekly charge which is standard rated. It then decides to provide its services from 2 companies. Company A provides the holiday accommodation and Company B provides various services to the holiday maker such as water and electricity. The overall weekly charge to the holiday maker doesn't change and the holiday maker has no practical choice but to accept and pay for B's services. The aim is that B's services will be charged at the zero and reduced rates, whilst A's services are standard rated.

This could trigger a disclosure, subject to any grandfathering (see paragraph 2.4 above), by virtue of:

• condition 1 since the combined supply was standard rated and the supplies by B are at the zero and reduced rates

• condition 3 as there is agreement between A and B for B to make its supplies to the holiday maker; the operator wouldn't be splitting its activities in this way if it were not for the VAT benefit being obtained; the operator's

business model is based on it making both A and B's supplies to the holiday maker; B's supply is dependent on A's being made; and A and B are charging the same combined price as was previously being charged - note: Condition 3 is satisfied if only 2 of these tests are passed; and

• this arrangement enables the operator to obtain the tax advantage of reducing their output tax liability and that tax advantage is the main benefit arising from the arrangement

Example 2

A shop, X, sells standard rated goods to retail customers. Another business, Y, sells services which are exempt. X and Y have no relationship with each other. If the goods from X and the services from Y were purchased together, they would be treated as a single taxable supply. A retail customer buys goods from X and then purchases services from Y.

On the facts above, there is a tax advantage to the retail customer since, by obtaining the supplies separately, they're paying less VAT overall. However, this wouldn't be disclosable by any of the parties because:

• there is no promoter, so any disclosure obligation would fall to the parties involved

• X has no knowledge of what the customer does at Y and no information on Y's business and therefore can't have a disclosure responsibility

• Y has no knowledge of X or its business or of the customer's tax situation and therefore can't have a disclosure responsibility

• the customer may not know the tax effects of their buying choice and therefore couldn't make a disclosure; any tax advantage was minor and not a main benefit, therefore, there was no disclosure responsibility

• there were no arrangements, rather only unrelated transactions from which there would be no expectation of a tax advantage as a main benefit

HMRC recognises that for there to be a disclosure responsibility on any person, that person must be in a position to have the information on which to make that disclosure. In the normal retail situation where a customer goes into a number of shops to purchase what they need, it is very unlikely that this could give rise to any disclosure, even if there is a tax advantage overall.

7.7 Hallmark 6: VAT - Offshore Supplies – insurance and finance

This hallmark applies only to VAT and not to other indirect taxes.

7.7.1 The legislation

Hallmark 6 is prescribed by regulation 5 to the Indirect Taxes (Notifiable Arrangements) Regulations 2017 (SI 2017/1216).

7.7.2 About Hallmark 6

The hallmark covers ‘offshore loops’ involving services of insurance or financial services that would be exempt if made from a UK-based business direct to EU customers.

These offshore loops involve supplies made via one or more businesses based outside the EU. The UK-based business supplies insurance or financial services to the non-EU business. The insurance or financial services are then supplied to EU customers from outside the EU by the non-EU business or other further businesses based outside the EU. The non-EU businesses rely on the supplies made by the UK-based business in order to make their supplies of services to the EU customers.

The UK-based business is able to recover any VAT on its costs as its insurance or financial intermediary services are ‘specified supplies’ for the purposes of the Value Added Tax (Input Tax) (Specified Supplies) Order 1999 which enables recovery of VAT on costs relating to those supplies.

7.7.3 The Tests

The hallmark is met if the following tests are passed:

7.7.4 Test 1:

• person ‘D’ based in the UK makes a supply of services to person ‘E’ based outside the EU, and

• the supply is an exempt supply, or would be an exempt supply if made in the UK, by virtue of any item of Group 2 or any of items 1 to 6 and 8 of Group 5, Schedule 9, VAT Act 1994

7.7.5 Test 2:

• E makes a supply of services to a person ‘F’ who belongs in the EU, where the supply would be an exempt supply if made in the United Kingdom

7.7.6 Test 3:

• the supply which D makes to E is used to make the supply by E to F

7.7.7 Further clarification of the Tests 1 – 3

A supply of services is made by D to E or E to F notwithstanding that the supply:

• is incorporated within a supply made by another person

• is split into separate supplies

• is effected by means of a chain of supplies involving one or more intermediate suppliers

7.7.8 Examples

The following examples are illustrative and not all the features describing the scenarios need to apply for a scheme to be notifiable. The tests detailed above (paragraphs 7.7.3 – 7.7.7) must be applied to any given scenario to determine if this hallmark description is met.

7.7.9 Example 1

Company A is an insurer in the UK and Company B is an insurance intermediary in the UK; they sell insurance policies to UK customers. Company A is advised to set up an associate insurance business, Company C, in a non-EU country which will act as the underwriter of policies sold to UK customers. Company B now provides its intermediary services to Company C and is able to recover its input tax on its costs as a result of it 'exporting' its services. Company A still bears the main insurance risk through re-insurance of Company C and, together with Company B, provides most of the resources and expertise needed. This structure satisfies tests 1-3 above and, from the circumstances, its main aim is to obtain the tax advantage of Company B recovering its input tax. So this is a notifiable arrangement subject to any 'grandfathering' (see paragraph 2.4 above).

If Company A was further advised to insert an additional non-EU intermediary between Companies B and C, this would still trigger a disclosure because of the clarification set out in 7.7.7 above regarding intermediate suppliers.

7.7.10 Example 2

Company D arranges loans for UK individuals from UK lenders F, receiving commission from the latter. The commission is consideration for D's supplies of exempt financial intermediary services to F.

On the basis of tax advice received, D sets up an associated company E outside EU, which contracts with the lenders in D's place, and sub-contracts the actual intermediation work to D. D now claims input tax as it is supplying exempt intermediation services to E, which in turn is supplying such services to the UK lenders F. The new structure doesn't deliver any significant non-tax benefits.

This structure satisfies tests 1-3 above and clearly has a main aim of obtaining the tax advantage of company D recovering its input tax. It is therefore notifiable subject to any grandfathering (see paragraph 2.4 above).

7.8 Hallmark 7: VAT - Offshore Supplies – relevant business person

This hallmark applies only to VAT and not other indirect taxes.

7.8.1 The legislation

Hallmark 7 is prescribed by regulation 6 to the Indirect Taxes (Notifiable Arrangements) Regulations 2017 (SI 2017/1216). This hallmark applies when deciding whether a person must disclose arrangements or a proposal as follows:

7.8.2 About Hallmark 7

This hallmark is covers arrangements where services are routed outside the UK in order that a UK or EU customer does not suffer a charge to VAT which can't be recovered. Such customers would include businesses that make exempt supplies.

The arrangements include a non-EU business in the supply chain that is a 'relevant business person' for the purposes of section 7A(2)(a), VAT Act 1994 so that supplies of services made to it from a UK-based business are made outside the EU and so escape UK VAT.

7.8.3 The tests

The following tests apply together to determine if this hallmark is met:

• a UK business, 'G', makes supplies of services to a relevant business person 'H' outside the EU

• that supply would be taxable at the standard or reduced rate had it been made in the UK

• the non-EU relevant business person H receiving the supply makes a supply to another person, 'I', who belongs in the EU and either:

  - the supply would be an exempt supply if made in the UK
  - the supply is made outside the EU in the place where H belongs

• the supply which G makes to H is used to make the supply by H to I

In applying these tests a supply of services is made by G to H or H to I notwithstanding that the supply:

- is incorporated within a supply made by another person

- is split into separate supplies
- is effected by means of a chain of supplies involving one or more intermediate suppliers

The meaning of 'a relevant business person' is given by section 7A(4), VAT Act 1994.

7.8.4 Examples

The following examples are illustrative and not all the features describing the scenarios need to apply for a scheme to be notifiable. The tests detailed above (paragraph 7.8.3) must be applied to any given scenario to determine if this hallmark description is met.

Example 1:

Company D arranges loans for UK individuals from UK lenders I, receiving commission from the latter. The commission is consideration for D's supplies of exempt financial intermediary services to I.

D incurs substantial input VAT on advertising costs from UK supplier G which it can't recover.

On the basis of tax advice received, D sets up an associated company H outside EU, which contracts with the lenders in D's place. H sub-contracts the actual intermediation work to D. H also buys in the advertising from G, obtaining it free of VAT since H belongs outside EU. The new structure doesn't deliver any significant non-tax benefits.

The conditions in section 7.8.3 above are met and the hallmark applies. It is therefore notifiable subject to any grandfathering (see paragraph 2.4 above).

Example 2:

Company J in UK provides tax advice services to wealthy UK individuals L. In order to avoid charging VAT on these services, J sets up associated company K outside EU, and arranges for L to contract with K for the tax advice service, with K sub-contracting the service to company J. J doesn't charge VAT to K since its service to K is treated as supplied where K belongs, outside EU. K doesn't charge VAT to customers L under the place of supply rules mentioned above.

The conditions in section 7.8.3 above are met and the hallmark applies. It is therefore notifiable subject to any grandfathering (see paragraph 2.4 above).

7.9 Hallmark 8: VAT - Options to Tax – disapplication

This hallmark applies only to VAT and not other indirect taxes.

7.9.1 The legislation

Hallmark 8 is prescribed by regulation 7 to the Indirect Taxes (Notifiable Arrangements) Regulations 2017 (SI2017/1216).

7.9.2 About Hallmark 8

This hallmark covers arrangements that prematurely end an option to tax a property.

7.9.3 The test

The hallmark applies where:

• a person (or, if that person is a body corporate, a relevant associate) has opted to tax a property that is a capital item and that option has not been revoked

• fewer than 20 years have expired since that option took effect

• that person, or a relevant associate, makes a supply of the opted property such that the supply is not a taxable supply as it is a supply of exempt land by the developer (under paragraph 12(1), Schedule 10, VAT Act 1994)

7.9.4 Example

A business opted to tax a property enabling it to recover VAT on construction costs. A consequence of opting is that it must charge VAT on any supplies of the building by way of rent, sale etc.

After 10 years, the business wishes to let the property to a business that can't recover VAT for example a bank or insurance company. In order to attract these tenants the business wants to avoid having to charge VAT on the rent. It is unable to revoke the option until 20 years has passed since opting. An adviser suggests a scheme to 'wash out' the option to tax on the property before the 20 year period has elapsed.

The new tenant provides the business with finance for refurbishment works on the building costing £300,000. This creates the conditions for the option to tax not to apply to the lease to the new tenant (under the anti-avoidance provision in Paragraph 12 of Schedule 10, VAT Act 1994).

The input VAT on the original building construction is not adjusted since the capital goods scheme adjustment period expired at the end of 10 years. The tax advantage gained from not having to charge VAT on the rent greatly outweighs the irrecoverable input tax suffered on the refurbishment.

The hallmark conditions above are met, and since one of the main benefits expected from the arrangements is obtaining this advantage, these would be notifiable arrangements unless grandfathering applies (see paragraph 2.4).

There could be a similar example in which no overall tax advantage is expected or where a VAT advantage might not be expected to be a main benefit. In such a case the hallmark description might be met but the arrangements wouldn't need to be disclosed because the overarching tax advantage (see paragraph 4.2) and main benefit (see paragraph 4.3) tests wouldn't be met.

8. When to disclose a notifiable proposal or notifiable arrangements

8.1 General

Section 3 of this notice explains who is required to disclose a notifiable proposal or notifiable arrangements. This section sets out the time when that person must make a disclosure. The timings may be different depending on who has the requirement to disclose.

8.2 Notifiable Proposals or Arrangements where the promoter must disclose

8.2.1 Time limits

Where a promoter is required to disclose they must do so within 31 days beginning with the earliest date they:

- make a firm approach to another person in relation to the proposal (see paragraph 8.3.1)
- make the proposed arrangements available for implementation by another person (see paragraph 8.3.2)
- first become aware of a transaction forming part of the arrangements implementing the proposal (see paragraph 8.3.3)

Which of the above tests triggers a disclosure will in practice depend upon how the arrangements are provided to users and the promoter's precise role. For example, disclosure of marketed arrangements will normally be triggered by the 'makes a firm approach' test.

8.2.2 Exemption for co-promoters

Where 2 or more persons are promoters in respect of the same, or substantially the same, arrangements, whether or not it is made available to the same person, the following rules can be used to enable only a single disclosure to be made, rather than a disclosure by each promoter. Use of these exemption rules is optional with the normal rules applying to those promoters who choose not, or are unable, to follow them.

The first rule ((a) below) is intended to apply when there is a co-promoter at the time of disclosure, whereas the second ((b) below) is intended to apply when a person becomes a co-promoter some time afterwards.

(a) The duty of a promoter (P2) in making a disclosure is discharged when all the following apply:

• another promoter (P1) discloses the information about the arrangements described at paragraph 9.3.

• P2 holds that information (normally, we would expect P1 to pass a copy of their disclosure to P2)

• P1 has provided the identity and address of P2 to HMRC (normally, this would happen at the time P1 makes disclosure of the arrangements, but in any case the information must be provided before P2's duty to disclose arises (see also paragraph 9.4).

(b) The duty of a promoter (P2) in making a disclosure is discharged when both the following apply:

• another promoter (P1) has made a disclosure of the information about the arrangements described at paragraph 9.3 to HMRC and been provided by HMRC with a scheme reference number

• P2 holds that information and the scheme reference number (normally, we would expect P1 to pass a copy of their disclosure along with the scheme reference number allocated by HMRC to P2)

In the first rule, if, as a result of promoter P1's disclosure, a scheme reference number is allocated, HMRC will issue this to P2 as well as P1.

There is more on scheme reference numbers, and what you should do if you are provided with one, in Section 11 of this notice.

8.2.3 Exemption for substantially the same arrangements

A promoter in relation to 2 or more notifiable proposals or sets of notifiable arrangements which are substantially the same (whether they relate to the same parties or different parties) is only required to make disclosure once. Minor changes, for example to suit the requirements of different clients, need not be separately disclosed providing that the revised proposal remains substantially the same.

What constitutes a change in arrangements so that they are no longer substantially the same is a matter which will need to be considered on each occasion.

Arrangements are not substantially the same if the effect of any change would be to make any previous disclosure misleading in relation to the second (or subsequent) client.

We won't regard arrangements as substantially the same where the arrangements have been changed to deal with changes in the law or accounting treatment or where the changes result in a different tax outcome. For example,

where revised arrangements result in the ability to recover input tax when previously the arrangements avoided incurring the irrecoverable input tax.

However, special care must be taken where an existing tax product is used as part of otherwise bespoke arrangements.

If used as part of separate arrangements for the same or different clients, then it may be that the resulting arrangements are so different from the earlier planning idea that the disclosure position needs to be considered afresh.

8.3 The tests that trigger a disclosure by a promoter

As explained in paragraph 8.2.1 above there are 3 tests to determine when a promoter is required to disclose.

8.3.1 The 'makes a firm approach' test

There is more detail concerning the point at which this takes place in the definition of a promoter at paragraphs 3.6 to 3.6.2. It is the time when the arrangements have been 'substantially designed' and the promoter makes a 'marketing contact' with another person.

Disclosure must be made within 31 days of the date the promoter first makes a firm approach.

8.3.2 The 'makes proposed arrangements available for implementation' test.

The test covers circumstances where a promoter makes arrangements available for implementation by clients without previously having come within the firm approach test (see paragraph 8.3.1 above) (for example without marketing the proposed arrangements).

For example, a promoter may not actively market proposed arrangements, but has a ready developed planning solution, a tax product, which they make available, with or without modification, to a specific client in response to an approach from that client.

Proposed arrangements are made available for implementation at the point when all the elements necessary for its implementation are in place and communication is made to a client suggesting the client might consider entering into transactions forming part of the arrangements. It doesn't matter whether full details of the arrangements are communicated at that time.

Disclosure must be made within 31 days of the date the promoter makes the proposal available for implementation. But if they were required to disclose under the 'makes a firm approach' test described in paragraph 8.3.1 above, then disclosure is required at that earlier point.

8.3.3 The 'becomes aware of a transaction' test

In practice it is likely that a disclosure will normally be triggered by one of the other 2 tests described in paragraphs 8.3.1 or 8.3.2, before this third test arises.

If neither of those 2 tests are met then the trigger for disclosure under this test is when a promoter becomes aware that the client has entered into any transaction forming part of the arrangements.

This test may arise where the first 2 tests have not been met if the arrangements are wholly bespoke and developed interactively with the client in response to the client's particular requirements. It may be that in these circumstances there is no point at which the arrangements can be said to be made available for implementation.

Where this test applies, the promoter must disclose the notifiable proposal within 31 days from when they become aware of any transaction forming part of arrangements implementing the proposal. This date applies only if the tests at paragraphs 8.3.1 and 8.3.2 are not met.

8.4 When the user of notifiable arrangements needs to disclose

8.4.1 Arrangements marketed by promoters based outside the UK

Where you are the client of a non-UK based promoter which fails to comply with any disclosure obligation, and where no person in the UK comes within the meaning of a promoter, including UK-based employees of the non-UK promoter, you must disclose the notifiable arrangements to HMRC yourself (see paragraph 3.9.1).

You must do so within 6 working days starting on the day you entered into the first transaction forming part of the arrangements (see paragraph 14.4.5).

Where disclosure has been made by a promoter, the scheme reference number allocated to it by HMRC must be provided to you.

HMRC can confirm to you whether a genuine reference number has been provided to you. Contact details are at paragraph 1.7.

Warning: Failure to provide details of notifiable arrangements you've used may result in a penalty (see paragraph 13).

8.4.2 Notifiable arrangements marketed by lawyers

Where a promoter is a lawyer and legal professional privilege prevents them from providing all or part of the required information to HMRC each user must disclose (see paragraph 3.9.2).

Disclosure must be made within 5 working days commencing from the day after entering the first transaction forming part of the arrangements (see paragraph 8.4.5).

8.4.3 Notifiable arrangements with no promoter, including 'in-house' arrangements

Where there is no promoter (other than in the case described in paragraph 8.4.2) the user must disclose (see paragraphs 3.9.1 and 3.9.3).

Disclosure must be made within 30 days commencing from the day after they entered into the first transaction forming part of the arrangements (see paragraph 8.4.5 below).

8.4.4 Exemption for substantially the same arrangements

If you have entered into 2 or more notifiable proposals or arrangements which are substantially the same, and have disclosed the first arrangements to HMRC in circumstances where either there is a promoter outside the UK (see paragraph 8.4.1) or where there is no promoter (see paragraph 8.4.3), you don't need to make a separate disclosure about the later arrangements.

8.4.5 The 'first transaction' test

The due date for making a disclosure, where the user is required to make the disclosure, is by reference to the first transaction forming part of the arrangements (see paragraph 8.5).

The user of the arrangements will need to ensure that they have systems in place where necessary in order that they can identify and report notifiable arrangements within the relevant time limit.

If you find that you have missed disclosing by the relevant date you should make a disclosure as soon as you are aware with a detailed explanation why disclosure was not made within the prescribed time. You may not be liable to a penalty for failing to make timely disclosure if you can demonstrate that you have a reasonable excuse (see section 13).

8.5 A transaction forming part of the arrangements.

A transaction which forms part of arrangements is one that will, either in isolation or in conjunction with other transactions, deliver the tax advantage expected from using the arrangements (see paragraph 9.3.4).

The concept of a transaction is not limited to the performance of a contract or the making of a payment under it – the entering into a contract is itself part of the transaction.

Whether an engagement letter is a transaction forming part of arrangements depends upon the nature of the engagement letter.

If the promoter, or a body controlled by the promoter such as an investment vehicle, is a counterparty to a transaction under the arrangements, and the engagement letter amounts to a contract to enter into such a transaction, then the engagement letter may be a transaction forming part of the arrangements.

8.6 Arrangements that provide an advantage in respect of more than one tax

Where a single arrangement provides an advantage in respect of more than one head of duty, each advantage is subject to its own disclosure considerations.

Where more than one advantage requires disclosure, the timing rules will always require them to be disclosed at the same time.

For administrative ease, combined disclosures can be made. This is explained further at paragraph 9.5.

9. How to make a disclosure

The following requirements have the force of law

9.1 The forms to complete

There are 3 different forms available that are to be used in the following circumstances:

- DASVOIT1 – notification by scheme promoter
- DASVOIT2 – notification by scheme user where promoter is outside the UK
- DASVOIT3 – notification by scheme user where there is no promoter, or the scheme is promoted by a lawyer who is unable to make a full notification

Use of these forms is a legal requirement (see paragraphs 1.4 and 1.5.3).

Warning: There are penalties for not providing required information in the specified form and manner. See section 13 for information about penalties.

9.2 How to obtain and submit the forms

You can make an online disclosure by clicking the relevant links on the GOV.UK website at Forms to disclose tax avoidance schemes. This enables you to use a structured form to send HMRC the prescribed information by secure e-mail.

You can obtain PDF versions of the forms for printing out by clicking the relevant links on the same web page. Alternatively, paper copies can be obtained by contacting HMRC using the contact details in paragraph 1.8.

The following has the force of law

• the completed forms should then be sent by post to the address shown at paragraph 1.7.

9.3 The information to be provided

9.3.1 General

The DASVOIT rules require information to be provided to HMRC by a promoter (or others) in respect of notifiable proposals or notifiable arrangements. There is no provision in the rules for information to be provided on a 'precautionary' basis.

Briefly, the regulations prescribe that the following information must be provided:

• your name and address if you are a promoter making the disclosure, a client making a disclosure where the promoter is a lawyer, or making an 'in-house' disclosure where there is no promoter

• your and the promoter's name and address if you are disclosing as the client of an off-shore promoter

• details of each provision in the Notifiable Arrangements Regulations that makes the proposed arrangements or arrangements disclosable – see paragraph 9.3.3

• a summary of the arrangements and the name by which it/they are known – see paragraph 9.3.4

• information explaining the elements of the arrangements and how the expected tax advantage arises – see paragraph 9.3.4

• the statutory provisions on which that tax advantage is based – see paragraph 9.3.4

9.3.2 Legal advice

Legal professional privilege may apply to certain advice given by lawyers to their clients. Such information need not be disclosed.

9.3.3 The prescribed notifiable arrangement(s)

The forms to be used to notify HMRC, DASVOIT1, DASVOIT2 and DASVOIT3 (see paragraph 9.1), have a list of the relevant provisions.

The relevant regime, VAT or other indirect tax, should first be selected.

Then the relevant hallmark (see paragraph 4.5 and section 7) should be indicated.

For some arrangements, more than one hallmark may apply. Here you need only indicate the main applicable hallmark.

See paragraph 9.5 below for situations where an advantage is obtained in respect of more than one tax.

9.3.4 Explaining the proposal or arrangements

Sufficient information must be provided such that an Officer of HMRC is able to understand how the expected tax advantage is intended to arise. The explanation should be in straightforward terms and should identify the steps involved and the relevant UK tax law.

If the arrangements are complex then copies of any prospectus or scheme diagrams will help us understand what is proposed. But even where you send such documents you must still use form DASVOIT1, DASVOIT2 or DASVOIT3 as appropriate. Where such documents are supplied there is no objection to these documents excluding information that would identify a client.

9.4 Notification of co-promoters

When a promoter makes a disclosure, they may also provide HMRC with details of any other promoter (a co-promoter) of the same or substantially the same arrangements. Promoters are not required to provide these details to HMRC but if they do so and provide the co-promoter with the information at paragraph 9.3.1 above the other promoter will be exempt from making their own disclosure (see paragraph 8.2.2). The details to be provided are the co-promoter's name and address. Where the co-promoter is a company, it is the company's name and address that is to be provided not that of an individual.

The details should be sent to the postal address at paragraph 1.7 and accompany the disclosure.

If you have already made a disclosure of the proposal or arrangements and hold the scheme reference number allocated by HMRC, and your co-promoter seeks exemption from making their own disclosure, their details need not be provided to HMRC if rule (b) at paragraph 8.2.2 is followed.

9.5 Arrangements that provide an advantage in respect of more than one tax

A single arrangement may provide an advantage in respect of more than one tax each of which is subject to its own disclosure considerations. For example both a VAT advantage and an Insurance Premium Tax advantage.

The following rule has the force of law

> Where more than one advantage requires disclosure, the arrangements need only be disclosed on one form. However, the description of the arrangements must make it clear that there is an advantage in respect of more than one tax and explain how each of those advantages arises.

The effect of the above on scheme reference numbers is explained at paragraph 11.7.

10. Client lists

10.1 General

Promoters are required to provide quarterly lists to HMRC of clients to whom they have become obliged to issue a scheme reference number during that calendar quarter.

The lists apply to proposals or arrangements disclosed at any time. See the examples in paragraph 10.3 below.

Warning: Failure to provide details of a client in accordance with the rules described in this section may result in a penalty (see paragraph 13).

10.2 Duty of a promoter to provide details of clients

The relevant legislation is at paragraph 27 of Schedule 17.

10.2.1 Providing client details - the duty

The duty to provide client details to HMRC applies to a promoter who is providing, or has provided, services to any person (the client) in connection with a notifiable proposal or arrangements and who is obliged to pass the scheme reference number to the client, (see paragraphs 11.2 and 10.2.2 below). The duty also applies to co-promoters whether or not they made a separate disclosure (see paragraphs 8.2.2).

This includes any person in the supply chain who is responsible to any extent for the organisation or management of the arrangements (see paragraph 3.7). To ensure equality of treatment, for penalty purposes, it also applies where a promoter would have been obliged to pass on a scheme reference number but for a failure by the promoter to notify the proposal or arrangements (see section 3).

10.2.2 When to provide a client's details

The requirement for a promoter to provide HMRC with a client's details for any quarter is triggered when the promoter has an obligation to notify the client of the scheme reference number under paragraph 23 of Schedule 17 (see paragraph 11.2).

This obligation arises when the later of 2 events occurs:

• the promoter being provided with the scheme reference number

• the promoter becoming aware of any transaction that forms part of the arrangements (see paragraph 8.5 on what constitutes 'a transaction forming part of the arrangements')

The promoter is required to provide prescribed information (see paragraph 10.2.3 below) to HMRC within 30 days of the end of a calendar quarter.

Promoters are not required to make nil returns for any quarter in which they have no clients to whom they have to pass the scheme reference number.

There is an extended deadline for provision of the client's tax identifier number in certain circumstances. The client must provide the promoter with their tax identifier number within 11 working days beginning with the later of the date the client receives the scheme reference number, or the date that the client first enters into a transaction forming part of the notifiable arrangements.

If these events are at or near the end of the quarter then the promoter may not have the tax identifier number to provide to HMRC or be able to inform HMRC that the client doesn't have a tax identifier number.

In this case the promoter is obliged to confirm to HMRC, within the usual 30 day prescribed period that one of 3 scenarios applies:

• the client has notified the promoter that they don't have a tax identifier number

• the client hasn't complied with their obligation to inform the promoter of their tax identifier number

• on the 16th day after the relevant period, that the client hasn't complied but that the time limit for the client to provide their tax identifier number hasn't expired

Where the time limit for the client to provide the information hasn't expired (the third bullet point above) then the prescribed period within which the promoter is required to provide HMRC with the client's tax identifier number or a written statement that the client doesn't have a tax identifier number, is extended to 60 days.

The extended period applies to the following prescribed information:

• the client's tax identifier number

• confirmation that the client doesn't have a tax identifier number

If after the 60 day extended period has expired the client has still not complied with their obligation to provide the promoter with their tax identifier number, then the promoter must provide a written statement to HMRC that the client hasn't complied with paragraph 25(2) of Schedule 17.

10.2.3 The information to be provided within the 30 day prescribed period:

• the full name and address of the promoter

• the scheme reference number issued by HMRC in connection with the proposal or arrangement

• the full name and address of each client. The address is the one to which the promoter sends the scheme reference number or the address shown on any register HMRC holds for the indirect tax concerned

• the tax identifier number of each client

• the end date of the calendar quarter for which the information is being supplied

Also, where the promoter is unable to provide the tax identifier number, one of the following:

• confirmation that the client doesn't have a tax identifier number

• confirmation that the client has failed to provide their tax identifier number

• that on the 16th day after the end of the calendar quarter, the time limit for the client to provide their tax identifier number has not expired

If the period for the provision of client information has been extended to 60 days, as described in paragraph 10.2.2 above, and the client has still not provided their tax identifier number and has not confirmed that they have no such number, the prescribed information to be provided by the promoter is:

• a written statement that the client has not complied with paragraph 25(2) of Schedule 17

10.2.4 How to submit client lists

There is no prescribed form for client lists. The requirement is to provide the information set out in paragraph 10.2.3 above within the stated time limits. We recommend setting out the information in 2 sections; the first part for the promoter's details and the second part for the prescribed information relating to the client(s).

To avoid any unnecessary HMRC enquiries you may wish to identify which, if any, of the listed clients decided not to proceed with the arrangements.

The following rule has the force of law

You must submit the client list by post to the address at paragraph 1.7

10.3 Examples – client lists

In these examples 'implemented the arrangements' refers to entering into a transaction forming part of the arrangements (see paragraphs 8.4.5 and 10.2.2).

Example 1

Promoter P discloses arrangements in November 2018 and HMRC issues a scheme reference number. P's normal practice is to issue a scheme reference number to clients as soon as they make proposed arrangements available to them.

The first relevant period will be the calendar quarter 1 January to 31 March 2019. This is because during that period P:

• issues the scheme reference number to clients X and Y

• becomes aware that X has implemented the arrangements

• also becomes aware that client Z, to whom P issued the scheme reference number in December 2018, has implemented the arrangements

P is required to provide information about clients X and Z in the client list due by 30 April 2019.

During the calendar quarter 1 April 2019 to 30 June 2019 P:

• does not issue this scheme reference number to any further clients

• becomes aware that Y has implemented the arrangements

P is required to provide information about client Y on the client list due by 30 July 2019.

Example 2

Promoter P has disclosed 2 proposed arrangements (A and B) each of which has been issued with a scheme reference number by HMRC. In the calendar quarter 1 January to 31 March 2019, they become aware that:

• clients X and Y have implemented arrangements A

• clients Y and Z have implemented arrangements B

P will be required to submit 2 forms by 30 April 2019, one for arrangements A (containing information about clients X and Y), and one for arrangements B (containing information about clients Y and Z).

11. What to do if you receive a scheme reference number

This section explains the scheme reference number system and the obligations of a person receiving a scheme reference number in relation to VAT or other indirect tax arrangements.

11.1 Outline of the scheme reference number system

The scheme reference number system is a means of identifying the users of disclosed arrangements ‘scheme users', allowing HMRC to prioritise and co-ordinate enquiries into users’ returns.

An 8-digit scheme reference number is allocated by HMRC at the time a disclosure is made. It is given to the person who disclosed the arrangements or proposed arrangements and any co-promoters notified in the disclosure.

They then in turn pass the number to the scheme user, sometimes via a third party client, in accordance with the rules explained below.

The scheme users then report the scheme reference number to HMRC. This must be reported on a specified HMRC form, DASVOIT4 (see paragraph 11.5).

Where a scheme user is the person required to disclose the arrangements (see section 3 for more on who must disclose), HMRC will provide the number directly to them, who nevertheless must report the number on the specified form, DASVOIT4.

The allocation or notification of a scheme reference number doesn’t indicate that HMRC accept that the arrangements achieve or are capable of achieving any purported tax advantage nor that the disclosure is complete.

Warning: You may incur a penalty if you fail to comply with the rules outlined in this section (see section 13).

11.2 Promoters must provide scheme reference number to clients

As a promoter you may have been provided with a scheme reference number by HMRC because you disclosed a notifiable proposal or notifiable arrangements, or because you were named as a co-promoter by another promoter at the time they made a disclosure (see paragraph 8.2.2 at (a)). Alternatively, you may have been provided with a scheme reference number by another promoter as a result of becoming a co-promoter sometime after a promoter made their disclosure (see paragraph 8.2.2 at (b)).

However you come to be in receipt of a scheme reference number you must:

• provide it, along with other related information, to any other person (your 'client') to whom you provide, or have provided, services in connection with the disclosed arrangements or any arrangements that are substantially the same - your client may be the person who is intended to obtain the tax advantage or they may be a third party

• use form DASVOIT5 by clicking the relevant links on the GOV.UK website at Tax Avoidance Schemes forms

• do so within 30 days of either being provided with the scheme reference number or becoming aware of any transaction that forms part of the arrangements, whichever is later

• include the client on a client list – see section 10

While there is no obligation to do so, you may find it more convenient to provide the number to a client when you make the arrangements available rather than wait until it has been implemented. If, but only if, you do so using the form DASVOIT5, you need not re-notify the number to your client when you become aware of a transaction forming part of the arrangements.

The information relating to the proposal or arrangements that a promoter is required to supply to clients comprises:

• information prescribed in regulations relating to the reference number for the arrangements comprising:

  - the name and address of the promoter
  - a summary of the notifiable proposal or notifiable arrangements and any name by which it is known
  - each reference number
  - the date that each reference number was sent to the client

• additional information, supplied by HMRC, which relates to avoidance schemes in general (and consequently is not limited to information relating to the particular arrangements in respect of which the reference number in the first bullet has been issued) - this information includes a list drawn up by HMRC of the risks and financial costs faced by users of tax avoidance schemes

The following requirement has the force of law

Promoters must use form DASVOIT5 published on the GOV.UK website for notifying scheme reference numbers to their clients and they must send the whole of the form, including the additional information.

The DASVOIT5 form that you're required to send to your client will clearly state that HMRC don't accept that the arrangements are capable of achieving any purported tax advantage, and that HMRC hasn't approved the scheme. HMRC does not approve any tax avoidance schemes.

Warning: Promoters may incur a penalty if they fail to provide the scheme reference number and other required information to clients on the relevant form, DASVOIT5, available on the GOV.UK website (see section 13).

11.3 Clients must provide the scheme reference number to parties to the arrangements

As explained at paragraph 11.2 above, if a promoter provides, or has provided, services in connection with a notifiable proposal or arrangements, they must provide their clients with any scheme reference number allocated by HMRC in relation to the proposal or arrangements.

This must be provided on the HMRC form DASVOIT5 containing guidance about when and how to report the reference number to HMRC or provide it to other parties.

On receipt of a scheme reference number, by whatever route, the client must provide the scheme reference number:

• to any other person whom you might reasonably expect to be a party to, and who might reasonably be expected to gain a tax advantage from, the arrangements

• within 30 days of either being provided with the scheme reference number by the promoter or becoming aware of any transaction that forms part of the arrangements, whichever is the later

The client must also provide:

• any additional information supplied by HMRC about avoidance schemes generally in the form and manner that HMRC requires

Warning: You may incur a penalty if you fail to provide the scheme reference number and other required information to clients on the relevant form, DASVOIT5, available on the GOV.UK website (see section 13).

11.3.1 Reasonable expectation

The client of a promoter is required to pass a scheme reference number to third parties when they have sufficient commercial connection with that party to have a reasonable expectation that they will gain a tax advantage from the arrangements.

For example if a parent company purchases arrangements and makes them available for subsidiary companies to use, but without becoming a party to those arrangements, the parent company must provide the scheme reference number to those subsidiaries that are expected to gain a tax advantage from the arrangements.

The client is not required to provide a number to a person simply because, for example, they learn about their use of particular arrangements through reading about it in the press or a tribunal decision, etc.

Warning: You may incur a penalty if you fail to provide the reference number and other information to other persons as described above (see section 13).

11.4 On receipt of scheme reference number from a promoter, clients must provide their tax identifier number to the promoter

Within 11 working days beginning with the later of:

- the date that the client receives a scheme reference number
- the date that the client first enters into a transaction forming part of the arrangements

the client must notify the promoter of their tax identifier number. Or if they don't have this, provide confirmation that they don't hold a tax identifier number.

The promoter will then provide this information to HMRC in accordance with section 10 above.

11.5 Parties to notifiable arrangements must notify the scheme reference number to HMRC

As explained at paragraphs 11.2 and 11.3, if you are a party to notifiable arrangements, the promoter or their client may provide you with a scheme reference number. This must be provided to you on form DASVOIT5. In some cases you may receive the number direct from HMRC as a result of disclosing the arrangements yourself (see paragraphs 3.9.1 to 3.9.3).

The following rule has the force of law

If you have received the scheme reference number and expect to obtain a tax advantage as a result of being a party to the arrangements you must provide information to HMRC on form DASVOIT4.

The information to be provided to HMRC is:

- name and address of the person 'P' providing the information

• scheme reference number(s)

• accounting period in which, or date on which, P expects a tax advantage to arise (this information is not required for customs duties)

• tax identifier number provided to P

• declaration confirming the accuracy and completeness of the information and which states whether P is also:

- a client
- another party to a notifiable proposal or arrangements
- an introducer or promoter in relation to the notifiable proposal or arrangement

Warning: You may incur penalties if you fail to notify prescribed information within the prescribed time limits (see section 13).

11.5.1 When to submit information on form DASVOIT4

The requirement to complete a DASVOIT4 with the information at paragraph 11.5 and to send it to HMRC is triggered by you receiving a scheme reference number from a promoter or their client where you expect to obtain a tax advantage as a result of being a party to the arrangements.

The following requirements have the force of law

A completed DASVOIT4 form must be sent to HMRC at the address in paragraph 1.7 within 31 days beginning with the day you first enter into a transaction forming part of the arrangements. You must continue to provide HMRC with a completed DASVOIT4 form for every subsequent year until the advantage ceases to apply.

The period covered by each DASVOIT4 form will be the 12 months up to each anniversary of the date you first entered into a transaction forming part of the arrangements. You must submit the completed form within 31 days starting with the day of the anniversary.

Warning: You may incur penalties if you fail to notify the scheme reference number correctly (see section 13).

11.5.2 Where to send form DASVOIT4

The following requirement has the force of law

The completed DASVOIT4 form must be sent to the postal address at paragraph 1.7.

It must be sent in sufficient time for it to be received by the relevant date as detailed at paragraph 11.5.1 above.

11.6 How to obtain form DASVOIT4

Form DASVOIT4 is available on the GOV.UK website, this is a PDF version you can print.

If you need HMRC to send you a paper copy, contact HMRC using the contact details in paragraph 1.8. The completed form should then be sent to HMRC by post as described in paragraph 11.5.2.

11.7 Arrangements that provide a benefit for more than one indirect tax

Where a single set of arrangements provides an advantage in respect of more than one indirect tax, the arrangements need only be disclosed on one DASVOIT4 form. However, the description of the arrangements must make it clear that there is an advantage in respect of more than one tax and explain how each of those advantages arises.

HMRC will issue a single scheme reference number that will apply to both advantages.

11.8 Duty of promoters to provide updated information

Where a promoter has made a disclosure under DASVOIT in respect of which HMRC has issued a scheme reference number the promoter is required to notify HMRC about any change in the name by which the proposal or arrangements are known and about any changes to the promoter's name or address.

If there is more than one promoter, each promoter is responsible only for notifying HMRC about changes to its name or address.

If there is more than one promoter and there has been a change in the name by which the proposal or arrangements are known, and one of the promoters notifies HMRC about the change, the duty on the other promoters to provide the same information is discharged.

The information about the changes must be provided to HMRC within 30 days of the change happening by sending the information in writing to the address at paragraph 1.7.

11.9 Removal of reporting duties

HMRC has discretion to remove the reporting duties associated with the disclosure of notifiable proposals and arrangements by giving notice from a given date that:

• the scheme reference number need no longer be reported

- by a promoter to its clients (paragraph 11.2),
- by clients to parties to the scheme (paragraph 11.3)
- by parties to the scheme to HMRC (paragraph 11.5) and

• a promoter has no further reporting obligations in relation to the arrangements to which the reference number was allocated

The removal of these reporting duties is notified to the person who originally made the disclosure and to any co-promoters whose details had been provided to HMRC by the person who made the original disclosure.

The removal of these reporting duties does not relieve any obligation under the DASVOIT rules that may have existed before the given date notified by HMRC.

12. Information powers

12.1 Summary

The legislation providing for HMRC's information powers are in paragraphs 28 to 34 of Schedule 17.

These include powers that enable HMRC to:

• require a promoter to provide information about a party to the arrangements who is not a client

• enquire into the reasons why a promoter or an introducer has not disclosed a proposal or arrangements and require further information and documents in support of that claim

• require an introducer (a person who introduces clients to a promoter) to identify the person who provided them with information relating to the proposed arrangements and anyone with whom they have made a marketing contact in relation to the proposed arrangements

These provisions provide a mechanism to identify notifiable proposals and arrangements which have not been disclosed and to identify users of the arrangements.

In addition to these powers HMRC may enforce disclosure by applying to a tribunal for an order to the effect that proposals or arrangements are notifiable or are to be treated as notifiable under DASVOIT.

12.2 Pre–disclosure enquiries into non-disclosure of arrangements

12.2.1 Explaining why arrangements have not been disclosed

The relevant legislation is in paragraph 29, Schedule 17.

HMRC may by written notice require a person, whom we suspect of being a promoter or introducer of a disclosable proposal or arrangements, to provide an explanation of why they think the proposal or arrangements are not notifiable by them.

If the person to whom the notice is issued is an introducer, and their reply is that the proposal is not notifiable by them because they are not the promoter, they should provide sufficient detail of their role in relation to the proposal to enable HMRC to confirm that they are not a promoter. Whilst not strictly required it would be helpful if an introducer identified the promoter in their reply.

However if it is not provided in response to the notice at this stage, HMRC have further powers to require it (see paragraph 12.2.3 below).

If the person is a promoter of the proposal or arrangements, they must provide an explanation of why they consider it is not disclosable by them. In doing so it is insufficient for the reply to simply refer to the fact that a lawyer or other professional has given an opinion to that effect.

Where the promoter maintains that the arrangements don't fall within any hallmark in the Notifiable Arrangements Regulations the explanation must provide sufficient information for HMRC to verify whether this is the case.

The information required at this preliminary stage is that which is required to test whether or not a proposal or arrangements is disclosable.

The information must be provided to HMRC within 11 working days, beginning with the day the notice is issued, or longer if HMRC has so directed.

Warning. Failure to provide information required by HMRC's written notice may result in a penalty (see paragraph 13.6).

12.2.2 Orders for supplementary information or documents

The relevant legislation is in paragraph 30, Schedule 17.

Where a person has stated that a proposal or arrangements are not disclosable by them HMRC may apply to the tribunal for an order that they provide specified information or documents in support of their statement. HMRC can use this power whether or not the statement was in response to a notice under paragraph 29 of Schedule 17 (see paragraph 12.2.1 above).

The tribunal rules require the tribunal to notify other parties of an application by HMRC. However, when making an application, HMRC will notify potentially affected persons at the same time.

The information must be provided by the 15th day beginning with the date of the order or any longer period directed by HMRC. Failure to comply may result in a penalty (see paragraph 13.6).

HMRC may agree to a longer period where it is satisfied there is a good reason why the promoter can't provide the information within 15 days.

12.2.3 Notice requiring an introducer to provide information to HMRC

The relevant legislation is in paragraph 31, Schedule 17.

Where HMRC suspect a person of acting as an introducer for a notifiable proposal which has not been disclosed, it may, by written notice, require them to provide the name and address of each person who has provided them with information about the proposed arrangements. The person who provides the introducer with the information may be a promoter or another intermediary.

An introducer may also be required by HMRC to provide the name and address of each person with whom the introducer has made a marketing contact in relation to the proposal (see paragraph 3.6.1) in order to identify persons who may be required to disclose.

The information must be provided to HMRC within 11 working days, beginning with the day the notice is issued, or longer if HMRC so directs.

Warning: Failure to do so may result in a penalty (see paragraph 13.6).

12.3 Resolving disputes and enforcing disclosure

12.3.1 Orders stating a proposal or arrangements are disclosable

The relevant legislation is at paragraph 4, Schedule 17.

HMRC may, in relation to a specified promoter, apply to the tribunal for an order stating that a proposal or arrangements are disclosable.

The tribunal will make an order if it is satisfied on the evidence that the proposal or arrangements are notifiable under paragraph 3 of Schedule 17 (see section 4 above).

Such an order has the effect of confirming that a proposal or arrangements were, and always were, disclosable within the time limits prescribed in the Disclosure of Avoidance Schemes Regulations.

Failure to disclose a notifiable proposal or arrangements may result in a penalty (see paragraph 13.5). Failure to disclose within 11 working days, beginning with the day the tribunal order is made, may result in a higher penalty (see paragraph 13.5.4).

12.3.2 Orders deeming a proposal or arrangements to be disclosable

The relevant legislation is at paragraph 5 of Schedule 17.

HMRC may, in relation to a specified promoter, apply to the tribunal for an order that a proposal or arrangements are to be treated as disclosable.

The tribunal can make an order if they are satisfied that HMRC have reasonable grounds for suspecting that the proposal or arrangements may be disclosable and have taken all reasonable steps to establish whether they are.

The effect of an order is that a proposal or arrangements are deemed to be disclosable and must be disclosed.

Disclosure must be made within 11 working days, beginning with the day the tribunal order is made.

Penalties apply when there is a failure to disclose a proposal or arrangements. When there is a failure to disclose within the 11 day period following a tribunal order, a higher penalty applies (see paragraph 13.5.5).

However, even if disclosure is made within the time limits in response to a tribunal order, if it subsequently comes to light that the proposal or arrangements were always disclosable, an application to the tribunal for a late notification penalty (see paragraph 13.5) may still be made.

12.4 Incomplete disclosures - Promoters

The relevant legislation is at paragraph 16 of Schedule 17.

If HMRC believes that a promoter has not provided all the prescribed information in relation to a disclosure, they may apply to the tribunal for an order that the promoter provide specified information and/or related documents.

A scheme reference number may be issued to ensure that users of the arrangements are able to comply with their obligation to notify HMRC. It does not imply that HMRC considers that a complete disclosure has been made.

The tribunal can make an order if satisfied that HMRC has reasonable grounds for suspecting that the specified information or documents form part of, or will support or explain, the prescribed information.

The effect of an order is that the specified information and/or documents must be provided to HMRC in the same way as if it were prescribed information. This must be done by the 11th working day beginning with the date of the order. Failure to do so may result in HMRC applying to the tribunal for a late notification penalty (see paragraph 13.5.1).

12.5 Further information and incomplete disclosures

The relevant legislation is in paragraphs 19 and 20 of Schedule 17.

HMRC may require a person to provide further specified information or documents about a notifiable proposal or arrangements in addition to the prescribed information already provided in 2 circumstances:

• when the person has provided the prescribed information as a promoter, a person dealing with a promoter outside the UK or where the arrangements don't involve a promoter (see section 3)

• when the person has provided information in purported compliance with the disclosure requirements for a person dealing with a promoter outside the UK or a person who is a party to arrangements where there is no promoter but HMRC believe that the person has not provided all the prescribed information (the equivalent provision for a promoter is described at 12.4 above)

Where HMRC impose a requirement to a person they must comply with the requirement within 10 working days beginning with the day HMRC imposed the requirement, or such longer period as HMRC may direct.

HMRC doesn't need to apply to the tribunal for permission to send a notice requiring a person to provide the information or documents. However if HMRC believes that the person has failed to provide the information or documents required then HMRC may apply to the tribunal for an order requiring the production of the information or documents. The tribunal won't make the order unless it is satisfied that HMRC has reasonable grounds for suspecting that the information or documents will assist HMRC in considering the notifiable proposals or arrangements.

The time limit for complying with an order is 10 working days beginning on the day that the tribunal made the order or any such longer period as HMRC may direct.

12.6 Information to enable HMRC to identify the end user of a proposal or arrangement

The relevant legislation is in paragraph 28, Schedule 17 and regulation 14 of the Disclosure of Avoidance Schemes Regulations.

HMRC can require, by written notice, a promoter to provide further information, if it suspects that a client on a client list is not a user of the proposal or arrangements.

This would be the case if a client included on the list was an intermediary rather than the user of the arrangements.

The required information is:

• the name and address of any person other than clients on the client list whom the promoter might reasonably be expected to know is or is likely to be a party to the arrangements who

- sells, or is likely to sell, the arrangements to another person
- has achieved, or is likely to achieve, a tax advantage by implementing the arrangements

• each tax identifier number provided to that person

• sufficient information to enable an officer of HMRC to understand the way in which that person is involved in the arrangements

The information must be provided within 11 working days from the date that the promoter receives the written notice from HMRC requiring the information or any such longer period as HMRC may direct.

13. Penalties

13.1 General

The penalties for failure to comply with a DASVOIT obligation are provided for in paragraphs 39 to 44 of Schedule 17.

Broadly, DASVOIT penalties fall into 3 categories:

• disclosure penalties – apply to failure to disclose a proposal or arrangements

• information penalties – apply to all other failures to comply with DASVOIT except for those covered by the next category below

• user penalties – apply to failure by a scheme user to report a scheme reference number to HMRC

Disclosure penalties and information penalties involve an initial penalty and a further penalty if non-compliance continues. The initial penalty is set by a tribunal and any further penalties are issued by HMRC.

Penalties don’t apply where a person has a reasonable excuse for a failure to comply with a DASVOIT obligation (see paragraphs 13.3 and 13.5.3).

13.2 Tribunal penalty proceedings

13.2.1 General

An authorised officer for HMRC may apply to the First-tier Tribunal to set a penalty on a specified person (or persons) for breach of a specified DASVOIT obligation. You'll find more about the tribunal system at Appeals Reviews and Tribunals Manual.

Applications will be subject to a hearing involving HMRC and the specified person at which each will put their case to a tribunal.

Factors that we will consider in deciding whether or not to institute penalty proceedings will include:

- the level of knowledge/experience the person could reasonably be expected to have of DASVOIT
- the person's previous behaviour in relation to DASVOIT
- the adequacy of the systems the person has put in place to ensure compliance with DASVOIT
- the nature of the behaviour that led to the failure (for example was it an isolated error, carelessness or a deliberate act)
- whether the person alerted HMRC to the failure before we raised the issue
- what the person did after the failure was discovered, or brought to their attention, to prevent any recurrence
- whether there is a reasonable excuse for the failure

If the tribunal accepts HMRC's case that there was a prima facie failure to comply, the tribunal must consider whether the person had a reasonable excuse (see paragraphs 13.3 and 13.5.3).

If the tribunal decides that either the person did not have a reasonable excuse for failing to comply with the DASVOIT obligation or there was an unreasonable delay after the excuse ceased before the person complied, it must decide upon the amount of the penalty.

13.3 Reasonable excuse: general

The law provides that a liability to a penalty does not arise in relation to a particular failure to comply if the person concerned satisfies HMRC or the relevant tribunal (as the case may be) that there is a reasonable excuse for the failure

There is no statutory definition of reasonable excuse which is a matter to be considered in light of the circumstances of the particular case.

What is reasonable will vary from person to person depending on the nature of the failure, and the circumstances and abilities of the person concerned.

HMRC usually consider a reasonable excuse to be something that stops a person from meeting a tax obligation despite them having taken reasonable care to meet that obligation. It is necessary to consider what a reasonable person, who wanted to comply would have done in the same circumstances.

13.3.1 Limitations to a defence of reasonable excuse

Whilst there is no definition of 'reasonable excuse', the law does specify circumstances that won't be regarded as a reasonable excuse.

For a person 'P':

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relied on any other person to do anything, that can't be a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) reliance on advice is to be taken automatically not to be a reasonable excuse if the advice was addressed to, or was given to, a person other than P or takes no account of P's individual circumstances.

The following paragraph 13.3.2 covers another situation that won't be regarded as constituting a reasonable excuse (monitored promoters and their clients)

13.3.2 Further limitations to defence of reasonable excuse apply to monitored promoters and their clients

There are further restrictions to the defence of reasonable excuse for advice given or procured by a monitored promoter under the Promoters of Tax Avoidance Schemes rules. See paragraph 50 of Schedule 17.

13.4 Appeals

There is a right of appeal against any penalty imposed under paragraphs 39 or 44 of Schedule 17 (disclosure, information and user penalties – see paragraphs 13.5 to 13.7 of this notice). In the case of a penalty issued by HMRC, the appeal will be to the First-tier Tribunal. In the case of a penalty set by a First-tier Tribunal, the appeal will be to the Upper Tribunal. Appeals against penalties set by the First-tier Tribunal may be made both on points of law arising from a tribunal decision and against the amount of the penalty (see guidance on the appeals system at Appeals Reviews and Tribunals Manual.

13.5 Disclosure penalties

13.5.1 Cases where no tribunal disclosure order is involved

This includes a failure to make a disclosure within the prescribed time frame (see section 8) as well as cases involving a failure to provide information in response to an information notice from HMRC (see paragraph 12.5) and where a tribunal has made an order regarding an incomplete disclosure (see paragraph 12.4).

There is an initial penalty covering the period from when the failure commenced up to a current date with further daily penalties if the failure continues.

The amount of an initial daily penalty for a failure to disclose by the due date, or in the specified form and manner, is set by the First-tier Tribunal (see paragraphs 13.5.2 and 13.5.3). The tribunal may set a penalty of an amount up to £600 a day during the 'initial period'.

However the tribunal may set a higher penalty of up to £1 million in some circumstances. When making this decision the tribunal will take into account all matters it considers relevant, including particularly the aim of deterring that person or other persons from failing to comply in a similar way (see paragraph 13.5.2).

The penalty may be the result of a:

• promoter failing to notify a proposal or arrangements

• scheme user failing to notify arrangements (see paragraphs 3.9,1, 3.9.2 and 3.9.3)

• promoter failing to comply with a tribunal order requiring the promoter to remedy an incomplete disclosure (see paragraph 12.4) (when operating the penalty provisions this is treated in the same way as a failure to disclose a notifiable proposal or arrangements)

• promoter or scheme user failing to comply with an information notice from HMRC (see paragraph 12.5)

HMRC may issue a further daily penalty, not exceeding £600, for each day that the failure to disclose continues after an initial penalty has been set until the day before the failure is remedied.

Warning: You may incur penalties of up to £1m or more if you fail to disclose notifiable arrangements or don't comply with a tribunal order or information notice from HMRC as described above.

13.5.2 Determining the amount of a penalty

The amount of the initial daily penalty is a matter for the tribunal to determine if it decides a person has failed to comply with an obligation to:

• disclose notifiable arrangements or a notifiable proposal

• provide information required by an order made under paragraph 16 of Schedule 17 (see paragraph 12.4)

• provide information required by a notice under paragraph 19 of Schedule 17 (see paragraph 12.5)

A tribunal may set any amount up to a maximum provided for in the law (see paragraph 13.5.1, 13.5.4 or 13.5.5). The wide range of amounts enables a tribunal to select an amount that is appropriate to the circumstances after taking into account all matters it considers relevant.

The law provides that in considering the rate of the penalty, a tribunal may have regard (in particular) to:

• in the case of a failure by a promoter, the amount of fees received, or likely to have been received by the promoter in connection with the arrangements

• in the case of a failure by any other person, the amount of the tax advantage gained, or sought to be gained by that person

This enables the tribunal to estimate the amount of the fees received or tax advantage gained where the actual figures are not known.

If a failure to comply with DASVOIT continues after a tribunal has imposed an initial penalty, HMRC may issue a continuing daily penalty. In such cases we will normally begin by using a daily amount that is proportionate to the amount imposed by the tribunal, compared to the maximum.

If the failure continues, HMRC will consider increasing the amount of a penalty, up to the maximum.

13.5.3 Reasonable excuse – for not disclosing

Paragraph 13.3 covers the general principles that apply to a claim of reasonable excuse and paragraphs 13.3.1 and 13.3.2 cover the limitations of such a claim. This paragraph focuses on reasonable excuse as it applies when a person fails to disclose a notifiable proposal or notifiable arrangements.

HMRC will consider a person to have a reasonable excuse for not making a disclosure where they are satisfied that there were reasonable grounds to consider that the proposal or arrangements were not disclosable.

HMRC does not consider that the fact a person has legal advice that the arrangements were not disclosable in itself provides a reasonable excuse. We consider that the proper test here is whether it was reasonable for a particular person to rely upon the particular advice received in relation to the particular facts of the case. We will also take into account factors such as the level of technical knowledge or expertise of the promoter.

In cases where a disclosure order is issued by the tribunal (see paragraph 12.3) any reasonable excuse which relies on doubt as to whether the arrangements are notifiable ends after 11 working days beginning with the day that the tribunal issues the order. This includes instances where the promoter has legal advice that the arrangements are not notifiable.

13.5.4 Penalties in cases where there is a tribunal order stating that a proposal or arrangements are disclosable (a paragraph 4 order)

An order made under paragraph 4 of Schedule 17, 'a paragraph 4 order', by a tribunal determines that a proposal or arrangements are notifiable (see paragraph 12.3.1). It has the effect of confirming that the proposal or arrangements are, and were always, notifiable within the normal prescribed time limits for disclosure (paragraphs 8.2.1, 8.4.1 – 8.4.3).

If the promoter had reasonable grounds to believe that the proposal or arrangements were not disclosable before the issue of the order, the order removes that doubt.

The law provides that the promoter can't rely on doubt as to the obligation to notify as a reasonable excuse for not providing the prescribed information about the proposal or arrangements after 11 working days beginning with the day the tribunal made the order.

If the promoter doesn't make a disclosure within 11 working days of the order being made, the maximum amount of both the initial daily penalty (which may be set by a tribunal) and the secondary daily penalty (which may be assessed by HMRC) increase to £5,000 for each day that the failure continues after the end of the 11 days.

This higher daily penalty is in addition to any penalties at up to £600 a day that may be issued for the period starting on the first day following the end of the prescribed period in which the proposal or arrangements should have been disclosed and ending 11 working days after the date on which the order was issued.

Where a tribunal has made an order requiring more information about a proposal or arrangements in respect of which a tribunal has given a paragraph 4 order that the proposal or arrangements are notifiable, the maximum penalty for failing to comply with the order is £5,000 a day.

If the maximum penalty the tribunal can set using the daily penalty described above is less than £1 million for the initial period, it may set a higher penalty of up to £1 million in some circumstances. When making this decision the tribunal will take into account all matters it considers relevant, including particularly the aim of deterring that person or other persons from failing to comply in a similar way.

13.5.5 Penalties in cases where there is a tribunal order stating that a proposal or arrangements are disclosable (a paragraph 5 order)

An order made under paragraph 5 of Schedule 17, a 'paragraph 5 order', by a tribunal determines that a proposal or arrangements are to be treated as notifiable (see paragraph 12.3.2). They must be disclosed within 11 working days, beginning with the day the order is made.

The issue of a paragraph 5 order doesn't on its own mean that there may be penalties as a result of the person failing to disclose before the tribunal issued the order.

After a paragraph 5 order, the initial period for which penalties may be set both for failing to disclose the proposal or arrangements and for failing to comply with an order for supplemental information relating to the proposal or arrangements starts on the 12th working day after the order is made.

The amount of the initial daily penalty is set by the First-tier Tribunal (see paragraphs 13.5.2 and 13.5.3).

The promoter can't rely on doubt as to the obligation to notify as a reasonable excuse preventing the imposition of penalties if it doesn't provide the prescribed information within 11 working days beginning with the date of the paragraph 5 order.

If the promoter doesn't disclose the proposal or arrangements within 11 working days of the order, the maximum amount of the initial daily penalty (which may be set by a tribunal) and the secondary daily penalty (which may be assessed by HMRC) is the higher amount of £5,000 rather than £600.

If a tribunal subsequently issues an order under paragraph 4 (see paragraph 12.3.1) or the person agrees that the proposal or arrangements were disclosable and that they were required to have made a disclosure before the paragraph 5 order was made, HMRC may apply to the tribunal to set a further penalty.

Where a tribunal has made an order requiring more information about a notifiable proposal or arrangements in respect of which a tribunal had given a paragraph 5 order, the maximum penalty for failing to comply with the order is £5,000 a day.

If the maximum penalty the tribunal can set using the daily penalty described above is less than £1m for the initial period, it may set a higher penalty of up to £1 million in some circumstances. When making this decision the tribunal will take into account all matters it considers relevant, including particularly the aim of deterring that person or other persons from failing to comply in a similar way.

13.6 Other information penalties

Information penalties apply to the following instances of failure to provide prescribed information by the due date and in the form and manner specified in this guidance:

• a promoter who doesn't respond to a pre-disclosure enquiry when required to do so (see paragraphs 12.2.1 and 12.2.2)

• an introducer who doesn't provide, when required to do so, the identity of the person who supplied them with information about the notifiable proposal or persons with whom the introducer has made marketing contacts (see paragraph 12.2.3)

• a promoter who doesn't provide their client with a scheme reference number or with the further required information as supplied for this purpose by HMRC (see paragraph 11.2)

• a client of a promoter who fails to provide the scheme reference number or the required information as supplied for this purpose by HMRC, to any person whom they might reasonably expect to be a party to the arrangements and expected to obtain a tax advantage from using it (see paragraph 11.3)

• a promoter who fails to provide HMRC with details of a client to whom they are obliged to issue a scheme reference number (see – section 10)

• a promoter who doesn't supply information on parties to the arrangements when required to do so by written notice (see – section 12)

• a client who doesn't provide to promoter their tax identifier number or assurances that they don't hold such a number (see paragraph 11.4)

• a promoter who fails to provide updated information about themselves and the arrangements (see paragraph 11.7)

In each case the failure includes cases where information is provided after the end of the period prescribed in DASVOIT for the provision of that information or in a format other than that specified in the DASVOIT guidance.

For all of the information penalties listed above, a tribunal may set an initial penalty for each failure of an amount not exceeding £5,000. HMRC may assess a daily penalty, not exceeding £600, for each day that each failure to provide information continues after an initial penalty has been set.

13.7 The user penalty

A party to notifiable arrangements, a 'scheme user', who fails to comply with an obligation to report a scheme reference number and related information (see paragraph 11.5) is liable to a penalty of:

• £5,000 for each set of arrangements to which the failure relates for a first occasion

• £7,500 for each set of arrangements on the second occasion within 3 years (whether or not it relates to the same arrangements involved in the previous occasion)

• £10,000 for each set of arrangements on the third and subsequent occasions (whether or not the failure relates to arrangements involved in a previous occasion)

A scheme user required to report information to HMRC who fails to do so in the form and manner specified in the DASVOIT guidance is liable to the same penalties.

These penalties are assessed by an authorised officer for HMRC.

Warning: you may incur penalties up to £10,000 for each set of arrangements if you don't report the prescribed information to HMRC in the manner specified in the DASVOIT guidance.

14. Publishing information notified to HMRC under DASVOIT

14.1 General

HMRC can publish information about arrangements which have been notified and to which it has allocated a scheme reference number.

It can also publish information about the promoters of those arrangements. The information may be published in any manner HMRC thinks appropriate.

14.2 Information which HMRC may publish

HMRC may publish:

- the name and address of the promoter
- any of the information prescribed for the purposes of making the disclosure
- a summary of the arrangements or proposed arrangements and any name or names they are known by
- the statutory provisions on which the tax advantage is based
- any ruling of a court or tribunal relating to the arrangements or proposed arrangements or promoter
- any other information which HMRC considers it appropriate to publish in order to identify the arrangements or proposed arrangements or a promoter of them

No information identifying any persons who enter into the arrangements may be published. But where the promoter also entered into the arrangements, this doesn't prevent HMRC publishing information about the promoter in relation to its activities as a promoter.

HMRC must tell a person in advance if they are considering publishing information that would identify them as a promoter of the arrangements HMRC intends to publish information about. The purpose of telling the person in advance is to give them a reasonable opportunity to make representations about why HMRC shouldn't publicly name the person as a promoter of the arrangements.

HMRC may also publish any ruling by a court or tribunal relating to any such arrangements or any such ruling relating to the promoter in that person's capacity as a promoter in relation to a notifiable proposal or arrangements.

14.3 Information HMRC must publish after a court ruling that is relevant to arrangements about which HMRC has published information.

If HMRC has published information about notifiable proposals or arrangements and there is a final ruling by a court or tribunal based on principles or reasoning which, if applied, would allow the tax advantage claimed to arise, HMRC must publish information about the ruling.

HMRC must publish this information in the same manner as it originally published information about the arrangements.

A ruling is final if it is:

- of the Supreme Court
- in respect of which either no appeal has been made or no further appeal may be made