Guidance

Disclosure of tax avoidance schemes (DOTAS)

Income Tax, Corporation Tax, Capital Gains Tax, National Insurance contributions (NICs), Stamp Duty Land Tax (SDLT), Annual Tax on Enveloped Dwellings (ATED), Apprenticeship Levy and Inheritance Tax (IHT)

HM Revenue and Customs (HMRC)
DOTAS Guidance

Contents

1. Introduction ........................................................................................................................................... 10
  1.1 What is this guidance about? ........................................................................................................... 10
  1.2 The status of this guidance ............................................................................................................. 10
  1.3 What’s new? ................................................................................................................................... 10
  1.4 What does this guidance cover? ...................................................................................................... 11
  1.4.1 Primary legislation ..................................................................................................................... 11
  1.4.2 Secondary legislation ................................................................................................................... 11
  1.4.3 Tertiary legislation (FA 2004, s.316, and SI 2012/1868, reg.21) .................................................. 12
  1.5 Use of legal references .................................................................................................................... 13
  1.6 Help and advice .............................................................................................................................. 15

2. An overview of the disclosure rules .................................................................................................... 16
  2.1 Objectives ....................................................................................................................................... 16
  2.2 The effect of disclosure ................................................................................................................... 16
  2.3 Scope and summary of the disclosure rules .................................................................................... 16
  2.3.1 Scope ........................................................................................................................................ 16
  2.3.2 Summary: Income Tax, Corporation Tax and Capital Gains Tax ............................................ 16
  2.3.3 Summary: National Insurance contributions ............................................................................ 17
  2.3.4 Summary: SDLT .......................................................................................................................... 18
  2.3.5 Summary: ATED ......................................................................................................................... 18
  2.3.6 Summary: IHT ............................................................................................................................. 18

3. Who discloses? ....................................................................................................................................... 20
  3.1 General .......................................................................................................................................... 20
  3.2 Who is a promoter? (FA 2004, s.307) .......................................................................................... 20
  3.3 Who is an introducer? (FA 2004, s.307) ....................................................................................... 21
  3.4 Scheme designers ............................................................................................................................ 21
  3.4.1 The benign test (SI 2004/1865, reg. 4(1) and (2)) .................................................................... 22
  3.4.2 The non-adviser test (SI 2004/1865, reg. 4(1) and (3)) .............................................................. 22
  3.4.3 The ignorance test (SI 2004/1865, reg. 4(1) and (4)) ............................................................... 23
  3.5 Who makes a scheme available for implementation by others? .................................................. 23
  3.6 Who makes a firm approach to another person with a view to making a scheme available for implementation by that person or others? ................................................................. 24
  3.6.1 The first test – P makes a marketing contact with C ................................................................. 24
  3.6.2 The second test – the scheme is substantially designed ............................................................ 25
  3.6.3 The third test – does P intend to make the scheme available him – or herself for implementation by clients? ................................................................................................................................. 25
  3.7 Scheme organisers and managers .................................................................................................. 26
  3.8 Corporate groups (SI 2004/1865, reg. 2) .................................................................................... 26
  3.9 Schemes marketed by offshore promoters (FA 2004, s.309) ....................................................... 26
  3.10 Schemes promoted by lawyers (FA 2004, s.310 and SI 2004/1865, reg. 6) ................................. 27
  3.11 Schemes with no promoter, including ‘in-house’ schemes (FA 2004, s.310) .............................. 28
  3.12 Overriding any duty of confidentiality (FA 2004, s316B) ............................................................... 28

4. Determining a hallmarked scheme – flow chart ................................................................................. 29
  4.1 Application of this section to National Insurance contributions arrangements ................................ 31
  4.2 Test 1: Are there arrangements that enable an IT, CT or CGT tax advantage be obtained? (FA 2004, s306(1)(a) and (b)) ................................................................................................................................. 31

5. Determining a hallmarked NI contribution scheme – flow chart ....................................................... 30
  A hallmarked NI contribution scheme ................................................................................................... 30

6. Determining a hallmarked, or hallmarked NI contribution, scheme – the tests ................................ 31
  6.1 Test 1: Are there arrangements that enable an IT, CT or CGT tax advantage be obtained? (FA 2004, s306(1)(a) and (b)) ................................................................................................................................. 31
7.8.7 Additional condition 2

7.8.4 Test 2

7.8.3 Test 1

7.8.5 Test 3

7.8.6 Additional condition 1

7.8.1 The legislation .............................................................................................................................. 57

7.8.2 About the hallmark....................................................................................................................... 61

been entered into were it not for the provision of the losses? ............................................................... 56

individually participating in the arrangements?...................................................................................... 56

7.7.5 Test 2

7.7.4 Informed Observer ....................................................................................................................... 55

7.7.3 Test 1

7.7.2 About the hallmark....................................................................................................................... 55

7.6.8 Test 4

7.6.7 Test 3

7.6.6 Test 2

7.6.10 Examples ....................................................................................................................................52

7.6.5 Informed Observer ................................................................................................................... 49

7.6.4 Test 1

7.6.3 Hallmark 5: Standardised tax products ........................................................................................... 46

7.6.2 About the hallmark....................................................................................................................... 48

7.6.1 The legislation .............................................................................................................................. 46

7.6.6 Test 2: Is the person intended to obtain the advantage a large business? (SI 2006/1543, regs. 3 and
4)........................................................................................................................................................... 33

7.6 Hallmark 5: Standardised tax products ........................................................................................... 46

7.5.2 Applying the hallmark .................................................................................................................45

7.5.1 The legislation .............................................................................................................................. 44

7.5.2 Applying the hallmark .................................................................................................................45

7.5.1 The legislation .............................................................................................................................. 44

7.5.1 The legislation .............................................................................................................................. 44

7.5 Hallmark 3: premium fee ................................................................................................................42

7.4.2 Confidentiality from HMRC ........................................................................................................42

7.4.1 The legislation.............................................................................................................................. 41

7.4.2 Confidentiality from HMRC ..........................................................................................................42

7.4.1 The legislation.............................................................................................................................. 41

7.3.6 Hallmark 1(b): Repeated and continued use of the element .........................................................41

7.3.5 Hallmark 1(b): Confidential ‘at any time’ ....................................................................................41

7.3.4 Hallmark 1(b): ‘Any element’ of the arrangements ..................................................................40

7.3.3 Hallmark 1(b): Confidentiality from HMRC ...............................................................................38

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4) ..........38

7.3.2 Hallmark 1(a): Confidentiality from competitors ........................................................................37

7.3.1 Hallmarks 1(a) and (b): Confidentiality where promoter involved .............................................35

7.2 Application of this section to National Insurance contribution schemes ........................................35

7.1 About the hallmarks ........................................................................................................................ 35

7.2 Application of this section to National Insurance contribution schemes ........................................35

7.1 About the hallmarks ........................................................................................................................ 35

7.6.1 The legislation .............................................................................................................................. 46

7.6.2 About the hallmark....................................................................................................................... 48

7.6.3 Abolition of exception for pre-1 August 2006 arrangements .........................................................49

7.6.4 Test 1 – are the arrangements made available generally .............................................................49

7.6.5 Informed Observer .......................................................................................................................49

7.6.6 Test 2 – are the arrangements standardised? ..............................................................................50

7.6.7 Test 3 – are the arrangements a tax product? ..............................................................................50

7.6.8 Test 4 – is the tax product not within an exception? ....................................................................51

7.6.9 Packaged solutions ....................................................................................................................52

7.6.10 Examples ....................................................................................................................................52

7.7 Hallmark 6: loss schemes .................................................................................................................54

7.7.1 The legislation .............................................................................................................................. 54

7.7.2 About the hallmark .......................................................................................................................55

7.7.3 Test 1 – is more than one individual expected to implement the tax arrangements? ..................55

7.7.4 Informed Observer .......................................................................................................................55

7.7.5 Test 2 – is the provision of losses one of the main benefits expected to accrue to one or more
individuals participating in the arrangements? ..................................................................................56

7.7.6 Test 3 Would it be unlikely the arrangements, or any element of the arrangements, would have been entered into were it not for the provision of the losses? ..........................................................56

7.8 Hallmark 7: leasing arrangements ..................................................................................................57

7.8.1 The legislation .............................................................................................................................. 57

7.8.2 About the hallmark .......................................................................................................................61

7.8.3 Test 1 – does the arrangement include a plant or machinery lease? ............................................62

7.8.4 Test 2 – is the lease of high value? ...............................................................................................62

7.8.5 Test 3 – is the lease a long lease? .................................................................................................62

7.8.6 Additional condition 1 – does the lease involve a party outside the charge to corporation tax? ..63

7.8.7 Additional condition 2 – does the arrangement involve the removal of risk from the lessor? .....63

3
7.9 Hallmark 8: employment income

7.9.1 The legislation

7.9.2 About the hallmark

7.9.3 NICs

7.9.4 The 2 scenarios

7.9.5 Condition 1 the ‘step’ condition

7.9.6 Condition 2 the ‘main benefit’ condition

7.9.7 Condition 2: example: relevant step by employer

7.9.8 Condition 2: example: sale of shares at market value

7.9.9 Condition 2: example: ‘two-step’ employee share offers

7.9.10 Condition 2: example: new employee share scheme set up to reduce earmarking charge

7.9.11 Condition 2: example: unfunded employer-financed retirement benefit scheme (EFRBS)

7.9.12 Condition 3: the ‘exclusion’ condition

7.9.13 Condition 3: example: exclusion for pension income chargeable under Part 9

7.9.14 Condition 4: the ‘contrived or abnormal step’ condition

7.10 Hallmark 9 financial products

7.10.1 The legislation

7.10.2 About the hallmark

7.10.3 Condition 1

7.10.4 Informed Observer

7.10.5 Condition 2 – main benefit

7.10.6 Condition 3 – terms of financial product not likely to have been entered into but for the tax advantage

7.10.7 Condition 4 - Contrived or abnormal steps

7.10.8 – Specified Financial Products

7.10.9 – Code of Practice on Taxation for Banks

7.10.10 Examples illustrating the application of conditions 2, 3 and 4 in the Financial Products

Hallmark

7.10.11 Statutory Exceptions in Regulation 19

7.10.12 Securities which have both a minimum term and a foreign currency clause

8. Determining a SDLT scheme – flow chart

9. Determining a SDLT scheme – the tests

9.1 General

9.2 Test 1: are there arrangements that enable an SDLT advantage to be obtained (FA 2004, s.306(1)(a) and (b) and s.318)?

9.3 Test 2: Is the advantage a main benefit of the arrangements? (FA 2004, s.306(1)(c))

9.4 Test 3: Grandfathering

9.4.1 Exceptions to grandfathering

9.5 Tests 4 to 7: introduction to steps A to F

9.5.1 General

To further restrict disclosed schemes, you are not required to notify schemes that comprise one or more of 6 ‘steps’ A to F (test 4). However, this is subject to:

9.5.2 The 6 steps – a summary

9.5.3 The 6 steps: the legislation

9.6 Approach to tests 4 to 7

9.6.1 Single step B

9.7 Tests 6 and 7: combination steps

9.7.1 SI 2005/1868: rule 1 to the schedule

This rule merely confirms that arrangements exempted from disclosure can include any combination of steps B, D, E and F, including multiple uses of the same step

9.7.2 Tests 6 and 7 (SI 2005/1868, Rule 2 to the schedule)

These tests provide that arrangements are not excluded from disclosure if they:

9.7.3 Examples of arrangements exempted from disclosure
10. Determining an ATED scheme – flow chart

11. Determining an ATED Scheme – the tests

11.1 General

11.2 Test 1: are there arrangements that enable an ATED advantage to be obtained? (FA 2004, s.306(1)(a) and (b) and s.318)

11.3 Test 2: is the tax advantage a main benefit of the arrangements (FA2004, s.306(1)(c))

11.4 Test 3: does the arrangement fall within one of the prescribed descriptions (SI 2013/2571 Reg 4)

11.5 Does the arrangement or proposal fall within one of the excluded arrangements? (SI 2013/2571)

11.6 The legislation

11.7 Exclusion 1 - the transfer is on such terms as would reasonably be expected to be agreed between unconnected persons

11.8 Exclusion 2 - the transferor and the transferee are members of the same group of companies and the transferee meets the ownership condition

11.9 Exclusion 3 - the transfer constitutes a distribution out of the assets of the transferor, and the transferee is an individual, a corporation sole, a trustee or a person who meets the ownership condition

11.10 Exclusion 4 - the transfer constitutes a settlement

11.11 Commencement and transitional provisions

12. 100

13. Determining an IHT scheme – the tests

13.1 General

13.2 The IHT hallmark and how it works

13.3 The hallmark conditions

13.3.1 Condition 1

13.3.2 Condition 2

13.3.3 The ‘established practice’ exception

13.3.4 The proposal or scheme

13.3.5 Related arrangements

13.3.6 Established practice and HMRC’s acceptance of that practice

13.3.7 Substantially the same

13.4 Examples of arrangements which aren’t notifiable

13.4.1 Ordinary outright gifts are not notifiable, even where they are exempt

13.4.2 Executing a will, deed of variation or disclaimer which gives rise to exemption from inheritance tax

13.4.3 Acquisition of property which qualifies for a statutory relief or a transfer which is specifically provided for in the inheritance tax legislation

13.4.4 Arrangements which may not result in a reduced inheritance tax liability, but which cap the value subject to inheritance tax

13.5 Examples of arrangements that might be notifiable

13.6 Examples of notifiable arrangements

13A - Determining an apprenticeship levy scheme – the tests

13A.1 - General

13A.2 - The tests for notifiable arrangements

13A.3 - Commencement

13A.4 - Meaning of ‘arrangements’ (FA 2004, s.318)

13A.5 - Meaning of ‘advantage’ (FA 2004 s.318)

13A.6 - When is the tax advantage a main benefit of the arrangements? (FA 2004, s306(1)(c))

13A.7 - Hallmarks applying for arrangements which obtain an advantage in relation to the apprenticeship levy - confidentiality hallmarks
14. When to disclose a notifiable scheme ................................................................. 118

14.1 General ........................................................................................................... 118
14.2 Schemes where the promoter must disclose .................................................. 118
14.2.1 Time limits (FA 2004, s.308(1) and (3), and SI 2012/1836, reg. 5(4), (5) and 2(3)) .............. 118
14.2.2 Exemption for co-promoters (FA2004, s308.(4) to (4C)) ........................................ 118
14.2.3 Exemption for substantially the same scheme (FA 2004, s.308(5)) ................................. 119
14.2.4 Disclosing SDLT schemes twice .................................................................... 120
14.3 The tests that trigger a disclosure ................................................................. 121
14.3.1 The ‘makes a firm approach’ test ..................................................................... 121
14.3.2 The ‘makes a scheme available for implementation’ test ................................. 121
14.3.3 The ‘becomes aware of a transaction’ test ...................................................... 122
14.3.4 The tests that trigger a disclosure .................................................................... 121
14.4 Schemes marketed by offshore promoters (FA 2004, s.309 and SI 2012/1836, reg. 5(6) and 2(3)) ................................................................. 122
14.5 Schemes marketed by lawyers (FA 2004, s.310 and SI 2012/1836, reg. 5(7) and 2(3)) .......... 123
14.6 Schemes with no promoter, including ‘in-house’ schemes (FA 2004, s.310 and SI 2012/1836, reg. 5(8) and 2(3)) ................................................................. 123
14.7 Exemption for substantially the same scheme (SI 2012/1836, reg 4(4)) ....................... 123
14.8 The ‘first transaction’ test ............................................................................... 123
14.9 A transaction forming part of the scheme ...................................................... 124
14.10 Arrangements that provide an advantage in respect of more than one head of duty .... 125
15. How to make a disclosure ................................................................................ 126
15.1 The forms to complete (FA 2004, s.316) .......................................................... 126
15.2 How to obtain and submit the forms ............................................................... 126
15.3 The information to be provided ...................................................................... 126
15.3.1 General (SI 2012/1836, reg. 4) ......................................................................... 126
15.3.2 Legal advice (FA 2004, s.314) .......................................................................... 127
15.3.3 The prescribed arrangement(s) ........................................................................ 127
15.3.4 Explaining the scheme ................................................................................... 128
15.4 Notification of co-promoters (FA 2004, s.308(4A)(a) and (4C)(a)) ......................... 128
15.5 Arrangements that provide an advantage in respect of more than one head of duty .... 128
16. Client Lists ........................................................................................................ 129
16.1 General (FA 2004, s.312B, 313ZA, 312ZB and SI 2010/2928, SI 2013/2592) ................. 129
16.2 Duty of promoter to provide details of client ................................................... 129
16.2.1 The duty .......................................................................................................... 129
16.2.3 The information to be provided within the 30 day prescribed period ................. 131
16.2.4 How to submit client lists ................................................................................ 131
16.3 Examples .......................................................................................................... 132
17. What to do if you receive a scheme reference number relating to an income tax, corporation tax, capital gains tax or NI contribution scheme ................................................................. 134
17.1 Outline of the scheme reference number system ............................................ 134
17.2 Promoters must provide scheme reference number to clients (FA 2004, s.312 and s.316A and SI 2012/1836, reg. 6). ................................................................. 134
17.3 Clients must provide scheme reference number to parties to the scheme (FA 2004, s.312A and SI 2012/1836, reg 6). ................................................................. 135
17.3.1 Employers must provide scheme reference numbers to employees (FA04, s312A(2), (2A) and (3)) ............................................................................... 136
17.3.2 Reasonable expectation .................................................................................. 137
17.4 On receipt of scheme reference number from a promoter clients must provide their National Insurance number and UTR to the promoter (FA2004 s.312B and SI 2013/2592) ................................. 137
17.5 Parties to a scheme must include the scheme reference number on a return, etc. (FA 2004, s.313 and SI2012/1836, reg 8B) .............................................................. 138
17.5.1 When to enter information on tax return or form AAG4 .......................................................... 138
17.5.2 Where to send form AAG4 ....................................................................................................... 140
17.5.3 Date for submission of form AAG4 to the DOTAS Enforcement team in the Counter-Avoidance Directorate .............................................................. 140
17.5.4 Expectation of obtaining a tax advantage ................................................................................. 141
17.6 How to obtain and submit form AAG4 ....................................................................................... 141
17.7 Is an individual or a small and medium enterprise (SME) exempt from notifying reference numbers? ................................................................................................. 141
17.8 Employers using schemes expected to give rise to tax and/or NI contributions advantage (FA04, s.312A(2), (2A), s.313(6), s.313ZC, SI2012/1836 reg 8B SI2012/1868 reg 16B and SI2017/1174 reg 1) .............................................................. 141
17.9 Arrangements that provide both a NI contribution advantage and an income tax advantage ...... 143
17.10 Withdrawal of scheme reference numbers ................................................................................ 144
18. What to do if you receive a scheme reference number relating to a SDLT scheme ...................... 145
18.1 Outline of the scheme reference number system ........................................................................ 145
18.2 Promoters must provide scheme reference number to clients ................................................... 146
18.3 On receipt of scheme reference number clients must provide certain information to the promoter (FA2004 s.312B and SI 2013/2592) .................................................................................. 146
18.4 Clients must provide scheme reference number to parties to the scheme .................................... 147
18.4.1 Reasonable expectation............................................................................................................. 147
18.5 Purchaser receiving a SDLT advantage must include the scheme reference number and other information on form AAG4 (SDLT) .......................................................... 147
18.5.1 When to enter information on form AAG4 (SDLT) ................................................................ 148
18.5.2 What to enter on form AAG4 (SDLT): ....................................................................................... 149
18.5.3 Address of property .................................................................................................................. 149
18.5.4 Title number ............................................................................................................................. 149
18.5.5 Market value ............................................................................................................................. 149
18.5.6 Declaration as to accuracy and completeness ........................................................................... 150
18.5.7 Expectation of obtaining a tax advantage ................................................................................. 150
18.5.8 Partnerships Finance Act 2003, Schedule 15, Part 3 ................................................................ 150
18.6 How to obtain and submit form AAG4 ....................................................................................... 151
18.7 Duty of promoters to provide updated information (FA 2004, s310C) ....................................... 151
19. What to do if you receive a scheme reference number relating to an IHT scheme ...................... 152
19.1 Outline of the scheme reference number system ........................................................................ 152
19.2 Promoters must provide scheme reference number to clients ................................................... 152
19.3 On receipt of scheme reference number clients must provide certain information to the promoter (FA2004 s.312B and SI 2013/2592) .................................................................................. 153
19.4 Clients must provide scheme reference number to parties to the scheme .................................... 153
19.5 Scheme user receiving an IHT advantage must include the scheme reference number and other information on an IHT account (form IHT100) or on form AAG4 (IHT) .......................................................... 154
19.5.1 Date for notifying the scheme reference number .................................................................... 154
19.5.2 When to enter information on an IHT account (form IHT100) or on form AAG4 (IHT) ...... 154
19.5.3 What to enter on form AAG4 (IHT) ....................................................................................... 155
19.6 How to obtain and submit form AAG4 (IHT) ............................................................................... 156
19.7 Duty of promoters to provide updated information (FA 2004, s310C) ....................................... 156
20. What to do if you receive a scheme reference number relating to an ATED Scheme .................. 157
20.1 Outline of the scheme reference number system ........................................................................ 157
20.2 Promoters must provide scheme reference number to clients (FA2004, s.312 and SI 2012/1836, Reg. 6) ......................................................................................................................... 157
20.3 Clients must provide scheme reference number to parties to the scheme (FA 2004, s 312A and SI 2012/1836, regs 6 to 8) ......................................................................................................................... 158
20.4 Reasonable expectation............................................................................................................... 159
20.5 On receipt of scheme reference number clients must provide certain information to the promoter (FA2004 s.312B and SI 2013/2592) ........................................................................................................159
20.6 Parties to an ATED scheme must include the scheme reference number and other required information on its ATED return or on form AAG4 (ATED) ........................................................................................159
20.7 Date for notifying the scheme reference number ........................................................................160
20.8 When to enter information on the ATED return or on form AAG4 ........................................160
20.9 What to enter on form AAG4 (ATED) ........................................................................................161
20.10 Address of the Relevant Property ............................................................................................161
21.11 Title number ..................................................................................................................................161
20.12 Business unique identifier ...........................................................................................................161
20.13 Country of origin and type of business unique identifier ............................................................161
20.14 First chargeable period in which tax advantage arises ................................................................162
20.15 Declaration as to accuracy and completeness ............................................................................162
20.16 Expectation of obtaining a tax advantage ....................................................................................162
20.17 How to obtain and submit form AAG4 (ATED) ...........................................................................162
20A.1 What to do if you receive a scheme reference number relating to an apprenticeship levy scheme

162
20A.1 - General ........................................................................................................................................162
20A.2 - Outline of the scheme reference number system ........................................................................162
20A.3 - Promoters must provide scheme reference number to clients (FA 2004, s.312 and s.316A and SI 2012/1836, reg. 6) .........................................................................................................................163
20A.4 - No requirement for employers to send SRN to employees (FA04, s312A) where scheme obtains apprenticeship levy advantage only ..........................................................164
20A.5 - Clients must provide scheme reference number to parties to the scheme other than employees (FA 2004, s.312A and SI 2012/1836, reg 6) ........................................................................................................164
20A.6 - On receipt of SRN from a promoter clients must provide their National Insurance number and unique taxpayer reference (UTR) to the promoter (FA2004 s.312B and SI 2013/2592) .........................................................................................................................165
20A.7 - Parties to a scheme must include SRN on a form AAG4 ................................................................165
20A.8 - Where to send form AAG4 ......................................................................................................166
20A.9 - How to obtain and submit form AAG4 ..................................................................................166
20A.10 - No requirement for employers to send HMRC employee details (FA04, s313ZC) where scheme obtains apprenticeship levy advantage only ..........................................................166
20A.11 - Duty of promoters to provide updated information (FA 2004, s310C) ..................................166
20A.12 - Withdrawal of scheme reference numbers ...........................................................................167
21. Information powers ...........................................................................................................................168
21.1 Summary ........................................................................................................................................168
21.2 Invoking the powers .......................................................................................................................168
21.3 Application hearings ......................................................................................................................168
21.4 Pre-disclosure enquiries into non-disclosure of a scheme ............................................................168
21.4.1 Explaining why a scheme has not been disclosed (FA 2004, s.313A and SI 2012/1836, reg. 9(5) and 2(3)) .........................................................................................................................................................168
21.4.2 Orders for supplementary information or documents (FA 2004, s.313B and SI 2004/1864, reg. 8A(2)) .........................................................................................................................................................170
21.4.3 Notice requiring introducer to provide information leading to promoter of scheme or to a person with whom the introducer has made a marketing contact (FA 2004, s313C and regulation 15) ........................................................................................................................................170
21.5 Resolving disputes and enforcing disclosure .................................................................................171
21.5.1 Orders stating a scheme is disclosable (FA 2004, s.314A, TMA 1970, s.98C(2E) and regulation 16(2) and 2(3) of SI 2012/1836) .........................................................................................................................171
21.5.2 Orders deeming a scheme to be disclosable (FA 2004, s.306A, TMA 1970 s.98C(2E) and regulations 5(2),16(1) and 2(3) of SI 20/1836) .........................................................................................................................171
21.6 Incomplete disclosures (FA 2004, s.308A and regulation 5(3) and 2(3) of SI 2012/1836) ..........172
21.7 Further information and incomplete disclosures after a scheme has been disclosed (FA2004 S.310A and s.310B) ........................................................................................................................................173
22. Penalties ..................................................................................................................................................175
  22.1 General .............................................................................................................................................175
  22.2 Tribunal penalty proceedings ...........................................................................................................175
    22.2.1 General ......................................................................................................................................175
  22.3 Reasonable excuse: general ...............................................................................................................176
  22.4 Appeals ............................................................................................................................................178
  22.5 Disclosure penalties ..........................................................................................................................178
    22.5.1 Cases where no disclosure order is involved ...........................................................................178
    22.5.2 Determining the amount of a penalty .......................................................................................179
    22.5.3 Reasonable excuse – reason to consider a scheme is not disclosable .......................................180
    22.5.4 Cases where a section 314A order has been made .................................................................181
  22.6 Other Information penalties ............................................................................................................183
  22.7 The user penalty – tax advantage ....................................................................................................184
  22.8 Failures involving both disclosable NI contribution arrangements and disclosable income tax
      arrangements (SI 2012/1868, reg 22(14)) ..........................................................................................184
  22.9 The user penalty – NI contributions advantage ..............................................................................185
  23. Publishing information notified to HMRC under DOTAS (s316C FA 2004) .................................186
    23.1 General .........................................................................................................................................186
    23.2 Information which HMRC may publish .......................................................................................186
    23.3 Information HMRC must publish after a court ruling that is relevant to arrangements about
         which HMRC has published information (FA 2004, s316C) .........................................................187
1. Introduction

1.1 What is this guidance about?

This guidance is about what to do if you promote or use arrangements (including any scheme, transaction or series of transactions) that will or are intended to provide the user with a tax or National Insurance contribution advantage when compared to adopting a different course of action. It is divided into sections (for example, 1, 2, 3) and paragraphs (for example, 1.5, 1.5.1, 1.5.2) and includes advice on:

- deciding if arrangements relating to income tax, corporation tax, capital gains tax, National Insurance contributions, SDLT, ATED, IHT and the apprenticeship levy should be disclosed to HMRC
- how to make a disclosure (section 15)
- the systems HMRC expects users of tax arrangements to have in place to monitor for arrangements that they, rather than the promoter, may need to disclose to HMRC (see paragraphs 3.9 to 3.110, and 14.4 to 14.6)
- how to notify HMRC that you are using a disclosed arrangement (sections 17, 18 and 19)

It does not include advice on revoked, repealed or superseded legislation.

Guidance on the rules for disclosing arrangements relating to VAT can be found at VAT Notice 700/8: disclosure of VAT avoidance schemes.

1.2 The status of this guidance

The parts of this guidance (detailed in paragraph 1.4.3 below) that specify the form and manner for providing specified information have the force of law.

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

1.3 What’s new?

This guidance replaces the previous version published on 28 February 2018.

This guidance has been updated to cover the new inheritance tax hallmark which was introduced with effect from 1 April 2018. The flowchart which was previously in Chapter 12 has been removed and the guidance in Chapter 13 has been wholly replaced. The guidance in the new Chapter 13

- explains how the new inheritance tax hallmark works and the conditions that mean a proposal or arrangements must be disclosed
- gives examples of arrangements that you don’t need to disclose and those that you do.
1.4 What does this guidance cover?

1.4.1 Primary legislation

The main legislation covered by this guidance is:

- the Finance Act 2004, Part 7 (s.306 to s.319) (as amended by s108 of FA2007, s116 of and Sch38 to FA2008, s56 of and Sch17 to FA2010, s215 of FA2012, s223 of FA2013, s284 of FA2014, s117 of and Sch17 to FA2015 and s104 FA2016
- the Social Security Administration Act 1992, s.132A
- the Taxes Management Act 1970, s.98C (inserted by s.315 and s.319 of FA2004 and amended by FA2009 s.108(9) and FA 2010 s.56, sch 17)

1.4.2 Secondary legislation

Other legislation covered by this guidance is:

- the SDLT (Avoidance Schemes) (Specified Proposals or Arrangements) Regulations 2012 (SI 2012/2396)
- the ATED Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2013 (SI 2013/2571 as amended by SI 2015/464)
- the IHT Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2011 (SI 2011/170)
1.4.3 Tertiary legislation (FA 2004, s.316, and SI 2012/1868, reg.21)

The Commissioners for Her Majesty’s Revenue and Customs hereby specify that the information required under the provisions described below (including, for National Insurance purposes, the appropriate corresponding provision (see paragraph 1.5) must be provided in the following form and manner:

- Finance Act 2004, section 308(1) and (3) – on forms AAG1 and AAG5
- Finance Act 2004, section 309(1) – on forms AAG2 and AAG5
- Finance Act 2004, section 310 – on forms AAG3 and AAG5
- Finance Act 2004, section 312(2) – on form AAG6
- Finance Act 2004, section 312A(2) – on form AAG6
- Finance Act 2004, section 312A(2) and (2A) – information to be provided by employer to its employees on form AAG7
- Finance Act 2004, section 313(1) and (3)(a) – in the boxes provided for this purpose on the return
- Finance Act 2004, section 313(1) and (3)(b) – on forms AAG4, AAG4 (SDLT), AAG4 (IHT) or AAG4 (ATED)
- Finance Act 2004, section 313ZA(3) – on the client list form supplied by the Counter-Avoidance Directorate
- Finance Act 2004, section 313ZC(5) – on the employee list form supplied by the Counter-Avoidance Directorate

When sending the following forms to HMRC by post, please send to the address at paragraph 1.6:

- AAG1
- AAG2
- AAG3
- AAG4, AAG4 (SDLT), AAG4 (IHT) AAG4 (ATED)
- AAG8
- the client list form
The prescribed electronic means for the submission of forms in accordance with section 316 Finance Act 2004 (and the corresponding regulation 21 (SI 2012/1868)) in relation to National Insurance contributions) is as follows:

- forms AAG1, AAG2, AAG3 AAG4, AAG4 (SDLT), AAG4 (ATED) and AAG4 (IHT) are submitted by means of the links provided at forms to disclose tax avoidance schemes - form AAG5 is not needed for forms submitted electronically.
- forms AAG6 are available at www.gov.uk/guidance/forms-to-disclose-tax-avoidance-schemes
- employers are required to send information to employees on form AAG7, which is available using the appropriate link at the same web address
- new form AAG8 is available using the appropriate link at the same web address as for forms AAG6 and AAG7. Employers, which have used a notifiable scheme relating to employees during a tax year, are required to provide HMRC with information about the relevant employees. Employers must provide this information by sending HMRC a completed form AAG8 by 19 April after the end of the tax year to which it relates (paragraph 17.8)

Because client lists and forms AAG8 include sensitive personal information, it is not appropriate to send them to HMRC using insecure methods of electronic communication like e-mail. Promoters and employers who wish to report the information electronically should therefore contact HMRC before submitting it to find out which digital method or methods Counter-Avoidance is making available for the transfer of information in a secure way. The Counter-Avoidance Directorate will tell the promoter or employer what they need to do in order to comply with their reporting obligations when sending the required information electronically and provide appropriate access to the online tools.

For more information, see paragraph 16.2.4 (client lists) or paragraph 17.8 (employee lists).

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 22.

1.5 Use of legal references

Selected legal references and extracts from the legislation are provided in the headings to, and reproduced in the text of, this guidance to act as a quick reference and to aid understanding.
The National Insurance related provisions are, in the main, not referred to or reproduced as they are intended to mirror (with some minor differences explained at the relevant paragraphs of this guidance) those found in the Finance Act 2004 and other legislation.

The table below, however, details the main corresponding or modifying provisions:

<table>
<thead>
<tr>
<th>Tax provision</th>
<th>Corresponding or modifying provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>TMA 1970, section 98C</td>
<td>SI 2012/1868, regulations 22 and 24</td>
</tr>
<tr>
<td>FA 2004, section 306</td>
<td>SI 2012/1868, regulation 5</td>
</tr>
<tr>
<td>FA 2004, section 306A</td>
<td>SI 2012/1868, regulation 6</td>
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<td>FA 2004, section 307</td>
<td>SI 2012/1868, regulation 7</td>
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<td>FA 2004, section 308</td>
<td>SI 2012/1868, regulation 8</td>
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<td>FA 2004, section 308A</td>
<td>SI 2012/1868, regulation 9</td>
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<td>FA 2004, section 309</td>
<td>SI 2012/1868, regulation 10</td>
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<td>FA 2004, section 310A</td>
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<td>FA 2004, section 310B</td>
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<td>FA 2004, section 310C</td>
<td>SI 2012/1868, regulation 11C</td>
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<td>FA 2004, section 311</td>
<td>SI 2012/1868, regulation 12</td>
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<td>FA 2004, section 312</td>
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<td>FA 2004, section 312A</td>
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<td>FA 2004, section 312B</td>
<td>SI 2012/1868, regulation 14A</td>
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<td>FA 2004, section 313</td>
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<td>FA 2004, section 313ZA</td>
<td>SI 2012/1868, regulation 16</td>
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<td>FA 2004, section 313ZB</td>
<td>SI 2012/1868, regulation 16A</td>
</tr>
<tr>
<td>FA 2004, section 313ZC</td>
<td>SI 2012/1868, regulation 16B</td>
</tr>
</tbody>
</table>
1.6 Help and advice

If you are concerned about any arrangement being marketed to you, or you would like to discuss any aspect of these guidance notes, you can:

Telephone: 03000 588993
Outside UK: +44 3000 588993

Contact us by post at the following address:

HM Revenue and Customs
Counter-Avoidance DOTAS Enforcement
S0483
Newcastle
NE98 1ZZ
2. An overview of the disclosure rules

2.1 Objectives

The objectives of the disclosure rules are to obtain:

- early information about tax arrangements and how they work
- information about who has used them

2.2 The effect of disclosure

On its own the disclosure of a tax arrangement has no effect on the tax position of any person who uses it. However, a disclosed tax arrangement may be rendered ineffective by Parliament, possibly with retrospective effect.

2.3 Scope and summary of the disclosure rules

2.3.1 Scope

Currently, disclosure covers certain tax arrangements relating to:

- Income Tax, Corporation Tax and Capital Gains Tax – the detailed rules are in sections 4, 6 and 7
  - Corporation Tax is defined in s.318 of FA 2004 as including any amount which, by virtue of any of the provisions mentioned in paragraph 1 of Schedule 18 to the Finance Act 1998 (c. 36) (company tax returns, assessments and related matters) is assessable and chargeable as if it were corporation tax
  - Bank Levy was added to paragraph 1 of Schedule 18 FA 1998 by virtue of paragraph 61 of Schedule 19 to Finance Act 2011 and so is within the scope of these rules
- National Insurance contributions – the detailed rules are in sections 5 to 7
- SDLT – the detailed rules are in chapters 8 and 9
- ATED – the detailed rules are in chapters 10 and 11
- IHT – the detailed rules are in chapters 12 and 13
- The apprenticeship levy – the detailed rules are in chapter 13A

2.3.2 Summary: Income Tax, Corporation Tax and Capital Gains Tax
Under the rules, a tax arrangement may need to be disclosed even if HMRC is already aware of it or it is not considered to be avoidance.

A tax arrangement should be disclosed where:

- it will, or might be expected to, enable any person to obtain a tax advantage (see paragraph 6.2)
- that tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement (see paragraph 6.3)
- it is a hallmarked scheme by being a tax arrangement that falls within any description (the 'hallmarks') prescribed in the relevant regulations – see section 7

In most situations where disclosure is required it must be made by the scheme ‘promoter’ within 5 days of one of 3 trigger events (see paragraph 14.3 for more detail on the events that trigger a disclosure).

However, the scheme user may need to make the disclosure where:

- the promoter is based outside the UK – see paragraph 14.4
- the promoter is a lawyer and legal professional privilege prevents him or her from providing all or part of the prescribed information to HMRC – see paragraph 14.5
- there is no promoter, such as when a person designs and implements their own scheme (in such cases disclosure must be made within 30 days of the scheme being implemented – see paragraph 14.6)

There is more guidance on who discloses in section 3 and the time limits for doing so in section 14.

Once a scheme has 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 sent on to clients and, if appropriate, on again to further clients until the final user of the scheme has received it. The scheme user must report their use of the scheme to HMRC by including the number on their tax return or on form AAG4.

There’s more on this in section 17, including what to do when a promoter’s client is not the person expected to obtain an advantage from the scheme.

A promoter must also provide HMRC with periodic lists of persons to whom they become liable to issue a scheme reference number (see section 16).

2.3.3 Summary: National Insurance contributions
The rules for disclosing hallmarked National Insurance contributions schemes mirror those that apply to income tax hallmarked schemes with some minor differences explained at the relevant paragraphs of this guidance.

Where there is both a National Insurance contributions advantage and a tax advantage, only one disclosure need be made but it must identify both advantages.

2.3.4 Summary: SDLT

From 1 November 2012 the descriptions of SDLT arrangements required to be disclosed were extended so that they now cover schemes intended to be used for non-residential or residential property of any value, subject to the following exceptions:

- arrangements that were first made available for implementation before 1 April 2010 unless those arrangements fall within certain descriptions (paragraph 9.7.2)

- arrangements falling within a ‘white list’, which includes the single use of a number of statutory reliefs (paragraphs 9.7-9.10)

The SRN system has applied to SDLT schemes since 1 April 2010.

With effect from 1 November 2012, the normal rule that a promoter has to disclose a scheme once only (unless it changes substantially) is overridden where:

- the scheme falls within certain descriptions (paragraph 14.2.4)
- it was disclosed before 1 April 2010

So as to require a further disclosure if the promoter continues to sell the scheme. The purpose of this change is to ensure that where such schemes continue to be promoted the promoter must provide HMRC with details of clients using the scheme (paragraph 14.2.4).

2.3.5 Summary: ATED

The regime was extended, with effect from 4 November 2013 to require the disclosure of certain arrangements where the aim was to reduce or avoid the ATED.

2.3.6 Summary: IHT

Certain IHT arrangements were brought into the DOTAS regime with effect from 6 April 2011, extending the regime to require disclosure of certain IHT arrangements which aim to seek to avoid or reduced the IHT entry charge when transferring property into trust.
Arrangements should be disclosed where:

- they will, or might be expected to, enable any person to obtain a tax advantage (see paragraph 6.2)
- the tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement (see paragraph 6.3)
- the arrangements must result in property becoming ‘relevant property’ as defined under s.58(1) of the IHT Act 1984
- the main benefit of the arrangements is the reduction, deferral or avoidance of the IHT entry charge and
- they are not the same (or substantially the same) as arrangements made available before 6 April 2011

The confidentiality and premium fee hallmarks were also extended to cover IHT with effect from 23 February 2016.

From this date, arrangements should be disclosed where:

- the arrangements will or might be expected to enable any person to obtain an advantage in relation to IHT (see paragraph 6.2) and
- that advantage in relation to IHT might be expected to be the main benefit, or one of the main benefits, of the arrangements (see paragraph 6.3) and
- the arrangements fall within either
  - the confidentiality where a promoter is involved hallmark (see paragraph 7.3), or
  - the premium fee hallmark (see paragraph 7.5)

2.3.7 Summary: apprenticeship levy

The regime was extended with effect from 21 December 2017 to require the disclosure of certain arrangements which aim to reduce or avoid the apprenticeship levy.

From 21 December 2017, arrangements should be disclosed where:
- the arrangements will or might be expected to enable any person to obtain an advantage in relation to the apprenticeship levy (see paragraph 6.2)
- that advantage might be expected to be the main benefit or one of the main benefits of the arrangements (see paragraph 6.3) and
- the arrangements fall within
  - one of the confidentiality hallmarks (see paragraphs 7.3 and 7.4)
  - the premium fee hallmark (see paragraph 7.5) or
  - the standardised tax product hallmark (see paragraph 7.6)
3. Who discloses?

3.1 General

The duty to disclose normally falls on the scheme promoter, however special rules apply when:

- a non-UK based promoter does not disclose a scheme – here the client of the promoter is required to disclose the scheme (see paragraph 3.9)
- the promoter is a lawyer and legal professional privilege prevents him or her from providing all or part of the prescribed information to HMRC – here the lawyer’s client must disclose the scheme (see paragraph 3.10)
- there is no promoter (for example, the scheme is devised ‘in-house’ for use within that entity or a corporate group to which it belongs) – here the scheme is disclosed by the scheme user (see paragraph 3.11)

Penalties can apply if a scheme is not disclosed accurately and at the right time (see section 22).

The Counter-Avoidance Directorate in HMRC works closely with compliance teams to ensure that schemes have been disclosed properly. Anyone likely to have a liability to disclose a scheme should ensure that effective identification and reporting arrangements exist.

The legislation requires that information shall be provided by a promoter (or others) in respect of notifiable proposals or notifiable arrangements, as defined in the legislation. There is no provision in the legislation for information to be provided on a ‘precautionary’ basis.

3.2 Who is a promoter? (FA 2004, s.307)

A person is a promoter if, in the course of a relevant business they:

- are to any extent responsible for the design of a scheme
- make a firm approach to another person with a view to making a scheme available for implementation by that person or others
- make a scheme available for implementation by others
- organise or manage the implementation of a scheme

A relevant business is:

- a business involving provision of services relating to tax (or where applicable National Insurance contributions)
- 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 scheme enables or is expected to enable a UK tax advantage to be obtained.

The meaning of promoter is widely drawn but employees of a promoter are not generally treated as if they are personally promoters of schemes promoted by their employer.

However, where there are no other promoters of a particular scheme resident in the United Kingdom, and a UK resident employee of any of the promoters carries on any of the activities described above from 17 April 2015, that employee is not excluded from being regarded as a promoter in relation to that scheme.

As a result, any employee or employees who are acting as a promoter in relation to a scheme are responsible for complying with the obligations that Part 7 imposes on promoters and is personally liable for penalties if those obligations are not complied with.

3.3 Who is an introducer? (FA 2004, s.307)

FA 2010 included a new category of person for information power purposes, an 'introducer,' to describe persons who advertise notifiable schemes on behalf of a promoter but whose role does not extend to that of a promoter (see paragraph 3.2 above).

An ‘introducer’ is defined in s.307(1A) FA 2004 as a person who ‘makes a marketing contact’ in relation to a notifiable scheme. You will find guidance on making a marketing contact in paragraph 3.6.1.

In the remainder of this paragraph we use the term ‘introducer’ to refer to a person who is purely an introducer and not a promoter. Such an introducer will not have been involved in the design of the scheme and may not know how the scheme is intended to work. Their role is simply to market the scheme to potential users and put them in touch with a promoter.

Introducers will often (but not always) be Independent Financial Advisors. However, if an introducer is responsible to any extent for organising or managing the arrangements implementing a particular scheme, this might mean they become a promoter in relation to that scheme and so become subject to the duties of a promoter (see paragraph 3.7).

The disclosure rules do not 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 under s.313C FA 2004 (see paragraph 21.4.3).

3.4 Scheme designers

A person who is only involved in the design of a scheme, and does not make the scheme available for implementation by others or organise or manage it, is not a promoter if any one of 3 tests is passed.
These are:

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

3.4.1 The benign test (SI 2004/1865, reg. 4(1) and (2))

The benign test applies where, in the course of providing tax (or National Insurance contributions) 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 marketing or designing a scheme may consult a second firm to provide advice in relation to a particular element of it.

This second firm will not be a promoter, despite being involved in the design of the overall scheme, so long as any tax (or National Insurance contributions) advice does not contribute to the tax (or National Insurance contributions) advantage element of it.

For example, a promoter may seek advice from an accounting or law firm on whether 2 companies are 'connected' for any purpose of the Taxes Acts. Provided the advice goes no further than explaining the interpretation of words used in tax legislation, it would be benign, as would advice on general compliance requirements, and so on.

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 (SI 2004/1865, reg. 4(1) and (3))

The non-adviser test applies where a person who, although involved in the design of a scheme, does not 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 will not become a promoter as long as it provides no tax advice (other than benign advice) in the course of carrying out its responsibilities
- accounting firm in relation to accounting aspects of a scheme - the firm is not a promoter so long as it provides no tax advice in the course of carrying out its responsibilities
3.4.3 The ignorance test (SI 2004/1865, reg. 4(1) and (4))

The ignorance test applies when a person could not reasonably be expected to have either:

- sufficient information to enable them to know whether or not the arrangements are disclosable schemes
- 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 are failed, or has only a partial understanding of the scheme so that they would be unable to comply with the disclosure requirements.

Where having the relevant ‘information’ depends not merely upon factual knowledge, but upon the application of some particular expertise, persons will not normally be expected to have such an expertise if it falls outside their own area of professional expertise (unless the matters in question can reasonably be said to be common knowledge amongst business and professional persons generally).

3.5 Who makes a scheme available for implementation by others?

A person makes a scheme available for implementation if and when:

- the scheme is fully designed
- it is capable of implementation in practice
- he/she communicates information about the scheme to potential clients suggesting that they consider entering into transactions forming part of the scheme

The design of a scheme will typically consist of a number of elements (for example, a partnership, a loan, partner’s contributions, the purchase of assets) structured to deliver the expected tax advantage.

The scheme will be capable of implementation in practice only when the elements of the design have been put into place ‘on the ground’. So, for example, if the design includes a loan, it will be capable of implementation only if and when an actual loan provider is in place and funds made available.

A scheme can be made available by more than one person such as by the scheme designer or those who provide the scheme under a licensing agreement with the designer. Each such person may be a promoter for disclosure purposes and have obligations as described in this guidance.

Paragraph 14.2.2 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 17.2) or providing client lists.
A person who acts solely as an intermediary between a scheme provider and a potential scheme user (i.e. they seek clients for the provider, not themselves) is not a promoter. Paragraph 14.3 provides information on when a scheme is ‘made available for implementation by others’.

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

This leg of the definition of ‘promoter’ was inserted by FA 2010. The change, combined with an addition to the list of events that trigger a disclosure (see paragraph 14.3), is intended to ensure that HMRC gets early information about marketed schemes. The change ensures that a disclosure is triggered as soon as a person takes steps to market the scheme, whether or not it is or could be made available for implementation at the same time or later. The legislation and associated guidance should be read in accordance with that policy intent.

The legislation contains 3 key tests to determine whether or not a person (P) is a promoter under this leg of the ‘promoter’ definition. The 3 tests are:

1. P ‘makes a marketing contact’ with another person (C) in relation to the scheme
2. at the time of the marketing contact, the scheme is ‘substantially designed’
3. P makes the marketing contact with a view to P making the scheme available for implementation by C or any other person

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 scheme to another person, C
- the communication is made with a view to C (or any other person) entering into transactions forming part of the arrangements
- the information communicated includes an explanation of any tax advantage that a person might be expected to obtain from using the arrangements

For a marketing contact to be made it is sufficient for the information communicated about the scheme to indicate the nature of the tax advantages persons using the scheme might expect to obtain. In order for there to be a marketing contact, it is not necessary for the information communicated to explain how the scheme works.

A person who makes a marketing contact may be either a promoter of the scheme 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 of the 3 of the tests described in paragraph 3.6 are met.

A person who makes a marketing contact with a view to introducing clients to another person (the promoter) who will make the scheme available to them is a scheme introducer only. That person will not be a promoter because they will not meet the third test described below at paragraph 3.6.3. An introducer may be required to provide
information to HMRC leading to the identification of the promoter (see paragraphs 3.3 and 21.4.3) or of a potential user of the scheme.

3.6.2 The second test – the scheme is substantially designed

The statutory test is that a scheme is substantially designed at any time if, at that time, the nature of the transactions to form part of the scheme has been sufficiently developed 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 at the time
- transactions not substantially different from those developed at the time

This test must be read in conjunction with the first test. If the first test is met a person will have communicated information to third parties about a scheme, including information about an expected tax advantage, with a view to persons entering into the scheme. This second test asks whether the design is worked up to the point that it would be reasonable to conclude that the combination of transactions envisaged in the design would be used to deliver the advantage to anyone wishing to secure the advantage communicated, without the design requiring further, substantial, amendment. In practice, this point will normally coincide with the point where a promoter has sufficient confidence in the tax analysis of the scheme to market it.

It does not matter whether:

- the detailed design is communicated to potential clients (the test is that the design is in place at the time information is communicated to third parties)
- the scheme is eventually implemented in that form (the test is that it is reasonable to believe that it might be implemented in that form or substantially the same form)
- potential clients choose not to enter the scheme for reasons unconnected with the design - the test focuses on design of the scheme not the mind of potential clients – it asks a promoter to assume that a person will want to obtain the tax advantage offered, and then whether it is reasonable to believe the design the client would use would be this one (or would the design have to change substantially before the scheme could be implemented)
- the scheme is capable of being implemented in practice (see paragraph 3.5) at this time, for example, the design of the scheme may include a loan – it does not matter whether or not an actual loan provider is in place at this point

3.6.3 The third test – does P intend to make the scheme available him – or herself for implementation by clients?

The test is that a person makes a marketing contact with a view to making the scheme available him- or herself (i.e. he or she is making a marketing contact with a view to obtaining clients who will buy the scheme from him or her).
A person who is simply an introducer will not meet this test and will not be a promoter because an introducer solicits clients for another person (the promoter) not him – or herself.

3.7 Scheme organisers and managers

A person who organises or manages a scheme 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 scheme available for implementation.

From 17 April 2015, such a person is regarded as a promoter including when they are not connected with a person that has marketed or designed the scheme or similar schemes or made such schemes available.

They will often be co-promoters of the scheme with the person or persons who designed, marketed or made the scheme available (see paragraph 14.2.2). As a result, the person organising or managing the scheme is responsible for complying with the obligations that Part 7 imposes on promoters, including co-promoters, and so may be liable for penalties if those obligations are not complied with.

3.8 Corporate groups (SI 2004/1865, reg. 2)

A group company that provides tax services to other companies within the same group is not a promoter. This ensures that disclosable schemes 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 3.11.

For the purpose of these rules a company is a group company where it is a member of a group under any of the existing provisions of the Taxes Acts, for example group relief or capital gains, but as modified by SI 2004/1865, reg. 2.

3.9 Schemes marketed by offshore promoters (FA 2004, s.309)

The obligations on promoters to disclose schemes they market or design apply to both UK and non-UK based promoters.

Where the promoter is not resident in the UK and does not disclose the scheme, clients of the promoter who are using the scheme may be required to disclose the details of the scheme.

If you are a client of an offshore promoter and you are a user of a scheme, for which the promoter has not let you know the reference number allocated to it by HMRC, you will be required to disclose the scheme yourself unless there:

- is an offshore promoter which has one or more employees who are resident in the UK and are personally 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, such as a financial adviser who is responsible to any extent for the organisation or management of the scheme (see paragraph 3.7)

Who are required to disclose the scheme marketed or designed or made available by the offshore promoter. A non-UK based promoter who has disclosed a scheme must provide his or her clients with the 8-digit reference number issued by the Counter-Avoidance Directorate in HMRC. This obligation falls onto any person in the UK who is a promoter in relation to that scheme.

If you are a user of such a scheme please contact the DOTAS Enforcement team in the Counter-Avoidance Directorate for advice if you are unsure whether these rules apply to you – see paragraph 1.6 for how to contact DOTAS Enforcement.

3.10 Schemes promoted by lawyers (FA 2004, s.310 and SI 2004/1865, reg. 6)

Schemes promoted by lawyers are within the scope of the disclosure rules in the same way as for other promoters.

However, where an adviser 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 adviser has no obligation to make a disclosure.

Unless there is another promoter who has an obligation to disclose the scheme, it must be disclosed by any person in the UK who enters into any transaction forming part of it. But the client of the lawyer has the option of waiving any right to legal privilege. If legal privilege is waived the lawyer is required to disclose.

The following important points should be noted in relation to waiver of legal privilege:

- any waiver must be made within sufficient time to enable the lawyer to disclose within 5 days of the scheme being made available (see paragraph 14.2.1), otherwise the client must make the disclosure within 5 or 30 days, as applicable, of the first transaction (see paragraph 14.5)
- any waiver can be limited by the client so as to apply only to the extent necessary to enable the lawyer to comply with the disclosure obligation and to have no relevance for any other purpose

Your lawyer or tax adviser will be able to help you but you can also contact the Counter-Avoidance Directorate in HMRC if you are in doubt – see paragraph 1.6.

Where a lawyer is ‘marketing’ a scheme, as described at paragraph 14.3, the lawyer cannot assert legal privilege. This means that such marketing is subject to the disclosure obligation and the lawyer should disclose the scheme (providing the other conditions are met) to the Counter-Avoidance Directorate in the normal way.
3.11 Schemes with no promoter, including ‘in-house’ schemes (FA 2004, s.310)

Where there is no person who is a ‘promoter’ in respect of a scheme, it must be disclosed by any person in the UK who enters into any transaction forming part of it. Whilst these rules can apply to an individual, partnership, trust or company, we expect them to be of most relevance to those companies with their own in-house tax departments.

Hallmarked schemes and hallmarked NI contribution schemes with no promoter are generally only required to be disclosed where the advantage is intended to be obtained by a business that is not a small or medium enterprise (see paragraph 6.6).

For SDLT schemes and IHT schemes, any in-house user has to disclose (see sections 8, 9, 12 and 13).

In both cases, disclosure only applies to schemes that have been implemented - there is no requirement to disclose mere plans and ideas.

3.12 Overriding any duty of confidentiality (FA 2004, s316B)

People sometimes wish to provide information to HMRC about potential failures of third parties to comply with the requirements of Part 7 of FA 2004 but are unable to do so because of some restriction on their ability to make such disclosures.

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 DOTAS.
4. Determining a hallmarked scheme – flow chart

Test 1: Are there arrangements (including any scheme, transaction or series of transactions), or proposals for arrangements, that enable, or might be expected to enable, any person to obtain an advantage in relation to income tax, corporation tax or capital gains tax?

Yes

Test 2: Are those arrangements or proposals such that the main benefit, or one of the main benefits, that might be expected to arise from them is the obtaining of that advantage?

Yes

Test 3: Is there a promoter of the arrangements or are they devised for use ‘in-house’?

Promoter

Test 4: Do any of the hallmarks 1(a), 1(b), 3 or 5-9 apply? Test 4b: for in-house schemes does either hallmark 6, 8 or 9 apply?

Yes

No

Test 5: Does one or more of the hallmarks 2, 3, or 7 apply but not any of the other hallmarks?

Yes

No

Test 6: Is the tax advantage intended to be obtained by a business that is not a small or medium enterprise?

Yes

No

A hallmarked scheme

(Note: The disclosure rules for other taxes may also apply)
5. Determining a hallmarked NI contribution scheme – flow chart

Test 1: Are there arrangements (including any scheme, transaction or series of transactions), or proposals for arrangements, that enable, or might be expected to enable, any person to obtain an advantage in relation to National Insurance contributions?

Yes

No

Test 2: Are those arrangements or proposals such that the main benefit, or one of the main benefits, that might be expected to arise from them is the obtaining of that advantage?

Yes

No

Test 3: Is there a promoter of the arrangements or are they devised for use 'in-house'?

Promoter

In-house

Test 4: Do any of the hallmarks 1(a), 1(b), 3, 5, 8 or 9 apply?

Yes

No

Test 4b: - for in-house schemes does either hallmark 8 or 9 apply?

Yes

No

Test 5: Do either of hallmarks 2 or 3 apply but none of the other hallmarks?

Yes

No

Test 6: Is the advantage intended to be obtained by a business that isn't a small or medium enterprise?

Yes

No

A hallmarked NI contribution scheme

(Note: The disclosure rules for other taxes may also apply)
6. Determining a hallmarked, or hallmarked NI contribution, scheme – the tests

6.1 Application of this section to National Insurance contributions arrangements

For the purposes of determining a hallmarked National Insurance contributions scheme, any references in this section to tax should be construed as a reference to National Insurance contributions.

The table at paragraph 1.5 details the main corresponding or modifying legislative provisions.

6.2 Test 1: Are there arrangements that enable an IT, CT or CGT tax advantage be obtained? (FA 2004, s306(1)(a) and (b))

6.2.1 Meaning of ‘arrangements’ (FA 2004, s.318)

The meaning of ‘arrangements’ is not exhaustively defined in the primary legislation but includes any scheme, transaction or series of transactions.

6.2.2 Meaning of ‘tax advantage’ (FA 2004, s.318)

The definition of ‘tax advantage’ is drawn from the definition of tax advantage in section 709 ICTA 1988 (repealed). However, unlike the section 709 ICTA 1988 definition, the definition in section 318 makes express reference to the deferral of tax and the avoidance of an obligation to deduct tax (for example under PAYE).

In the context of the legislation for transactions in securities, the Courts considered the meaning of ‘tax advantage’ on a number of occasions. We expect the existing body of case law to apply equally for disclosure purposes. From these cases some general points can be made:

- the definition of tax advantage in section 709 was very widely drawn and consequently we expect that FA 2004, s.318 will also be construed widely – it includes the avoidance or reduction of a charge to tax, a relief from tax, repayment of tax and, as mentioned, the deferral of tax or the avoidance of an obligation to deduct tax
- where the scheme is expected to result in tax being avoided or reduced then the long-standing judgment of Lord Wilberforce in CIR v Parker (1966 AC 141) applies and the existence of a tax advantage is tested on a comparative basis
- in Sema Group Pension Fund (2003 STC 95) Lord Justice Parker said that ‘what the draftsman was manifestly trying to do when defining ‘tax advantage’ in s709(1) was to cover every situation in which the position of the taxpayer vis-à-vis the Revenue is improved in consequence of the particular transaction or transactions’
- a relief or exemption from tax, substantial shareholdings relief, loss relief, group relief, etc. will give rise to a tax advantage as defined

In deciding whether the necessary comparison can be made it should be noted that the very wide range of possible ways in which tax arrangements might be structured
made it impossible to outline in regulations the range of schemes likely to come within the disclosure rules.

Such schemes may involve for example, income being received in capital form or rewards for remuneration being structured to fall outside the provisions of ITEPA or an imbalance between the economic cost of the tax advantage and the value of that advantage to the taxpayer.

For NICs purposes, the definition potentially applies to all classes of National Insurance.

6.3 Test 2: Is the advantage a main benefit of the arrangements? (FA 2004, s.306(1)(c))

The 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.

In our experience those who plan tax arrangements fully understand the tax advantage such schemes are intended to achieve.

Therefore we expect it will be obvious (with or without detailed explanation) to any potential client what the relationship is between the tax advantage and any other financial benefits of the product they are buying.

The test is objective and considers the value of the expected tax advantage compared to the value of any other benefits likely to be enjoyed.

6.4 Test 3: Is there a promoter of the arrangements? (FA2004 s.307, s309, s310 SI 2004/1865)

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 it. The distinction is important for 2 reasons:

- different hallmarks apply to promoted and ‘in-house’ schemes
- ‘in-house’ schemes are only required to be disclosed when the tax advantage is intended to be obtained by a business that is not a small or medium enterprise
A scheme is a promoted scheme even where the user is required to disclose the details of it to HMRC as a result of the promoter being either:

- offshore and failing to disclose the scheme to HMRC – see paragraph 3.9
- a lawyer who is prevented by legal and professional privilege from providing all of the prescribed information to HMRC – see paragraph 3.10

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

When there is a promoter of the arrangement, it is a hallmarked scheme when any one of the following hallmarks applies:

- hallmark 1(a): Confidentiality from other promoters – see paragraph 7.3.2
- hallmark 1(b): Confidentiality from HMRC – see paragraphs 7.3.3 to 7.3.6
- hallmark 3: Premium fee – see paragraph 7.5
- hallmark 5: Standardised tax products – see paragraph 7.6
- hallmark 6: Loss schemes – see paragraph 7.7
- hallmark 7: Leasing arrangements – see paragraph 7.8
- hallmark 8: Employment income – see paragraph 7.9
- hallmark 9: Financial products – see paragraph 7.10

Hallmarks 6 and 7 do not apply when determining a hallmarked NI contribution scheme.

6.6 Test 5: The hallmarks for ‘in-house’ arrangements

When the arrangement is designed ‘in-house’, it is a hallmarked scheme when any one of the following hallmarks applies. The first 3 hallmarks below only apply when the person receiving the tax advantage is not a small or medium enterprise (see paragraph 6.7 below):

- hallmark 2: Confidentiality from HMRC – see paragraphs 7.4
- hallmark 3: Premium fee – see paragraph 7.5
- hallmark 7: Leasing arrangements – see paragraph 7.8
- hallmark 8: Employment income – see paragraph 7.9
- hallmark 9: Financial products – see paragraph 7.10
- Hallmark 7 does not apply when determining a hallmarked NI contribution scheme.

6.7 Test 6: Is the person intended to obtain the advantage a large business? (SI 2006/1543, regs. 3 and 4)

If you devise a tax arrangement for use ‘in-house’, you need only consider if it is a hallmarked scheme (and disclose it to HMRC) if the person intended to obtain the tax advantage is a business that is not a small or medium enterprise.
‘Businesses’ are:

- companies
- partnerships
- any other person whose profits are charged to income tax as trading or property income

Guidance on whether a business is a small or medium enterprise for the purposes of the 2003 EC Recommendation tests is at CIRD91400. See in particular the flow chart at CIRD92850.
7. The hallmarks

With the exception of paragraphs 7.3 - 7.3.6 and 7.5 – 7.5.3, this guidance does not apply where the advantage arises in relation to IHT. There is further detailed guidance about IHT in Sections 12 and 13. This guidance also does not apply to SDLT or ATED – see sections 8 to 11.

7.1 About the hallmarks

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

Some of these are designed to capture new and innovative arrangements. Others are designed to capture areas of specific concern. These may include schemes that are well known or commonly used.

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

It is expected that the range of hallmarks will change over time, such as to test perceived changes in the avoidance market place or the effectiveness of a Counter-Avoidance measure.

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

Similarly, we do not regard all arrangements that include or meet a hallmark description as practices that are unacceptable to us – whilst we have tried to keep burdens to a minimum, you may have to tell us about schemes that may not be considered to be avoidance.

7.2 Application of this section to National Insurance contribution schemes

For the purposes of determining a hallmarked NI contribution scheme, any references in this section to tax should be construed as a reference to NICs. The table at paragraph 1.5 details the main corresponding or modifying legislative provisions.

Hallmarks 6 (loss schemes) and 7 (leasing arrangements) and the ATED hallmarks do not apply when determining a hallmarked NI contribution scheme.

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

These hallmarks were extended to cover IHT with effect from 23 February 2016.
7.3.1 The legislation

Hallmarks 1(a) (see 7.3.2) and 1(b) (see 7.3.3) are prescribed by regulation 6 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543) as amended by the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) (Amendment) Regulations 2013 (2013 No. 2595).

Description 1: confidentiality where promoter involved

6(1) Arrangements are prescribed if:

(a) any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements, and

(b) it might reasonably be expected that a promoter would wish the way in which that element of those arrangements secures, or might secure, a tax advantage to be kept confidential from any other promoter at any time following the material date

6(2) arrangements are prescribed if it might reasonably be expected that a promoter would, but for the requirements of these Regulations, wish to keep the way in which any element of those arrangements (including the way in which the arrangements are structured) secures, or might secure, the tax advantage confidential from HMRC at any time following the material date, and a reason for doing so is to facilitate repeated or continued use of the same element, or substantially the same element, in the future

6 (2A) cases where arrangements will be prescribed under paragraph (2) include, but are not limited to, where:

(a) a promoter does not provide to the user of the arrangements (‘the user’), or prevents or discourages the user of the arrangements from retaining any promotional materials, data or written professional advice relating to those arrangements, and

(b) it might reasonably be expected that the reason for doing so is to keep the arrangements confidential from HMRC in order to facilitate repeated or continued use of any element of those arrangements.

6(3) in a case where:

(a) by virtue of regulation 6 of the Promoters Regulations, no person is to be treated as the promoter in relation to the arrangements, or

(b) by virtue of section 309(1) of FA 2004 (duty of person dealing with promoter outside United Kingdom), a user of the arrangement has a duty to provide prescribed information,

for paragraph (2) substitute -

‘6(2) arrangements are prescribed if it might reasonably be expected that the user of the arrangements would, but for the requirements of these regulations, wish to keep the way in which any element of those arrangements (including the way in which the arrangements are structured) that secures the tax advantage confidential from HMRC at any time following the material date.’
Definition of ‘the material date’ (Regulation 2(2) SI 2006/1543) ‘the material date’ means whichever of the following is applicable:

(a) for a proposal notifiable under section 308(1) of FA 2004, the relevant date (as defined in section 308(2) of FA 2004)

(b) for arrangements notifiable under section 308(3) of FA 2004, the date the promoter first becomes aware of any transaction forming part of the notifiable arrangements

(c) for arrangements notifiable under section 309 or 310 of FA 2004, the date the person enters into any transaction forming part of the notifiable arrangements

7.3.2 Hallmark 1(a): Confidentiality from competitors

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4).

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 7.3.5)

The test would be answered in the affirmative if an element of the scheme were sufficiently new and innovative that a promoter would want the details to remain secret in order to maintain their competitive advantage and ability to earn fees.

When applying the test the promoter should first consider its own position and if it concludes that it would want to keep the arrangement confidential from another promoter then the arrangement is within the hallmark.

If the promoter concludes that it does not want to keep the arrangement confidential from another promoter then it needs to consider if it might reasonably be expected that another promoter would wish to keep the arrangement confidential.

When considering if another promoter would wish to keep the arrangement confidential the promoter should only attribute to the hypothetical promoter the knowledge and information that the promoter itself holds and should not attribute to the hypothetical promoter any other knowledge or information.

In addition the promoter should assume that the hypothetical promoter takes a reasonable view of its obligations to disclose proposals and arrangements under DOTAS and does not take an extreme view.

The test is unrelated to:
any general rule or agreement by a client that they keep advice confidential
whether any fees charged would be at a premium level

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

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

7.3.3 Hallmark 1(b): Confidentiality from HMRC

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4).

The amendments made by the 2013 Regulations put beyond doubt that this test requires the same approach as regulation 6(1), as described in paragraph 7.3.2 above.

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 HMRC”
- “… at any time following the material date?” (see paragraph 7.3.5)
- “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 7.3.6.)

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 to the hypothetical promoter any other knowledge or information.

In addition the promoter should assume that the hypothetical promoter takes a reasonable view of their obligations to disclose proposals and arrangements under DOTAS and does not take an extreme view.

The test would be answered in the affirmative if an element of the scheme were sufficiently new and innovative that a promoter (including the promoter applying the test) would want the details to remain secret in order to facilitate repeated or continued use of any element of the arrangement.

The test applies to any scheme that HMRC would be likely to take action to counter (legislatively or operationally) if it knew about it.
However, where the person with a duty to disclose the arrangements is the scheme user, he must consider:

- “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 7.3.4)
- … at any time following the material date?” (see paragraph 7.3.5)

In either case the relevant question(s) must be consciously answered at the time the relevant trigger for disclosure arises. (See also paragraph 7.3.5.)

Promoters will answer the relevant questions in one of the following ways:

- “I or any other promoter would wish to keep an element of the scheme confidential from HMRC in order to facilitate repeated or continued use of that element, or substantially the same element, in future”
- “I or any other promoter would not wish to keep any element of the scheme confidential from HMRC in order to facilitate repeated or continued use of that element, or substantially the same element, in the future but, and disregarding any obligation of confidentiality, I nevertheless wish to keep it confidential from HMRC for other reasons”
- “I or any other promoter would not wish to keep any element of the scheme confidential from HMRC”

A promoter is not required to make disclosure under this hallmark where the answer falls within the second or third bullet.

The user will answer the relevant question in one of two ways:

- ‘I wish to keep an element of the scheme confidential from HMRC.’
- ‘I do not wish to keep any element of the scheme confidential from HMRC.’

The user is not required to make disclosure under this hallmark where the answer falls within the second bullet.

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

The 2013 Regulations put it beyond doubt that there does not need to be an explicit confidentiality agreement between the promoter and user about the arrangement before the test is met.

Regulation 6(2A) provides that arrangements will be prescribed under regulation 6(2) if the promoter does not provide, allow 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 to facilitate repeated or continued use of the any element of the arrangements.
There may be circumstances where a promoter does not routinely provide to a client some information for reasons other than keeping the arrangement confidential from HMRC, for example detailed legal advice which the promoter does not share with the user in order to protect its legal privilege.

The regulation is not limited to these circumstances and will apply if it might reasonably be expected that other means would be used to keep the arrangement confidential from HMRC in order to facilitate the repeated or continued use of an element.

HMRC will not:

- assume that because a scheme was not disclosed that the promoter wanted to keep it confidential from HMRC (likewise, a promoter is not required to disclose everything just to prove there was nothing to disclose)
- carry out ‘fishing expeditions’ to determine what schemes have not been disclosed under this hallmark

If HMRC discover a scheme that has not been disclosed we will, when considering whether the test has been applied correctly, examine all the evidence and form a balanced view as to why it was not disclosed. Indicative factors include:

- how new, innovative and aggressive the scheme is – schemes that promoters know to be known to HMRC are not caught by the hallmark – these can be evidenced from, for example, technical guidance notes, case law, or past correspondence with a case officer in HMRC or between HMRC and a professional body where the detail of how the scheme works has been made clear
- whether a promoter imposes an obligation upon potential clients, whether in writing or verbally, to keep the details of the scheme confidential from third parties including HMRC – this factor would not be considered if the agreement is a general agreement
- whether a promoter does not provide to, or otherwise prevents or discourages the user from, retaining promotional materials, data or written professional advice so that such information cannot 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 scheme may have a limited ‘shelf life’ because Parliament may act to close it once it became known
- the degree of co-operation to requests for information from HMRC concerning a specific scheme and the reasons for not providing information

7.3.4 Hallmark 1(b): ‘Any element’ of the arrangements

The hallmark asks whether the promoter or scheme user (as applicable) wants to keep any element of the arrangements confidential from HMRC. This could include part of a bespoke arrangement where the totality of the scheme will not be repeated.
7.3.5 Hallmark 1(b): Confidential ‘at any time’

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

7.3.6 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 scheme (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 schemes used by either other clients or the same client. It could apply, for example, where the totality of the scheme is expected to be repeatable in its generic form time and again, or where the key element was conceived as part of a bespoke scheme and then recorded on a register for use in other schemes in the future.

‘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 scheme to run its course.

7.4 Hallmark 2: confidentiality where no promoter involved

7.4.1 The legislation

Hallmark 2 is prescribed by regulation 7 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

Regulation 7

(1) Arrangements are prescribed if:

(a) no person is a promoter in relation to them
(b) the intended user of the arrangements is a business which is not a small or medium-sized enterprise
(c) any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements
(d) it might reasonably be expected that a user would, but for the requirements of these Regulations, wish to keep the way in which that element secures the advantage confidential from HMRC at any time following the material date, and
(e) a reason for the user’s wishing to keep the element confidential from HMRC is -
   (i) to facilitate repeated or continued use of the same element, or substantially the same element, in the future, or
   (ii) to reduce the risk of HMRC using that information to open an enquiry into any return or account which a person is required by or under any enactment to deliver to HMRC, or
(iii) to reduce the risk of HMRC using that information to withhold payment of all or part of an amount claimed separately from a return under:
   (aa) section 261B of the Taxation of Chargeable Gains Act 1992
   (treating trade loss etc. as CGT loss), or
   (bb) Part 4 of the ITA 2007 (loss relief).

(2) Arrangements are also prescribed if:

(a) paragraphs (1) (a) to (c) are met, and
(b) if there had been a promoter in relation to the arrangements it might reasonably have been expected that they would, but for the requirements of these Regulations, wish to have kept the way in which any element of the arrangements (including the way in which the arrangements were structured) that secured the advantage confidential from HMRC at any time following the material date, and a reason for doing so would be to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

7.4.2 Confidentiality from HMRC

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

Regulation 7(1) requires that the in-house person has to consider whether or not a user would reasonably be expected to wish to keep the arrangements confidential from HMRC.

The user may be the in-house user itself or a hypothetical user. 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 has to consider if any other user would wish to keep the arrangements confidential from HMRC.

When applying the test the in-house user should only attribute to the hypothetical user the knowledge and information that the in-house user itself holds and should not attribute to the hypothetical user any other knowledge or information.

In addition the in-house user should assume that the hypothetical user takes a reasonable view of their obligations to disclose proposals and arrangements under DOTAS and does not take an extreme view.

So the test under 7(1) for a person using an in-house scheme is, having entered into a transaction forming part of the arrangements:

- “do I wish to keep confidential from HMRC
- would any 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 7.3.4)
- … at any time following the material date?” (see paragraph 7.3.5)
- “is a reason for doing so to:
  o facilitate the repeated or continued use of that element, in the future?”

(The guidance on ‘repeated and continued use’ at paragraph 7.3.6,
when read in the context of a scheme user, applies to this hallmark in the same way as it applies to hallmark 1(b))

○ reduce the risk that HMRC might open an enquiry into any return or account that I am required to make?

○ reduce the risk that HMRC might withhold some or all of a repayment sought in a claim outside a return in respect of relief for losses under s261B Taxation of Chargeable Gains Act 1992 (trade loss treated as capital loss) or Part 4 Income Tax Act 2007 (loss relief)?

Again the test is not circular in that it does not mean that all undisclosed schemes are, by default, schemes that a taxpayer wishes to keep confidential and so should have been disclosed. The guidance on this at paragraph 7.3.3 applies equally here.

As for hallmark 1(b), if HMRC discover a scheme that has not been disclosed we will, when considering whether the test has been applied correctly, examine all the evidence and form a balanced view as to why it was not disclosed. Indicative factors include:

- how innovative or aggressive the scheme is. Schemes that taxpayers are aware to be known to HMRC are not caught by the hallmark
- the degree of co-operation with requests for information from HMRC concerning a specific scheme and the reasons for not providing that information
- whether a taxpayer imposes an obligation upon other parties to the scheme, whether in writing or verbally, to keep the details of the scheme confidential from HMRC

The 2013 Regulations introduced a new paragraph 7(2) for users of in house schemes. Again, it does not apply where the person intended to obtain the tax advantage is a small or medium enterprise. This applies alongside the test under paragraph 7(1).

The test under paragraph 7(2) requires the user of the in house scheme to consider, hypothetically, whether or not a promoter would disclose the arrangements in question. They must consider:

- ‘if there were a promoter for these arrangements, would 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) that secures the tax advantage to be kept confidential from HMRC, and a reason for doing so would be to facilitate repeated or continued use of the same element, or substantially the same element, in the future’
- … at any time following the material date?’ (see paragraph 7.3.5)

The test requires the in-house user to put themselves in the position of a promoter who would want to exploit the arrangement commercially. At the time of applying the test the in-house user may not have any intention of making the arrangement available to anyone else but they must apply the test nevertheless.

The test, if answered in the affirmative, will provide HMRC with early information on in-house arrangements that could be made available to other users. To apply the test
the in-house user needs to ask themselves:

- “if I were a promoter would I want to keep this arrangement confidential from HMRC so that I can re-use or continue to use any element of the arrangement?”

The relevant question(s) must be consciously answered at the time the relevant trigger for disclosure arises, failure to do this prima facie constitutes a breach of the disclosure obligation. Considering both paragraphs 7(1) and 7(2) together, the user of the in house scheme will answer the relevant questions in one of the following ways:

- 'I do, or the hypothetical user or promoter would, wish to keep an element of the scheme confidential from HMRC'
- 'I do not, and the hypothetical user or promoter would not, wish to keep any element of the scheme confidential from HMRC.'

The user of the in house scheme will not be required to make disclosure under this hallmark where the answer falls within the second bullet.

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

7.4.3 The timing rule

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.

7.5 Hallmark 3: premium fee

This hallmark was extended to cover IHT with effect from 23 February 2016.

7.5.1 The legislation

Hallmark 3 is prescribed by regulation 8 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

Regulation 8

1. Arrangements are prescribed if they are such that it might reasonably be expected that a promoter or person connected with a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements of these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

But arrangements are not prescribed by this regulation if:
(a) no person is a promoter in relation to them, and
(b) the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.

2. For the purposes of paragraph (1), and in relation to any arrangements, a ‘premium fee’ is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises, and which is:

(a) to a significant extent attributable to that tax advantage, or
(b) to any extent contingent upon the obtaining of that tax advantage as a matter of law.

7.5.2 Applying the hallmark

This hallmark applies to both promoted and ‘in-house’ arrangements. For ‘in-house’ arrangements, it does not apply where the person intended to obtain the tax advantage is a small or medium enterprise.

The hallmark contains a hypothetical test that does not depend on a premium fee actually being received and considers whether in the absence of the Disclosure of Tax Avoidance Schemes regime a premium fee could be obtained. The question is whether it might reasonably be expected that a promoter could charge a premium fee if he wished to do so.

That a promoter does not charge a premium fee is not conclusive, though the hallmark would be met if he does. ‘Fees’ for these purposes are drawn very widely and include amounts paid directly or indirectly to the promoter.

The test should be applied from the perspective of a client who is experienced in receiving tax advice or other services of the type being provided. Our assumption is that where a client regards the advice as valuable and not generally available he would be prepared to pay a premium for it. Equally, by contrast, if similar advice was available elsewhere the client would be unwilling to pay more than a normal fee for it.

We know that the size of fee charged is not the only reason why a client may choose a particular accounting or law firm. So the hallmark is no more than a broad attempt to identify tax advice that is innovative and valuable and which the promoter can use to obtain premium fees from a client who is experienced in receiving services of the type being provided.

7.5.3 Is the fee significantly attributable to, or contingent on, the advantage?

It is recognised that almost any fee obtained in relation to tax planning can to some extent be said to be attributable to obtaining a tax advantage. So a ‘premium fee’ for this purpose is a fee that is to a significant extent attributable to the tax advantage or is contingent upon a tax advantage as a matter of law being obtained.

‘As a matter of law’ was inserted with effect from 1 January 2011 in order to limit the hallmark to situations where the fee is contingent upon the scheme delivering the expected tax advantage in the sense that the tax analysis underpinning the scheme is correct.
The hallmark will no longer apply to situations where the fee is contingent wholly on factors other than the tax analysis being correct. So, for example, it will not apply to salary sacrifice schemes where the fee is contingent upon the number of employees entering into the scheme.

In other words the hallmark works on the assumption that where a promoter is able to market a tax arrangement that is innovative then not all promoters will be in a similar position and potential users will be prepared to pay more to the promoter for that scheme.

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

So 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
- the 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
- the size of the transaction – if a large amount is at stake on a deal, the tax adviser may wish to increase his fee to reflect the greater level of exposure
- the skill or reputation of the adviser – some advisers normally charge more for advice than others to reflect the perceived higher quality of advice they offer
- the scarcity of appropriately skilled staff – some areas of tax advice are more complex and fees may be higher to reflect this
- the number of users who sign up for a scheme – in some schemes, for example certain salary sacrifice schemes, the size of the fee depends upon the number of employees who take up the scheme (see above)

7.6 Hallmark 5: Standardised tax products

7.6.1 The legislation

Hallmark 5 is prescribed by regulations 10 and 11 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI2006/1543). The hallmark was amended with effect from 23 February 2016 by SI2016/99.

This section 7.6 explains how the hallmark applies after these changes. The amended hallmark applies when deciding whether a person must disclose a scheme as follows:

- when the promoter is required to disclose a notifiable proposal under section 308(1) FA2004 and the relevant day is on or after 23 February 2016 (paragraph 14.2.1)
- when the promoter must disclose notifiable arrangements under section 308(3) and the promoter becomes aware of arrangements implementing the scheme on or after 23 February 2016
• when the user of the scheme must disclose their use of the arrangements under section 309 or 310 (paragraphs 14.4 and 14.5) and all of the transactions forming part of the arrangements were entered into on or after 23 February 2016

Regulation 10

(1) Subject to regulation 11, arrangements are prescribed if a promoter makes the arrangements available for implementation by more than one person and the conditions in paragraph (2) are met.

(2) The conditions are that an informed observer (having studied the arrangements and having regard to all relevant circumstances) could reasonably be expected to conclude that:

(a) the arrangements have standardised, or substantially standardised, documentation:
   • the purpose of which is to enable a person to implement the arrangements,
   • the form of which is determined by the promoter, and
   • the substance of which does not need to be tailored, to any material extent, to enable a person to implement the arrangements
(b) a person implementing the arrangements must enter into a specific transaction or series of specific transactions
(c) the transaction or series of transactions is standardised, or substantially standardised, in form, and
(d) either the main purpose of the arrangements is to enable a person to obtain a tax advantage or the arrangements would be unlikely to be entered into but for the expectation of obtaining a tax advantage.

Regulation 11: Arrangements excepted from Hallmark 5

(2) The following arrangements are excepted from being prescribed under regulation 10,

(a) arrangements which consist solely of one or more plant or machinery leases (see regulation 14)

(b) an enterprise investment scheme (Part 5 ITA 2007 and Schedule 5B to TCGA 1992)

(c) arrangements using a venture capital trust (Part 6 ITA 2007)

(d) arrangements qualifying under the corporate venturing scheme (see Schedule 15 to the Finance Act 2000)

(e) arrangements qualifying for community investment tax relief (see Schedules 16 and 17 to the Finance Act 2002), [Now Part 7 ITA 2007 and Part 7 CTA 2010]
(f) an account which satisfies the conditions in the Individual Savings Account Regulations 1998

(g) an approved share incentive plan (see Chapter 6 of Part 7 of, and Schedule 2 to, ITEPA 2003)

(h) approved share option scheme (see Chapter 7 of Part 7 of, and Schedule 3 to, ITEPA 2003)

(i) an approved CSOP scheme (see Chapter 8 of Part 7 of, and Schedule 4 to, ITEPA 2003)

(j) the grant of one or more qualifying options which meet the requirements of Schedule 5 to ITEPA 2003 (enterprise management incentives):

- together only with such other steps as are reasonably necessary in all the circumstances for the purposes of facilitating it, or
- which fall to be notified to the Board in accordance with Part 7 of that Schedule

(i) a registered pension scheme (see section 150(2) of FA 2004)

(j) an overseas pension scheme in respect of which tax relief is granted in the United Kingdom under section 615 of ICTA 1988 (exemption from tax for superannuation payments in respect of persons not resident in the United Kingdom or in respect of trades carried on wholly or partly outside the United Kingdom)

(k) a pension scheme which is a relevant non-UK pension scheme within the meaning given by paragraph 1(5) of Schedule 34 to FA 2004

(l) a scheme to which section 731 of ITTOIA 2005 applies (periodical payments of personal injury damages)

(m) arrangements which would be prescribed by regulation 19 but for regulation 21 (Code of Practice on Taxation for Banks)

7.6.2 About the hallmark

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4) and, other than some exceptions, is intended to capture what are often referred to as ‘mass marketed schemes’.

The fundamental characteristic of such schemes is their ease of replication rather than the volume of take-up or how they are made available – the number of clients, or potential clients, can vary enormously, as can the way in which they are ‘marketed’.
Schemes with this replication characteristic have variously been described to us as ‘shrink-wrapped’ or ‘plug and play’ schemes.

Essentially, all the client purchases is a prepared tax product that requires little, if any, modification to suit his circumstances. To adopt it would not require him or her to receive significant additional professional advice or services.

The hallmark is met when the tests below are met and the product does not fall within one of the exceptions.

7.6.3 Abolition of exception for pre-1 August 2006 arrangements
From 23 February 2016, arrangements which are the same, or substantially the same, as arrangements first made available before 1 August 2006 are no longer excluded from the scope of the hallmark and must be disclosed under section 308.

7.6.4 Test 1 – are the arrangements made available generally

The manner in which schemes caught by this hallmark are promoted can vary enormously. At one end of the spectrum the scheme promoter could enter into a proactive campaign or aggressive marketing strategy.

At the other (especially for established schemes) the promoter could simply react to a casual enquiry for ‘ideas’ from a potential client or offer him or her a product having identified a potential need, such as whilst carrying out consultancy work.

Consequently, this test is not based on how or why a scheme is promoted but how available it is to potential users, for example whether or not it is bespoke.

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

7.6.5 Informed Observer

Each of the remaining tests [paragraphs 7.6.6 – 7.6.7] 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 scheme to consider whether an 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.

An informed observer is to be contrasted with an ‘uninformed observer’ but isn’t an ‘expert’ or necessarily a tax practitioner.

The informed observer is independent, has all relevant information about the scheme and has sufficient knowledge to understand both the scheme and the relevant statutory context.

To sum up, the informed observer is assumed to have the appropriate knowledge and skillset to reach the conclusions that the hallmark requires.
While the promoter isn’t an informed observer for this purpose, the informed observer should be presumed to have access to all of the information that is available to the promoter of the scheme.

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 and
- HMRC guidance

7.6.6 Test 2 – are the arrangements standardised?

This test is intended to limit disclosure under this hallmark to those arrangements that are offered by the promoter as a finished ‘product’, rather than a package of proposed arrangements and additional services.

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. Instructions on how to implement the scheme might, typically, also be included, as may a copy of Counsel’s Opinion.

In order for this hallmark to apply, the arrangements will also commit users to enter into either a specific standardised (or substantially standardised) transaction, or more usually a number of specific transactions, comprising the scheme.

For example, a person entering into the scheme may be required to join a specific partnership, take out a specific loan from a specific provider, buy a specific financial instrument 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 effecting those transactions would not prevent the informed observer from being reasonably expected to conclude that the documentation is substantially standardised.

7.6.7 Test 3 – are the arrangements a tax product?

There are 2 alternative tests. Only one test needs to be met in order for the arrangements to be a tax product covered by the hallmark. One of the alternative
tests asks whether the main purpose of the product is to enable a person to obtain a tax advantage.

Note that it is not enough under this test for the obtaining of a tax advantage to be only one of the main purposes of the arrangements. Obtaining that advantage must be their single main purpose.

The other alternative test asks whether the person or persons who entered into the arrangements would be unlikely to do so if it were not for the expectation of obtaining a tax advantage.

These 2 alternative tests are intended to identify products that would be highly unlikely to exist but for the tax advantage or, if they did exist without the tax advantage arising, would not be commercially viable.

The 2 alternative tests do not cover all standardised arrangements which might enable a person to obtain a tax advantage. The tax advantage may, for example, not be the main purpose of the arrangements where tax relief is provided for in legislation in order to support ordinary business or investment decision-making.

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.

For instance, the simple decision to fund business activities using debt rather than equity is outside the scope of the standardised tax product hallmark as it would be reasonable to expect an informed observer to conclude that the decision as to how to raise finance will be principally a commercial decision in relation to which the aim of obtaining a tax advantage is not the main purpose.

On the other hand, the standardised tax product hallmark may apply where tax relief is given or where funds are raised through debt instead of equity if it would be reasonable to expect an informed observer to conclude that there are elements of the arrangements which seek artificially to inflate the value of the tax reliefs or interest deductions in ways that are not driven by commercial factors.

7.6.8 Test 4 – is the tax product not within an exception?

There are a number of standardised tax products that are excepted from disclosure. The list of exceptions is found at regulation 11 to the relevant legislation – reproduced at paragraph 7.6.1 above.

The exceptions from the hallmark recognise that arrangements promoted by a bank may also be notifiable under the financial products hallmark were it not for the statutory exclusion for arrangements falling within the Code of Practice on Taxation for Banks.

The exception ensures that if standardised arrangements, which include a financial product, would be excepted from the financial products hallmark because the arrangements are compliant with the Code of Practice on Taxation for Banks, then those arrangements will not be notifiable under the standardised tax products hallmark either.
7.6.9 Packaged solutions

Accountants and other promoters of tax arrangements often maintain a ‘solutions register’ that enables them to offer the same or similar solution to more than one client.

The ‘solution’ will often require transactions of a specific nature to be carried out, possibly in a pre-ordained sequence, such as clauses to be inserted into contracts. It will be a matter of scale and degree as to whether schemes on these registers fall within this hallmark.

In general, we would not expect such schemes to be caught where, before they can be implemented, the relevant transactions or documentation require significant tailoring to suit the client’s circumstances, or there are other circumstances where the input from a professional goes substantially beyond rudimentary oversight and checking.

7.6.10 Examples

Arrangements involving the following types of product are unlikely to be standardised tax products covered by the hallmark on the assumption they are being entered into for ordinary, genuinely commercial reasons and are not designed to obtain greater tax relief than is envisaged:

- Social Investment Tax relief (SITR)
- Seed Enterprise Investment Schemes (SEIS)
- Quoted Eurobonds
- Excluded Indexed securities

These types of product should not be notifiable for the reasons below unless they are used as part of wider arrangements which are structured in such a way that an informed observer could reasonably be expected to conclude that their main purpose is the generation of a tax advantage.

This might arise for example where they form part of wider and more complex arrangements which seek to obtain more relief than would otherwise be due but for the inclusion of those wider arrangements or transactions.

Social Investment Tax Relief (SITR)

The main purposes of SITR funds are to promote investment which supports social enterprise and to produce investment income for investors. The tax relief compensates to an extent for the disproportionately high cost of due diligence needed to evaluate the potential success of the social enterprise before investing.

These main purposes apply to ordinary use of investments of this sort which are not part of wider tax-driven arrangements.
HMRC does not consider that an informed observer could reasonably be expected to conclude that the main purpose of arrangements comprising an SITR fund is to enable a person to obtain a tax advantage.

It is also HMRC’s view that an informed observer could reasonably be expected to conclude that SITR investments, which don’t form part of wider arrangements, would proceed to a significant degree if the tax incentives weren’t available.

Accordingly it is HMRC’s view that funds which qualify for SITR are not notifiable arrangements by virtue of the standardised tax product hallmark applying.

**Seed Enterprise Investment Schemes (SEIS)**

SEIS complements the older Enterprise Investment Scheme reliefs. SEIS is intended to recognise the particular difficulties which very early stage companies face in raising funds by offering tax relief at a higher rate.

The main purposes of SEIS are to promote investment in early stage companies and to produce investment income for investors. The tax relief compensates to an extent for the disproportionately high cost of due diligence needed to evaluate the potential success of the companies before investing.

HMRC considers that were individuals to have sufficient information about the early stage companies they would continue to make decisions to invest because of the potential for such investments to produce significant income and gains. It is therefore HMRC’s view that an informed observer could reasonably be expected to conclude that investments through SEIS wouldn’t have obtaining a tax advantage as their main purpose and would proceed to a significant degree if the tax incentives weren’t available. It is accordingly HMRC’s view that SEIS aren’t notifiable arrangements by reason of the standardised tax product hallmark applying.

**Quoted Eurobonds**

The issuing of securities is a commercial practice. The genuine raising of finance by way of debt, including through the use of quoted Eurobonds, rather than equity has a commercial purpose and benefit.

HMRC considers that the benefit of paying interest on a security with commercial terms, without being required to withhold income tax from the interest, is not important or significant compared with the main benefit of the arrangements, which is to raise or maintain working capital.

HMRC also does not consider that such finance is unlikely to have been raised without the tax advantage of being entitled to pay interest without withholding income tax. The tax advantage of not being required to account for withholding tax is not one of the main benefits of the arrangements therefore s306(1)(c) Finance Act 2004 is not satisfied and the standardised tax products hallmark does not need to be considered.

There is HMRC guidance on Eurobonds in the Corporation Tax Manual at CTM35218.

Excluded Indexed securities

The issuing of securities is a commercial practice. The main purpose of doing so is generally to raise capital, not to obtain a tax advantage.
It is HMRC’s view that an informed observer couldn’t reasonably be expected to conclude that the main purpose for issuing Excluded Indexed Securities is to enable a person to obtain a tax advantage, unless the securities are issued as part of wider arrangements designed to obtain greater tax relief than envisaged.

HMRC considers that Excluded Indexed Securities are not brought within the scope of the standardised tax products hallmark as a result of the favourable tax treatment of the returns on such securities.

There is HMRC guidance on Excluded Indexed Securities in the Savings and Investment Income Manual at SAIM9070.

7.7 Hallmark 6: loss schemes

7.7.1 The legislation

Hallmark 6 is prescribed by regulation 12 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543). The hallmark was amended with effect from 23 February 2016 by SI2016/99. This section of the guidance explains how the hallmark applies after these changes. The amended hallmark applies when deciding whether a person must disclose a scheme as follows:

- when the promoter is required to disclose a notifiable proposal under section 308(1) FA2004 and the relevant day is on or after 23 February 2016 (paragraph 14.2.1)
- when the promoter must disclose notifiable arrangements under section 308(3) and the promoter becomes aware of arrangements implementing the scheme on or after 23 February 2016
- when the user of the scheme must disclose their use of the arrangements under section 309 or 310 (paragraphs 14.4 and 14.5) and all of the transactions forming part of the arrangements were entered into on or after 23 February 2016

Regulation 12

Arrangements are prescribed if:

(a) the promoter expects more than one individual to implement the same, or substantially the same, arrangements, and

(b) an informed observer (having studied the arrangements and having regard to all relevant circumstances) could reasonably be expected to conclude that—

(i) the main benefit or one of the main benefits which could be expected to accrue to some or all of the individuals participating in the arrangements is the provision of losses, and
the arrangements (including the way they are structured) contain an element which is, or elements which are, unlikely to have been entered into by the individuals concerned were it not for the provision of those losses, and

those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax.

7.7.2 About the hallmark

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4) and is intended to capture various loss creation schemes that are typically used by wealthy individuals.

The schemes vary considerably in detail but are normally designed so that they generate trading losses for wealthy individuals that can then be offset against income tax and capital gains tax liabilities or generate a repayment.

The hallmark is met when the tests below are met.

7.7.3 Test 1 – is more than one individual expected to implement the tax arrangements?

This test is met if the promoter expects that there will be more than one individual client for each set of arrangements having the same, or substantially the same, form.

7.7.4 Informed Observer

Tests 2, 3 and 4 are considered through the eyes of a hypothetical informed observer. It requires the promoter or other person with a potential duty to notify HMRC about the scheme to consider whether it would be reasonable to expect an informed observer, who has studied the arrangements and taken all relevant circumstances into account, to conclude that all of the tests are met. If the informed observer could reasonably be expected to reach that conclusion, then the hallmark covers the arrangements.

An informed observer is to be contrasted with an ‘uninformed observer’ but is not an ‘expert’ or necessarily a tax practitioner. The informed observer is independent, has all relevant information about the scheme and has sufficient knowledge to understand both the scheme and the relevant statutory context.

To sum up, the informed observer is assumed to have the appropriate knowledge and skillset to reach the conclusions that the hallmark requires.

While the promoter is not an informed observer for this purpose, the informed observer should be presumed to have access to all of the information that is available to the promoter of the scheme.

The scope of ‘all relevant circumstances’ will vary according to the nature of the arrangements 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 and
HMRC guidance.

7.7.5 Test 2 – is the provision of losses one of the main benefits expected to accrue to one or more individuals participating in the arrangements?

Arrangements are not notifiable unless the arrangements enable or might be expected to enable a person to obtain a tax advantage and obtaining that advantage is one of the main benefits expected to arise from the arrangements (see paragraph 6.3). Test 2 supplements the 'main benefit' condition in section 306(1)(c).

The test is objective and involves a comparison of:

- the value of the expected tax advantage resulting from the provision of losses under the arrangements and
- the value of any other benefits expected to arise as a result of individuals participating in the arrangements

The test is passed if the hypothetical informed observer could reasonably be expected to conclude that the provision of losses is one of the main benefits expected to accrue from the arrangements. The provision of losses will be a main benefit if they are a significant or important element of the benefits and not incidental or insubstantial.

The application of the loss schemes hallmark is therefore not limited to schemes where there are no benefits other than the tax advantage or where the value of those other benefits is insignificant compared to the tax reliefs resulting from the losses.

The provision of losses will be the main benefit expected to accrue from participating in the arrangements (not merely one of the main benefits) if they are the most significant or most important element of the benefits.

Although the test is not limited to such cases, the provision of losses will always be the main benefit where, for example, it would be reasonable to expect the value of the tax relief from claiming losses expected to accrue under the arrangements to be greater than the total amount of the investment which represents real personal risk.

This could happen where the amount an individual invests in the scheme is geared up by a non-recourse loan or limited recourse loan obtained from sources connected with the scheme and the way the arrangements operate means that however little income or capital gains the scheme generates, the value of the tax relief will be greater than the amount the individual ‘investor’ has, in economic substance, contributed.

This test doesn’t catch genuine business start-ups where any losses are an unintended, albeit possibly predictable, consequence.

7.7.6 Test 3 Would it be unlikely the arrangements, or any element of the arrangements, would have been entered into were it not for the provision of the losses?
Test 3 is intended to identify arrangements that it is highly unlikely would exist but for the tax advantage they are expected to enable a person to obtain or, if they did exist without giving rise to the tax advantage, would not be marketable propositions.

This test applies by reference to an informed observer. It requires the promoter or other person with a potential duty to notify HMRC about the scheme to consider whether an informed observer could reasonably be expected to conclude that the arrangements include uncommercial transactions.

Uncommercial transactions include, for example, terms or steps which it is unlikely would be entered into but for the value of the loss relief claims which the arrangements are expected to enable participants to make.

The considerations that the informed observer would take into account will include the extent to which economic losses differ from the tax losses and whether losses are incurred as part of real commercial transactions or are contrived as part of an avoidance scheme.

Under this condition, genuine business start-up losses, which are an ordinary consequence of starting up a new business venture, remain outside the scope of the loss schemes hallmark.

However, the theoretical projection of a profit at some point in the distant future wouldn’t prevent the hallmark from applying and requiring the disclosure of the arrangements.

7.8 Hallmark 7: leasing arrangements

7.8.1 The legislation

Hallmark 7 is prescribed by regulations 13 to 17 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

Regulation 13

1 Arrangements are prescribed if:

   (a) the arrangements include a plant or machinery lease,

   (b) one of the additional conditions is met (see regulation 15),

   (c) the relevant value condition is met (see regulation 16), and

   (d) the lease is not a short-term lease (see regulation 17).

2 But arrangements are not prescribed by this regulation if:

   (a) no person is a promoter in relation to them, and
the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.

Regulation 15: The additional conditions

(1) The first additional condition is that the arrangements are designed in such a way that one or more of the plant or machinery leases, comprised in the arrangements, are or would be entered into by—

(a) one party who has or would have a right or entitlement to claim capital allowances under Part 2 of CAA 2001 (plant and machinery allowances) in respect of the expenditure incurred on the plant or machinery, and

(b) another party who is not, or would not be, within the charge to corporation tax.

(2) A lease satisfies this condition if sub-paragraphs (a) and (b) of paragraph (1) are met, regardless of whether there are or would be (in addition to the parties mentioned in those sub-paragraphs) other parties to the lease who satisfy neither of those conditions.

(3) A party who acts merely as a guarantor under the lease is to be disregarded for the purposes of paragraph (1)(b).

(4) The second additional condition is that the arrangements include provision designed to:

(a) remove from the lessor the whole, or the greater part, of any risk, which would otherwise fall directly or indirectly upon the lessor, of sustaining a loss if payments due under the lease are not made in accordance with its terms, and

(b) do so by the provision of money or a money debt.

For the purposes of this paragraph ‘money’ and ‘money debt’ have the same meanings as they have in section 702(6) of ITEPA 2003.

(5) The third additional condition is that the arrangements are designed to consist of, or include—

(a) a sale and finance leaseback arrangement (within the meaning of section 221 of CAA 2001), or

(b) a lease and finance leaseback (within the meaning of section 228A(2)) of CAA 2001).

The third additional condition is subject to the following paragraphs of this regulation.

(6) In a case falling within paragraph (5)(a) the third additional condition does not apply if the arrangements are designed in such a way that:
(a) the assets leased or to be leased under the sale and finance leaseback are or will be unused and not second-hand at the time when the assets are acquired or created, and

(b) the interval between the acquisition or creation of the asset and the sale of the asset under the sale and finance leaseback arrangement is not more than 4 months.

(7) The third additional condition does not apply if plant or machinery which is, or which the promoter expects to become, a fixture, is leased with relevant land, unless the plant or machinery is used for storage or production.

Here ‘used for storage or production’ means used for the purposes of:

(a) storing, moving or displaying goods to be sold in the course of a trade

(b) manufacturing goods or materials

(c) subjecting goods or materials to a process

(d) storing goods or materials:
   (i) which are to be used in the manufacture of other goods or materials
   (ii) which are to be subjected to a process in the course of a trade
   (iii) which having been subjected in the course of a trade to process, manufactured or produced, have not yet been delivered to a purchaser, or
   (iv) upon their arrival in the United Kingdom from a place outside it.

(8) But paragraph (7) does not apply (so that, accordingly, the third additional condition is met) if the arrangements are designed in such a way that:

(a) the qualifying expenditure incurred on the fixture referred to in paragraph (7) amounts or will amount to more than 50% of the aggregate value of the assets subject to the lease, and

(b) the rent payable under the lease is directly or indirectly dependent on the availability of capital allowances under Part 2 of CAA 2001 in respect of expenditure on any plant or machinery comprised in the lease.

(9) In determining the value of the assets comprised in the lease the following rules apply:

Rule 1

The value of the land subject to the lease is the market value of the lessor’s interest.
Rule 2

The value of the plant or machinery subject to the lease is to be determined in the same manner as for the purposes of regulation 16(1).

(10) In this regulation:

- ‘fixture’ has the meaning given by section 173(1) of CAA 2001
- ‘relevant land’ has the meaning given by section 173(2) of CAA 2001

Regulation 16: The relevant value condition

(1) The relevant value condition is met if:

(a) the lower of the cost to the lessor, or the market value, of any one asset forming part of the plant and machinery leased or to be leased under the arrangements is at least £10,000,000, or

(b) the aggregate of the lower of the costs to the lessor, or the market values, of all of the assets forming part of the plant and machinery leased or to be leased under the arrangements is at least £25,000,000.

(2) For the purposes of paragraph (1) the market value of plant or machinery leased or to be leased under arrangements is to be determined on the assumption of a disposal:

(a) by an absolute owner

(b) free from all encumbrances, and

(c) in the open market

(3) ‘Absolute owner’ in the application of paragraph (2)(a) to Scotland, means the owner.

Regulation 17: Short-term leases

(1) For the purposes of regulation 13(1)(d) a lease whose term is 2 years or less is a short-term lease.

But a lease is not a short-term lease if any of the following Conditions apply.

In those Conditions ‘L’ is the lessee.

(2) Condition A is that the lease contains an option exercisable by L to extend the term so that the total term exceeds 2 years.
(3) Condition B is that at the time of the inception of the lease, other arrangements have been entered into which contemplate the extension of the lease to L which, if carried out, would extend the term of the lease so that it exceeds 2 years.

(4) Condition C is that:

(a) a person leases an asset to L under a lease that would, apart from this paragraph, be a short-term lease

(b) the inception of that lease is on or after the date on which these Regulations come into force

(c) at or about the time of the inception of that lease, arrangements are entered into for the asset to be leased to one or more other persons under one or more other leases, and

(d) in the aggregate, the term of the lease to L and the terms of the leases to such of those other persons as are connected with L exceed 2 years

(5) In this regulation ‘inception’ has the meaning given by section 70YI CAA 2001.

7.8.2 About the hallmark

This hallmark applies both to promoted and ‘in-house’ arrangements, but for in-house arrangements it does not apply where the person intended to obtain the tax advantage is a small or medium enterprise.

It is met when both:

- all of tests 1 to 3 described below are met
- any one of the 3 additional conditions is met
7.8.3 Test 1 – does the arrangement include a plant or machinery lease?

The hallmark only applies if the arrangement includes a plant or machinery lease. In brief, this is:

- any agreement or arrangement under which a person grants to another person the right to use plant or machinery for a period and which in accordance with generally accepted accounting practice falls, or would fall, to be treated as a lease
- any other agreement or arrangement to the extent that, in accordance with generally accepted accounting practice falls (or would fall) to be treated as a lease, the agreement conveys (or falls or would fall to be regarded as conveying) the right to use an asset, and the asset is plant or machinery
- the finance lease where plant or machinery is the subject of a sale and finance leaseback as defined in section 221 of the Capital Allowances Act 2001

7.8.4 Test 2 – is the lease of high value?

The hallmark only applies to high value plant or machinery leases. It is a high value lease when, of the assets forming part of the plant and machinery leased or to be leased under it:

- the cost to the lessor of any one asset or its market value (whichever is lower) is at least £10m
- the cost to the lessor of all the assets or their market value (whichever is lower) is at least £25m

Facilities to lease assets with an individual value of £10m or to the aggregate value of at least £25m are caught by this test even if there is no guarantee that the £25m threshold will be reached and should be disclosed when the facilities are made available.

Where a succession of leases are made to the same parties, or persons connected with them, and they are negotiated at the same time or as part of the same series of negotiations (that is, as part of the ‘arrangements’), the value of the plant or machinery to be leased under all the leases should be aggregated.

The acquisition of assets with an aggregate value of more than £25m (and no individual asset is at least £10m) does not have to be disclosed if the assets are to be leased to a variety of clients and no individual lease meets the £10m or £25m threshold, as appropriate.

7.8.5 Test 3 – is the lease a long lease?

The hallmark only applies where the lease is not a short-term lease. The meaning of ‘short-term lease’ is different from that of ‘short lease’ in section 70I of CAA 2001.
A short-term lease is one whose term is 2 years or less but does not include leases that:

- contain an option allowing the lessee to extend the lease beyond 2 years
- at the time of inception, other arrangements have been entered into that contemplate an extension beyond 2 years
- are incepted on or after 1st August 2006 with the intention that the assets be leased under it to one or more other persons such that the aggregate term exceeds 2 years

7.8.6 Additional condition 1 – does the lease involve a party outside the charge to corporation tax?

This additional condition applies where the arrangement includes one or more plant or machinery lease entered, or to be entered, into by:

- a party who is entitled to claim capital allowances (on plant and machinery) in relation to the leased asset
- a party who is not, or would not be, within the charge to corporation tax

It does not matter how many parties there are to the lease. Where there are more than 2 parties involved the arrangement is a hallmarked scheme if there are, or would be, parties to the lease meeting each of the above bullets

A manufacturer may, of course, be a lessor and so a party to the lease, but a manufacturer of leased equipment is not a party to the lease merely by virtue of being a supplier to the lessor

A party that acts solely as a guarantor is not taken into account in considering whether this condition is met – however you need to consider whether the guarantee provided is such that the second additional condition is met

7.8.7 Additional condition 2 – does the arrangement involve the removal of risk from the lessor?

This additional condition applies where the arrangement includes provision that:

- removes the whole, or the greater part, of the risk that would otherwise fall directly or indirectly upon the lessor if payments due under the lease were not made in accordance with its terms
- does so by the provision of money or a money debt
- ‘money’ includes money expressed in a currency other than sterling
- ‘money debt’ means any obligation that falls to be, or may be, settled by the payment of money, or the transfer of a right to settlement under an obligation which is itself a money debt. It covers all trade debts, as well as other money debts, such as debentures

7.8.8 Additional condition 3 – does the arrangement involve a finance leaseback?
This additional condition applies where the arrangements consist of, or include:

- a sale and finance leaseback arrangement
- a lease and finance leaseback

However, there are 2 exceptions to this general rule.

First, this additional condition does not apply where the arrangements consist of, or include a sale and finance leaseback arrangement and, at the time the sale and finance leaseback is entered into, the assets leased, or to be leased, are new. By this it is meant that the assets:

- at the time they are acquired or created by the seller, are unused and not second-hand
- were acquired or created by the seller not more than 4 months before the sale part of the sale and finance leaseback arrangement

Second, it is recognised that many property transactions consist of sale or lease and finance leaseback, and most property includes plant or machinery such as central heating and air conditioning. It is not intended that the simple sale and leaseback of plant or machinery within a typical building such as an office block fall within this additional condition.

The hallmark does not attempt to define the type of plant or machinery that is excluded when leased with land. Instead it takes the approach that the arrangements do not need to be disclosed where:

- the plant or machinery is, or is expected to become, a fixture that is part of the leased land
- the plant or machinery does not exceed half the value of the leased assets
- the rent payable under the lease is not directly or indirectly dependent on the availability of capital allowances

However, leases involving plant and machinery used for storage or production do not fall within this exemption – see the definition at regulation 15(7) reproduced at paragraph 7.9.1 above.

So, for example, if a factory is sold and leased back where the production line plant in the factory has a value of over £25m (or contains equipment with an individual value of over £10m) it will need to be disclosed.

But the sale and leaseback of an office block costing £100m with £35m of plant or machinery that does not meet the definition of ‘plant used for storage or production' will not need to be disclosed under this condition.

7.9 Hallmark 8: employment income

7.9.1 The legislation
Hallmark 8 is prescribed by regulation 18 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543).

Regulation 18

(1) Arrangements are prescribed if:

(a) Conditions 1 and 2 are met and Condition 3 is not met, or
(b) Conditions 1, 2 and 3 are met and at least one of Conditions 4 and 5 is met.

(2) Condition 1 is met if the arrangements involve at least one of the following:

(a) a relevant third person taking a relevant step under section 554B,
(b) any person taking a relevant step under section 554C or 554D, or
(c) B taking a step under section 554Z18 or 554Z19.

(3) Condition 2 is met if the main benefit, or one of the main benefits, of the arrangements is that an amount that would otherwise count as employment income under section 554Z2(1) is reduced or eliminated.

(4) Condition 3 is met if, by reason of at least one of sections 554E to 554X or regulations made under section 554Y, Chapter 2 of Part 7A does not apply.

(5) Condition 4 is met if the arrangements involve one or more contrived or abnormal steps without which the main benefit in paragraph (3) would not be obtained.

(6) Condition 5 is met if the arrangements involve:

(a) a relevant step being treated as taking place, and
(b) Chapter 2 of Part 7A applying as a consequence of sub-paragraph (a).

(7) In this regulation:

(a) references to sections or Parts are to those in ITEPA unless otherwise stated,
(b) ‘B’ has the meaning given for Part 7A by sections 554A(1)(a) and 554Z17(7) read together,
(c) ‘contrived or abnormal’ has the same meaning as in section 207 of the Finance Act 2013, and
(d) ‘relevant third person’ has the same meaning as in section 554A(7).

7.9.2 About the hallmark

The employment income hallmark came into force on 4 November 2013 and will not have effect where:

- the relevant date under section 308(1) of the Finance Act 2004 for the promoter to provide the prescribed information in respect of a notifiable proposal is before 4 November 2013
- the date under section 308(3) of that Act on which the promoter first becomes aware of any transaction that is part of notifiable arrangements is before 4 November 2013
The guidance on the employment income hallmark therefore applies where the person has a duty to provide prescribed information on a notifiable proposal or becomes aware of a transaction forming part of notifiable arrangements on or after 4 November 2013.

The hallmark applies to both promoters and those designing notifiable arrangements for use ‘in house’.

Unlike other hallmarks for ‘in house’ notifiable arrangements this hallmark applies to all sizes of business.

7.9.3 NICs

Arrangements designed to circumvent Part 7A are normally intended to obtain not only a tax advantage but also a NIC advantage. The NIC DOTAS regulations – the NICs (Application of Part 7 of the Finance Act 2004) Regulations 2012 (SI 2012/1868) – attract the prescribed descriptions in the tax DOTAS regulations.

See regulation 25 of SI 2012/1868. Therefore, the employment income hallmark will apply for the purposes of both income tax and NIC.

7.9.4 The 2 scenarios

Regulation 18(1) sets out 2 scenarios within the new prescribed description. These scenarios are defined in terms of Conditions 1 to 5, which are defined in regulation 18(2) to (6).

Regulation 18(1)(a) defines the first scenario in which arrangements are notifiable if the statutory conditions are met. In summary, it is that:

- the arrangements are intended to circumvent Part 7A
- none of the Part 7A exclusions is in point

The first scenario will apply if, but only if, Conditions 1 and 2 are met and Condition 3 is not met. Conditions 1 to 3 are discussed in sections 7.11.4 to 7.11.12.

The second scenario will apply if, but only if, Conditions 1, 2 and 3 are met and at least one of Conditions 4 and 5 is met. Conditions 4 and 5 are discussed in sections 7.11.13 and 7.11.14.

7.9.5 Condition 1 the ‘step’ condition

Regulation 18(2) defines Condition 1, the ‘step’ condition. It specifies 3 possible ‘steps’, using the terminology of Part 7A. If none of these steps is taken, value does not emerge to benefit ‘A’ (broadly speaking, the employee) and the arrangement does not satisfy Condition 1.

If ‘B’ (broadly speaking, the employer) earmarks a sum of money or asset, that will not, as such, satisfy Condition 1 unless B is taking a step under section 554Z18.
Condition 1 will also be met if the employer provides security within section 554Z19.

But, if B takes a relevant step under section 554C or 554D, that will satisfy Condition 1 even though Chapter 2 of Part 7A will not apply by reason of this step. For the purposes of Condition 1, it does not make any difference when the relevant step is to be taken.

7.9.6 Condition 2 the ‘main benefit’ condition

Condition 1 is very broad. But it is a necessary condition, not a sufficient condition. Therefore, the hallmark will not apply to arrangements merely because they meet Condition 1. Arrangements also need to meet Condition 2, which is much narrower.

Regulation 18(3) defines Condition 2, the ‘main benefit’ condition. It states that Condition 2 is met if the main benefit, or one of the main benefits, of the arrangements is that an amount that would otherwise count as employment income under section 554Z2(1) is reduced or eliminated.

If Part 7A bites, there is an amount counting as employment income under section 554Z2(1). Therefore, if arrangements do not have the benefit of reducing or eliminating such income, they will not satisfy Condition 2.

Furthermore, if arrangements have the benefit of reducing or eliminating Part 7A income, but this benefit is peripheral and the main benefit (or main benefits) of the arrangements do not include either a tax advantage or a NIC advantage, the arrangements will not satisfy Condition 2.

But if arrangements have more than one main benefit, and one of the main benefits is that an amount counting as employment income under section 554Z2(1) is reduced or eliminated, Condition 2 is met – no matter what the other main benefit or benefits may be.

One way to decide whether Condition 2 is met is to ask: what are the parties to the arrangement really trying to achieve? The examples in the following sections illustrate this.

7.9.7 Condition 2: example: relevant step by employer

If an employer makes a normal salary payment to an employee, this will be a relevant step under section 554C and will thus meet Condition 1.

However, an employer is not (except in certain unusual circumstances) a relevant third person, and so the salary payment will not trigger Part 7A.

This is a consequence of the arrangements. But reduction or elimination of Part 7A income is not the main benefit, or one of the main benefits, of the arrangements. Therefore Condition 2 is not met.

7.9.8 Condition 2: example: sale of shares at market value

An employee benefit trust (EBT) sells shares in the sponsoring employer to an employee for market value. Because this meets the conditions of section 554Z8,
there will be no Part 7A income.

But this will not be the main benefit, or one of the main benefits, of the transaction, it will be, at most, only a peripheral benefit. The main benefit of the transaction will be obtaining an asset with the hope of gaining investment return which is not reflected in its market value.

7.9.9 Condition 2: example: ‘two-step’ employee share offers

Arrangements will not meet Condition 2 merely because they are complicated. The sponsoring employer of an EBT approaches the EBT trustees with a recommendation that the trustees sell a number of shares to employees at market value. The recommendation is made in such a way that, if the trustees agree that they will make such a sale, they do not thereby take any relevant steps under section 554B.

Sometime later, after the administrative and HR aspects of the arrangements have been completed, the employer asks the trustees to transfer specified parcels of shares to identified employees for immediate completion of the sale. The share transfers are relevant steps under section 554C.

The trustees earmark shares to be transferred, but, because the arrangements are such that they do not earmark the shares with a view to a later relevant step, they do not take any relevant steps under section 554B.

Condition 1 is met, because the trustees take relevant steps under section 554C. One of the benefits of the arrangements is that the Part 7A income arising on the section 554C step is, in each case, reduced under section 554Z8 by the consideration paid for the shares.

However, it does not follow that Condition 2 is met. If one considers the benefits, the ‘two-step’ arrangements are a more complex version of the example in section 7.11.7.

The main benefit of the transaction will be obtaining an asset with the hope of gaining investment return which is not reflected in its market value, not the reduction or elimination of Part 7A income.

7.9.10 Condition 2: example: new employee share scheme set up to reduce earmarking charge

Arrangements will not meet Condition 2 merely because they include a new arrangement which takes account of Part 7A.

The owner of a private company wants to sell some shares to an employee at market value. Although the employee is not able to pay for the shares now, the parties expect that the employee will be able to pay for them in the not too distant future.

The parties foresee the following Part 7A consequences. On earmarking shares to sell to the employee at the expected future date, the shareholder will take a relevant step under section 554B. And, on selling the shares, the shareholder will also take a relevant step, under section 554C.
Under section 554Z5, the value of the section 554B step would reduce the value of the section 554C step – but that would be nil anyway, as the employee would have paid market value for the shares.

Accordingly, the parties set up a new employee share scheme, under which the shareholder grants a share option to the employee, the exercise price being equal to the market value of the shares at the time of the grant of the option.

The arrangement is such that all the conditions of section 554Z7(1) are satisfied, in particular, there is no connection (direct or indirect) between the shareholder’s earmarking of the shares and a tax avoidance arrangement (cf. section 554Z). Consequently, as provided by section 554Z7, the value of the section 554B step is reduced to nil by the exercise price. This is one of the benefits of the arrangements.

The employee exercises the option as planned and pays for the shares, being taxed on any increase in value of the shares above the exercise price by the normal share option tax rules in Chapter 5 of Part 7. See ERSM110000.

Condition 2 is not met. As in the examples in section 7.11.7 and 7.11.8, the main benefit of the transaction will be obtaining an asset with the hope of gaining investment return which is not reflected in its market value, not the reduction or elimination of Part 7A income.

7.9.11 Condition 2: example: unfunded employer-financed retirement benefit scheme (EFRBS)

An employer and an employee are considering the provision of retirement benefits by means of an EFRBS. They realise that a funded EFRBS, whereby defined contributions are paid to a trust and immediately earmarked for the employee’s benefit, would trigger Chapter 2 of Part 7A.

A promoter has designed a proposal for arrangements under which an employer:

- makes a contractual promise that it will, itself, pay retirement benefits to the employee based on the value of specified sums or assets whether or not actually held by employer

- never pays contributions to a third party to fund that third party to pay those benefits instead

The employer and employee agree that they will implement these arrangements by setting up an unfunded EFRBS.

Condition 1 is met, because the payment of retirement benefits will be a relevant step under section 554C.

These arrangements escape Part 7A, because no relevant third person is involved. In the circumstances under review, the reduction or elimination of Part 7A income is not a peripheral benefit.
Funded EFRBS are among the arrangements which Part 7A is intended to catch. In the circumstances under review, one of the main benefits of the provision of retirement benefits by means of an unfunded EFRBS is the reduction or elimination of Part 7A income. Condition 2 is therefore met.

Because the arrangements are to pay retirement benefits, the Part 7A exclusions covering deferred remuneration and share and share option schemes cannot apply to them.

Because the arrangements are to pay retirement benefits based on the value of specified sums or assets, they are ‘money purchase’ defined contribution arrangements. They are thus different both from deferred remuneration and share and share option schemes and from defined benefit arrangements.

This example considers an EFRBS. A scheme that is restricted to providing pensions cannot be an EFRBS as defined in section 393A. However, the Part 7A rules specific to EFRBS modify the definition where appropriate to include schemes which would be EFRBS except that they are restricted to providing pensions. Therefore, the employment income hallmark applies to such schemes in the same way that it applies to EFRBS as defined in section 393A.

HMRC continues to monitor the risks that increasing use of unfunded EFRBS presents to the Government’s objective of creating a more affordable pensions tax regime through restricting the tax reliefs for pension savings. The new employment income hallmark supports this activity.

7.9.12 Condition 3: the ‘exclusion’ condition

Regulation 18(4) defines Condition 3, the ‘exclusion’ condition. Condition 3 is, in summary, that one of the Part 7A exclusions applies.

Arrangements designed to avoid Part 7A will normally satisfy Conditions 1 and 2 but not Condition 3. They will then come within regulation 18(1)(a) and be ‘prescribed’. Conversely, the Part 7A exclusions prevent Part 7A income arising in certain circumstances envisaged and defined by Parliament.

For example, section 554F is an exclusion for certain commercial transactions, and section 554G is an exclusion for certain transactions under employee benefit packages. Tax planning to take advantage of the Part 7A exclusions in the way intended by Parliament may satisfy Conditions 1 and 2, but it will also satisfy Condition 3. It will thus be outside regulation 18(1)(a).

However, arrangements may involve taking advantage of a Part 7A exclusion in a way not intended by Parliament. Such arrangements will satisfy Conditions 1, 2 and 3 and be outside regulation 18(1)(a). Regulation 18(1)(b) is directed against such arrangements. It sets out a second scenario in which arrangements are disclosable if the statutory conditions are met. It will apply if Conditions 1, 2 and 3 are met and at least one of Conditions 4 and 5 is met.

7.9.13 Condition 3: example: exclusion for pension income chargeable under Part 9

A UK resident individual receives employment-related pension income from a non-UK pension scheme. This income is chargeable to income tax under Part 9. Although
the pension payment is a relevant step under section 554C, it comes within the exclusion in section 554S. Condition 3 is therefore met.

The arrangements are therefore outside the first scenario (regulation 18(1)(a)) – whether or not Condition 2 is met.

7.9.14 Condition 4: the ‘contrived or abnormal step’ condition

Regulation 18(5) defines Condition 4, the ‘contrived or abnormal step’ condition. It states that Condition 4 is met if the arrangements involve one or more contrived or abnormal steps without which the main benefit in regulation 18(3) would not be obtained. In Condition 4, ‘contrived’ and ‘abnormal’ have the same meaning as in section 207 of Finance Act 2013 (general anti-abuse rule: definition of ‘abusive’ tax arrangements).

It is often the case that perceived loopholes in tax legislation are very narrow, and that to enter into arrangements which are expected to enable a person to obtain a tax advantage requires the adoption of some step or feature that wouldn't otherwise have been taken.

In practice the contrived or abnormal steps may take a wide variety of forms. The words 'contrived' and 'abnormal' are therefore not defined in the legislation and so will be applied in their normal sense.

Part D of the guidance about the General Anti Abuse Rule (GAAR) includes a number of examples to illustrate when an arrangement might be treated as abusive in the context of the GAAR. This includes consideration of whether the means of achieving the substantive tax results include any contrived or abnormal steps.

Current guidance on the GAAR, which covers the meanings of ‘contrived’ and ‘abnormal’ in section 207 FA 2013, is available at: www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules

In Condition 4, ‘the main benefit in paragraph (3)’ means the main benefit mentioned above. It does not imply that Condition 4 can only be met if there is only one main benefit.

Part 7A is complex legislation, and taxpayers may therefore enter into complex arrangements in order to comply with Part 7A.

In particular, the provisions of the share-related earmarking exclusions at sections 554J to 554M are very detailed and will involve careful design of plans or schemes to ensure those provisions are satisfied. In that context, the detail and complexity of particular arrangements will not, in themselves, mean that such arrangements are regarded as contrived or abnormal.

7.9.15 Condition 5: the ‘deliberate fall-back charge’ condition

Regulation 18(6) defines Condition 5, the ‘deliberate fall-back charge’ condition. It states that Condition 5 is met if the arrangements involve:

(a) a relevant step being treated as taking place, and
(b) chapter 2 of Part 7A applying as a consequence.
Some of the exclusions in Chapter 1 of Part 7A are safeguarded by what is commonly known as a ‘fall-back’ charge. If an arrangement at first comes within the exclusion, but later on fails to meet the statutory conditions, then Part 7A bites.

However, the relevant step which, because of the exclusion, did not give rise to Part 7A income still does not give rise to Part 7A income, the past is left undisturbed. Instead, there is a deemed relevant step at the time when the statutory conditions are breached, giving rise to a ‘fall-back’ charge. See, for example, section 554O, especially section 554O(3) and (4).

These contingent fall-back charges are safeguards, rather than primary charging provisions. Condition 5 catches arrangements which seek to defer tax by excluding an upfront charge for the price of a later fall-back charge.
7.10 Hallmark 9 financial products

7.10.1 The legislation

Hallmark 9 is prescribed by regulation 19 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543). The hallmark was introduced by SI2016/99 which amended SI2006/1543 with effect from 23 February 2016.

The hallmark applies when deciding whether a person must disclose a scheme as follows:

- when the promoter is required to disclose a notifiable proposal under section 308(1) FA2004 and the relevant day is on or after 23 February 2016 (paragraph 14.2.1)
- when the promoter must disclose notifiable arrangements under section 308(3) and the promoter becomes aware of arrangements implementing the scheme on or after 23 February 2016
- when the user of the scheme must disclose their use of the arrangements under section 309 or 310 (paragraphs 14.4 and 14.5) and all of the transactions forming part of the arrangements were entered into on or after 23 February 2016.

Regulation 19

(1) Subject to regulation 21, arrangements are prescribed if:

(a) condition 1 is met, and

(b) it would be reasonable to expect an informed observer (having studied the arrangements and having regard to all relevant circumstances) to conclude that:

(i) condition 2 is met, and

(ii) either condition 3 or condition 4 is met.

(2) Condition 1 is that the arrangements include at least one financial product specified in regulation 20(1) (a 'specified financial product').

(3) Condition 2 is that the main benefit, or one of the main benefits, of including a specified financial product in the arrangements is to give rise to a tax advantage.

(4) Condition 3 is that a specified financial product included in the arrangements contains at least one term which is unlikely to have been entered into by the persons concerned were it not for the tax advantage.

(5) Condition 4 is that the arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained.
(6) For the purposes of this regulation condition 3 is treated as not having been met if:

(a) the specified financial product includes a term requiring that it is held for a minimum period of time before it is redeemed and:

   (i) section 135 or 136 of TCGA 1992 applies to the specified financial product, and

   (ii) condition 3 is met only by virtue of that term, or

(b) the specified financial product includes a term whereby the issuing company can secure that the date for redemption falls before the end of the permitted period and:

   (i) but for that term, the specified financial product would be an equity note, and

   (ii) condition 3 is met only by virtue of that term.

(7) In paragraph (6)(b) 'equity note' and 'the permitted period' have the meanings given by section 1016 of CTA 2010.

(8) For the purposes of condition 4 a step is not to be treated as being contrived or abnormal if:

   (a) that step involves only the transfer of an asset to which the condition in paragraph 15A(2)(b) of Schedule 7AC to TCGA 1992 applies, or

   (b) that step involves only the issue of shares and:

      (i) that step is taken to eliminate or substantially reduce the economic risk of holding a loan relationship or a derivative contract, or part of such a loan relationship or a derivative contract, which is attributable to fluctuations in exchange rates, and

      (ii) the shares are treated for accounting purposes as a liability of the company in accordance with generally accepted accounting practice.

(9) For the purposes of this regulation, neither condition 3 nor condition 4 is treated as having been met if:

   (a) the specified financial product includes a term providing for conversion into, or redemption in, a currency other than sterling, and

   (b) both condition 3 and condition 4 are met only by virtue of that term.

Regulation 20

   (1) The financial products specified in this paragraph are:
(a) a loan
(b) a share
(c) a derivative contract within the meaning given by section 576 of CTA 2009
(d) a repo in respect of securities within the meaning given by section 263A(A1) of TCGA 1992
(e) a creditor repo, creditor quasi-repo, debtor repo or a debtor quasi-repo (within the meanings given by sections 543, 544, 548 and 549 of CTA 2009 respectively)
(f) a stock lending arrangement within the meaning given by section 263B(1) of TCGA 1992
(g) an alternative finance arrangement within Chapter 6 of Part 6 of CTA 2009 or Part 10A of ITA 2007
(h) a contract which, whether alone or in combination with one or more other contracts:

(I) is in accordance with generally accepted accounting practice required to be treated as a loan, deposit or other financial asset or obligation, or
(II) would be required to be so treated by the person entering into the arrangements were that person a company to which the Companies Act 2006 applies.

(2) Paragraph (1) does not specify a financial product held within an account which satisfies the conditions in regulation 4 of the Individual Savings Account Regulations 1998.

Regulation 21

Arrangements are excepted from being prescribed under regulation 19 if:

(a) a promoter is a participating entity, or is part of a participating group, within the meaning of section 286 of the Finance Act 2014, and
(b) HMRC has confirmed, or could reasonably be expected to confirm, to the promoter that the arrangements are acceptable transactions under the Code of Practice on Taxation for Banks (as published by the Commissioners for Her Majesty’s Revenue and Customs on 31 May 2013)

7.10.2 About the Hallmark

This hallmark covers arrangements which include one or more specified financial products and at least one of the main benefits of including the financial products in the arrangements is to give rise to a tax advantage.
It is intended to catch arrangements using financial products where there is a direct link between the financial product and all or part of the tax advantage the arrangements are expected to enable a person to obtain.

Where this is the case, the financial products hallmark aims to cover arrangements where:

- either the financial product includes one or more terms that are unlikely to have been entered into were it not for the tax advantage, or
- the arrangements include one or more contrived or abnormal steps without which the tax advantage could not have been obtained.

The hallmark includes 3 conditions. Conditions 1 and 2 are necessary but not sufficient on their own to bring arrangements within the hallmark. The hallmark will not apply merely because condition 1 or 2 or both are met. If the hallmark is to apply, both conditions 1 and 2 must be met and either condition 3 or condition 4 must also be met.

7.10.3 Condition 1
Condition 1 is a factual test. It is satisfied if the arrangements include one or more of the financial products specified in Regulation 20. Regulation 20 is reproduced in paragraph 7.10.1 above.

7.10.4 Informed Observer
The financial products hallmark requires the promoter or other person with a potential duty to notify HMRC about the scheme to consider whether it would be reasonable to expect an informed observer, who has studied the arrangements and taken all relevant circumstances into account, to conclude that condition 2 and either condition 3 or condition 4 are met.

An informed observer is to be contrasted with an ‘uninformed observer’ but isn’t an ‘expert’ or necessarily a tax practitioner. The informed observer is independent, has all relevant information about the scheme and has sufficient knowledge to understand both the scheme and the relevant statutory context.

To sum up, the informed observer is assumed to have the appropriate knowledge and skillset to reach the conclusions that the hallmark requires.

While the promoter is not an informed observer for this purpose, the informed observer should be presumed to have access to all of the information that is available to the promoter of the scheme.

The scope of ‘all relevant circumstances’ will vary according to the nature of the arrangements but circumstances that it would be relevant for the informed observer to take into account when determining whether conditions 2, 3 and 4 apply 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 and
- HMRC guidance
7.10.5 Condition 2 – main benefit

Arrangements aren’t notifiable unless they enable or might be expected to enable a person to obtain a tax advantage and obtaining that advantage is one of the main benefits expected to arise from the arrangements (see paragraph 6.3).

The financial products hallmark doesn’t apply unless it is also the case that it would be reasonable to expect an informed observer to conclude that one of the main benefits of including a financial product in the arrangements is to give rise to a tax advantage.

The term ‘tax advantage’ has the same definition in both tests (see paragraph 6.2.2). The test is objective and involves a comparison of:

- the value of the expected tax advantage resulting from the inclusion of a financial product in the arrangements and
- the value of any other benefits expected to arise from the inclusion of the financial product

The test is passed if it would be reasonable to expect the hypothetical informed observer to conclude that the tax advantage resulting from the inclusion of the financial product is a significant or important element of the benefits and not incidental or insubstantial.

7.10.6 Condition 3 – terms of financial product not likely to have been entered into but for the tax advantage

Condition 3 focusses on terms included in any specified financial products included in the arrangements. Terms in the wider arrangements of which those products form part are not considered as part of condition 3.

It is intended to identify financial products which include terms that it is unlikely would be acceptable to anyone considering the acquisition of that financial product were it not for the tax advantage the product offers, either on its own or in combination with other specified financial products.

As this test applies by reference to an informed observer, it requires the promoter, or other person with a potential duty to notify HMRC about the scheme, to consider whether it would be reasonable to expect the informed observer to conclude that the financial product includes one or more uncommercial terms.

In this context, a term or terms are regarded as uncommercial if the informed observer could reasonably be expected to conclude that it is unlikely that the term, or terms, would be included in the financial product were it not for the tax advantage that is a main benefit of including one or more financial products in the arrangements.

There are a number of examples illustrating the operation of conditions 3 and 4 in paragraphs 7.10.10

7.10.7 Condition 4 - Contrived or abnormal steps
Condition 4 is met when it would be reasonable to expect the hypothetical informed observer to conclude that the arrangements, in which the financial product or products are included, involve one or more contrived or abnormal steps without which the tax advantage could not be obtained.

As explained earlier, condition 2 must always be met in order for the hallmark to apply. As a result, arrangements are not notifiable arrangements by virtue of condition 4 unless the informed observer would reasonably conclude that the tax advantage arising from the inclusion of a specified financial product in the arrangements, wouldn’t be obtained without there also being one or more contrived or abnormal steps in those arrangements.

The tax advantage considered in condition 4 must be the same tax advantage, the existence or creation of which is one of the main benefits of including a financial product in the arrangements in condition 2.

As with the application of other tests underpinning different hallmarks, the test is to be applied on the basis that the informed observer would reach his or her conclusions after having studied the arrangements and having regard to all relevant circumstances including commercial rationale and HMRC guidance.

Steps taking place as part of transactions forming part of the arrangements under consideration are not regarded as contrived or abnormal under this hallmark if they have a justifiable commercial rationale in their own right, such that it would be reasonable to expect steps and arrangements of this sort to be entered into apart from the particular context of the arrangements in question.

It is often the case that perceived loopholes in tax legislation are very narrow, and that to enter into arrangements which are expected to enable a person to obtain a tax advantage requires the adoption of some step or feature that wouldn’t otherwise have been taken.

In practice steps that an informed observer might reasonably conclude are contrived or abnormal may take a wide variety of forms. The words ‘contrived’ and ‘abnormal’ are therefore not defined in the legislation and so will be applied in their normal sense.

Part D of the guidance about the General Anti Abuse Rule (GAAR) includes a number of examples to illustrate when an arrangement might be treated as abusive in the context of the GAAR. This includes consideration of whether the means of achieving the substantive tax results include any contrived or abnormal steps.

When identifying steps which it considers an informed observer might reasonably conclude are contrived or abnormal, HMRC intends approaching this question in the same way in relation to the financial products hallmark as it does in relation to the GAAR.

7.10.8 – Specified Financial Products

The financial products to which the hallmark applies are specified in Regulation 20, which is reproduced in paragraph 7.10.1.
The category of specified financial products that includes loans isn’t limited to simple transactions for the direct or explicit lending of money. For example, debt instruments issued in exchange for a capital asset and other more complex arrangements that involve a person incurring liabilities to be repaid are also specified financial products by virtue of being ‘loans’.

Unlike the other categories of financial product, derivative contracts are only capable of being specified financial products if they are held by companies. Derivative contracts held by individuals are not financial products for the purposes of the hallmark.

7.10.9 – Code of Practice on Taxation for Banks

Schemes aren’t disclosable under the financial products hallmark if the promoter is part of a banking group and the scheme would be, or has been confirmed to be, acceptable under the Code of Practice for Banks.

7.10.10 Examples illustrating the application of conditions 2, 3 and 4 in the Financial Products Hallmark

**Quoted Eurobonds**

The issuing of securities is a commercial practice. The genuine raising of finance by way of debt, including through the use of quoted Eurobonds, rather than equity has a commercial purpose and benefit. HMRC considers that the benefit of paying interest on a security with commercial terms, without being required to withhold income tax from the interest, is not important or significant compared with the main benefit of the arrangements, which is to raise or maintain working capital.

HMRC also does not consider that such finance is unlikely to have been raised without the tax advantage of being entitled to pay interest without withholding income tax.

The tax advantage of not being required to account for withholding tax is not one of the main benefits of the arrangements therefore s306(1)(c) Finance Act 2004 is not satisfied and the financial products hallmark does not need to be considered.

There is HMRC guidance on Eurobonds in the Corporation Tax Manual at CTM35218.

**Self-invested Personal Pensions (SIPPs)**

Members of SIPPs are entitled to claim income tax relief on the contributions they pay to the scheme. If a specified financial product is acquired or held as a scheme investment, the investment income and gains are exempt from tax in line with the rules for other types of registered pension scheme.

These are both tax advantages, but in straightforward cases where investments are being held for the purposes of increasing the value of authorised benefits payable to the member, it is HMRC’s view that it would not be reasonable for an informed observer to conclude that either condition 3 or condition 4 is met.

**Excluded Indexed securities**
HMRC accepts that there is commercial demand for investments which include terms providing investment returns based on a specified index and that some investors prefer not to take direct ownership of the underlying assets. Excluded indexed securities are taxed under the capital gains rules. There is HMRC guidance on the tax treatment of Excluded Indexed Securities in the Savings and Investment Income Manual at SAIM3050.

While the tax advantage is arguably a main benefit of holding excluded indexed securities, HMRC’s view is that these products, whose investment returns are determined by the value of certain assets, would be commercially viable without this favourable tax treatment.

Consequently, HMRC doesn’t take the view that it would be reasonable for an informed observer to conclude that investors would be unlikely to choose to have their investment returns determined in this way, were it not for the tax advantages of investing in such securities nor that it involves any contrived or abnormal steps. HMRC would expect an informed observer to conclude that neither condition 3 nor condition 4 is met.

**Tax advantaged employee share schemes**

Setting up and operating a tax advantaged employee share scheme should not meet condition 3. In HMRC’s view, the types of shares which are stipulated in the relevant scheme rules should not contain any terms that it would be reasonable for an informed observer to conclude are unlikely to be entered into if there were no tax advantage.

**Employee Ownership Trusts**

The Employee Ownership Trust rules require shares to be disposed of to a qualifying vehicle and there is no need to include unusual terms in the shares for the rules to apply. Accordingly, condition 3 should not be met.

**Real Estate Investment Trusts [REIT]**

Where a company meets the requirements to become a REIT it can notify HMRC that it intends to become one.

The exemption for the property rental business of a REIT arises through the company meeting the various statutory requirements for qualifying for that treatment. The tax advantage of the exemption doesn’t arise from the inclusion of the company shares in the arrangements.

Condition 2 is therefore not met by reason of the company qualifying for treatment as a REIT. However, if the REIT shares are held as part of wider arrangements, then those arrangements must be considered against all of the hallmarks.

There is a summary of the conditions relating to REITs in the HMRC guidance manual at GREIT02005.

**Earn-out rights**
Where the consideration received for the disposal of shares consists of or includes earn-out rights, condition 1 will be met because the shares disposed of are a specified financial product.

If shares are to be received under the earn-out rights then those shares will also be a specified financial product. The earn-out right itself is not a specified financial product.

Where the consideration to be received under the earn-out rights takes the form of shares or debentures of the new company then it will be a question of fact whether their use gives rise to a main benefit in the shape of a tax advantage, or whether all the main benefits of the arrangements are of another nature (such as the commercial advantage of the acquiring company). An informed observer may therefore conclude, depending on the facts of the case, that condition 2 is not met.

There would seem to be no reason for the specified financial products involved in earn-out arrangements to contain special terms and so an informed observer would not be expected to conclude that condition 3 is met.

Section 138A TCGA allows the disposal of the old securities for the earn-out rights to enjoy a tax treatment similar to that afforded by section 135 on an exchange of shares.

It follows that where arrangements include steps intended to meet the conditions for section 138A to apply, those steps would not be viewed as contrived or abnormal by an informed observer provided that, if section 138A were not in point, they would have the effect of fulfilling the conditions for section 135 to apply. In such cases, condition 4 would therefore not be met.

An informed observer would be unlikely to conclude that, having decided on the use of earn-out rights in arrangements, the framing of those rights so as to meet the conditions of section 138A was a contrived or abnormal step.

So condition 4 is unlikely to be met. The terms implicit in the section 138A conditions are unremarkable and in the great majority of cases will be fully consistent with the principal commercial objective of using earn-out rights.

**Entrepreneur’s Relief**

Entrepreneurs’ relief (ER) on a gain in respect of a disposal of shares or securities requires the claimant to have held at least 5% of the company's ordinary share capital and 5% of the voting rights in the company for one year before the disposal.

Where a class of share is created (or the rights attaching to an existing class are amended) so that the shares in question carry voting rights and form part of the company’s ordinary share capital, but do not carry an economic interest in the company which is consistent with other classes of the company's shares, holders of those shares may be entitled to ER - which would not otherwise be due - on other shares.

HMRC considers it would normally be reasonable for an informed observer to conclude in these circumstances that the main benefit, or one of the main benefits, of including such shares in the arrangements is to secure the tax advantage represented by ER (condition 2).
Depending on the arrangements, the observer may also conclude that the creation of special shares, or the amendment of the existing shares, constitutes a contrived or abnormal step, or that one or more of the terms of the shares are such that it is unlikely they would be entered into but for the tax advantage. As a result condition 3 or condition 4 or both would be met.

However, HMRC recognises a limited range of circumstances in which the use of shares in this way would not meet condition 2. Where this is the case, the satisfaction of conditions 3 or condition 4 will not be sufficient to require disclosure.

For example, where the use of shares with anomalous economic rights to ensure entitlement to ER is part of a larger scheme or arrangement to further the commercial interests of the company then an informed observer may conclude that obtaining the tax advantage of ER is not a main benefit of including the new class of shares in the arrangements.

**Discounted Bonds**

HMRC does not consider it would be reasonable for an informed observer to conclude that either condition 3 or 4 is met by bonds that are discounted for commercial reasons.

However the position may be different if the discounted bond forms part of a wider set of arrangements containing abnormal or contrived steps or relying on one or more terms of the bond which are unlikely to have been entered into were it not for the expected tax advantage.

**Partition demergers**

Arrangements consisting of a reorganisation of share capital of a holding company into different classes of share to reflect different interests in a group before a demerger should not be caught by the hallmark.

The main benefit of the demerger is the commercial outcome. HMRC does not consider it would be reasonable for an informed observer to conclude that either condition 3 or condition 4 is met where there is a commercially-driven reorganisation.

**Joint Venture arrangements and CGT groups**

Structuring joint venture arrangements so they are consistent with the CGT groups legislation (section 170 TCGA 1992) would not be within the hallmark to the extent the investing companies obtain a fair stake in the joint venture by reference to the respective values of their contributions.

Where such standard commercial arrangements are entered into, it would not be reasonable for an informed observer to conclude that either condition 3 or condition 4 are met.

This is because commercial arrangements which ensure that investing companies are entitled to their fair share in the joint venture, wouldn’t include terms in a financial product a person is unlikely to enter into but for the tax advantage, or involve abnormal or contrived steps.

**Short term loans**
There is no requirement to withhold tax from interest payable on loans of less than 12 months. The ordinary use of short-term loans is a commercial decision from which the tax treatment flows. HMRC does not consider it would be reasonable for an informed observer to conclude that arrangements including, in isolation, a short-term loan meet either condition 3 or condition 4.

However, if arrangements are made to ensure the loan is treated for tax purposes as ‘short’ when in reality the loan will last more than 12 months, or the short-term loan is an essential part of wider arrangements involving contrived or abnormal steps, then the arrangements may be notifiable.

There is HMRC guidance about short interest in the Savings and Investment Income Manual at SAIM9070.

7.10.11 Statutory Exceptions in Regulation 19

In the examples above, it is HMRC’s view that disclosures would not be needed because it wouldn’t be reasonable to expect that an informed observer would conclude that either condition 3 or 4 is met. There are however certain arrangements which must include uncommercial terms or potentially contrived or abnormal steps if taxpayers are to obtain tax advantages intended by Parliament.

Therefore, in order to prevent such arrangements having to be notified under the Financial Products hallmark, the legislation includes a number of statutory exceptions for arrangements, without which it might otherwise be reasonable to expect an informed observer to conclude that one or both of conditions 3 and 4 were met.

**Minimum holding period for securities**

If a vendor accepts some or all of the sale price for a business in the form of securities, any chargeable gain on the disposal may be deferred under either section 135 or section 136 TCGA 1992.

It is common practice to include a term in the security preventing the holder from redeeming the security for a certain period. The inclusion of such a term in the security ensures that the legislation operates as intended and indeed prevents the vendor from exploiting the provisions.

However it would be reasonable for an informed observer to conclude that the minimum holding period is a term which the holder would have been unlikely to enter into were it not for the tax advantage of ensuring the gain is deferred under section 135 or 136 TCGA.

The hallmark is therefore explicitly prevented from applying where the only reason the hallmark would apply is because the inclusion of such a term in the security would otherwise cause condition 3 to be met.

HMRC does not consider that it would be reasonable for an informed observer to conclude that including a minimum holding period in the terms of securities, which have been received as consideration for the disposal of a business, would represent a contrived or abnormal step.
However, if the wider arrangements including the securities with the minimum holding period, include contrived or abnormal steps without which the tax advantage could not be obtained, it would still be possible for the hallmark to apply to those arrangements.

**Redemption of a security before the end of the ‘permitted period’**.

Any debt with a term exceeding 50 years is designated as a type of equity note under section 1015 CTA 2010 which means that interest payable is treated as a distribution and is not deductible. As a result, it is common practice for long-term financing to ensure its term is just less than 50 years.

HMRC does not consider that it would be reasonable for an informed observer to conclude that it would be a contrived or abnormal step for a security to include such a maturity date.

However, it might be reasonable for an informed observer to conclude that the inclusion of such a term would be unlikely were it not for the tax advantage. The hallmark is therefore explicitly prevented from applying in these circumstances where the inclusion of a term of this sort is the only reason why condition 3 is met in relation to the arrangements.

There is HMRC guidance on Equity Notes in the Corporation Tax Manual at CTM15515.

**Transfers subject to the Substantial Shareholdings Exemption [SSE]**

The SSE rules are intended not to disadvantage groups that do not segregate different trading activities in different companies. Relief is available when a trading division, which is to be sold, is transferred to another group company prior to sale of that company in order to qualify for SSE.

The transferee company is often newly established for this purpose. It could be reasonable for an informed observer to conclude that the transfer of part of the company’s trading activities serves no commercial purpose other than facilitating access to the relief and so that it is a contrived or abnormal step without which the SSE would not be available.

The hallmark is therefore explicitly prevented from applying where the only reason it would otherwise apply is because the transfer causes condition 4 to apply.

**Hedging of foreign exchange risks on loans etc.**

One way in which a company may hedge a foreign exchange risk on a loan relationship or derivative contract is by assigning the loan or contract in exchange for preference shares issued in the same currency as the loan.

Such arrangements fall within Regulations 3 and 4 of the Loan relationship and Derivative contracts (Disregard and bringing into account of profits and losses) Regulations 2004 [SI2004/3256] and as a result any foreign exchange movements are disregarded in the tax calculations.

HMRC have no objection to companies hedging their foreign exchange risks in this way. However, it would potentially be reasonable for an informed observer to conclude that the assignment of the loan in exchange for shares is a contrived or abnormal step without which the tax advantage which arises under the regulations mentioned above would not be obtained.
The hallmark is therefore explicitly prevented from applying where the only reason the hallmark would otherwise apply is because the taking of such steps causes condition 4 to be met.

Arrangements of this type won't inevitably be excluded from the scope of the hallmark. If the shares contain terms which it would be reasonable for an informed observer to conclude are unlikely to have been entered into but for a tax advantage, Condition 3 may be met and the hallmark would apply.

There is more detailed guidance about the hedging of foreign exchange risks in the Corporate Finance Manual from CFM62210.

Non-qualifying corporate bonds

Holders of a loan security can ensure it is not treated as a qualifying corporate bond (QCB) for CGT purposes by including a term that the security may be converted into, or redeemed in, a currency other than sterling.

This means that the loan agreement falls outside the definition of a corporate bond at section 117(1) TCGA 1992. As a result the asset is not exempt from CGT and any capital losses arising will be available to set off against chargeable gains on other assets.

HMRC considers there is a significant possibility that it would be reasonable for an informed observer to conclude that the introduction of the foreign currency clause could meet both conditions 3 and 4.

Condition 3 could be met because there is a significant possibility that an informed observer would reasonably conclude that the terms of the security would be unlikely to include the foreign currency conversion or redemption clause if this did not result in the security not being a QCB and so being liable to CGT.

Condition 4 could also be met because it might be reasonable for an informed observer to conclude that introducing the foreign currency clause into the terms of the security would be a contrived or abnormal step.

The hallmark is therefore explicitly prevented from applying where the only reason why both conditions 3 and 4 would otherwise be met is the inclusion of the term providing that the security may be converted into, or redeemed in, a currency other than sterling in order to ensure that a security is not a QCB for the purposes of CGT.

7.10.12 Securities which have both a minimum term and a foreign currency clause

It is not uncommon for securities received as consideration for the sale of a business to include both:

- a minimum holding period to ensure that sections 135 and 136 operate as intended (regulation 19(6)(a)(i)) and
- a foreign currency option in order for the security to be treated as a non-QCB for the purposes of CGT (regulation 19(9)(a))
As described in paragraph 7.10.11, the statutory exceptions ensure the financial products hallmark doesn’t apply to securities whose terms include either a minimum holding period or a foreign currency option.

However, the exceptions don’t cover securities with both of these provisions. This means that the hallmark could potentially apply to arrangements solely by reason of the security containing both terms.

HMRC is satisfied that the combination of these terms in the same security doesn’t create extra Exchequer risk compared to securities containing only one of the terms. HMRC can therefore confirm that arrangements do not have to be notified under this hallmark in these circumstances.

The hallmark will be treated as not applying if the only reason conditions 3 or 4 are met is because the financial product included in the arrangements has both of the terms described in regulation 19(6)(a)(i) and regulation 19(9)(a).
8. Determining a SDLT scheme – flow chart

Test 1: Are there arrangements (including any scheme, transaction or series of transactions), or proposals for arrangements, that enable, or might be expected to enable, any person to obtain an advantage in relation to SDLT?

Yes → Test 2: Are those arrangements or proposals such that the main benefit, or one of the main benefits, that might be expected to arise from them is the obtaining of that advantage?

Yes → Test 3: Are the arrangements
1. the same or substantially the same as arrangements that were first made available by any person for implementation before 1 April 2010 (see paragraph 9.7) and
2. not certain arrangements involving the transfer of rights rules (see paragraph 9.7.2)?

Yes → Not a notifiable SDLT scheme
(Note: The disclosure rules for other taxes may apply)

No → Test 4: Do the arrangements comprise one or more of the steps A to F described at paragraph 9.8.2

Yes → Test 5: Do the arrangements include any unlisted step that is necessary to secure the SDLT advantage?

Yes → Test 6: Do the arrangements include all, or at least two of, steps A, C and D?

No → No → Test 7: Do the arrangements involve more than one instance of step A, C or D?

No → No → Test 6: Do the arrangements include all, or at least two of, steps A, C and D?

Yes → Yes → A notifiable SDLT scheme
(Note: The disclosure rules for other taxes may also apply)

9.1 General
The hallmarks at section 7, including the ‘confidentiality’ and ‘premium fee’ hallmarks, do not apply to this section.

9.2 Test 1: are there arrangements that enable an SDLT advantage to be obtained (FA 2004, s.306(1)(a) and (b) and s.318)?

The guidance at paragraph 6.2 applies to this section in the same way as it does for section 6.

Note: The definition of ‘arrangements’ used for disclosure purposes is wider than the concept of ‘linked transactions’ used for SDLT purposes (FA 2003, s.108).

9.3 Test 2: Is the advantage a main benefit of the arrangements? (FA 2004, s.306(1)(c))

The guidance at paragraph 6.3 applies to this section in the same way as it does for section 6.

9.4 Test 3: Grandfathering

Certain schemes are exempted from disclosure (or ‘grandfathered’). Schemes are exempt if they are the same or substantially the same as arrangements made available by any person before 1st April 2010. But some schemes involving the transfer of rights rules do not benefit from this grandfathering (see paragraph 9.7.2 below).

See paragraph 14.2.3 below for the meaning of ‘substantially the same’. It is irrelevant whether a given legal entity made the arrangements available prior to 1st April 2010, what is important is whether any person made them available prior to this date.

It is a matter of fact whether an arrangement is ‘grandfathered’.

Evidence of grandfathering would include:

- the existence and substance of the arrangement being clearly described in tax manuals or publications
- a practitioner’s own record as to when they made, or learnt that competitors were making, an arrangement available

‘Makes available for implementation’ takes the meaning at s.308(2) Finance Act 2004 and detailed guidance as to its meaning is given at paragraph 14.3.2 below.

The fact that any particular scheme is exempted from disclosure by the application of test 3 should not be taken as an indication that HMRC either finds the scheme acceptable, or that we accept that it works under current law.

Satisfying tests 4 to 7 (paragraphs 9.8-9.10) will also remove the need to notify HMRC of arrangements.
9.4.1 Exceptions to grandfathering

The grandfathering rule does not apply to certain arrangements involving the transfer of rights rules. Arrangements are not exempt under the grandfathering rules where:

(a) a chargeable interest is acquired under a contract, the substantial performance or completion of which falls to be disregarded under section 45(3) of the Finance Act 2003, and

(b) the secondary contract referred to in section 45(3) of the Finance Act 2003 applies to a transaction with one or more of these features:

(i) a distribution in specie (such as a distribution of an asset in physical form without selling it and distributing the cash)

(ii) an acquisition by a partnership

(iii) an acquisition by a settlement

(iv) an element of gift or transfer at an undervalue

(v) the grant of an option

(vi) an assignment or novation

9.5 Tests 4 to 7: introduction to steps A to F

9.5.1 General

To further restrict disclosed schemes, you are not required to notify schemes that comprise one or more of 6 ‘steps’ A to F (test 4). However, this is subject to:

- an overarching rule that any arrangement that contains an unlisted step – where that unlisted step is necessary for securing the SDLT advantage – is not exempted from disclosure (test 5)

- certain restrictions on using combinations of steps or multiples of the same step (tests 6 and 7 – see paragraph 9.10 below)

This is in addition to the grandfathering rule at Test 3 and paragraph 9.7 above. The steps A to F have been described to us as ‘existing toolkit’. We believe a better term would be ‘existing building blocks’.

For SDLT purposes, HMRC is not interested in the existing building blocks in themselves. But we are interested in the ways in which the building blocks are put together to form more complex products. Hence the limits on the ways in which steps A to F can be used in combination.

The fact that any particular scheme is exempted from disclosure by the application of tests 4 to 7 should not be taken as an indication that HMRC either finds the scheme acceptable, or that we accept that it works under current law.

9.5.2 The 6 steps – a summary
The 6 listed steps are:

- **Step A:** the acquisition of a chargeable interest in land by a special purpose vehicle (SPV)
- **Step B:** claims to certain reliefs (see paragraph 9.8.3 below)
- **Step C:** the sale of shares in a SPV which holds chargeable interests in land, to a person who is not connected to either the SPV or the vendor
- **Step D:** not electing to waive the exemption from VAT (i.e. not ‘opting to tax’)
- **Step E:** structuring a transaction as the transfer of a going concern for VAT purposes
- **Step F:** the creation of a partnership to which a property subject to a land transaction is to be transferred

### 9.5.3 The 6 steps: the legislation

The 6 steps are listed in the Schedule to The SDLT Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868).

The steps are as follows:

**Step A:** acquisition of a chargeable interest by special purpose vehicle

The acquisition of a chargeable interest in land by a company created for that purpose (‘a special purpose vehicle’).

**Step B:** claims to relief

Making:

(a) a single claim to relief under any of the following provisions of the Finance Act 2003:

1. section 57A (sale and leaseback arrangements)
2. section 58B (relief for new zero-carbon homes)
3. section 58C (relief for new zero-carbon homes: supplemental)
4. section 60 (compulsory purchase facilitating development)
5. section 61 (compliance with planning obligation)
6. section 63 (demutualisation of insurance company)
7. section 64 (demutualisation of building society)
8. section 65 (incorporation of limited liability partnership)
9. section 66 (transfers involving public bodies)
10. section 67 (transfer in consequence of reorganisation of parliamentary constituencies)
11. section 69 (acquisition by bodies for national purposes)
12. section 71 (certain acquisitions by registered social landlords)
13. section 74 (collective enfranchisement by leaseholders)
14. section 75 (crofting community right to buy)
15. Schedule 6 (disadvantaged areas relief)
16. Schedule 6A (relief for certain acquisitions of residential property)
17. Schedule 6B (transfers involving multiple dwellings)
18. Schedule 7 (group relief and reconstruction acquisition relief)
(xix) Schedule 8 (charities relief)
(xx) Schedule 9 (right to buy, shared ownership leases etc), or

(aa) a single claim to relief under Schedule 61 to Finance Act 2009 (alternative finance investment bonds), or

(ab) one or more claims to relief under any one of the following provisions of the Finance Act 2003:

- section 71A (alternative property finance: land sold to financial institution and leased to individual)
- section 72 (alternative property finance in Scotland: land sold to financial institution and leased to individual)
- section 72A (alternative property finance in Scotland: land sold to financial institution and individual in common), or
- section 73 (alternative property finance: land sold to financial institution and resold to individual)

Step C: sale of shares in special purpose vehicle

The sale of shares in a special purpose vehicle, which holds a chargeable interest in land, to a person with whom neither the special purpose vehicle, nor the vendor, is connected.

Step D: not exercising election to waive exemption from VAT

No election is made to waive exemption from value added tax contained in paragraph 2 of Schedule 10 to the Value Added Tax Act (treatment of buildings and land for value added tax purposes).

Step E: transfer of a business as a going concern

Arranging the transfer of a business, connected with the land which is the subject of the arrangements, in such a way that it is treated for the purposes of value added tax as the transfer of a going concern.

Step F: undertaking a joint venture

The creation of a partnership (within the meaning of paragraph 1 of Schedule 15 to the Finance Act 2003) to which the property subject to a land transaction is to be transferred.
9.6 Approach to tests 4 to 7

The way to approach the steps is as follows:

- identify all the single listed steps comprised in the arrangement – paragraph 9.9.1 provides guidance on what constitutes a single step B
- identify any unlisted steps in the arrangement that are necessary to secure the expected SDLT advantage (if there are any such steps, the scheme is not exempted from disclosure – see paragraph 9.8.1 above)
- if the arrangement involves a combination of steps, or more than one instance of the same step, refer to tests 6 to 7 (paragraph 9.10 below) to see if that combination or multiple falls within the arrangements exempted from disclosure

9.6.1 Single step B

A single instance of step B consists of either:

- a single claim to one of the reliefs listed under step B(a)(i) to (a)(xx) and step B(aa) in the Schedule (see paragraph 9.8.3)
- one or more claims to one the reliefs listed under step B(b)(i) to (b)(iv) in the Schedule (see paragraph 9.8.3)

Note: For this purpose a claim can still be a ‘single claim’ even if it is one of a number of identical claims being made in respect of separate and distinct properties. So, for example, where 2 properties are transferred from group company A to group company B, each of the 2 claims to group relief is a ‘single claim’ for this purpose.

Examples of single step B:

- a single claim to charities relief is one step B (single use of a relief in group (a))
- 2 claims to alternative property finance: land sold to a financial institution and leased to an individual constitutes one step B (multiple use of a relief in group (b))

We will accept that a single step B(a)(xviii) (group relief and reconstruction acquisition reliefs) includes actions taken or not taken with the intention of ensuring that, within the context of the withdrawal of group, reconstruction or acquisition relief:

- the purchaser ceases to be a member of the same group as the vendor
- control of the acquiring company changes
- arrangements for either of the above events are entered into
- on or after the end of the period of 3 years beginning with the effective date of the relief, rather than before the end of that period

A ‘single claim’ to a relief means step B does not include any arrangement that comprises more than one claim to the same listed relief within groups (a) and (aa) of
the Schedule. Nor do such schemes constitute multiples of step B. They are not within step B at all.

For example:

- 2 claims to group relief fall outside step B (2 claims to the same listed relief)
- A claim to group relief and a claim to reconstruction relief also fall outside step B (2 claims to the same listed relief – although these are separate reliefs, they are listed together in group (a)(xviii))

Any such arrangement is not excepted from disclosure.

- An arrangement that comprises the use of 2 or more different listed reliefs will amount to 2 or more separate instances of step B. For example: a claim to charities relief and a claim to group relief constitute 2 separate steps B (use of 2 separately listed reliefs)
- A claim to group relief and a claim to alternative property finance: land sold to financial institution and leased to individual constitute 2 separate steps B (use of 2 separately listed reliefs)

In such cases, you should refer to paragraph 9.10 to see whether the combination is excepted from disclosure.

9.7 Tests 6 and 7: combination steps

Rules 1 and 2 of the schedule to The SDLT Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868) specify which combinations of steps, or multiples of the same step, can be used as part of the excepted arrangements.

These 2 rules are separate (i.e. they are not 2 legs of a single rule in which Rule 2 is merely an extension of Rule 1). It is necessary to consider Rule 2 even where Rule 1 is not in point.

9.7.1 SI 2005/1868: rule 1 to the schedule

This rule merely confirms that arrangements exempted from disclosure can include any combination of steps B, D, E and F, including multiple uses of the same step.
9.7.2 Tests 6 and 7 (SI 2005/1868, Rule 2 to the schedule)

These tests provide that arrangements are not excluded from disclosure if they:

- include any combination of steps A, C and D
- involve a multiple use of any of steps A, C or D

9.7.3 Examples of arrangements exempted from disclosure

Examples of arrangements exempted from disclosure include schemes that consist of:

- 2 steps B
- 2 steps B and a single step A
- 2 Steps B and 2 steps F

9.7.4 Examples of arrangements not exempted from disclosure

Examples of arrangements that are not exempted from disclosure include schemes that consist of:

- 2 claims to group relief (double use of the same relief does not fall within step B at all – see paragraph 9.8.1 above)
- 2 steps A only
- 2 steps B and single steps A and D
- 2 steps B and 2 steps A
10. Determining an ATED scheme – flow chart

Test 1: Are there arrangements (including any scheme, transaction or series of transactions), or proposals for arrangements, that enable, or might be expected to enable, any person to obtain an advantage in relation to The ATED?

Test 2: Are those arrangements or proposals such that the main benefit, or one of the main benefits, that might be expected to arise from them is the obtaining of that advantage?

Test 3: Do the arrangements or proposals fall within one or more of the descriptions in regulation 4 of SI 2013/2571,
   a) the ownership condition is no longer met,
   b) the taxable value of the property is reduced to £2m or less,
   c) the taxable value of the property is reduced so that the tax is less than it otherwise would have been.

Test 4: Do the arrangements or proposals fall within one of the excluded arrangements listed in the schedule to SI 2013/2571

11. Determining an ATED Scheme – the tests

A notifiable ATED
(Note: The disclosure rules for other taxes may also apply)
11.1 General

The hallmarks at Section 7, including the confidentiality and premium fee hallmarks do not apply to ATED. However, the disclosure rules for other taxes may apply to the arrangement.

11.2 Test 1: are there arrangements that enable an ATED advantage to be obtained? (FA 2004, s.306(1)(a) and (b) and s.318)

The meaning of ‘arrangements’ is not exhaustively defined in the primary legislation but includes any scheme, transaction or series of transactions. The guidance at paragraph 6.2 applies to this section in the same way as it does for section 6.

11.3 Test 2: is the tax advantage a main benefit of the arrangements (FA 2004, s.306(1)(c))

The definition of ‘tax advantage’ is widely drawn and construed. It involves the avoidance or reduction of a charge to tax, a relief or an increased relief and the deferral of tax. The guidance at paragraph 6.3 applies to this section in the same way as it does for section 6.

11.4 Test 3: does the arrangement fall within one of the prescribed descriptions (SI 2013/2571 Reg 4)

The ATED descriptions are initially drawn very widely. However, disclosure is not required if the arrangement falls within one or more of the exclusions outlined in paragraph 11.5 below.

The Legislation

Prescribed description of arrangements in relation to ATED:

(1) For the purposes of Part 7 of the Finance Act 2004 (disclosure of tax avoidance schemes) the arrangements specified in paragraph (2) are prescribed in relation to ATED.

(2) Arrangements are prescribed if they are not excluded arrangements under the Schedule and as a result of any element of the arrangements:

(a) a company, partnership or collective investment scheme ceases to meet the ownership condition in respect of the chargeable interest

(b) the taxable value of the chargeable interest is reduced to the lowest taxable value shown in the right hand column of the table in section 99(4) of the Finance Act 2013 or less, or

(c) the taxable value of the chargeable interest is reduced with the consequence that a lower annual chargeable amount applies than that which otherwise would have applied.

(3) In this regulation:

(a) reference to a lower annual chargeable amount applying is to be read in
accordance with the table at section 99(4) of the Finance Act 2013, and

(b) reference to ‘taxable value’ is to be read in accordance with section 102 of the Finance Act 2013.

The ownership condition is met where a single dwelling interest is held by a company, a partnership with a company member or a collective investment scheme. Where arrangements are put in place to transfer the ownership of a dwelling to an entity which is not among those listed as ‘excluded’ then a disclosure will be required.

Where the value of a dwelling is reduced so that the charge to ATED falls or the dwelling is taken out of the charge completely and this has been achieved other than by a transaction which could reasonably be considered as made at arm’s length, a disclosure will be required.

11.5 Does the arrangement or proposal fall within one of the excluded arrangements? (SI 2013/2571)

The excluded arrangements are listed in the Schedule to the ATED Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2013 (SI 2013/2571).

11.6 The legislation

Excluded arrangements:

Arrangements are excluded arrangements if they comprise a transfer of the chargeable interest from a company, partnership or collective investment scheme (a ‘transferor’) to a transferee where one or more of the following applies.

- The transfer is on such terms as would reasonably be expected to be agreed between unconnected persons.
- The transferor and the transferee are members of the same group of companies and the transferee meets the ownership condition.
- The transfer constitutes a distribution out of the assets of the transferor, and the transferee is an individual, a corporation sole, a trustee or a person who meets the ownership condition.
- The transfer constitutes a settlement.

In paragraph 1 reference to being ‘unconnected persons’ is to be read in accordance with section 1122 of the Corporation Tax Act 2010.

In paragraph 2 reference to companies being ‘members of the same group of companies’ is to be read in accordance with section 152 of the Corporation Tax Act 2010.

In paragraph 4 ‘settlement’ has the meaning given by section 43 of the IHT Act 1984.

Schemes are exempted from disclosure where they fall within one of these exclusions. The fact that a scheme is exempted from disclosure does not necessarily indicate that HMRC finds it acceptable or accepts that the scheme works. If an arrangement satisfies one or more of these tests then there is no requirement to
notify the scheme to HMRC.

Where a dwelling is disposed of to an unconnected person then this will be outside DOTAS. However, HMRC acknowledge that de-enveloping may be achieved by the disposing of a dwelling to a connected person, either an individual connected with the corporate wrapper or a fellow group member.

Where such transactions are carried out on the same terms as they would for an unconnected person transaction then there is no requirement to notify HMRC of the disposal.

De-enveloping may also be achieved by the liquidation of a company giving rise to a distribution of the company assets to shareholders. Such transactions are outside the scope of DOTAS.

For ATED purposes, ‘entitled’ means beneficially entitled and this excludes entitlement in the capacity of a trustee or personal representative or entitlement as a beneficiary under a settlement. Where a dwelling is transferred to the shareholders of the company who are trustees of a settlement then this will be regarded as a settlement under Paragraph 4.

11.7 Exclusion 1 - the transfer is on such terms as would reasonably be expected to be agreed between unconnected persons

A dwelling has been transferred using the open market value.

For example, an individual owns a company which in turn owns a chargeable interest within the scope of ATED. The company transfers the dwelling to the individual at market value and thus takes the dwelling outside ATED.

Although the individual is a connected person because the market value of the dwelling has been used, there is no requirement to notify HMRC of the transfer.

11.8 Exclusion 2 - the transferor and the transferee are members of the same group of companies and the transferee meets the ownership condition

A dwelling has been transferred to a fellow group member. For example, a company owns a dwelling within the charge to ATED. The company transfers the dwelling to a fellow group company where it will also be within the charge to ATED. There is no requirement to notify HMRC of the transfer.

11.9 Exclusion 3 - the transfer constitutes a distribution out of the assets of the transferor, and the transferee is an individual, a corporation sole, a trustee or a person who meets the ownership condition

A company owns a dwelling within the charge to ATED and goes into liquidation.

For example, a company decides to de-envelope by winding the company up and makes a distribution of the company assets to the shareholder, who is an individual. This transaction would be outside DOTAS.

11.10 Exclusion 4 - the transfer constitutes a settlement

A company owns a dwelling within the charge to ATED and transfers the dwelling to trustees.
For example, a company owns a dwelling within the charge to ATED and the shareholders of the company are trustees of a settlement. The company decides to de-envelope by distributing the assets of the company to the trustees. There is no requirement to notify HMRC of the transfer.

There are a number of statutory exemptions within ATED, including Charitable Companies, Public Bodies, Bodies established for National Purposes and Dwellings Conditionally Exempt from IHT. Where transactions relate to any of these exempt entities, there is no requirement to notify HMRC under the current ATED Regulations.

11.11 Commencement and transitional provisions

Apart from specific transitional provisions described below, generally a proposal or arrangement for ATED is disclosable where:

- for the purposes of section 308(1), the relevant date is on or after the date that the regulations come into effect on 4 November 2013
- for the purposes of section 308(3), the date on which the promoter first becomes aware of any transaction forming part of the notifiable arrangements is on or after the date the regulations come into effect on 4 November 2013

Specific transitional provisions are needed for the ATED regulations because they also apply to proposals or arrangements where the relevant date under section 308(1) or 308(3) falls within the period beginning 31 January 2013 and ending on the day before the regulations come into effect.

If this is the case then the date by which the information on the arrangement or proposal need to be supplied is 17th January 2014 rather than the usual 5 day period.
12.

13. Determining an IHT scheme – the tests

13.1 General

A proposal or arrangement is notifiable under DOTAS as an IHT scheme if:

- there are arrangements which are expected to provide an IHT advantage
- this advantage is expected to be one of the main benefits of the arrangements and
- the arrangements fall within one of three hallmarks which apply for IHT

The Inheritance Tax Avoidance Schemes (Prescribed Description of Arrangements) Regulations 2017 (SI1172/2017) give the description, or IHT hallmark, of arrangements that have to be notified. The new hallmark applies when deciding whether a person must disclose a proposal or arrangements as follows:

- when the promoter is required to disclose a notifiable proposal under section 308(1) FA2004 and the relevant day is on or after 1 April 2018 (paragraph 14.2.1)
- when the promoter must disclose notifiable arrangements under section 308(3) and the promoter first becomes aware of arrangements implementing the scheme on or after 1 April 2018
- when the user of the scheme must disclose their use of the arrangements under section 309 or 310 (paragraphs 14.4 and 14.5) and all of the transactions forming part of the arrangements are entered into on or after 1 April 2018

The previous IHT hallmark included ‘grandfathering’ provisions to except from disclosure arrangements that were first made available before 6 April 2011 or which were substantially the same as arrangements first made available before that date. These ‘grandfathering’ provisions cease to apply from 1 April 2018. This means that arrangements that would have been excepted from disclosure before 1 April 2018 under the 2011 hallmark will, from 1 April 2018, have to be tested against the new IHT hallmark.

In addition to the specific IHT hallmark, the confidentiality and premium fee hallmarks were extended to cover IHT with effect from 23 February 2016. Guidance on the application of those hallmarks can be found in paragraphs 7.3 to 7.3.6 and 7.5 to 7.5.3. Neither the grandfathering exception described in the previous paragraph nor the one described below in relation to the new hallmark apply to an IHT scheme which is disclosable under either the confidentiality or the premium fee hallmark.
13.2 The IHT hallmark and how it works

The IHT hallmark provides that an arrangement is notifiable if it would be reasonable to expect an informed observer, who has studied the arrangements and had regard to all relevant circumstances, to conclude that conditions 1 and 2 are met. 'Arrangements' takes it meaning from section 318 of Finance Act 2004 and includes any scheme, transaction or series of transactions.

The 'informed observer' test is crucial as this provides the context in which the conditions are to be judged.

The informed observer is to be contrasted with an ‘uninformed observer’, but isn’t an expert or necessarily a tax practitioner.

The informed observer is independent, has all the relevant information about the scheme and has sufficient knowledge to understand both the scheme and the relevant statutory context.

The informed observer is assumed to have the appropriate knowledge and skillset to reach the conclusions that the hallmark requires.

While the promoter isn’t an informed observer for this purpose, the informed observer should be presumed to have access to all of the information that is available to the promoter of the scheme.

The scope of ‘all relevant circumstances’ will vary according to the nature of the arrangements, but circumstances which may be relevant for the informed observer to take into account include:

- the non-tax benefits that are expected to arise from the arrangements
- the overall effect or consequences of the arrangements
- the terms of the documentation and the substance of the arrangements, and
- HMRC guidance and published statements

13.3 The hallmark conditions

The IHT hallmark has two conditions. Both conditions have to be met for the arrangement to be notifiable.

Many commonly used tax planning arrangements falling within Condition 1 will not cause Condition 2 to be met and therefore won’t be notifiable.

13.3.1 Condition 1

Condition 1 is that the main purpose, or one of the main purposes, of the arrangements is to enable a person to obtain an advantage in relation to inheritance tax set out in one or more of sub-paragraphs (a) to (d).

In most cases it should be clear whether the main purpose, or one of the main purposes, of the arrangements is to secure one of the listed tax advantages, or whether the tax advantage arises inadvertently as a by-product of the arrangements.
As this has to be determined by reference to how an ‘informed observer’ would view the arrangements, this test should be relatively straightforward.

Condition 1 focuses on areas of highest risk and greatest concern to HMRC. The tax advantages listed under condition 1 are:

(a) the avoidance or reduction of a relevant property entry charge

This imports the wording from the previous IHT hallmark (SI2011/170). Arrangements, the main purpose, or one of the main purposes, of which is to reduce or avoid the charge which would otherwise arise when property becomes relevant property are within (a).

(b) the avoidance or reduction of a charge to IHT under

- section 64 Inheritance Tax Act 1984 (IHTA 1984) (the charge on relevant property at the ten-year anniversary)
- section 65 IHTA 1984 (the charge on relevant property at any other time)
- section 72 IHTA 1984 (the charge arising on property leaving employee or newspaper trusts) or
- section 94 of IHTA 1984 (the charge arising in connection with close company transfers)

(c) the avoidance or reduction of a charge to IHT arising from the application of section 102, 102ZA, 102A or 102B of the Finance Act 1986 in circumstances where there is also no charge to income tax under Schedule 15 to the Finance Act 2004 (charge to income tax on benefits received by former owner of property). This relates to arrangements that seek to avoid the IHT implications of being a gift with reservation of benefit but where there is also no pre-owned asset income tax charge under Schedule 15 to FA 2004

(d) a reduction in the value of the person’s estate without giving rise to a chargeable transfer or potentially exempt transfer. This relates to arrangements where a person removes value from their estate without that reduction giving rise to either a chargeable transfer or a potentially exempt transfer. A reduction in the value of a person’s estate other than in an arm’s length bargain will usually give rise to a transfer of value under section 3 IHTA 1984.

13.3.2 Condition 2

IHT arrangements won’t be notifiable unless both Conditions 1 and 2 are met.

Condition 2 is that the arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained.

When considering this condition, it is the arrangements that must be reviewed to conclude whether they involve one or more contrived or abnormal steps and then to consider whether those contrived or abnormal steps are necessary to achieve the tax advantage.
For example, the use of trusts is not itself contrived or abnormal. A gift into a discretionary trust would not, on its own, meet condition 2. The gift would be an immediately chargeable transfer. The fact that the gift was to a discretionary trust would not, on its own, mean that the arrangements by way of which the gift is made include a contrived or abnormal step.

If a more complex trust structure was used instead, for example for added protection of the trust assets, the additional complexity might lead an informed observer to conclude that those additional steps are 'contrived or abnormal' in the sense that it was unusual to go to those lengths and levels of complexity. However, condition 2 will only be met if the steps that are contrived or abnormal are required to achieve a tax advantage.

To an 'uninformed observer' the creation of a trust might seem like an unusual and therefore abnormal thing to do. Equally the idea of creating a trust and then making a loan to the trustees of that trust might seem contrived to an uninformed observer.

However, whether arrangements are contrived or abnormal, or involve contrived or abnormal steps, has to be considered from the point of view of an 'informed observer'.

A straightforward trust arrangement is not contrived or abnormal in this context. Nor is the making of a loan to trustees of a trust that an individual has set up, or to a company to which the individual has a connection. Equally, choosing to invest money into assets which will qualify for relief from inheritance tax may or may not be commonplace, but in the context of the 'informed observer' such an investment, on its own, would be neither contrived nor abnormal.

The inclusion of the words 'contrived or abnormal' in Condition 2 and the requirement for them to be considered by the hypothetical informed observer mean that normal and straightforward inheritance tax planning will not be notifiable. Inheritance tax planning that requires greater complexity or contrivance to achieve the intended tax advantages though is likely to be notifiable.

In particular it can be helpful to consider whether the economic consequences are as expected. Making a gift presupposes that the donor no longer beneficially owns the gifted property. If the donor is able to enjoy the gifted property in broadly the same way as previously this might well be an indicator of a disclosable scheme.

13.3.3 The 'established practice' exception

The new hallmark takes effect from 1 April 2018 (see paragraph 13.1) so a proposal which was made available before that date would not have been notifiable at that time. However where that proposal is implemented again on or after 1 April 2018 a duty to notify would arise under section 308(3) FA04. The 'established practice' exception is intended to ensure that such a duty doesn't arise if the conditions in the exception are met.

Arrangements won't be prescribed and so won't be notifiable, if they:

(a) implement a proposal which has been implemented by related arrangements, and

(b) are substantially the same as the related arrangements.
‘Related arrangements’ are defined as arrangements which:

(a) were entered into before 1 April 2018, and

(b) at the time they were entered into, accorded with established practice of which HMRC had indicated their acceptance.

This provision is designed to remove from the scope of the hallmark established IHT planning schemes whose workings are well understood and agreed. Such schemes are excepted if:

- that scheme has been sold and implemented at least once before the new hallmark takes effect
- HMRC has indicated its acceptance that it achieves that well understood tax outcome, and
- it is sold and implemented again without being changed after the hallmark takes effect

13.3.4 The proposal or scheme

The first stage is to establish whether the proposal or scheme in question, which is being implemented by the present arrangements, was implemented in the same form before 1 April 2018. If that proposal has not been implemented before 1 April 2018 the exception does not apply. Even if the exception does apply, it is still necessary to test the proposal or arrangements against the premium fee and confidentiality hallmarks, which means the proposal or scheme may be notifiable by virtue only of one or both of those hallmarks.

For the exception to apply the present arrangements must implement a proposal which has previously been implemented by related arrangements. It is therefore important to identify the proposal which the present arrangements are implementing.

The proposal is the specific combination of elements or steps which are designed to achieve the intended tax advantage and which is being made available to a potential user. While there may be a number of very similar proposals in existence which are designed to achieve the same tax advantage, for example different companies offering their own versions of a tax saving scheme, each would be a separate proposal.

The exception applies to arrangements which implement a proposal which has been implemented by related arrangements. It follows that the proposal which is being implemented by the present arrangements has to be the same proposal that was implemented by the related arrangements before 1 April 2018. The exception does not apply to arrangements which implement a different proposal. That other proposal must be considered on its own merits.

By way of example, Insurance Co have offered their clients a Discounted Gift Trust v1.0 since 2010. This proposal was first implemented in 2010 and continues to be offered in April 2018 in exactly the same way. The implementation of this proposal by arrangements entered into after 1 April 2018 would be the implementation of a proposal that has previously been implemented before 1 April 2018 and which, subject to satisfying the established practice requirements, would be within the exception. The arrangements would still have to be tested against the confidentiality
and premium fee hallmarks but if they accord with established practice they would seem likely not to be notifiable under the IHT hallmark.

However, suppose Insurance Co decide that they want to make changes to the elements or steps which are required to achieve the intended tax advantage and after 1 April 2018 offer their clients what amounts to Discounted Gift Trust v.1.1 (notwithstanding that they may choose not to change the name or version number). This is a new proposal, even though it may be ‘substantially the same’ as Discounted Gift Trust v1.0. This proposal and any arrangements that implement it are not excepted, and must be tested by reference to the new IHT hallmark as well as the confidentiality and premium fee hallmarks.

Changes to a proposal or scheme which do not affect the elements or steps that are required to achieve the intended tax advantage would not result in this being a new proposal. For example, changes to the name of the scheme or the entity making the proposal, or changes for other regulatory reasons that do not affect the elements or steps which lead to the intended tax advantage, would not give rise to a new proposal.

If the proposal had previously been implemented before 1 April 2018, the next step is to consider whether the previously implemented arrangements are ‘related arrangements’.

13.3.5 Related arrangements
In order to be ‘related arrangements’, the earlier arrangements must:

• have been entered into before 1 April 2018, and

• at the time they were entered into those arrangements, have accorded with established practice of which HMRC had indicated their acceptance.

13.3.6 Established practice and HMRC’s acceptance of that practice
There are two elements to this requirement. The first is to consider whether the arrangements ‘accord with established practice’, and secondly whether HMRC has indicated acceptance of that established practice.

Taking the ‘established practice’ first, this is not defined in the legislation and therefore takes its ordinary meaning.

Established practice may be demonstrated by reference to published material (whether from HMRC, or text books or articles in journals) or by other written evidence of what had become a common practice by the relevant time (that is, when the arrangements were entered into).

It is then necessary to consider whether the arrangements actually carried out were the same as those identified as established practice, or whether there were any significant differences between the actual arrangement in question and those that were commonly carried out. If, for example, the particular difference between the actual arrangement and the ‘normal’ arrangement was the introduction of some feature which was designed to achieve a particular tax advantage, then it is doubtful that the actual arrangement accorded with established practice.
The second requirement is that HMRC had, at the time the arrangements were entered into, indicated its acceptance of the established practice. This may have been through published material such as guidance or other means. For example, HMRC may have made a clear statement in its published tax bulletins, or its internal manuals, or in correspondence with some representative body (such as Society of Trust & Estate Practitioners, the Chartered Institute of Taxation, or other similar body).

13.3.7 Substantially the same

Having determined that the current arrangements implement a proposal that had previously been implemented by related arrangements but which would not have been notifiable as it pre-dates the 2018 IHT hallmark, the final criteria for arrangements to be within the exception is that they must be ‘substantially the same’ as the current arrangements.

It is therefore useful to set out what is meant by ‘substantially the same’ in this context.

It is important to bear in mind that the ‘substantially the same’ requirement relates to the arrangements being implemented and the related arrangements, not to the proposal that the arrangements are implementing. For the exception to apply the current arrangements have to implement the same proposal as was implemented by the ‘related arrangements’.

Minor changes, for example to reflect the different personal details of users, will not stop arrangements from being substantially the same. For example, a retail discounted gift product would provide for the user to specify the sum of money being placed into the product, the chosen beneficiaries, the amount and frequency of the payments that the user is to carve out for their own benefit and so on. These differences in personal details do not change the underlying proposal, so that, for example, an implementation of Discounted Gift Trust v1.0 by arrangements entered into by Ms Jones, investing £250,000 and retaining withdrawals of £1,041.66 per month, would be substantially the same as the implementation of Discounted Gift Trust v1.0 by Mr Smith, investing £1 million and retaining withdrawals of £75,000 per annum.

However, where the arrangements being implemented are altered beyond merely making the necessary changes to effect the proposal for that individual, the arrangements will no longer be ‘substantially the same’ and will not be capable of being related arrangements.

13.4 Examples of arrangements which aren’t notifiable

As set out above, the hallmark does not catch straightforward inheritance tax planning. The examples below show how some of these arrangements (which could include proposals) would be tested against the hallmark. Bear in mind however, that arrangements must always be tested against all relevant hallmarks, which, for IHT, includes confidentiality and premium fee.
13.4.1 Ordinary outright gifts are not notifiable, even where they are exempt

Example 1: A lifetime gift to a spouse or civil partner

Condition 1 Such a gift is caught by condition 1(d) as at least a main purpose of the gift is to reduce the value of the person’s estate without giving rise to a chargeable transfer or a potentially exempt transfer. Instead the reduction gives rise to an exempt transfer.

But to be notifiable condition 2 must also be met

Condition 2 It is not reasonable to expect that an informed observer would conclude a straightforward gift or transfer of assets to a spouse or civil partner includes either contrived or abnormal steps. This is simply the use of an exemption provided for by the legislation.

Although condition 1 is met, condition 2 is not, so these arrangements are not notifiable under this hallmark.

Example 2 Regular gifts out of income

Condition 1 If these are gifts to an individual, they may be caught by condition 1(d) as a main purpose of the gifts is to reduce the value of the person’s estate without giving rise to a chargeable transfer or a potentially exempt transfer – they give rise to a series of exempt transfers. If these are gifts into trust, they may also be caught by condition 1(a) in that they avoid or reduce a relevant property entry charge.

Again, although condition 1 may be met, to be notifiable condition 2 must also be met

Condition 2 It is not reasonable to expect that an informed observer would conclude it is either contrived or abnormal for a person to make regular gifts to those the person wants to benefit from their generosity where they are straightforward gifts to an individual or gifts into trust. This would just be the use of an exemption provided for by the legislation.

In some cases the person intending to make such gifts may be advised to record their intention or commitment in writing before making the gifts. Such a step might seem contrived or abnormal in the sense that unilateral gifts are commonly made without being pre-ordained, so that the pre-ordination appears abnormal. But in the context of the exemption for regular gifts out of income, which have to be part of the transferor’s normal expenditure, recording this commitment in advance is simply a step in demonstrating that the exemption is due. Recording the commitment does not secure the exemption, but it may help to establish that the exemption is due based on the subsequent transfers.

Although condition 1 is met, condition 2 is not, so these arrangements are not notifiable under this hallmark.
Example 3: Transfers of value equal to the available nil rate band into trust, which may be repeated every seven years

Condition 1 These gifts are chargeable but within the available nil rate band, so they are taxed at zero per cent. There is no reduction or avoidance of any charge set out in condition 1, so condition 1 is not met.

Condition 2 Even if the arrangements met condition 1, it would not be reasonable to expect an informed observer to conclude a gift of a sum equal to the available nil rate band on its own was either contrived or abnormal, or contained contrived or abnormal steps.

Neither condition 1 nor condition 2 is met, so these arrangements are not notifiable under this hallmark.

Example 4: Making a lifetime transfer to a bare trust for a minor beneficiary

Condition 1 The transfer is a gift into a bare trust from which the donor cannot benefit. Although the transfer reduces the value of the transferor’s estate, it gives rise to a potentially exempt transfer. Condition 1(d) is therefore not met and the arrangement does not give rise to any of the other tax advantages set out in condition 1. This analysis would apply whether or not the trustees were able to defer actual payments to the beneficiary beyond the age of 18.

As condition 1 is not met there is no need to consider condition 2.

13.4.2 Executing a will, deed of variation or disclaimer which gives rise to exemption from inheritance tax

Example 5: Executing a will that leaves property to an exempt beneficiary such as the spouse or a charity

Condition 1 Executing a will does not meet any of the elements of condition 1. Although a will may be executed to reduce or avoid the IHT charge on death by use of exemptions, the will does not reduce the person’s estate. Rather the will determines how the estate devolves on death and it is this devolution which secures any IHT exemption. As there is no reduction in the person’s estate without giving rise to a chargeable transfer, condition 1(d) is not met.

As condition 1 is not met there is no need to consider condition 2.
Example 6: Executing a deed of variation to which s.142 IHTA 1984 applies to transfer assets on death to an exempt beneficiary

Condition 1: Executing a deed of variation may reduce the inheritance tax charge on a person's death, but it does not meet any of the elements of condition 1 with regard to the person who has died as their estate is not reduced.

A deed of variation is a lifetime transfer by the donor (the beneficiary) who originally inherited the property on the death. The property is treated as never being comprised in the donor's estate, so there is no reduction in the donor's estate and condition 1(d) is not met with respect to the donor.

This is not therefore a notifiable arrangement under this hallmark.

As condition 1 is not met there is no need to consider condition 2.

Example 7: Disclaiming an entitlement under a will to which s.142 IHTA 1984 applies where there is an exempt residuary beneficiary

Condition 1: Disclaiming an entitlement under a will where there is an exempt residuary beneficiary may reduce the inheritance tax charge on a person's death, but it does not meet any of the elements of condition 1 with regard to the person who has died.

The beneficiary who makes the disclaimer is making a lifetime transfer of the property, but the property is treated as never being comprised in the beneficiary's estate, so there is no reduction in the value of the beneficiary's estate and condition 1(d) is not met.

This is not therefore a notifiable arrangement under this hallmark.

As condition 1 is not met there is no need to consider condition 2.

13.4.3 Acquisition of property which qualifies for a statutory relief or a transfer which is specifically provided for in the inheritance tax legislation

Example 8: Purchase of shares which will qualify for business property relief after they have been owned for two years

Condition 1: The purchase of shares does not reduce the value of a person's estate. If it becomes available, business property relief only has the effect of reducing the value transferred by a transfer of value, it does not remove the value of the shares from the estate. The act of purchasing shares in order to qualify for business property relief after two years does not, on its own, meet condition 1. It is not therefore a notifiable arrangement under this hallmark.

As condition 1 is not met there is no need to consider condition 2.
Example 9: Gift of land where the donor continues to use that land but pays full consideration for their use

Condition 1  The gift of land which the donor continues to occupy or use would normally be a gift with reservation of benefit, but the payment by the donor of full consideration in money or money’s worth for that use prevents section 102 FA 1986 applying. It would be reasonable to expect an informed observer to conclude that at least a main purpose of this arrangement is to reduce or avoid a charge to inheritance tax as a gift with reservation of benefit. As there is also no pre-owned assets income tax charge under Schedule 15 Finance Act 2004, this arrangement meets condition 1(c).

Condition 2  Even though condition 1 is met, the gift of land followed by payment of full consideration for use of that land would not, on its own, be regarded as contrived or abnormal, or involving contrived or abnormal steps. Sale and leaseback arrangements are not unusual in either the commercial world or for individuals (equity release).

Example 10: Gift of an undivided share of property which is subsequently used by both the donor and donee

Condition 1  The gift of land from which the donor continues to enjoy the benefit of occupation would be a gift with reservation of benefit, but where the donee has taken up possession and enjoyment of the property by occupying the property with the donor, section 102B Finance Act 1986 prevents this being a gift with reservation of benefit. There is no pre-owned assets income tax charge under Schedule 15 Finance Act 2004. Depending on all the relevant circumstances it is likely that an informed observer would conclude that obtaining the inheritance tax advantage was the main reason, or one of the main reasons for the arrangements. It would therefore be reasonable to expect an informed observer to conclude that condition 1(c) was met.

Condition 2  If condition 1 was met, the gift of a share in land followed by the donee occupying that land with the donor could not be said to be contrived or abnormal. The analysis might be different where the donor only retained a very small proportion of the property in comparison to their level of occupation.

Example 11: A non-UK domiciled individual who is not UK resident transfers funds from a sterling denominated UK bank account into a US dollar denominated UK bank account, so that the bank account is left out of account under section 157 IHTA 1984

Condition 1  The transfer reduces the value of the person’s estate that will be subject to inheritance tax on death, as the US dollar account will be ignored at that time. But the account remains part of the person’s estate, so there is no actual reduction in the value of that person’s estate and condition 1(d) is not met.

As condition 1 is not met there is no need to consider condition 2.
Example 12: A non-UK domiciled individual transfers non-UK situs property into a trust just before they become deemed domiciled in the UK. The individual can benefit from the trust

Condition 1  The transfer reduces the value of the person’s estate, but this reduction does not give rise to a chargeable transfer or potentially exempt transfer due to section 3(2) IHTA 1984. It is likely that an informed observer would conclude that obtaining the inheritance tax advantage was the main reason, or one of the main reasons for the arrangements, so condition 1(d) is met.

Condition 2  A transfer into a discretionary trust, on its own, is not contrived or abnormal. Although this arrangement is entered into to obtain an inheritance tax advantage, it is making use of the excluded property provisions. The transfer is not within condition 2 and is not a notifiable arrangement under this hallmark.

Example 13: Immediately before a ten-year anniversary a distribution is made from a relevant property settlement to reduce the charge on the subsequent ten-year anniversary

Condition 1  This arrangement meets condition 1(b) if it is reasonable to expect an informed observer to conclude that the main purpose, or one of the main purposes, of making the distribution is to reduce the charge at the ten-year anniversary. It would follow that condition 1(b) is met.

Condition 2  This arrangement does not contain any contrived or abnormal steps. The inheritance tax legislation applies a tax charge in respect of the distribution and another tax charge at the ten-year anniversary. The choice of making the distribution before the ten-year anniversary may be to achieve a lower overall inheritance tax bill, but the trustees choosing to exercise their powers to make a distribution is, on its own, neither contrived nor abnormal. It would not therefore be reasonable to expect an informed observer to conclude that condition 2 was met.

13.4.4 Arrangements which may not result in a reduced inheritance tax liability, but which cap the value subject to inheritance tax
Example 14: Gift and Loan Trusts/Loan Trusts

Gift and loan trusts involve the creation of a trust by a person by way of gift, followed by the person making an interest free loan to the trustees which is repayable on demand. The settlor is excluded from benefiting from the trust. Loan trusts are similar except that the trust is established by the granting of the interest free loan without the separate initial gift. The trustees invest the borrowed money. The person may or may not require repayment of some or all of the loan in their lifetime. Any part of the loan which has not been repaid by the person’s death is included within their estate.

Condition 1  The person’s estate is not reduced by the granting of the loan, so condition 1(d) is not met. The arrangement does not meet any of conditions 1(a) to (c). The hoped for inheritance tax saving arises only if the value of the investment rises, but if it falls no inheritance tax saving is achieved.

As condition 1 is not met there is no need to consider condition 2.

Example 15: Loans to companies or other entities from which the lender cannot benefit

Condition 1  The granting of a loan which is repayable on demand, or on which a commercial rate of interest is charged, does not reduce the value of the lender’s estate, so condition 1(d) is not met. The granting of such a loan, without any further steps, would not meet any of conditions 1(a) to (c) either.

As condition 1 is not met there is no need to consider condition 2.

13.5 Examples of arrangements that might be notifiable

Because conditions 1 and 2 have to be evaluated taking all relevant circumstances of those particular arrangements, or that proposal for arrangements, into account, there will be some arrangements and proposals where it is difficult to be definitive about whether they are notifiable. Where arrangements include multiple steps in order to achieve the intended tax advantage however, there becomes an increased likelihood that they may be notifiable, either by reason of the IHT hallmark or because they fall within the confidentiality or premium fee hallmarks.
Example 16: Arrangement to gift shares which qualify for business property relief into trust and subsequently sell the shares back to the transferor

Condition 1

In isolation the transfer of shares qualifying for business property relief into a trust, or the sale of trust assets by the trustees, would not meet condition 1. Where arrangements are entered into with the intention that all of these steps take place, the arrangements have the effect of placing cash into a relevant property trust, but without incurring a relevant property entry charge. As one of the main purposes of these arrangements is to reduce or avoid a relevant property entry charge it would be reasonable to expect an informed observer to conclude that condition 1(a) is met.

This can be contrasted to a situation where, for example, family company shares are transferred into trust for succession planning purposes, at which time there is no intention of the trustees selling those shares. If the trustees later took an independent decision to sell the shares it is unlikely that an informed observer would conclude these separate steps form part of a single overall arrangement, or to conclude that condition 1(a) was met.

Condition 2

It would not normally be possible to transfer cash into a relevant property trust without incurring a relevant property entry charge, which is what has been achieved. To achieve this outcome and to gain this tax advantage, contrived steps are necessary, that is the transfer or shares qualifying for relief followed by their sale back to the transferor rather than the simple transfer of cash which would be the non-contrived way of achieving the same result. Without these contrived steps the tax advantage would not arise. It would therefore be reasonable to expect an informed observer to conclude, considering the arrangements as a whole, that condition 2 was met.

13.6 Examples of notifiable arrangements

Where new proposals for arrangements involve contrived or abnormal steps in order to obtain the inheritance tax advantages set out in condition 1 these proposals will be notifiable.

As explained in the introduction, the ‘grandfathering’ provisions in the 2011 regulations cease to apply from 1 April 2018. This means that arrangements which would have previously been excepted from disclosure will be notifiable if the two conditions in the new hallmark are met.
Example 17: Creation of a reversionary lease

A person owning a freehold grants a lease to a trust or to their children. The lease starts in 21 years’ time, longer than the person expects to survive. The person continues to live in the property until the sub-lease begins.

Condition 1  The arrangements avoid or reduce a charge to inheritance tax arising from the application of the gift with reservation of benefit rules. The person continues to benefit from the property, but the whole value of the property is no longer in the estate. If, in addition, no charge arises under Schedule 15 Finance Act 2004, it would be reasonable to expect an informed observer to conclude that this arrangement meets condition 1(c).

Condition 2  The creation of a lease which only takes effect several years in the future and which in the meantime allows the owner of the property to continue in occupation at no cost is a contrived and/or abnormal step. The tax advantage would not be achieved without this contrived or abnormal step. It is therefore reasonable to expect an informed observer to conclude that this arrangement meets condition 2 and is notifiable under this hallmark.

Example 18: Employee benefit trusts (EBTs)

A person owns an investment company with two part-time employees. The directors are that person and his two children. He is the sole shareholder and wishes to transfer the company to his children on his death. He creates an employee benefit trust and settles the shares on that trust. The trust excludes him and his children while he is alive and satisfies section 86 IHTA. His children can benefit after his death.

Condition 1  The arrangements result in a reduction in the value of the person’s estate which does not give rise to a chargeable transfer or a potentially exempt transfer. It is reasonable to expect an informed observer to conclude that obtaining this tax advantage was the main purpose, or one of the main purposes, of these arrangements and therefore that condition 1(d) is met.

Condition 2  The use of an EBT in these circumstances is a contrived step. The purpose is to transfer the company shares to the children, but the tax advantage is obtained by using an EBT to achieve that outcome. The tax advantage could not be achieved without this contrived step. It is therefore reasonable to expect an informed observer to conclude that condition 2 is met and this arrangement is notifiable under this hallmark.
13A - Determining an apprenticeship levy scheme – the tests

13A.1 - General

Any reference to a hallmark means one of the prescribed descriptions in the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI2006/1543).

All references in this Chapter to tax include a reference to the apprenticeship levy. All references in this Chapter to a tax advantage include a reference to an apprenticeship levy advantage.

13A.2 - The tests for notifiable arrangements

Arrangements are notifiable if:

- they enable or might be expected to enable any person to obtain an advantage in relation to the apprenticeship levy
- the main benefit or one of the main benefits that might be expected to arise from the arrangements is the obtaining of that advantage and
- one of the following hallmarks applies:
  - The confidentiality hallmarks – descriptions 1(a), (1)(b) and (2)
  - The premium fee hallmark - description 3 or
  - The standardised tax products hallmark – description 5.

If the scheme is an in-house scheme with no promoter, the confidentiality and premium fee hallmarks apply only if the apprenticeship levy advantage is intended to be obtained by a business which isn’t a small or medium enterprise.

13A.3 - Commencement

There is an obligation to disclose notifiable arrangements, where the only advantage they enable or might be expected to enable is an advantage in relation to the apprenticeship levy, in the following circumstances:

- when the relevant day for the purposes of notifying the proposal for the arrangements under section 308(1) FA2004 is on or after 21 December 2017
- in relation to the promoter’s duty to disclose arrangements under section 308(3) FA2004, when the promoter becomes aware of any transaction forming part of the notifiable arrangements on or after 21 December 2017
- in relation to a scheme-user’s duty to disclose their arrangements under section 309 or 310, when all of the transactions forming part of the arrangements were entered into on or after 21 December 2017.

13A.4 - Meaning of ‘arrangements’ (FA 2004, s.318)

The meaning of ‘arrangements’ is not exhaustively defined in the primary legislation but includes any scheme, transaction or series of transactions.
13A.5 - Meaning of ‘advantage’ (FA 2004 s.318)

The definition of ‘tax advantage’ is very widely drawn and is construed widely. It includes the avoidance or reduction of a charge to tax, a relief or increased relief from tax and the deferral of tax.

Where the scheme is expected to result in tax being avoided or reduced then the long-standing judgement of Lord Wilberforce in CIR v Parker (1966 AC 141) applies and the existence of a tax advantage is tested on a comparative basis (see paragraph 6.2.2 for more detail).

A relief or exemption from tax will give rise to a tax advantage, as defined.

13A.6 - When is the tax advantage a main benefit of the arrangements? (FA 2004, s306(1)(c))

The 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:

- in our experience those who plan tax arrangements fully understand the tax advantage such schemes are intended to achieve – therefore we expect it will be obvious (with or without detailed explanation) to any potential client what the relationship is between the tax advantage and any other benefits of the product they are buying/the arrangements they are entering into
- the test is objective and considers the value of the expected tax advantage compared to the value of any other benefits likely to be enjoyed

13A.7 - Hallmarks applying for arrangements which obtain an advantage in relation to the apprenticeship levy - confidentiality hallmarks

The confidentiality hallmarks apply in relation to arrangements which enable or might be expected to enable a person to obtain an advantage in relation to the apprenticeship levy.

There is detailed guidance on the confidentiality hallmarks in paragraphs 7.3 to 7.4.3.

13A.7.1 - Hallmarks applying for arrangements which obtain an advantage in relation to the apprenticeship levy – premium fee hallmark

The premium fee hallmark applies in relation to arrangements which enable or might be expected to enable a person to obtain an advantage in relation to the apprenticeship levy.

There is detailed guidance on this hallmark in paragraphs 7.5 to 7.5.3.

13A.7.2 - Hallmarks applying for arrangements which obtain an advantage in relation to the apprenticeship levy – standardised tax product hallmark
The standardised tax product hallmark applies in relation to arrangements which enable or might be expected to enable a person to obtain an advantage in relation to the apprenticeship levy.

There is detailed guidance on this hallmark in paragraphs 7.6 to 7.6.10.
14. When to disclose a notifiable scheme

14.1 General

Section 3 explains who is required to disclose a notifiable scheme. In general, it is a scheme promoter who has to disclose. However, each user may have to disclose where an offshore promoter or a lawyer markets the scheme and there is no other person in the UK within the meaning of a promoter, or it is devised for use ‘in house’.

When new hallmarks are introduced or existing hallmarks are revised then arrangements which have already been marketed or made available may need to be disclosed. In such cases the scheme should be disclosed once one of the tests described in paragraph 14.2.1 is triggered, on or after the date the scheme becomes notifiable.

14.2 Schemes where the promoter must disclose

14.2.1 Time limits (FA 2004, s.308(1) and (3), and SI 2012/1836, reg. 5(4), (5) and 2(3))

Where a promoter is required to disclose he must do so within 5 days beginning with the day after he:

- makes a firm approach to another person with a view to making the scheme available for implementation by that person or others (see paragraph 14.3.1)
- makes a scheme available for implementation by another person (see paragraph 14.3.2)
- becomes aware of a transaction forming part of the scheme (see paragraph 14.3.3)

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

Weekends, bank holidays, Good Friday and Christmas Day are not counted in calculating the 5 days.

14.2.2 Exemption for co-promoters (FA2004, s308.(4) to (4C))

Where 2 or more persons are promoters in respect of the same, or substantially the same, scheme, 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)) is intended to apply when a person becomes a co-promoter some time afterwards.
A promoter (P2) is exempt from making a disclosure when:

(a) another promoter (P1) discloses the scheme information described at paragraph 15.3.1

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

P1 has provided the identity and address of P2 to HMRC (normally, this would happen at the time P1 makes his disclosure of the scheme, but in any case the information must be provided before P2’s duty to disclose arises (see also paragraph 13.4))

(b) A promoter (P2) is exempt from making a disclosure when:

- another promoter (P1) has made a disclosure of the scheme information described at paragraph 13.3 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 his or her disclosure along with the scheme reference number allocated by HMRC to P2)

In applying the above rules to NICs, the promoter P2 is exempt from disclosing the National Insurance contribution element of a scheme if the information provided to him or her is only in respect of any income tax advantage element. However, the promoter P1 continues to have a duty to disclose both elements.

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 15.

14.2.3 Exemption for substantially the same scheme (FA 2004, s.308(5))

A promoter is required to disclose the same scheme only once (except for certain SDLT schemes (see paragraph 14.2.4). Minor changes, for example to suit the requirements of different clients, need not be separately disclosed providing the revised proposal remains substantially the same.

What constitutes a change in a scheme or arrangement so that it is no longer substantially the same is a matter which will need to be considered on each occasion.

In our view a scheme is no longer 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.

In general provided the tax analysis is substantially the same we will regard schemes as ‘substantially the same’ where the only change is a different client including a different company in the same group.
HMRC will not regard schemes as substantially the same where there are changes to deal with changes in the law or accounting treatment, changes in the tax attributes such as schemes creating income losses instead of capital losses or other legal and commercial issues.

However, special care must be taken where an existing tax product is used as part of an otherwise bespoke scheme. This has been described to us as ‘the use of existing toolkit’.

Where a piece of ‘existing toolkit’ is used as part of a separate scheme for the same or different client then it may be that the resulting scheme is so different from the earlier planning idea that the disclosure position needs to be considered afresh.

In some situations this might involve the client being given 2 or more numbers, for example where the scheme involves a combination of ideas that were themselves disclosed and allocated a number.

14.2.4 Disclosing SDLT schemes twice

Before April 2010, Scheme Reference Numbers (SRNs) were not issued to SDLT disclosures. This meant that whilst HMRC obtained early warning of the arrangements disclosed it did not enable users of the arrangements to be identified.

From April 2010 SRNs were issued in respect of disclosable SDLT arrangements but this only applied to new schemes.

As many SDLT arrangements are exempted from disclosure, or ‘grandfathered’, because they are the same as schemes HMRC is already aware of (see paragraph 9.7), new users of these arrangements could not be easily identified.

To enable users of certain arrangements to be identified the disclosure rules have been amended to enable SRNs to be issued in respect of these schemes. This will bring these arrangements within both the client list rules (section 14) and the rules requiring users to notify HMRC of their use of the arrangements on form AAG4 (SDLT) (paragraph 16.4).

In general, schemes that have been disclosed once are exempted from being disclosed again (paragraph 14.2.3). However, with effect from 1 November 2012, certain SDLT schemes (broadly those involving sub-sale arrangements) that were disclosed before April 2010 will have to be disclosed one further time.

Schemes will be disclosable one further time if:

- a promoter disclosed the scheme before April 2010
- on or after 1 November 2012, the promoter is a promoter in relation to the scheme
- the scheme falls within conditions A and B

Condition A is that a chargeable interest is acquired under a contract, the substantial performance or completion of which falls to be disregarded by virtue of section 45(3) of the Finance Act 2003.
Condition B is that the secondary contract referred to in section 45(3) of the Finance Act 2003 applies to a transaction with one or more of these features:

(i) a distribution in specie (i.e. a distribution of an asset in physical form without selling it and distributing the cash)
(ii) an acquisition by a partnership
(iii) an acquisition by a settlement
(iv) an element of gift or transfer at an undervalue
(v) the grant of an option
(vi) an assignment or novation

Following a second disclosure of the arrangements promoters are reminded of their obligations to include users on a client list (section 14) and to pass the SRNS on to those to whom the scheme is marketed (para 15.2 and 15.3) so that users ultimately complete and return form AAG4 (SDLT) (paragraph 16.4).

14.3 The tests that trigger a disclosure

14.3.1 The ‘makes a firm approach’ test

This test was inserted by FA 2010, thereby creating a new trigger event, which has to be considered before the ‘makes a scheme available for implementation’ test.

The ‘makes a scheme available for implementation’ test was intended to trigger disclosure of a marketed scheme early in the marketing process.

However, it became apparent that some promoters were taking steps to delay having to make a disclosure under the letter of the law in order to maximise potential avoidance opportunities before HMRC was able to react to any disclosure.

HMRC had examples of promoters taking steps to ensure that a disclosure was not triggered until virtually the point where it was implemented. As a result the application of the provision in practice was not consistent with the policy objective.

Consequently, the ‘makes a firm approach’ test was introduced to ensure that disclosure of a marketed scheme is triggered as soon as a promoter takes steps to market the scheme to potential clients, as originally intended.

There is more detail concerning the point at which this takes place in the definition of a promoter at paragraphs 3.6 and 3.6.1 in particular. It is the time when the promoter communicates information about the scheme, which is ‘substantially designed’ (see paragraph 3.6.2), to a third party (who may be a potential client or a scheme introducer) with a view to obtaining clients for the scheme.

14.3.2 The ‘makes a scheme available for implementation’ test.

As described in paragraph 14.3.1, this test did not have the effect originally intended. The test is retained to cover the circumstances where a promoter makes a scheme
available for implementation by clients without previously having come within the firm approach test (i.e. without marketing the scheme).

For example, a promoter may offer a client a ‘packaged solution’. By ‘packaged solution’ we refer to the situation where a promoter does not actively market a scheme, but has a ready developed planning solution (i.e. a scheme) on a solutions database or similar system which is rolled out, with or without modification, to a specific client in response to an approach from that client.

In our view a scheme is made available for implementation at the point when all the elements necessary for implementation of the scheme are in place and a communication is made to a client suggesting the client might consider entering into transactions forming part of the scheme, but it does not matter whether full details of the scheme are communicated at that time.

In practice, it is likely that even arrangements that have to be heavily modified to meet the circumstances of the particular client will reach a point where the design is complete, the scheme is capable of implementation, and the client is then invited to enter into arrangements forming part of the scheme.

At that point the scheme is made available for implementation. The promoter might consider such arrangements to be bespoke. But the promoter should focus on whether or not the scheme is made available for implementation, not on to what degree it is bespoke.

14.3.3 The ‘becomes aware of a transaction’ test

The trigger for disclosure under this test is that a promoter becomes aware that the client has entered into any transaction forming part of the scheme.

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

This third test may be the only test to arise where a scheme is wholly bespoke. By a wholly bespoke scheme we mean a tax arrangement designed by an interactive process in response to a client’s specific tax management issue, where it may be that at no point can the scheme be said to be made available for implementation.

The trigger for disclosure will then be the implementation itself.

14.4 Schemes marketed by offshore promoters (FA 2004, s.309 and SI 2012/1836, reg. 5(6) and 2(3))

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 offshore promoter, you must disclose the scheme to HMRC yourself (see paragraph 3.9).

You must do so within 5 days of entering into the first transaction forming part of the scheme (see paragraph 14.8). Weekends, bank holidays, Good Friday and Christmas day are ignored for the purposes of determining the due date.
Where disclosure has been made by a promoter, the promoter must give you the scheme reference number allocated to it by the Counter-Avoidance Directorate in HMRC. The Counter-Avoidance Directorate can confirm to you whether a genuine reference number has been provided to them.

Contact details are at paragraph 1.6.

Warning: failure to provide details of the scheme you have used may result in a penalty (see paragraph 22).

14.5 Schemes marketed by lawyers (FA 2004, s.310 and SI 2012/1836, regs. 5(7) and 2(3))

Where a promoter is a lawyer and legal professional privilege prevents him or her from providing all or part of the prescribed information to HMRC each user must disclose (see paragraph 3.10).

Disclosure must normally be made within 5 days of entering into the first transaction forming part of the scheme (see paragraph 14.8). Weekends, bank holidays, Good Friday and Christmas Day are ignored for the purposes of determining the due date.

14.6 Schemes with no promoter, including ‘in-house’ schemes (FA 2004, s.310 and SI 2012/1836, reg. 5(8) and 2(3))

Where there is no promoter (other than in the case described in paragraph 14.5) the user must disclose (see paragraphs 3.8 and 3.10).

He must do so within 30 days of entering into the first transaction forming part of the scheme (see paragraph 14.8 below). Weekends, bank holidays, Good Friday and Christmas Day are included for the purposes of determining the due date.

14.7 Exemption for substantially the same scheme (SI 2012/1836, reg 4(4))

If you have entered into 2 or more schemes which are substantially the same, and have disclosed the first scheme to HMRC under s309 or s310, you do not need to make separate disclosures about the later schemes.

14.8 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 scheme. In the majority of cases where disclosure is required, it is likely that the tax department or individual is fully aware that the scheme is to be implemented and can monitor when the first transaction takes place.

In other cases, especially in larger organisations, systems should be put in place to identify and report disclosable schemes within the relevant time limit. What those systems are depends on individual circumstances. However they should be reasonable and proportionate to the risk.

In general, we expect the adopted system to involve the people who have the ability and authority to purchase, design or implement the sorts of schemes that are disclosable.
These will normally be people within the tax department itself. Such people should be identified and be made sufficiently aware of the adopted system in order that disclosure can be made on time. The system should be reviewed periodically, at least once a year.

It is, however, accepted that there may be unusual circumstances that are either unforeseeable or beyond your control where a disclosable scheme is not captured by the adopted system in sufficient time for the disclosure to be made within the relevant time limit. In some cases, the scheme may not be discovered until the end of year audit and tax computation.

Concerns have arisen, in particular, over a UK tax advantage arising as a main benefit following:

- a controlled foreign company entering into local tax planning arrangements
- unusual accountancy treatment
- commercial transactions being carried out by non-tax specialists without the knowledge of the tax department
- the size of the tax benefit being too small for the tax department to be aware of it

You should make disclosure of the scheme as soon as you are aware that it is late with an explanation as to why. If you have a reasonable excuse for not disclosing earlier you will not be liable to a penalty (see section 19).

14.9 A transaction forming part of the scheme

A transaction which forms part of a scheme is one that will, either in isolation or in conjunction with other transactions, deliver the tax advantage expected from using the scheme (see paragraph 15.3.4).

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 a scheme depends upon the nature of the engagement letter. An engagement letter is unlikely to amount to a transaction forming part of a scheme where the promoter is not counterparty to any of the scheme transactions as defined above.

However, if the promoter, or a body controlled by the promoter such as an investment vehicle, is counterparty to a scheme transaction, and the engagement letter amounts to a contract to enter into such a transaction, then the engagement letter may be a scheme transaction.

This is to be distinguished from the case where the engagement letter merely amounts to an agreement by a client to pay for, and by the promoter to provide, details of a scheme. Indeed, in some cases a client may buy a scheme but not enter into any transaction which forms part of the scheme.
14.10 Arrangements that provide an advantage in respect of more than one head of duty

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 15.5.
15. How to make a disclosure

15.1 The forms to complete (FA 2004, s.316)

There are 4 different forms available for use in the following circumstances:

- AAG1 – notification of scheme by promoter
- AAG2 – notification by scheme user where offshore promoter does not notify
- AAG3 – notification by scheme user where no promoter, or promoted by lawyer unable to make full notification
- AAG5 – continuation sheet

Use of these forms is a legal requirement (see paragraphs 1.2 and 1.5.3).

15.2 How to obtain and submit the forms

You can make an online disclosure by using forms to disclose tax avoidance schemes on the GOV.UK website. 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 or by contacting the DOTAS Enforcement team within HMRC at the postal address shown at paragraph 1.6. Alternatively, paper copies can be obtained from the order line by Telephone on 08459 000404 or by Fax on 08459 000604.

The completed forms should then be sent by either post or e-mail to the DOTAS Enforcement team. When sending a form by post use the address shown at paragraph 1.6.

15.3 The information to be provided

15.3.1 General (SI 2012/1836, reg. 4)

The legislation requires that information shall be provided by a promoter (or others) in respect of notifiable proposals or notifiable arrangements, as defined in the legislation. There is no provision in the legislation 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 the provision, in the Prescribed Descriptions of Arrangements Regulations that makes the scheme disclosable – see paragraph 15.3.3
- a summary of the proposal/arrangements and the name by which it/they are known – see paragraph 15.3.4
- information explaining the elements and how the expected tax advantage arises – see paragraph 15.3.4
- the statutory provisions on which that tax advantage is based – see paragraph 15.3.4

15.3.2 Legal advice (FA 2004, s.314)
Legal professional privilege may apply to certain advice given by lawyers to their clients. Such information need not be disclosed.

15.3.3 The prescribed arrangement(s)

The relevant forms have a list of the relevant provisions.

For hallmarked schemes, the relevant hallmark (see section 7) should be indicated. For some schemes, more than one hallmark may apply. Here you need only indicate one hallmark. However, in order to allow HMRC to monitor the value of the hallmarks, we would prefer you to indicate the main applicable hallmark.

For SDLT schemes there are 4 options, first to indicate disclosure of a scheme in relation to the acquisition of a chargeable interest and then the type of property for which the arrangement is to be used.

For IHT schemes there is only one box to be ticked.

See paragraph 15.5 below for situations where an advantage is obtained in respect of more than one head of duty.
15.3.4 Explaining the scheme

Sufficient information must be provided such that an Officer of the Board 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. Common technical or legal terms and concepts need not be explained in depth.

If the scheme is 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 AAG1, AAG2 or AAG3 as appropriate. Where such documents are supplied there is no objection to these documents excluding information that would identify a client.

15.4 Notification of co-promoters (FA 2004, s.308(4A)(a) and (4C)(a))

When a promoter makes a disclosure, it may also provide HMRC with details of any other promoter (a co-promoter) of the same or substantially the same scheme. Promoters are not required to provide their details to HMRC but if they do so and provide the co-promoter with the information at paragraph 15.3.1 above the other promoter will be exempt from making its own disclosure of the scheme (see paragraph 14.2.2). 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 1.6 and accompany the disclosure.

If you have already made a disclosure of the scheme and hold the scheme reference number allocated by HMRC, and your co-promoter seeks exemption from making his own disclosure, his details need not be provided to HMRC if rule (b) at paragraph 14.2.2 is followed.

15.5 Arrangements that provide an advantage in respect of more than one head of duty

A single arrangement may provide an advantage in respect of more than one head of duty each of which is subject to its own disclosure considerations. For example both a NI contribution advantage and an income tax advantage or both an IHT advantage and a Capital Gains Tax advantage.

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

The effect of the above on scheme reference numbers is explained at paragraph 17.8.
16. Client Lists

16.1 General (FA 2004, s.312B, 313ZA, 312ZB and SI 2010/2928, SI 2013/2592)

From 1 January 2011 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 schemes disclosed at any time. If a scheme was disclosed before 1 January 2011 a promoter will have to provide a client list in respect of any clients to whom he is required to issue a scheme reference number on or after that date. He will not have to provide a client list in respect of any clients to whom he was required to issue a scheme reference number before 1 January 2011 (even if he actually issues them with a scheme reference number on or after that date). See the examples in paragraph 16.3 below.

HMRC uses the information from client lists to assess and monitor the level of risk posed by disclosed arrangements.

Warning: failure to provide details of a client in accordance with the rules described in this section may result in a penalty (see paragraph 22).

16.2 Duty of promoter to provide details of client

16.2.1 The duty

The duty 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 (under s.312(2) - see paragraph 16.2.2 below and section 15). The duty applies to co-promoters whether or not they made a separate disclosure (see paragraphs 3.4, 14.2.2, 13.4 and 15.2).

This includes any person in the supply chain who is responsible to any extent for the organisation or management of the scheme (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 under s308(1) or (3) (see section 12).

Under the duty the promoter is required to provide prescribed information (see paragraph 16.2.3 below) to HMRC within a prescribed period (30 days) of the end of a relevant period (calendar quarter).

There is an extended deadline in certain circumstances for provision of the client’s Unique Tax Reference (UTR) and National Insurance number. See the examples in paragraph 14.4 below.

This is irrespective of weekends, bank holidays, Good Friday and Christmas Day. So for example, the client list for the quarter ended 31 March 2012 was due on or before 30 April 2012 regardless of the holidays that fell on 6 and 9 April. The list for the quarter ended 30 June will be due on 30 July, not the last day of that month.
16.2.2 When to provide a client’s details

The trigger for a promoter to provide a client’s details for any quarter is the promoter coming under the s.312 (2) obligation to notify the scheme reference number in relation to that client (see paragraph 15.2).

This obligation arises when the later of 2 events occurs: the promoter being provided with the scheme reference number, or becoming aware of any transaction that forms part of the scheme (see paragraph 14.9 on what constitutes ‘a transaction forming part of the scheme’)

In most cases this is likely to mean that the promoter will provide the client’s details in the quarter in which the promoter first becomes aware of a transaction forming part of the scheme. In any other case it will be the quarter in which the promoter receives the scheme reference number.

A client may take the first step and enter into an arrangement, but later withdraw from, or unwind, it so that no tax advantage is obtained. Even where this occurs within the same calendar quarter, the promoter is still obliged to include the client on the client list. This is because the trigger for inclusion on the client list is the same as for the scheme reference number notification obligation.

However, the client may not be obliged to report the scheme reference number on a return because the trigger for a client to report the scheme reference number on a return or AAG4 is different (see paragraph 17.5).

Promoters may therefore wish to advise Counter Avoidance Directorate of clients who have subsequently decided not to proceed with arrangements when they submit their client list to avoid any unnecessary enquiries in the future.

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 UTR and National Insurance number in certain circumstances. The client has to provide the promoter with their UTR and National Insurance number within 10 days of the later of the client receiving 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 UTR and National Insurance number to provide to HMRC or be able to inform HMRC that the client does not have a UTR and National Insurance number.

In which case the promoter is obliged to confirm to HMRC, within the usual 30 day prescribed period, that either 1 of 3 scenarios applies:

- that the client has notified the promoter that they do not have a UTR or National Insurance number
- that the client has not complied with their obligation to inform the promoter of their UTR and National Insurance number
- on the 16 day after the relevant period that the time limit for the client to provide their UTR and National Insurance number has not expired
• Where the time limit for the client to provide the information has not expired (the third bullet point above) then the prescribed period is extended to 60 days. The extended period only applies to the following prescribed information.

• the client’s UTR and National Insurance number
• confirmation that the client does not have a UTR and National Insurance number
• confirmation that the client has not complied with their obligation to provide the UTR and National Insurance number

16.2.3 The information to be provided within the 30 day prescribed period

• the promoter’s full name and address
• the scheme reference number issued by HMRC in connection with the proposal or arrangement
• the client’s full name and address. The address is the one to which the promoter sends the scheme reference number
• the client’s UTR number or National Insurance number
• confirmation that the client does not have a UTR or National Insurance number
• confirmation that the client has failed to provide their UTR and National Insurance number
• that on the 16 day after the end of the calendar quarter, the time limit for the client to provide their UTR and National Insurance number has not expired
• the end date of the calendar quarter for which the information is being supplied

16.2.4 How to submit client lists

There are two parts to the form which must be used for the reporting of client details. The first part contains the promoter’s details. The second part contains the prescribed information relating to the client(s).

Don’t send reports or information about clients by email. The security of emails you send over the internet can’t be guaranteed.

If you choose to send client lists electronically you should contact Counter-Avoidance to find out which digital method or methods HMRC is currently making available for the transfer of client information in a secure way. The Counter-Avoidance Directorate of HMRC will let you know what you need to do in order to comply with your reporting obligations when using electronic communication and provide such access as you will need.

Use the address or telephone number specified in paragraph 1.6 to tell HMRC that you would prefer to send us your client list manually or to make any queries about the online facilities which may be used to make DOTAS reports.
Use the address specified in paragraph 1.6 to send the client list by post if you don’t want to report client information electronically.

16.3 Examples

In these examples ‘implemented the scheme’ refers to entering into a transaction forming part of the scheme (see paragraphs 14.8 and 16.2.2).

Example 1

Promoter P discloses a scheme in November 2010 and HMRC issues a scheme reference number. P’s normal practice is to issue a scheme reference number to clients as soon as he makes a scheme available to them.

The first relevant period will be 1 January to 31 March 2011.

During that period P:

- issues the scheme reference number to clients X and Y
- becomes aware that X has implemented the scheme
- also becomes aware that client Z, to whom P issued the scheme reference number in December 2010, has implemented the scheme
- P is required to provide information about clients X and Z in the client list due by 30 April 2011.

During the period 1 April 2011 to 30 June 2011 P:

- does not issue this scheme reference number to any further clients
- becomes aware that Y has implemented the scheme

P is required to provide information about client Y on the client list due by 30 July 2011.
Example 2

Promoter P discloses a scheme in January 2011 and HMRC issues a scheme reference number.

On 17 February 2011 P becomes aware that client X has implemented the scheme. He issues X with the scheme reference number 30 days later.

On 31 March 2011 P becomes aware that client Y has implemented the scheme. He issues Y with the scheme reference number 30 days later on 30 April 2011.

P is required to provide information about clients X and Y in the client list for the period 1 January to 31 March 2011, due by 30 April 2011.

Example 3

Promoter P discloses a scheme on 22 March 2011. On 29 March 2011 he becomes aware that client X has implemented the scheme.

P receives a scheme reference number from HMRC on 2 April 2011. The ‘relevant date’ for the purposes of s.312 FA 2004 is 2 April 2011.

P is required to provide information about client X in the client list for the quarter ended 30 June 2011, due by 30 July 2011.

Example 4

Promoter P has disclosed two schemes (A and B) each of which has been issued with a scheme reference number. In the period to 31 March 2011, he becomes aware that:

- clients X and Y have implemented scheme A
- clients Y and Z have implemented scheme B
- P will be required to submit 2 forms by 30 April 2011, one for scheme A (containing information about clients X and Y), one for scheme B (containing information about clients Y and Z)
17. What to do if you receive a scheme reference number relating to an income tax, corporation tax, capital gains tax or NI contribution scheme

17.1 Outline of the scheme reference number system

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

It works by scheme users reporting an 8-digit scheme reference number to HMRC. This is normally done on the relevant tax return, but in some circumstances it has to be reported separately on a specified HMRC form.

This reference number is allocated by HMRC at the time the scheme is disclosed and is given to the person who disclosed the scheme and, from 1 November 2008, any co-promoters notified in the disclosure.

They then in turn pass it to the scheme user, sometimes via a third party client, in accordance with the rules explained below. Where a scheme user is the person required to disclose the scheme, HMRC will provide the number directly to him or her, who nevertheless must report the number on his return or the specified form.

The allocation or notification of a scheme reference number does not indicate that HMRC accept that the scheme achieves or is 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 22).

17.2 Promoters must provide scheme reference number to clients (FA 2004, s.312 and s.316A and SI 2012/1836, reg. 6)

As a promoter you may have been provided with a reference number by HMRC because you disclosed a scheme, or because you were named as a co-promoter by another promoter at the time they disclosed the scheme (see paragraph 14.2.2 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 14.2.2 at (b)).

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

- provide it to any other person (your ‘client’) to whom you provide, or have provided, services in connection with the disclosed scheme or any scheme that is substantially the same – your client may be the person who is intended to obtain the tax advantage or he may be a third party (for example, a person who does not himself enter into the scheme or expect to obtain a tax advantage)
- do so using form AAG6
- 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 scheme, whichever is later
- include the client on a client list – see chapter 14
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 scheme available rather than wait until it has been implemented.

If, but only if, you do so using the form AAG6, you need not re-notify the number to your client when you become aware of a transaction forming part of the scheme.

If you have been provided with more than one scheme reference number in relation to any given scheme, you only need provide one of those numbers to your client. The information relating to the scheme that a promoter is required to supply to clients comprises:

- information prescribed in regulations relating to the reference number for the scheme
- additional information, supplied by HMRC, which relates to avoidance schemes in general (and consequently is not limited to information relating to the particular scheme in respect of which the reference number in the first bullet has been issued)

The additional information about avoidance is being incorporated into form AAG6, which promoters must use for notifying SRNs to their clients. It comprises the list drawn up by HMRC of the risks and financial costs faced by users of tax avoidance schemes.

Promoters must use the new form AAG6 after it is published on the GOV.UK website and they must send the whole of the AAG6 form when reporting SRNs to clients, including the additional information.

Warning: promoters may incur a penalty if they fail to provide the reference number and other required information to clients on the relevant form AAG6 available on the GOV.UK website (see section 22).

17.3 Clients must provide scheme reference number to parties to the scheme (FA 2004, s.312A and SI 2012/1836, reg 6)

As explained at paragraph 17.2 above, if a promoter provides, or has provided, services in connection with a disclosable scheme, they must provide their clients with any scheme reference number allocated by HMRC in relation to that scheme.

This must be provided on the HMRC form AAG6 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 SRN:

- 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 scheme (this includes a requirement for an employer to pass the information to each employee who may obtain a tax advantage in relation to a scheme implemented by the employer in relation to their employment – see below)
using form AAG7 if the client is an employer passing SRNs to employees (or otherwise on form AAG6) (see paragraph 17.3.1)

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 scheme, 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 use the prescribed forms to provide the required information (see section 22).

17.3.1 Employers must provide scheme reference numbers to employees (FA04, s312A(2), (2A) and (3))

Where the client is an employer and a promoter has provided the employer with a scheme reference number and additional information, the employer is required to pass the information to each of its employees who might reasonably be expected to receive an advantage as a result of the scheme.

The employer must also provide the scheme reference number and additional information to employees in circumstances when it is the employer who might reasonably be expected to gain a tax advantage in relation to the employment of those employees by entering into the scheme.

The circumstances in which this duty applies includes when those employees are not themselves expected to gain a tax advantage by reason of the arrangements.

The scheme reference number and the additional information described in paragraph 17.3 must be provided to the employees within 30 days in the specified form and manner using a form AAG7.

The reference to employees includes former employees (including office holders) in relation to whose employment any person receives or might reasonably be expected to receive the advantage.

Warning: Employers may incur a penalty if they fail to provide the reference number and other required information to employees on form AAG7 (see section 22).
17.3.2 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 scheme.

Example 1: sale and leaseback with a finance house

A company which is not subject to UK corporation tax seeks to reduce costs on equipment. It buys a disclosable leasing scheme from a promoter (thereby becoming their ‘client’). Under the scheme it purchases equipment and then enters into a sale and leaseback arrangement with a UK finance house.

The finance house not the company, obtains the tax advantage, as defined, but the company seeks to share in the capital allowances the finance house can claim.

The promoter is required to provide the company with the scheme reference number.

As the company can reasonably be expected to know that the finance house is a party to, and expects to gain a tax advantage from, the scheme, it must provide them with the scheme reference number.

Example 2: scheme made available to subsidiaries

A parent company purchases a disclosable scheme from a promoter and makes it available for subsidiary companies to use, but without becoming a party to the arrangements that make up the scheme.

The promoter is required to provide the company with the scheme reference number.

The parent company must provide the scheme reference number to those subsidiaries that are expected to gain a tax advantage from the scheme.

The client is not required to provide a number to a person simply because, for example, they learn about their use of a scheme through reading about it in the press or a Special Commissioners’ 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 22).

17.4 On receipt of scheme reference number from a promoter clients must provide their National Insurance number and UTR to the promoter (FA2004 s.312B and SI 2013/2592)

Within 10 days from the later of the date that the client receives a scheme reference number or the date that the client first enters into a transaction forming part of the arrangements the client has to notify the promoter of their:
- National Insurance number
- UTR

Or if they have neither of these, confirmation that they do not hold a National Insurance number or a UTR. The promoter will then provide this information to HMRC in accordance with chapter 16 above.

17.5 Parties to a scheme must include the scheme reference number on a return, etc. (FA 2004, s.313 and SI2012/1836, reg 8B)

As explained at paragraphs 17.2 and 17.3, if you are a party to a scheme, the promoter or his client may provide you with a scheme reference number. Since 1 November 2008 this must be provided to you on form AAG6. In some cases you may receive the number direct from HMRC as a result of disclosing the scheme yourself (see paragraphs 3.9 to 3.11).

With the one exception for certain employees mentioned below, if you have received the scheme reference number and expect to obtain a tax or NI contribution advantage as a result of being a party to the scheme you must:

- include the scheme reference number on your tax return only in the specific boxes provided or in specified circumstances on form AAG4 – see paragraph 17.5.1
- state the last day of the year of assessment, tax year, accounting period or earnings period (as the case may be) in which, or the date on which, you expect the advantage to be obtained – see paragraph 17.5.4

If you are a partnership which expects a tax or NI contributions advantage to arise in respect of a partner’s share of partnership profits or gains, the information is to be entered on both your partnership return and the relevant individual, company, or trust and estate return (as the case may be) for the partner in question.

There may be an exception from this requirement if it was your employer who notified you of the scheme reference number (see paragraph 17.3 and 17.3.1). If you received the number from your employer (unless your employer is a promoter and you received the reference number in your capacity as a client of your employer’s business), you are not required to include this number on your return or in any information you provide to HMRC on a form AAG4.

Your employer is required to provide HMRC with the reference number for the scheme and details identifying you and whether and when you obtain or might reasonably be expected to obtain a tax advantage resulting from the arrangements (paragraph 17.8).

Warning: you may incur penalties if you fail to notify prescribed information within the prescribed time limits (see section 22).

17.5.1 When to enter information on tax return or form AAG4

Subject to the following the information (at paragraph 17.4) must be entered on the return (in the specific boxes and nowhere else) that relates to the year of
assessment, tax year, accounting period or earnings period (as the case may be) in which you first enter into a transaction forming part of the scheme.

If any one of the following apply the information must not be entered onto a return, instead you must use form AAG4:

- you expect to obtain a tax or NI contribution advantage but do not have a return on which you would otherwise be required to enter the information (if you are a partnership which expects a tax or NI contributions advantage to arise in respect of a partner’s share of partnership profits or gains, and do not have either or both the partnership return and the return for the partner in question, form AAG4 must be completed for each return)
- you expect to obtain an NI contribution advantage but no other tax advantage
- you expect to obtain an apprenticeship levy advantage but no other advantage
- you are late submitting the return for the relevant period such that it will not be submitted to HMRC before the statutory filing date
- you have submitted the return for the relevant period but have not included the information at paragraph 17.3 in it
- you need to notify more scheme reference numbers than there are spaces on the return (you should use form AAG4 to notify only those numbers that will not fit on the return)
- the scheme gives rise to a claim to relief made separately from your return under section 261B of TCGA1992 (treating trade loss etc. as CGT loss) or any of the various loss relief provisions within Part 4 of ITA2007 – in these circumstances you must also notify the SRN on your Income Tax or Corporation Tax Return affected by the use of the scheme

You must continue to do this for every subsequent year or period until the advantage ceases to apply. For example, if losses created by a scheme are expected to be used in a future year, you should enter the information at paragraph 15.4 in the year you first enter into a transaction forming part of the scheme and each subsequent year, including those where the losses are not used, until the losses have been used up. The information must be included in the scheme reference boxes on the return or on the form AAG4 as described above.

Where you use a scheme that involves an in-year claim not covered by the last bullet above, for example a coding adjustment, reduction in any payment on account or quarterly payment, there is no statutory requirement to disclose the scheme reference number as part of the claim. However, it will be helpful if you show the number on any such claims and you must include it in your return or on form AAG4 as appropriate.

Individuals who received the scheme reference number from their employer are generally not required to include this number on their return or on a form AAG4 (see paragraph 17.5).

Warning: You may incur penalties if you fail to notify the scheme reference number correctly (see section 22).
17.5.2 Where to send form AAG4

Other than for in-year claims (see below), form AAG4 must be sent to the address specified in paragraph 1.6 in sufficient time for it to be received by the date appropriate to the entity receiving the tax advantage as detailed at paragraph 17.5.4 below.

17.5.3 Date for submission of form AAG4 to the DOTAS Enforcement team in the Counter-Avoidance Directorate

Where the advantage that is expected to arise is an NI contribution advantage in respect of employments (other than an advantage relating only to Class 1A contributions – see below), the scheme reference number must be reported to HMRC by the employer on form AAG4 no later than 14 days after the final tax period in the tax year (i.e. if the final tax period runs to 5 of April, then by the 19 of April.

Where the advantage that is expected to arise relates to the apprenticeship levy, the employer must similarly report the SRN to HMRC on form AAG4 within 14 days of the end of the final tax period in the tax year.

However, see paragraph 17.8 where the scheme is expected to give rise to a PAYE tax advantage, either on its own or as well as an NI contribution advantage.

In other cases the form AAG4 must be sent as follows:

- where an NI contribution advantage is expected to arise relating only to Class 1A contributions and it does not give rise to a tax advantage, the reference number must be reported by 6 July following the relevant tax year
- for partnerships, or partners in respect of whom the partnership expects the tax or NI contributions advantage to arise in respect of profits the form must reach Counter-Avoidance Directorate by 31st October following the end of the year of assessment, tax year, accounting period or earnings period in which the tax advantage arises
- if you are an individual, or trustee the form must reach Counter-Avoidance Directorate by 31st January following the end of the year of assessment, tax year, accounting period or earnings period in which the tax advantage arises
- if you are a corporate body the form must reach Counter-Avoidance Directorate within 12 months of the end of the accounting period in which the tax advantage arises

For in-year claims, form AAG4 must be sent to your HMRC office with the claim and not to the DOTAS Enforcement team in the Counter-Avoidance Directorate.
17.5.4 Expectation of obtaining a tax advantage

You are required to state the last day of the year of assessment, tax year, accounting period or earnings period (as the case may be) in which, or the date on which, you expect the advantage to be obtained. You must continue to do this for every subsequent year or period until the advantage ceases to apply.

In the majority of cases the date will be the same as the period in which you first enter into a transaction forming part of the scheme.

However, this is not always the case. For example, where the implementation of a scheme spans the end of a period, with the advantage expected to arise in a subsequent period, you should quote the subsequent period in respect of which the advantage is expected to arise.

For loss schemes, if you use the loss or part of the loss in the period for which a return is being, or would otherwise be, completed, you should quote the last day of that period.

If you do not use any of the loss in that period you should quote the last day of the next period in respect of which you expect it to be used.

17.6 How to obtain and submit form AAG4

Form AAG4 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 the DOTAS Enforcement team at the postal address shown at paragraph 1.6. Alternatively, paper copies can be obtained from the order line by Telephone: 08459 000404 or by Fax: 08459 000604. The completed forms should then be sent by either post or e-mail to the DOTAS Enforcement team.

When sending the form by post use the address shown at paragraph 1.6.

17.7 Is an individual or a small and medium enterprise (SME) exempt from notifying reference numbers?

No, the available exemption for individuals who are not in business and SMEs is from the requirement to determine (and disclose) if they use in-house hallmarked schemes (see paragraph 6.7).

However, they are required to declare on their tax return or form AAG4 any scheme reference numbers issued or provided to them that relate to schemes they use.

17.8 Employers using schemes expected to give rise to tax and/or NI contributions advantage (FA04, s.312A(2), (2A), s.313(6), s.313ZC, SI2012/1836 reg 8B SI2012/1868 reg 16B and SI2017/1174 reg 1)

This paragraph applies where:

- the client of a promoter in relation to a scheme is an employer
• The scheme in question is expected to result in a tax and/or NI contributions advantage in relation to the employment of one or more directors or employees of the employer either for the employer or the employees or both

• the promoter has notified the scheme to HMRC and it has been given a reference number, the promoter is obliged to notify this number and other specified information to the client (the employer) in the usual way

The employer is required to make an annual report to HMRC providing information about relevant employees. Relevant employees are those employees

• who might reasonably be expected to receive a tax and/or NI contributions advantage as a result of the scheme or

• who are not expected to gain a tax or NI contributions advantage as a result of the scheme, but in relation to whose employment the employer might reasonably be expected to gain a tax and/or NI contributions advantage from entering into the scheme

The employer is required to send this information to HMRC by 19th April after the end of the tax year to which the information relates. The employees will be the same employees to whom the employer is required to give information about the scheme on form AAG7 (see paragraphs 17.3 and 17.3.1).

The information that an employer has to send HMRC is:

• the employer’s name, address and reference number

• the name and National Insurance number of all relevant employees

• the reference number allocated by HMRC to the scheme

• where an employee obtains or might reasonably be expected to obtain a tax advantage from the scheme, the tax year in which the tax advantage arises

• where any of the relevant employees do not or might not reasonably be expected to obtain a tax advantage from the scheme, confirm that this is so

• the name and address of the promoter and any name given to the scheme when it was notified

The information must be submitted by the same date for each subsequent tax year in which a person obtains or might reasonably be expected to obtain a tax advantage by reason of the scheme.

Where an employer enters into a scheme which is expected to result only in a NI contributions advantage, and not a tax advantage as well, the employer is not required to send information about relevant employees to HMRC for tax years earlier than 2018-19. This transitional provision doesn’t remove the requirement for employers to tell employees the scheme reference number and to send HMRC a form AAG4 reporting their use of the scheme in the 2016-17 and 2017-18 tax years (see paragraphs 17.3.1 and 17.5.1).

The employees receiving information from their employer are not required to include the scheme reference number on their returns.
All employee details must be sent to HMRC using a form AAG8. Form AAG8 may be sent either electronically or by post.

Don’t send reports or information about your employees by email. The security of emails you send over the internet can’t be guaranteed.

If you choose to send employee details electronically you should contact Counter-Avoidance to find out which digital method or methods HMRC is currently making available for the transfer of employee information in a secure way. The Counter-Avoidance Directorate of HMRC will let you know what you need to do in order to comply with your reporting obligations when using electronic communications and provide such access as you need.

Use the address specified in paragraph 1.6 to send the employee details on an AAG8 client list by post if you don’t want to report online.

Use the address or telephone number specified in paragraph 1.6 to contact HMRC about submitting a form AAG8 or about any DOTAS issue.

17.9 Arrangements that provide both a NI contribution advantage and an income tax advantage

A single arrangement may provide both a NI contribution advantage and an income tax advantage, each of which is subject to its own disclosure considerations.

Where both advantages are required to be disclosed, HMRC will issue a single scheme reference number that will apply to both advantages.

You need only make one entry on your return or form AAG4 and an employer reporting in accordance with paragraph 17.8 need only make one entry for each employee.

17.9.1 - Duty of promoters to provide updated information (FA 2004, s310C)

Promoters are required to notify HMRC about any change in the name by which the scheme is known and about any changes to the promoter’s name or address. However this duty doesn’t apply unless:

- the scheme is expected to obtain a tax advantage and HMRC allocated a scheme reference number to it on or after 26 March 2015 or
- the scheme is expected to obtain only an NI contributions advantage and HMRC allocated a scheme reference number to it on or after 21 December 2017.

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 scheme is 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 HMRC Counter-Avoidance DOTAS Enforcement at the address specified in paragraph 1.6.

17.10 Withdrawal of scheme reference numbers

HMRC has discretion to remove the reporting duties associated with the disclosure of a notifiable scheme by giving a notice specifying that with effect from a given date:

- the scheme reference number need no longer be sent:
  - by a promoter to its clients (paragraph 17.2)
  - by clients to parties to the scheme (paragraph 17.3)
  - by employers to their employees (paragraph 17.3.1) and

- promoters and employers have no further reporting duties in connection with the scheme to which the reference number was allocated

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

Lifting these duties for the future doesn't relieve any DOTAS obligation that may have existed prior to the date specified in the notice.

If a party to a scheme reports the number after HMRC has issued a notice relating to it, it will have no impact on HMRC’s interventions.
18. What to do if you receive a scheme reference number relating to a SDLT scheme

18.1 Outline of the scheme reference number system

The scheme reference number system is a means of identifying the users of disclosed schemes, allowing HMRC to prioritise and co-ordinate enquiries into users’ returns. The scheme reference number system applies to SDLT schemes and arrangements which became notifiable on or after 1 April 2010 (including schemes that became notifiable for a second time after 1 November 2012 – see sections 8 and 9).

Prior to 1 April 2010 numbers relating to notifiable schemes and arrangements were given to promoters etc. but these were not Scheme Reference Numbers within the meaning of the legislation and there was no obligation either to pass the number to users etc. or for the users to notify the number to HMRC.

The remainder of the guidance in section 16 relates solely to SDLT schemes and arrangements which became notifiable on or after 1 April 2010. If you are in doubt as to whether a reference number you have received should be passed on or notified to HMRC you should contact Counter-Avoidance Directorate using the contact details at paragraph 15.2.

The scheme reference number system works by scheme users reporting an 8-digit scheme reference number to HMRC. For SDLT schemes the scheme reference number has to be reported on form AAG4 (SDLT).

This reference number is allocated by HMRC at the time the scheme is disclosed and is given to the person or persons who disclosed the scheme. They must pass it to the scheme user, sometimes via a third party client, in accordance with the rules explained below.

Where a scheme user is the person required to disclose the scheme (see section 3), HMRC will provide the number directly to them and they must nevertheless report the number on the form AAG4 (SDLT).

The person who is responsible to any extent for organising or managing the transactions forming part of the notifiable SDLT arrangements in the course of a business is a promoter in relation to those arrangements.

Such a person may be responsible for complying with the obligation to disclose the scheme. The extent of that person’s responsibilities will depend on whether the scheme has been disclosed to HMRC by another promoter.

The allocation or notification of a scheme reference number does not indicate that HMRC accept that the scheme achieves or is capable of achieving any purported tax advantage.

Warning: you may incur a penalty if you fail to comply with the rules outlined in this section (see section 22).
18.2 Promoters must provide scheme reference number to clients

As the promoter of a SDLT you will have been provided with a reference number by HMRC because you disclosed a SDLT scheme.

You must:

- provide it to any other person (your ‘client’) to whom you provide, or have provided, services in connection with the disclosed scheme or any scheme that is substantially the same – your client may be the person who is intended to obtain the tax advantage or he may be a third party (i.e. a person who does not himself enter into the scheme or expect to obtain a tax advantage)
- provide additional information supplied by HMRC about avoidance schemes generally in the form and manner that HMRC requires
- provide the information using form AAG6
- 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 scheme, whichever is later
- include the client on a client list – see chapter 14

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 scheme available rather than wait until it has been implemented. If, but only if, you do so using the form AAG6, you need not re-notify the number to your client when you become aware of a transaction forming part of the scheme.

If you have been provided with more than one scheme reference number in relation to any given scheme, you only need provide one of those numbers to your client.

18.3 On receipt of scheme reference number clients must provide certain information to the promoter (FA2004 s.312B and SI 2013/2592)

Within 10 days from the later of the date that the client receives a scheme reference number or the date that the client first enters into a transaction forming part of the arrangements the client has to notify the promoter of their:

- National Insurance number
- UTR

Or if they have neither of these, confirmation that they do not hold a National Insurance number or a UTR. The promoter will then provide this information to HMRC in accordance with chapter 16 above.
18.4 Clients must provide scheme reference number to parties to the scheme

As explained at paragraph 16.2 above, if a promoter provides, or has provided, you with services in connection with a disclosable scheme, he may also provide you with a scheme reference number.

This should be given to you on HMRC form AAG6. This form contains guidance about when and how to report the reference number to HMRC or provide it to other parties.

When you have been provided with a scheme reference number, by whatever route, you must:

- provide it to any other person who you might reasonably expect to be a party to, and whom might reasonably be expected to gain a tax advantage from, the scheme
- provide the information using form AAG6
- do so 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 scheme, whichever is the later

18.4.1 Reasonable expectation

Your obligation, as the client of a promoter, to pass a scheme reference number to third parties only applies when you have sufficient commercial connection with that party to have a reasonable expectation that they will gain a tax advantage from the scheme.

As examples:

- you are a parent company which purchases a scheme and makes it available for subsidiary companies to use but without yourself becoming a party to the arrangements that make up the scheme – you must provide the scheme reference number to those subsidiaries that are expected to gain a tax advantage from the scheme
- you are a property developer which purchases a scheme and makes it available to property purchasers but without yourself becoming a party to the arrangements that make up the scheme – you must provide the scheme reference number to those purchasers that are expected to gain a tax advantage from the scheme
- you are not required to provide a number to a person simply because, for example, you learn about their use of a scheme through hearsay, reading about it in the press or a Tribunal decision, etc

18.5 Purchaser receiving a SDLT advantage must include the scheme reference number and other information on form AAG4 (SDLT)

As explained at paragraphs 18.2 and 18.3, if you expect to obtain a tax advantage from a disclosed scheme, the promoter of the scheme or his client may provide you with a scheme reference number.
This should be given to you on an HMRC form AAG6. This form contains guidance about when and how to report the reference number to HMRC. In some cases you may receive the number directly from HMRC as a result of disclosing the scheme yourself (see paragraphs 3.9 to 3.11).

The scheme reference number and additional information specified at paragraph 18.5.2 must be entered on form AAG4 (SDLT).

This is the only means by which HMRC may be notified of a SDLT scheme. The scheme reference number for SDLT schemes should never be entered on either an SDLT 1 return or the user's tax return. Such an entry will not discharge a scheme user’s obligations under DOTAS.

If you are a purchaser for SDLT purposes (see SDLTM07200 for definition) and expect to receive a SDLT advantage you must within the time limit detailed at paragraph 18.5.1:

- include the number on form AAG4 (SDLT)
- provide the information specified in paragraph 18.5.2

The purchaser is limited to a person who is either a party to the transaction or has provided consideration for that transaction. The term purchaser is defined as the person who acquires the subject matter of a land transaction and includes a tenant if the interest in land is a grant of a lease (S43 Finance Act 2003).

When SDLT group relief is withdrawn, group relief may be recovered from a person other than the purchaser (Schedule 7, Para 5, Finance Act 2003, SDLTM 23100). The obligation to disclose a Scheme Reference Number falls only on the purchaser.

Any other person from whom Group Relief may be recovered whilst they may be in receipt of a SDLT advantage, they are not obliged to be passed a Scheme Reference Number nor to disclose that to HMRC.

18.5.1 When to enter information on form AAG4 (SDLT)

The information detailed at paragraph 18.5.2 must be entered on form AAG4 (SDLT) when you receive the number or you enter into the first land transaction in connection with the arrangements, whichever is later.

You must continue to do this for each subsequent transaction in which you expect to obtain a SDLT advantage from the scheme.

Form AAG4 (SDLT) should be sent to the DOTAS Enforcement team in the Counter-Avoidance Directorate within HMRC (the address can be found at paragraph 15.2) in sufficient time for it to be received within 30 days of the later of the following 2 events:

- receiving a scheme reference number from the promoter or another party to the scheme
- the effective date of the first land transaction which forms part of the scheme
- The effective date takes its normal meaning for SDLT purposes (S119 Finance Act 2003). The general rule is when the land transaction is completed but there are exceptions and further guidance may be found in the SDLT Manual at SDLTM7600.

18.5.2 What to enter on form AAG4 (SDLT):

- the scheme reference number
- the name and address of the person providing the scheme reference number (the person who is expecting to obtain a SDLT advantage)
- the address of the property forming the subject of the arrangements (see paragraph 18.5.3)
- the title number (or numbers) of the property (see paragraph 18.5.4),
- the unique transaction reference number which is found, for a paper return, in the 'Reference' box attached to the payslip on the Land Transaction Return (Form SDLT 1) or, for an electronic return, on the electronic SDLT submission receipt
- the market value of the property (see paragraph 18.5.5)
- the effective date (see paragraph 18.5.1) of the first land transaction which forms part of the arrangement
- the name of the person providing the declaration as to the accuracy and completeness of the notification (see paragraph 18.5.6)
- the capacity in which that person is acting (for example purchaser, company secretary etc.) – regardless of who has provided the information the signatory should be that of the purchaser

18.5.3 Address of property

Give the full address including the postcode if there is one. If the property does not have a postcode or a building number then you must provide sufficient information of the nature and location of the property to enable it to be accurately identified,

18.5.4 Title number

If the property or properties that is/are the subject(s) of the arrangements is/are registered give the title number for the property. If no title number has been allocated then this information need not be provided.

18.5.5 Market value

The figure to be entered for the market value is the Open Market Value of all the property on which a SDLT advantage is to be obtained assuming it has been purchased without the benefit of the SDLT arrangements. Market value takes the statutory definition for SDLT purposes at S118 Finance Act 2003. This in turn is tied to Sections 272 to 274 of the Taxation of Capital Gains Tax Act 1992.
The market value of an asset is the price which that asset might reasonably be expected to fetch on a sale in the open market. In a normal land transaction such a value will normally have been arrived at by an independent valuer before the transaction has been entered into and so should be readily available.

If, exceptionally, such a value has not been obtained then a reasoned estimate is acceptable bearing in mind that HMRC requires the information in order to assess the likely tax at risk.

Submission of the AAG4 (SDLT) should not be held up because a valuation has not been obtained nor should the market value be omitted. Either of these courses of action could render the user liable to a penalty.

18.5.6 Declaration as to accuracy and completeness

The person obtaining the SDLT advantage from the arrangements should sign the declaration. This will usually be the purchaser. Whilst in the majority of cases the return is likely to be drafted and submitted by a solicitor, licensed conveyancer, legal executive or accountant, it is the responsibility of the person obtaining the advantage to ensure that the information given on the AAG4 (SDLT) is complete and correct and sign the declaration accordingly.

18.5.7 Expectation of obtaining a tax advantage

If you are a party to a scheme, have been provided with a scheme reference number, but do not expect to obtain a tax advantage (for example, because the advantage is expected to be obtained by another person or you have not yet decided to implement the scheme), you need not include the number on form AAG4 (SDLT) unless and until such time as your expectation changes.

18.5.8 Partnerships Finance Act 2003, Schedule 15, Part 3

Where the arrangements involve a partnership all of the partners have joint and several liability for any SDLT subject to special provisions. Further guidance may be found at [Stamp and property taxes: manuals](#).

Whilst more than one partner might therefore be expected to receive a SDLT advantage, HMRC will accept a single joint notification, signed by the representative partner on behalf of all of the liable partners, rather than each making their own notification.
18.6 How to obtain and submit form AAG4 (SDLT)

You can obtain and submit form AAG4 (SDLT) online along with other forms to disclose tax avoidance schemes.

You can obtain PDF version of the forms for printing out by clicking the relevant links on the same web page or by contacting the DOTAS Enforcement team within HMRC at the postal address shown at paragraph 1.6. Alternatively, paper copies can be obtained from the order line by Telephone on 08459 000404 or by faxing on 08459 000604.

The completed forms should then be sent by either post or e-mail to the DOTAS Enforcement team.

When sending the form by post, use the address shown at paragraph 1.6.

18.7 Duty of promoters to provide updated information (FA 2004, s310C)

The duty of a promoter to tell HMRC about any change:

- in the name by which the scheme is known
- of the promoter’s name or address (paragraph 17.9)

Also applies where the tax advantage relates to SDLT.
19. What to do if you receive a scheme reference number relating to an IHT scheme

19.1 Outline of the scheme reference number system

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

The scheme reference number system applies to IHT schemes and arrangements which became notifiable on or after 6 April 2011.

The remainder of the guidance in section 19 relates solely to IHT schemes and arrangements which became notifiable on or after 6 April 2011.

If you are in doubt as to whether a reference number you have received should be passed on or notified to HMRC you should contact Counter-Avoidance Directorate using the contact details at paragraph 1.6.

The scheme reference number system works by scheme users reporting an 8-digit scheme reference number to HMRC. For IHT schemes the scheme reference number has to be reported in one of two ways and this is explained below.

This reference number is allocated by HMRC at the time the scheme is disclosed and is given to the person or persons who disclosed the scheme. They then in turn pass it to the scheme user, sometimes via a third party client, in accordance with the rules explained below.

Where a scheme user is the person required to disclose the scheme, HMRC will provide the number directly to him or her, who nevertheless must report the number on his IHT account (form IHT100) or the specified form.

The allocation or notification of a scheme reference number does not indicate that HMRC accept that the scheme achieves or is capable of achieving any purported tax advantage.

Warning: You may incur a penalty if you fail to comply with the rules outlined in this section (see section 22).

19.2 Promoters must provide scheme reference number to clients

As the promoter of an IHT scheme you will have been provided with a reference number by HMRC because you disclosed an IHT scheme. You must:

- provide it to any other person (your ‘client’) to whom you provide, or have provided, services in connection with the disclosed scheme or any scheme that is substantially the same – your client may be the person who is intended to obtain the tax advantage or he may be a third party (i.e. a person who does not himself enter into the scheme or expect to obtain a tax advantage)
- provide additional information supplied by HMRC about avoidance schemes generally in the form and manner that HMRC requires
- provide the information using form AAG6
• 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 scheme, whichever is later
• include the client on a client list – see chapter 16
• 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 scheme available rather than wait until it has been implemented. If, but only if, you do so using the form AAG6, you need not re-notify the number to your client when you become aware of a transaction forming part of the scheme.
• If you have been provided with more than one scheme reference number in relation to any given scheme, you only need provide one of those numbers to your client.

19.3 On receipt of scheme reference number clients must provide certain information to the promoter (FA2004 s.312B and SI 2013/2592)

Within 10 days from the later of the date that the client receives a scheme reference number or the date that the client first enters into a transaction forming part of the arrangements the client has to notify the promoter of their:
• National Insurance number
• UTR

Or if they have neither of these, confirmation that they do not hold a National Insurance number or a UTR. The promoter will then provide this information to HMRC in accordance with chapter 16 above.

19.4 Clients must provide scheme reference number to parties to the scheme

As explained at paragraph 19.2 above, if a promoter provides, or has provided, you with services in connection with a disclosable scheme, he may also provide you with a scheme reference number. This should be given to you on an HMRC form AAG6.

When you have been provided with a scheme reference number, by whatever route, you must:
• provide it to any other person who you might reasonably expect to be a party to, and whom might reasonably be expected to gain a tax advantage from, the scheme
• provide the information using form AAG6
• do so 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 scheme, whichever is the later

19.4.1 Reasonable expectation

Your obligation, as the client of a promoter, to pass a scheme reference number to third parties applies only when you have sufficient commercial connection with that party to have a reasonable expectation that they will gain a tax advantage from the scheme.
You are not required to provide a number to a person simply because, for example, you learn about their use of a scheme through hearsay, reading about it in the press or a Tribunal decision, etc.

19.5 Scheme user receiving an IHT advantage must include the scheme reference number and other information on an IHT account (form IHT100) or on form AAG4 (IHT)

As explained at paragraphs 19.2 and 19.3, if you are party to an IHT scheme, the promoter of the scheme or his client may provide you with a scheme reference number.

This should be provided to you on HMRC form AAG6. In some cases you may receive the number directly from HMRC as a result of disclosing the scheme yourself (see paragraphs 3.9 to 3.11).

If you expect to obtain a tax advantage as a result of being a party to the scheme, you must:

- include the scheme reference number on your IHT account (form IHT100) or on form AAG4 (IHT) – see paragraphs 19.5.2 and 19.5.3
- state the tax year in which or date on which you expect the advantage to be obtained
- The Scheme reference number for IHT schemes should never be entered on any other IHT account form or Self Assessment tax return. Such an entry will not discharge your obligations as a scheme user under DOTAS.

Warning: You may incur penalties if you fail to notify prescribed information within the prescribed time limits (see section 22).

19.5.1 Date for notifying the scheme reference number

You must notify HMRC of the information at paragraph 19.4 above within 12 months of the end of the month in which you first entered into a transaction forming part of the notifiable arrangements.

19.5.2 When to enter information on an IHT account (form IHT100) or on form AAG4 (IHT)

You must enter the information (at paragraph 19.4) on your IHT account (form IHT100) if:

- you are liable to submit an inheritance account (form IHT100) in respect of a transaction forming part of the notifiable arrangements
- the statutory time limit for submitting the inheritance account is no later than the date by which you must notify the scheme reference number and you submit the account within that time limit
Enter the SRN in box K1 in the IHT account if you are liable to submit a single SRN in respect of a transaction forming part of notifiable arrangements. Box K1 in the IHT account has room for only one SRN.

If you have more than one SRN to report, use form AAG4 (IHT) to report the additional SRNs.

You must enter the information on form AAG4 (IHT) in all other circumstances, including in the following situations:

- you are not liable to submit an inheritance account
- you have more than one SRN to submit in relation to IHT
- you are liable to submit an inheritance account (form IHT100) but the statutory date for doing so is later than the date by which you must report the scheme reference number
- you are liable to submit an IHT account (form IHT100) in respect of a transaction forming part of the notifiable arrangements by the date by which you must report the scheme reference number but your account will not be submitted by the statutory filing date or you have already submitted it without the scheme reference number
- you are liable to submit an IHT account (form IHT100) in respect of a transaction forming part of the notifiable arrangements by the date by which you must report the scheme reference number but, exceptionally, you have more than one scheme reference number to report – you must enter the excess scheme reference numbers on form AAG4 (IHT)

19.5.3 What to enter on form AAG4 (IHT)

- the scheme reference number
- the name and address of the person providing the scheme reference number (the person who expects to obtain an IHT advantage)
- the UTR of the person providing the scheme reference number, if one has been allocated by HMRC
- the IHT reference number, if one has been allocated by HMRC
- the tax year in which or the date on which the person expects to obtain the IHT advantage
- the name of the person providing the declaration as to the accuracy and completeness of the notification

The person obtaining the IHT advantage from the arrangements should sign the declaration. The form may be drafted by a solicitor, legal executive or accountant but the person obtaining the advantage must ensure that the information given on the AAG4 (IHT) is complete and correct and sign the declaration accordingly.
19.5.5 Expectation of obtaining a tax advantage

If you are a party to a scheme, have been provided with a scheme reference number, but do not expect to obtain a tax advantage (for example, because the advantage is expected to be obtained by another person or you have not yet decided to implement the scheme), you need not include the number on form AAG4 (IHT) unless and until such time as your expectation changes.

19.6 How to obtain and submit form AAG4 (IHT)

You can obtain and submit form AAG4 (IHT) online along with other forms to disclose tax avoidance schemes.

You can obtain PDF version of the forms for printing out by clicking the relevant links on the same web page or by contacting the DOTAS Enforcement team within HMRC at the postal address shown at paragraph 1.6.

Alternatively, paper copies can be obtained from the order line by Telephone on 08459 000404 or by Fax on 08459 000604. The completed forms should then be sent by either post or e-mail to the DOTAS Enforcement team.

When sending the form by post, send it to the address shown at paragraph 1.6.

19.7 Duty of promoters to provide updated information (FA 2004, s310C)

The duty of a promoter to tell HMRC about any change:

- in the name by which the scheme is known
- of the promoter’s name or address (paragraph 17.9)

Also applies where the tax advantage relates to IHT.
20. What to do if you receive a scheme reference number relating to an ATED Scheme

20.1 Outline of the scheme reference number system

The scheme reference number system is a means of identifying the users of disclosed schemes, allowing HMRC to prioritise and co-ordinate enquiries into users’ returns. The scheme reference number system applies to ATED proposals and arrangements (called schemes below) which became notifiable on or after 4 November 2013.

If you are in doubt as to whether a reference number you have received should be passed on or notified to HMRC you should contact Counter-Avoidance Directorate using the contact details at paragraph 1.6.

The scheme reference number system works by scheme users reporting an 8-digit scheme reference number to HMRC. For ATED schemes the scheme reference number has to be reported in one of two ways and this is explained below.

This reference number is allocated by HMRC at the time the scheme is disclosed and is given to the person or persons who disclosed the scheme. They then in turn must pass it to the scheme user, sometimes via a third party client, in accordance with the rules explained below.

Where a scheme user is the person required to disclose the scheme, HMRC will provide the number directly to him or her, who nevertheless must report the number on his ATED return or the specified form.

The allocation or notification of a scheme reference number does not indicate that HMRC accept that the scheme achieves or is 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 22).

20.2 Promoters must provide scheme reference number to clients (FA2004, s.312 and SI 2012/1836, Reg. 6)

As the promoter of an ATED scheme you will have been provided with a reference number by HMRC because you disclosed an ATED scheme, or because you were named as co-promoter by another promoter at the time they disclosed the scheme (see paragraph 14.2.2 at (a)).

Alternatively you may have provided with a scheme reference number by another promoter as a result of becoming a co-promoter sometime after the main promoter made their disclosure (see paragraph 14.2.2 at (b)).
However you come to be in receipt of a scheme reference number you must:

- provide it to any other person (your ‘client’) to whom you provide, or have provided, services in connection with the disclosed scheme or any scheme that is substantially the same – your client may be the person who is intended to obtain the tax advantage or he may be a third party (i.e. a person who does not himself enter into the scheme or expect to obtain a tax advantage)
- provide additional information supplied by HMRC about avoidance schemes generally in the form and manner that HMRC requires
- provide the information using form AAG6
- 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 scheme, whichever is later
- include the client on a client list – see chapter 16

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 scheme available rather than wait until it has been implemented.

If, but only if, you do so using the form AAG6, you need not re-notify the number to your client when you become aware of a transaction forming part of the scheme.

If you have been provided with more than one scheme reference number in relation to any given scheme, you only need provide one of those numbers to your client.

20.3 Clients must provide scheme reference number to parties to the scheme (FA 2004, s 312A and SI 2012/1836, regs 6 to 8)

As explained at paragraph 20.1.2 above, if a promoter provides, or has provided, you with services in connection with a disclosable scheme, he may also provide you with a scheme reference number.

This should be given to you on HMRC form AAG6. This form contains guidance about when and how to report the reference number to HMRC or provide it to other parties.
When you have been provided with a scheme reference number, by whatever route, you must:

- provide it to any other person who you might reasonably expect to be a party to, and whom might reasonably be expected to gain a tax advantage from, the scheme
- provide the information using form AAG6
- do so 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 scheme, whichever is the later

20.4 Reasonable expectation

Your obligation, as the client of a promoter, to pass a scheme reference number to third parties applies only when you have sufficient commercial connection with that party to have a reasonable expectation that they will gain a tax advantage from the scheme.

You are not required to provide a number to a person simply because, for example, you learn about their use of a scheme through hearsay, reading about it in the press or a Tribunal decision, etc.

20.5 On receipt of scheme reference number clients must provide certain information to the promoter (FA2004 s.312B and SI 2013/2592)

Within 10 days from the later of the date that the client receives a scheme reference number or the date that the client first enters into a transaction forming part of the arrangements the client has to notify the promoter of their:

- NINO
- UTR
- if they have neither of these, confirmation that they do not hold a National Insurance number or a UTR

The promoter will then provide this information to HMRC in accordance with chapter 14 above.

20.6 Parties to an ATED scheme must include the scheme reference number and other required information on its ATED return or on form AAG4 (ATED)

As explained at paragraphs 20.1. 2 and 20.1. 3, if you are party to an ATED scheme, the promoter of the scheme or his client may provide you with a scheme reference number.

This should be given to you on HMRC form AAG6. This form contains guidance about when and how to report the reference number to HMRC. In some cases you may receive the number directly from HMRC as a result of disclosing the scheme yourself.
If you expect to obtain a tax advantage as a result of being party to the scheme, you must:

- include the scheme reference number on your ATED return or on form AAG4 (ATED) – see paragraph 20.1.2
- state the chargeable period in which you expect the advantage to be obtained
- The Scheme reference number for ATED schemes should never be entered on any other Self Assessment tax return. Such an entry will not discharge your obligations as a scheme user under DOTAS

Warning: you may incur penalties if you fail to notify prescribed information within the prescribed time limits (see section 22).

20.7 Date for notifying the scheme reference number

You must notify HMRC of the scheme reference number and other required information within 30 days of the later of:

- the effective date of the first transaction which forms part of the arrangements
- the date of the receipt of the scheme reference number

20.8 When to enter information on the ATED return or on form AAG4

You must enter the information above on your ATED return if:

- you are liable to submit an ATED return
- the statutory time limit for submitting the ATED Return is no later than the date by which you must notify the scheme reference number and you submit the Return within that time limit
- You must enter the information on form AAG4 (ATED) in all other circumstances, including in the following situations:
  - you are not liable to submit an ATED Return
  - you are liable to submit an ATED Return but the statutory date for doing so is later than the date by which you must report the scheme reference number
  - you are liable to submit an ATED Return in respect of a transaction forming part of the notifiable arrangements by the date by which you must report the scheme reference number but your Return will not be submitted by the statutory filing date or you have already submitted it without the scheme reference number
  - you are liable to submit an ATED Return in respect of a transaction forming part of the notifiable arrangements by the date by which you must report the scheme reference number but, exceptionally, you have more than one scheme reference number to report – you must enter the excess scheme reference numbers on form AAG4 (ATED)
20.9 What to enter on form AAG4 (ATED)

- the scheme reference number
- the name and address of the person providing the scheme reference number (the person who expects to obtain an ATED advantage)
- the address of the relevant property (see paragraph 20.1.10)
- the title number or numbers of the property (see paragraph 20.1.11)
- any tax reference number or other business unique identifier allocated by HMRC or a foreign tax authority (see paragraph 20.1.12)
- where a foreign authority has allocated a business unique identifier, the name of the country on behalf of which that foreign authority acts and the type of business unique identifier allocated (see paragraph 20.1.13)
- the first chargeable period in which the person expects to obtain the ATED tax advantage (see paragraph 20.1.14)
- the name of the person providing the declaration as to the accuracy and completeness of the notification and the capacity in which they are acting (see paragraph 20.1.15)

20.10 Address of the Relevant Property

Give the full address including the postcode of the property forming the subject of the arrangements. If the property doesn't have a postcode or a building number then you must provide sufficient information of the nature and location of the property to enable it to be accurately identified.

20.11 Title number

Give the title number (if any is allocated) of the property forming the subject of the arrangements, for example the UK HM Land Registry title number (or equivalent for Scotland and Northern Ireland). In some cases the property subject to ATED may be registered under more than one title number, for example where properties under separate title numbers are treated as one for ATED purposes. In this scenario, you should enter one title number in the 'Property title number' box and any other title numbers in the Notes section of the form.

20.12 Business unique identifier

Enter any Business Unique Identifier (for example, your HMRC Corporation Tax UTR Number or Self-Assessment UTR). If you do not hold such a reference number you can enter the Company Registration Number allocated by the Registrar of Companies where the company is incorporated, the VAT Registration Number or Employer PAYE reference number.

20.13 Country of origin and type of business unique identifier

Enter the name and country of the organisation that allocated the reference, plus the type of tax reference quoted, for example HMRC UK VAT Registration Number.
20.14 First chargeable period in which tax advantage arises

Enter the start date of the first chargeable period in which you expect to gain a tax advantage from using the scheme, for example 01 04 2013.

20.15 Declaration as to accuracy and completeness

The person obtaining the ATED advantage from the arrangements should sign the declaration. The form may be drafted by a solicitor, legal executive or accountant but the person obtaining the advantage must ensure that the information given on the AAG4 (ATED) is complete and correct and sign the declaration accordingly.

20.16 Expectation of obtaining a tax advantage

If you are a party to a scheme, have been provided with a scheme reference number, but do not expect to obtain a tax advantage (for example, because the advantage is expected to be obtained by another person or you have not yet decided to implement the scheme), you need not complete form AAG4 (ATED) unless and until such time as your expectation changes.

20.17 How to obtain and submit form AAG4 (ATED)

You can obtain and submit form AAG4 (ATED) online along with other forms to disclose tax avoidance schemes.

You can obtain PDF version of the forms for printing out by clicking the relevant links on the same web page or by contacting the DOTAS Enforcement team within HMRC at the postal address shown at paragraph 1.6.

Alternatively, paper copies can be obtained from the order line by Telephone on 08459 000404 or by Fax on 08459 000604. The completed forms should then be sent by either post or e-mail to the DOTAS Enforcement team.

When sending the form by post use the address shown at paragraph 1.6.

20.18 Duty of promoters to provide updated information (FA 2004, s310C)

The duty of a promoter to tell HMRC about any change in the name by which the scheme is known changes and about any change of the promoter’s name or address (paragraph 17.9) also applies where the tax advantage relates to ATED.

20A. What to do if you receive a scheme reference number relating to an apprenticeship levy scheme

20A.1 – General

All references in this Chapter to tax include a reference to the apprenticeship levy. All references in this Chapter to a tax advantage include a reference to an apprenticeship levy advantage.

20A.2 - Outline of the scheme reference number system
The scheme reference number system is a means of identifying the users of disclosed schemes, allowing HMRC to prioritise and co-ordinate enquiries into users’ returns.

It works by scheme users reporting an 8-digit scheme reference number to HMRC.

This reference number is allocated by HMRC within 90 days of the scheme being disclosed and is given to the person who disclosed the scheme and any co-promoters notified in the disclosure.

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

Where the scheme is expected to obtain an apprenticeship levy advantage and no other tax advantage the scheme user must report the number to HMRC on a form AAG4.

When the user of a scheme which is expected to obtain an apprenticeship levy advantage only is the person required to disclose the scheme, HMRC will provide the number directly to that person and that person must nonetheless report the number to HMRC on an AAG4.

The allocation or notification of a scheme reference number doesn’t indicate that HMRC accept that the scheme achieves or is 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 Chapter 22).

20A.3 - Promoters must provide scheme reference number to clients (FA 2004, s.312 and s.316A and SI 2012/1836, reg. 6)

As a promoter you may have been provided with a reference number by HMRC because you disclosed a scheme, or because you were named as a co-promoter by another promoter at the time they disclosed the scheme. 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 14.2.2).

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

- provide it to any other person (your ‘client’) to whom you provide, or have provided, services in connection with the disclosed scheme or any scheme that is substantially the same – your client may be the person who is intended to obtain the tax advantage or he or she may be a third party (for example, a person who does not him or herself enter into the scheme or expect to obtain a tax advantage)
- do so using form AAG6
- 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 scheme, whichever is later
- include the client on a client list – see chapter 14
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 scheme available rather than wait until it has been implemented. If, but only if, you do so using the form AAG6, you need not re-notify the number to your client when you become aware of a transaction forming part of the scheme.

If you have been provided with more than one scheme reference number in relation to any given scheme, you only need provide one of those numbers to your client. The information relating to the scheme that you as promoter are required to supply to clients comprises:

- your name and address
- the name or a brief description of the arrangements
- the reference number HMRC has allocated to the scheme
- the date you send this information to the client
- additional information reproduced on form AAG6

Promoters must use form AAG6 to report SRNs to clients and must send clients the whole of the AAG6 form when doing so, including the additional information.

Warning: promoters may incur a penalty if they fail to provide the reference number and other required information to clients or don't provide the information by completing and sending clients the whole of the relevant form AAG6 (available on the GOV.UK website - see chapter 22).

20A.4 - No requirement for employers to send SRN to employees (FA04, s312A)

where scheme obtains apprenticeship levy advantage only

The apprenticeship levy advantage, which an employer expects to obtain from a disclosable scheme, when the scheme is expected to give rise to an apprenticeship levy advantage only and not to any other tax and/or NICs advantage, wouldn't relate to the employments of particular employees.

An employer will not therefore be legally required to notify the scheme reference number for such a scheme to employees.

20A.5 - Clients must provide scheme reference number to parties to the scheme other than employees (FA 2004, s.312A and SI 2012/1836, reg 6)

Clients must notify a scheme reference number which they have received directly or indirectly from a promoter, to any other person whom they might reasonably expect to be a party to, and who might reasonably be expected to gain a tax advantage from, the scheme. This information must be passed on 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 scheme, whichever is the later.

This requirement doesn't apply in relation to employees of a scheme-user which is an employer.
If the client of a promoter has sufficient commercial connection with a third party to have a reasonable expectation that they will gain an advantage from the scheme, that client is required to pass the scheme reference number to that third party.

Example: scheme made available to subsidiaries

A parent company purchases a disclosable scheme from a promoter and makes it available for subsidiary companies to use, but without becoming a party to the arrangements that make up the scheme.

The promoter is required to provide the company with the scheme reference number.

The parent company must provide the scheme reference number to those subsidiaries that are expected to gain a tax advantage from the scheme.

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

If the client is required to report the scheme reference number to other parties to the arrangements, they must comply with the obligation by completing and sending the other persons the whole of form AAG6.

Warning: you may incur a penalty if you fail to provide the reference number and other information to other persons as described above or don't use the prescribed forms to do so (see section 22).

20A.6 - On receipt of SRN from a promoter clients must provide their National Insurance number and unique taxpayer reference (UTR) to the promoter (FA2004 s.312B and SI 2013/2592)

Within 10 days from the later of the date that the client receives a scheme reference number or the date that the client first enters into a transaction forming part of the arrangements the client has to notify the promoter of their:

- National Insurance number
- UTR
- Or, if they have neither of these, confirmation that they do not hold a National Insurance number or a UTR

The promoter must provide this information to HMRC in accordance with chapter 16 above.

20A.7 - Parties to a scheme must include SRN on a form AAG4

If you expect to have obtained an advantage in relation to the apprenticeship levy only, you must report any scheme reference number you have received for that scheme to HMRC on a form AAG4.
The AAG4 must be sent to HMRC within 14 days after the end of the final tax period in the tax year (i.e. if the final tax period runs to the 5th of April, then by the 19th of April).

You must continue to do this for every subsequent year or period until the advantage ceases to apply.

Warning: You may incur penalties if you fail to notify the scheme reference number correctly (see chapter 22).

20A.8 - Where to send form AAG4

Form AAG4 must be sent to the address specified in paragraph 1.6 in sufficient time for it to be received by the date appropriate to the entity receiving the tax advantage as detailed at paragraph 17.5.4.

20A.9 - How to obtain and submit form AAG4

Form AAG4 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 the DOTAS Enforcement team at the postal or e-mail address shown at paragraph 1.6. Alternatively, paper copies can be obtained from the order line by Telephone: 08459 000404 or by Fax: 08459 000604. The completed forms should then be sent by either post or e-mail to the DOTAS Enforcement team at the address specified in paragraph 1.6.

20A.10 - No requirement for employers to send HMRC employee details (FA04, s313ZC) where scheme obtains apprenticeship levy advantage only

The apprenticeship levy advantage, which an employer expects to obtain from a disclosable scheme, when the scheme is expected to give rise to an apprenticeship levy advantage only and no other tax and/or NICs advantage, wouldn’t relate to the employments of particular employees.

An employer will not therefore be legally required to report any employee details to HMRC under s313ZC in connection with such a scheme.

20A.11 - Duty of promoters to provide updated information (FA 2004, s310C)

Where a promoter has notified a scheme under section 308, the promoter is required to notify HMRC about any change in the name by which the scheme is 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 scheme is 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 HMRC Counter-Avoidance DOTAS Enforcement at the address specified in paragraph 1.6.

20A.12 - Withdrawal of scheme reference numbers

HMRC has discretion to remove the reporting duties associated with the disclosure of a notifiable scheme by giving a notice specifying that with effect from a given date:

- the scheme reference number need no longer be sent:
  - by a promoter to its clients (paragraph 17.2)
  - by clients to parties to the scheme (paragraph 17.3)
  - by employers to their employees (paragraph 17.3.1) and

- promoters and employers have no further reporting duties in connection with the scheme to which the reference number was allocated

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

Lifting these duties for the future doesn't relieve any DOTAS obligation that may have existed prior to the date specified in the notice.

If a party to a scheme reports the number after HMRC has issued a notice relating to it, it will have no impact on HMRC’s interventions.
21. Information powers

21.1 Summary

Information powers introduced in FA2007, FA2010, FA2013, FA2014 and FA2015 enable HMRC to:

- require an introducer (a person who introduces clients to a promoter) to identify the person who provided them with information relating to the scheme or to identify persons with whom they have made a marketing contact in relation to a scheme
- enquire into the reasons why a promoter has not disclosed a scheme,
- enforce disclosure in appropriate cases
- call for more information where a disclosure is incomplete or where HMRC considers that further information about the scheme is needed
- request further information from the promoter about clients using schemes

These provisions are mostly exercisable through the Tribunal and provide a mechanism to identify schemes which have not been disclosed and to identify users of schemes.

21.2 Invoking the powers

In order to use many of the powers described above, HMRC must have reasonable grounds to suspect that a person has been non-compliant in relation to a particular scheme.

The powers will be exercised only by officers within HMRC’s Counter-Avoidance Directorate.

21.3 Application hearings

The majority of the powers described above are dependent upon the Tribunal making a relevant order following an application from HMRC. The precise procedure is a matter for the Tribunal and you will find more about applications to a tribunal at Index ARTG - Appeals reviews and tribunals guidance.

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.

21.4 Pre-disclosure enquiries into non-disclosure of a scheme

21.4.1 Explaining why a scheme has not been disclosed (FA 2004, s.313A and SI 2012/1836, reg. 9(5) and 2(3))

Section 313A allows HMRC by written notice to require a person, whom we suspect of being a promoter or introducer of a disclosable scheme, to provide an explanation of why they think that scheme is not notifiable by them.

The notice must specify the scheme in relation to which the person’s opinion and reasons are sought.
Introducers are included in this power because it is not always obvious whether a person advertising a scheme to potential buyers is a promoter of that scheme or merely an introducer.

In such circumstances HMRC may not have sufficient evidence to suspect that person of being the promoter, but it is important to find out who the promoter is. An intermediary may be responsible to any extent for the organisation or management of a scheme as consequently fail to be treated as a promoter and not as an introducer under the DOTAS rules (paragraph 3.7).

If the person to whom the notice is issued is an introducer, their reply should be that the scheme is not notifiable by them because they are an introducer and not the promoter. The explanation should provide sufficient detail of their role in relation to the scheme to enable HMRC to confirm that they are not a promoter.

The explanation does not strictly need to identify the promoter in order to satisfy the person’s obligation under section 313A, but it would be helpful if that information were to be provided. If it is not provided in response to the notice under section 313A, HMRC have further powers to require it (see paragraph 21.4.3 below).

If the person is a promoter of the scheme, they must provide an explanation of why they consider the scheme 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.

Instead it must engage with all the relevant legal tests. In particular, where the promoter maintains that the arrangements do not fall within any hallmark in the Descriptions Regulations and the equivalent descriptions in relation to SDLT, IHT and ATED, 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 scheme is disclosable, not information that describes how the scheme works.

Because HMRC will normally issue a section 313A notice only following an informal approach (see paragraph 21.2), it will usually be apparent which legal tests are engaged and the promoter’s explanation can focus on those tests.

Example 1

In a reply to a s313A notice issued by HMRC a promoter states that although scheme Alpha is a standardised tax product it is substantially the same description as a scheme first made available before 1 August 2006.

Consequently, it is covered by the ‘grandfathering’ rule in the hallmark. The explanation should identify the predecessor scheme and provide information as to what evidence (for example published guidance, journals, tax press etc.) informed the promoter’s view that the scheme was first made available before 1 August 2006. It must engage with all the relevant legal tests so in addition the explanation should cover all the other relevant hallmarks e.g. confidentiality.
The information must be provided to HMRC within 10 days, beginning with the day after the notice is issued, or longer if HMRC has so directed. Weekends, bank holidays, Good Friday and Christmas Day are not counted in calculating the 10 days. Failure to do so may result in a penalty (see paragraph 22.6).

21.4.2 Orders for supplementary information or documents (FA 2004, s.313B and SI 2004/1864, reg. 8A(2))

HMRC may apply to the Tribunal for an order that a person provide specified information or documents in support of his stated reasons as to why a scheme is not disclosable by that person, whether or not the reasons were given in response to a notice under s.313A (see paragraph 21.4.1 above).

Again, the information or documents required at this preliminary stage are those which are required to test whether or not a scheme is disclosable by that person, not information that describes how the scheme works.

Example 2

Scheme Beta involves a trading partnership and is expected to provide the partners with tax losses which can be used to offset personal income and gains.

The promoter’s reply to a section 313A notice says that the tax losses are not the main benefit, or one of the main benefits, of using the scheme, which is wholly commercial.

The promoter chooses not to explain this position in further detail. HMRC uses section 313B to seek information and documents relating to how the various benefits, in particular the potential for taxable income, have been quantified and measured against the benefit of the tax losses.

The information must be provided by the 14th day after the date of the order or any longer period directed by HMRC.

HMRC will agree to a longer period where we are satisfied there is good reason why the promoter cannot provide the information within 14 days. Weekends, bank holidays, Good Friday and Christmas Day are not counted in calculating the 14 days. Failure to comply may result in a penalty (see paragraph 22.6).

21.4.3 Notice requiring introducer to provide information leading to promoter of scheme or to a person with whom the introducer has made a marketing contact (FA 2004, s313C and regulation 15)

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

This formal power will be used only if the introducer is not willing to identify the promoter voluntarily.
From 26 March 2015, 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 a scheme under s.309 or s.310.

The information must be provided to HMRC within 10 days, beginning with the day after the notice is issued, or longer if HMRC so directs.

Weekends, bank holidays, Good Friday and Christmas Day are not counted in calculating the 10 days. Failure to do so may result in a penalty (see paragraph 22.6).

21.5 Resolving disputes and enforcing disclosure

21.5.1 Orders stating a scheme is disclosable (FA 2004, s.314A, TMA 1970, s.98C(2E) and regulation 16(2) and 2(3) of SI 2012/1836)

HMRC may, in relation to a specified promoter, apply to the Tribunal for an order stating that a scheme is disclosable.

The Tribunal will make an order if it is satisfied on the evidence that the scheme falls within s.306 FA 2004

Such an order has the effect of confirming that a scheme is, and was always, disclosable within the time limits prescribed in the Information Regulations.

Failure to disclose a scheme may result in a penalty (see paragraph 22.5). Failure to disclose a scheme within 10 days, beginning with the day after a section 314A order is made, may result in a higher penalty (see paragraph 22.5.4).

Weekends, bank holidays, Good Friday and Christmas Day are not counted in calculating the 10 days.

21.5.2 Orders deeming a scheme to be disclosable (FA 2004, s.306A, TMA 1970 s.98C(2E) and regulations 5(2),16(1) and 2(3) of SI 20/1836)

HMRC may, in relation to a specified promoter, apply to the Tribunal for an order that a scheme is to be treated as disclosable.

The Tribunal can only make an order if they are satisfied that HMRC have reasonable grounds for suspecting that the scheme may be disclosable and have taken all reasonable steps to establish whether it is.

Grounds for suspicion may include:

- the fact that the arrangements fall within any ‘hallmark’ prescribed in the relevant regulations
- an attempt to avoid or delay complying with s.313A or s.313B
- a failure to comply with s.313A or s.313B in relation to another scheme
The effect of an order is that a scheme is deemed to be disclosable under s.308 and must be disclosed. The granting of a section 306A order does not determine whether or not the scheme would have been disclosable, absent the order. Consequently, the granting of the order may create a requirement to disclose that might not otherwise arise and the Information Regulations provide a time limit for complying with that requirement.

Disclosure must be made within 10 days, beginning with the day after the order is made. Failure to disclose a scheme is liable to a penalty (see paragraph 22.5).

Failure to disclose a scheme within 10 days, beginning with the day after a section 306A order is made, is liable to a higher penalty (see paragraph 22.5.5). Weekends, bank holidays, Good Friday and Christmas Day are not counted in calculating the 10 days.

However, even if disclosure is made within the time period described above, if, on the basis of information that subsequently comes to light, HMRC can demonstrate that the scheme was always disclosable, an application to the Tribunal for a late notification penalty (see paragraph 22.5) may still be made.

21.6 Incomplete disclosures (FA 2004, s.308A and regulation 5(3) and 2(3) of SI 2012/1836)

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 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 only 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 or documents must be provided to HMRC in the same way as if it were prescribed information. This must be done by the 10th day after the date of the order. Failure to do so may result in HMRC applying to the Tribunal for a late notification penalty (see paragraph 22.5.1).

Weekends, bank holidays, Good Friday and Christmas Day are not counted in calculating the 10 days.

If the information or documentation is provided within the time period described above but HMRC nevertheless believes the information was always disclosable as prescribed information, and has been provided later than the normal disclosure due date, an application to the Tribunal for a late notification penalty may still be made.
21.7 Further information and incomplete disclosures after a scheme has been disclosed (FA2004 S.310A and s.310B)

HMRC may require a person to provide further information to HMRC in 2 circumstances:

- when the person has provided the prescribed information under s.308 (as a promoter), s. 309 (as a person dealing with a promoter outside the UK) and s.310 (where the arrangements do not involve a promoter)
- when the person has provided information in purported compliance with s309 or s310 but HMRC believe that the person has not provided all the prescribed information (the equivalent provision for a promoter is described at 21.6 above)

In these circumstances HMRC can require the person to provide further specified information or documents about the notifiable proposal or arrangements in addition to the prescribed information already required under s.308, s.309 or s.310.

For example, HMRC may require the promoter to supply a detailed analysis of the financial transactions undertaken by a typical client as part of a scheme along with the documentation for those financial transactions.

HMRC does not need the Tribunal’s permission to send a notice requiring a person to send in the specified information or documents. The time limit for complying with an order is 10 working days from when HMRC imposes the requirement or any longer period as HMRC may direct.

If HMRC believes that the person has failed to provide the information or documents required, it has the option to apply to the Tribunal for an order requiring the production of the information or documents (s.310B).

A Tribunal won’t make such an order unless it is satisfied 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 from a Tribunal is 10 working days beginning on the day that the Tribunal made the order or any such longer period as HMRC may direct.

21.8 Information to enable HMRC to identify the end user of a proposal or arrangement (FA2004, s.313ZB and regulation 13A)

HMRC can require a promoter to provide further information, if it suspects that a client on a client list is not a user of the proposal or arrangement but an intermediary.

The promoter is only required to provide the information it has in its possession at the time the written notice requiring the further information is received. 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 scheme
- is likely to sell the arrangements to another person
- achieve a tax advantage by implementing the arrangements
• the UTR of 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 has to be provided within 10 days from the date that the promoter receives the written notice requiring the information.
22. Penalties

22.1 General

HMRC’s focus is upon enabling scheme promoters and users to comply with their DOTAS obligations. However, a penalty regime is necessary to deter non-compliant behaviours.

The penalties for failure to comply with a DOTAS obligation without reasonable excuse are provided for in section 98C Taxes Management Act 1970, as amended by FAs 2007 and 2010 (or regulation 22 of SI 2012/1868 in relation to NICs). Broadly, DOTAS penalties fall into 3 categories:

1. Disclosure penalties – apply to failure to disclose a scheme. There are variations in cases where a Tribunal has issued a disclosure order.

2. Information penalties – apply to all other failures to comply with DOTAS except for those covered by 3 below.

3. 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 determined by a Tribunal.

22.2 Tribunal penalty proceedings

22.2.1 General

The procedure is that HMRC will apply to a Tribunal to determine a penalty on a specified person (or persons) for breach of a specified DOTAS obligation. You will 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.

Decisions on the selection of cases for penalty proceedings will be made in Counter-Avoidance Directorate of HMRC. Cases of suspected non-compliance are investigated by the disclosure enforcement team in this Directorate.

The factors taken into account when deciding whether to institute proceedings at the First-tier Tribunal will include whether a person had a reasonable excuse for not doing what they were otherwise required to do and whether they ultimately complied without unreasonable delay after that excuse ceased (see paragraphs 22.3 and 22.5.3).
The other factors that we will consider in deciding whether or not to institute penalty proceedings will include:

- the level of knowledge and experience the person could reasonably be expected to have of DOTAS
- the person’s previous behaviour in relation to DOTAS
- the adequacy of the systems the person has put in place to ensure compliance with DOTAS
- the nature of the behaviour that led to the failure (for example, was it 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

HMRC’s role at a penalty hearing is to put to the Tribunal the case that a specified person has failed to comply with a DOTAS obligation.

If it 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 22.3 and 22.5.3).

If the Tribunal decides that either the person didn’t have a reasonable excuse for failing to comply with the DOTAS obligation, or there was an unreasonable delay after the excuse ceased before the person complied, it must decide upon the amount of the penalty (see paragraphs 22.5 and 22.6)

22.2.2 SDLT schemes

Use of SDLT schemes is always notified on form AAG4 (SDLT) so there is no requirement to enter a scheme reference number on a SDLT return.

HMRC will only require one AAG4 (SDLT) from a partnership in respect of each notifiable arrangement, regardless of the number of partners.

All partners are jointly and severally liable for any penalties arising from any non-compliance as detailed at paragraph 22.2 above.

22.3 Reasonable excuse: general

Section 118(2) TMA 1970 provides that:

‘For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed, and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.’

This means that in the event of a reasonable excuse the legislation deems that no failure occurred for the purposes of imposing penalties.
The law does not define ‘reasonable excuse’, and it is left to the judgment of the tax authorities and the tribunals as to whether a reasonable excuse exists in any particular case. This recognises that there probably cannot be a single absolute standard by which the words ‘reasonable excuse’ can be defined.

What constitutes a reasonable excuse will vary according to the nature of the failure and the type and circumstances of the person concerned.

But generally, reasonable excuse is seen by HMRC, as developed by case law, as being an unusual event that is either unforeseeable or beyond the person’s control (such as serious illness) that formed an insurmountable obstacle to timely compliance.

Example:

Promoter P has put a reasonable and proportionate system in place to ensure that schemes are captured and disclosed on time. Something occurs, so unusual that it cannot be captured by the system and reported on time.

P discovers the error and then discloses the scheme promptly with an explanation of what has happened. HMRC would consider P to have a reasonable excuse.

22.3.1 Limitations to defence of reasonable excuse – monitored promoters and their clients

A monitored promoter is a promoter to which a First-tier Tribunal has approved the issue of a monitoring notice under s242-244 FA 2014 (Promoters of Tax Avoidance Schemes guidance paragraph 3.1).

The objectives of the monitored promoter rules are to change the behaviour of a small and persistent minority of promoters of avoidance schemes who are not transparent with HMRC and display other behaviours detrimental to the fairness of the tax system.

A monitored promoter cannot rely on legal advice as a reasonable excuse in connection with the charging of penalties in respect of failing to meet any of its duties under the DOTAS rules if:

- the advice was not based on a full and accurate description of the facts
- the conclusions in the advice were unreasonable

Where a client of a non-resident monitored promoter fails to notify HMRC in accordance with s309 FA 2004, any legal advice given or procured by the monitored promoter is to be ignored in determining whether the person has a reasonable excuse for that failure in connection with the charging of penalties in respect of that failure.

Similarly, where a person has entered into a transaction that is part of arrangements for which there is no promoter under DOTAS and that person fails to provide information to HMRC in accordance with s310 FA 2004, any legal advice given or procured by a monitored promoter is to be ignored in determining whether the person has a reasonable excuse for that failure in connection with the charging of penalties in respect of that failure.
22.4 Appeals

There is a right of appeal against any penalty which has been determined either by a Tribunal or by HMRC. In the case of a penalty determined by HMRC, the appeal will be to the First-tier Tribunal. In the case of a penalty determined by a First-tier Tribunal, the appeal will be to the Upper Tribunal.

Appeals against penalties determined by the First-tier Tribunal may be made both on points of law arising from the Tribunal decision and against the amount of the penalty (see guidance on the appeals system at Appeals Reviews and Tribunals Manual).

22.5 Disclosure penalties

22.5.1 Cases where no disclosure order is involved

For failure to disclose a scheme by the due date or in the specified form and manner a Tribunal may determine a penalty of an amount not exceeding £600 a day during the 'initial period'. The penalty may be the result of:

- a scheme promoter failing to notify a scheme as required by section 308(1) or (3) FA 2004
- a scheme promoter failing to comply with an order made by a Tribunal under section 308A FA 2004 requiring the promoter to make good an incomplete disclosure made under section 308 - when operating the penalty provisions this is treated in the same way as a failure to disclose the scheme under section 308
- a scheme user failing to notify a scheme as required by section 309(1) or section 310 FA 2004
- a promoter or scheme user failing to comply with an information notice from HMRC under section 310A FA 2004 (see 21.7)

When there has been a failure to disclose a scheme on time, the 'initial period' begins on the first day following the end of the 'prescribed period'

This is the period within which the scheme should have been disclosed. For guidance on when the prescribed period ends:

- paragraph 14.2.1 explains when the prescribed period ends in relation to disclosure of a scheme under section 308 by a promoter
- paragraph 14.4 explains when the prescribed period ends in relation to disclosure of a scheme under section 309 by a user of a scheme with no UK promoter
- paragraph 14.6 explains when the prescribed period ends in relation to disclosure of a scheme under section 310 by a user of a scheme with no promoter
The initial period in relation to penalties payable by a promoter for failing to comply with an order made by a Tribunal under section 308A, also begins on the first day after the end of the period within which the scheme should have been disclosed under section 308 (see paragraph 14.2.1).

Where a person has failed to comply with an information notice under section 310A, the 'initial period' begins the day after the date specified in the notice for that person to provide the required information.

In each case, the initial period ends with the earlier of:

- the day on which the Tribunal determines the penalty
- the last day before the day on which the scheme is disclosed or as appropriate all of the required information is received by HMRC, thereby ending the failure

The amount of the initial daily penalty is determined by the First-tier Tribunal (see paragraphs 22.5.2 and 22.5.3).

If the maximum penalty the Tribunal can set using the daily penalty described above is less than £1m for the initial period, it may determine a higher penalty of up to £1 million in certain circumstances.

When making this decision the Tribunal will take into account all considerations it considers relevant, including particularly the aim of deterring that person or other persons from future compliance failures of a similar nature.

HMRC may determine a secondary daily penalty, not exceeding £600, for each day that the failure to disclose continues after an initial penalty has been determined.

Warning: you may incur penalties of up to £1m or more if you fail to disclose a notifiable scheme or don't comply with a notice from HMRC under section 308A or section 310A FA 2004.

22.5.2 Determining the amount of a penalty

The rate and amount of the initial daily penalty are matters for the Tribunal to determine if it decides that a person has failed to comply with a DOTAS obligation to

- disclose a scheme
- provide information required by an order made under section 308A or
- provide information required by a section 310A notice

A Tribunal may determine any amount up to a maximum provided for in the law (see paragraph 22.5.1, 22.5.4 or 22.5.5 as appropriate).

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 aim of deterring that person or other persons from failing to comply in the same way in the future is specified to be one of those relevant considerations.

So for example, it may impose a much higher penalty on a promoter in a case of deliberate non-compliance than it would in a case of carelessness.

The law provides that in considering the rate of the penalty, a Tribunal shall 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 scheme
- 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 DOTAS continues after a Tribunal has imposed an initial penalty, HMRC may determine a continuing daily penalty. In such cases we will normally begin by determining 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 the daily penalty it determines, up to the maximum.

22.5.3 Reasonable excuse – reason to consider a scheme is not disclosable

HMRC will consider a person to have a reasonable excuse for not disclosing a scheme where they are satisfied that there were reasonable grounds to consider that the scheme was not disclosable.

HMRC does not consider that the fact a person has legal advice that the scheme is not disclosable in itself provides a reasonable excuse. Case law (in relation to s.118 (2) TMA 1970 generally) indicates that what is reasonable in such circumstances depends upon the particular facts.

We consider that the proper test here, in the DOTAS context, 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.

The factors we will consider in relation to a promoter may include the following:

- what level of knowledge did the promoter have, or might be expected to have, of DOTAS?
- what level of knowledge did the promoter have, or might be expected to have of the tax system generally and specifically of the parts engaged by the scheme?
- did the promoter provide the legal adviser with full and accurate information about the scheme?
- are any of the details of the scheme in dispute significantly different from those of the one to which the legal advice relates?
was any analysis or assumption made by the instructing promoter correct or reasonable (for example in a tax loss scheme, are any assumptions made about how much trading income the participants may receive reasonable and supported by evidence)?

- to what degree does the legal advice explain why the scheme is not disclosable, by reference to the relevant tests in the DOTAS legislation?

In cases where a disclosure order is issued by the Tribunal (see paragraph 21.5) any reasonable excuse which relies on doubt as to whether the arrangements are notifiable ends 10 days following the day that the Tribunal issues the order. This includes instances where the promoter has legal advice that the arrangements are not notifiable.

22.5.4 Cases where a section 314A order has been made

A section 314A order issued by a Tribunal determines that a scheme is notifiable. It has the effect of confirming that the scheme is, and was always, notifiable within the normal time limits prescribed in the Information Regulations (paragraph 14.2.1).

As described above in paragraph 22.5.1, the initial period for which penalties may be determined, both for failing to disclose the scheme and for failing to comply with an order made under section 308A relating to the scheme, starts the day after the end of the prescribed period, and the initial period ends with the earlier of:

- the day on which the Tribunal determines penalties
- the last day before the day on which the scheme is disclosed or the promoter complies with the relevant section 308A order

The amount of the initial daily penalty is determined by the First-tier Tribunal (see paragraphs 22.5.2 and 22.5.3).

If the promoter had reasonable grounds to believe that the scheme was not disclosable before the issue of the order, the order removes that doubt.

The law provides that the promoter cannot rely on doubt as to notifiability as a reasonable excuse for not providing the prescribed information about the scheme within 10 days of the tribunal making the order.

This does not mean that penalties will definitely be determined against on the promoter if it does not provide the prescribed information within 10 days of the order.

However, any contention the promoter makes that it should not be made liable for penalties because it has a reasonable excuse cannot depend on there being doubt about whether or not the scheme is notifiable.

If the promoter does not disclose the scheme within 10 business days of the order being made, the maximum amount of both the initial daily penalty (which may be determined by a Tribunal) and the secondary daily penalty (which may be determined by HMRC) increase to £5,000 for each day that the failure continues after the 10 days.
Weekends, bank holidays, Good Friday and Christmas Day are not counted in calculating the 10 business days.

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

Where a Tribunal has made an order under section 310A requiring more information about a scheme in respect of which a Tribunal has given an order under section 314A, the maximum penalty for failing to comply with the section 310A 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 considerations it considers relevant, including particularly the aim of deterring that person or other persons from failing to comply in a similar way.

22.5.5 Cases where a section 306A order has been issued

A section 306A order issued by a Tribunal determines that a scheme is to be treated as notifiable. It must be disclosed within 10 business days, beginning with the day after the order is made (see paragraph 21.6).

After a section 306A order, the initial period for which penalties may be determined both for failing to disclose the scheme and for failing to comply with a section 308A notice relating to the scheme starts on the 11th business day after the order is made.

This initial period ends with the earlier of:

- the day on which the Tribunal determines penalties
- the last day before the day, on which the scheme is disclosed or the promoter complies with the section 308A notice

The amount of the initial daily penalty is determined by the First-tier Tribunal (see paragraphs 22.5.2 and 22.5.3).

The law provides that the promoter cannot rely on doubt as to notifiability as a reasonable excuse preventing the imposition of penalties if it does not provide the prescribed information within 10 business days of the section 306A order.

If the promoter does not disclose the scheme within 10 business days of the order, the maximum amount of the initial daily penalty (which may be determined by a Tribunal) and the secondary daily penalty (which may be determined by HMRC) is the higher amount of £5,000 rather than £600. Weekends, bank holidays, Good Friday and Christmas Day are not counted in calculating the 10 days.

If a Tribunal subsequently issues an order under s314A or the person agrees that the scheme was disclosable and that they were required to have disclosed it before the section 306A order was made, HMRC may apply to the Tribunal to determine a further penalty. This penalty will relate to the period starting on the date by which the
scheme should have been disclosed and ending 10 business days after the s306A order or, if earlier, on the day before the prescribed information was provided.

Any backdated penalty would be at the lower maximum rate of £600 per day.

Where a Tribunal has made an order under section 310A requiring more information about a scheme in respect of which a Tribunal has given an order under section 306A, the maximum penalty for failing to comply with the section 310A 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 considerations it considers relevant, including particularly the aim of deterring that person or other persons from failing to comply in a similar way.

22.6 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 does not respond to a pre-disclosure enquiry when required to do so (see paragraphs 21.4.1 and 21.4.2)
- an introducer who does not provide, when required to do so, the identity of the person who supplied them with information about the scheme or persons with whom the introducer has made marketing contacts (see paragraph 21.4.3)
- a promoter who does not provide his client with a scheme reference number and with the further required information as supplied for this purpose by HMRC (see paragraph 17.2)
- a client of a promoter who fails to provide the scheme reference number to any other person whom he might reasonably expect to be a party to the scheme and expected to obtain a tax advantage from using it) (see paragraph 17.3) (This includes employers failing to provide the scheme reference number to an employee for a scheme implemented by the employer in relation to that employee’s employment. It doesn’t matter for this purpose whether the tax advantage is expected to be obtained by the employer only, the employee only or both.)
- A promoter who fails to provide HMRC with details of a client to whom he is obliged to issue a scheme reference number ( see – section 16)
- a promoter that does not supply further information on parties to the arrangement when required to do so by written notice (see – section 21)
- an employer who fails to provide the scheme reference number to employees in relation to whose employments a tax advantage is expected to arise (see paragraph 17.3.1)
- an employer who fails to provide HMRC with information about employees to whom it is required to provide a scheme reference number (see paragraph 17.8)
- a client who does not provide to promoter their National Insurance number, UTR or assurances that neither applies (see paragraph 17.4)
• a person who fails to tell HMRC the scheme reference number notified to
them by a promoter and the time when the person expects to obtain the tax
advantage under the arrangements (see paragraph 17.5)

• a promoter who fails to provide updated information about themselves and
the scheme (see paragraph 17.9.1)

In each case the failure includes cases where information is provided after the end of
the period prescribed in the Information Regulations or in a format other than that
specified in the DOTAS guidance (paragraph 1.4.3).

For all of the information penalties listed above, a Tribunal may determine an initial
penalty for each failure of an amount not exceeding £5,000.

HMRC may determine a daily penalty, not exceeding £600, for each day that each
failure to provide information continues after an initial penalty has been determined.

The maximum daily penalty for all failures increases from £600 a day to £5000 per
day starting on the 11th business day after an order has been made under section
306A or 314A (see paragraphs 22.2.4 and 22.2.5).

22.7 The user penalty – tax advantage

A scheme user who fails to comply with a section 313 obligation to report a scheme
reference number and related information (on a return or separately, as prescribed in
the Information Regulations) is from 26 March 2015 liable to a penalty of:

• £5,000 per scheme (for example, each scheme to which the failure relates)
for a first occasion
• £7,500 per scheme on the second occasion within 3 years (whether or not it
relates to the same scheme involved in the previous occasion)
• £10,000 per scheme on the third and subsequent occasions (whether or not
the failure relates to schemes involved in a previous occasion)

Before that date the penalty was £100 for a first occasion, £500 for a second occasion
and £1,000 on third and subsequent occasions.

A scheme user, who is required to report this information on a return doesn’t satisfy
their obligations under s313 unless they enter the information in the boxes provided
for that purpose on the return.

For instance, including the scheme reference number or numbers in the ‘white space’
box on returns does not meet the user’s obligation to report the scheme reference
number.

Warning: you may incur penalties up to £10,000 per scheme if you do not report the
scheme reference number on your return in the boxes on the return specified for this
purpose or in the form and manner specified if a report is to be made separately from
a return. These penalties are determined by HMRC.

22.8 Failures involving both disclosable NI contribution arrangements and disclosable
income tax arrangements (SI 2012/1868, reg 22(14)
No penalty will be charged for a failure to disclose a NI contribution arrangement if the arrangement, or substantially the same arrangement, is also a disclosable income tax arrangement and a penalty has been determined for failing to disclose that arrangement.

The same principle applies in relation to information and user penalties.

22.9 The user penalty – NI contributions advantage

A scheme user who fails to report a scheme reference number and related information on an AAG4 in relation to a scheme which is expected to obtain only an NI contributions advantage (and no tax advantage), is from 21 December 2017 liable to a penalty of:

- £5,000 per scheme (for example, each scheme to which the failure relates) for a first occasion
- £7,500 per scheme on the second occasion within 3 years (whether or not it relates to the same scheme involved in the previous occasion)
- £10,000 per scheme on the third and subsequent occasions (whether or not the failure relates to schemes involved in a previous occasion)

Before that date the penalty was £100 for a first occasion, £500 for a second occasion and £1,000 on third and subsequent occasions.

Warning: you may incur penalties up to £10,000 per scheme if you do not report the scheme reference number using form AAG4. These penalties are determined by HMRC.
23. Publishing information notified to HMRC under DOTAS (s316C FA 2004)

23.1 General

From 26 March 2015 HMRC can publish information about schemes which have been notified and to which it has allocated a scheme reference number from that date.

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

23.2 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 scheme and any name or names it is known by
- the statutory provisions on which the tax advantage is based
- any ruling of a court or tribunal relating to the scheme or promoter
- any other information which HMRC considers it appropriate to publish in order to identify the scheme or a promoter of it

No information identifying any persons who enter into the scheme may be published under s316C FA 2004. But where the promoter also entered into the scheme, this does not 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 whose details HMRC intends publishing.

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 one of the arrangements’ promoters. This will help to ensure the information HMRC publishes about promoters is accurate.

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.

This provision is limited to court rulings given after 25 March 2015. HMRC may publish the number of persons who have entered into a scheme.

This information will generally be obtained from the promoter when it is required to provide client lists to HMRC under s313ZA (see paragraph 16.2).

HMRC may publish that a scheme is ‘APN relevant’ if it may exercise its power to issue Accelerated Payment Notices to users of the scheme because the scheme meets the definitional criteria for eligible ‘DOTAS arrangements’ set out at Section 219 of the Finance Act 2014.
HMRC may also publish that a scheme is APN relevant if it has included the SRN allocated to the scheme on the list of schemes whose users HMRC may issue with an Accelerated Payment Notice.

23.3 Information HMRC must publish after a court ruling that is relevant to arrangements about which HMRC has published information (FA 2004, s316C)

If HMRC has published information about tax arrangements under s316C and there is a final ruling by a court or tribunal based on principles or reasoning which, if applied to the scheme, would allow the tax advantage claimed to arise from the scheme, HMRC must publish information about the ruling.

HMRC must publish this information in the same manner as it published the information under s316C.

A ruling is final if it is:

- a ruling of the Supreme Court
- a ruling in respect of which no appeal or further appeal may be made