



HM Revenue
& Customs

Tackling Promoters of Tax Avoidance

Consultation

Publication date: 21 July 2020

Closing date for comments: 15 September 2020

Subject of this consultation:	Proposals to tackle promoters (and other enablers) of tax avoidance schemes that would reduce the scope for promoters (and other enablers) to market tax avoidance schemes.
Scope of this consultation:	<p>The government seeks views on proposals to strengthen the sanctions against those who promote or enable tax avoidance schemes and makes changes to the following anti-avoidance regimes:</p> <ul style="list-style-type: none"> • Disclosure of Tax Avoidance Schemes (DOTAS) • Promoters of Tax Avoidance Schemes (POTAS) • Penalties for Enablers of Defeated Tax Avoidance • General Anti Abuse Rule (GAAR) • Disclosure of Avoidance Schemes: VAT and other indirect taxes (DASVOIT)
Who should read this:	The government would like views from members of the public, representative bodies, advisers and promoters, as well as businesses and individuals who may have received marketing material (even where they have not undertaken what that material proposed), taken advice about, or used arrangements which seek to avoid tax.
Duration:	The consultation runs from 21 July 2020 to 15 September 2020
Lead official:	HMRC
How to respond or enquire about this consultation:	<p>Please send all responses or enquiries to: ca.consultation@hmrc.gov.uk</p> <p>Please note that the mailbox will not accept e-mails larger than 10mb.</p>
Additional ways to be involved:	HMRC welcomes meetings with interested parties to discuss these proposals. The government has also launched a separate call for evidence on tackling disguised remuneration schemes which seeks views on how we address them, including how the government can go further to tackle promoters.
After the consultation:	The responses to this consultation will be considered alongside the responses to the draft legislation that is published today. The government will consider those responses in readiness for the Finance Bill that is published later this year. A summary of responses will also be published later this year.

Getting to this stage:

These changes were first announced in December 2019 as part of the government's response to Sir Amyas Morse's Independent Review of the Loan Charge. In that response the government announced that it would take further measures to tackle promoters of tax avoidance schemes that would reduce the scope for promoters to market tax avoidance schemes. At Budget 2020 the Government announced that these measures would be taken forward in Finance Bill 20/21. These proposals were also described in the 'Promoter Strategy' published by HMRC in March 2020.

The government recognises the complexity of these proposals and the importance of ensuring that they are appropriately targeted. It is, therefore, publishing this consultation document alongside the draft legislation published today.

Previous engagement:

All of the regimes to which the changes described here relate have been the subject of earlier extensive consultation.

Contents

Foreword	5
1. Executive Summary	7
2. Introduction	9
3. Tackling promoters who do not disclose avoidance schemes to HMRC	13
4. Dealing with promoters who sell schemes that do not work	21
5. Dealing with promoters who seek to sidestep the Promoters of Tax Avoidance Schemes Regime	26
6. Penalties for those who enable tax avoidance schemes that fail	33
7. Maintaining the General Anti Abuse Rule	42
8. Assessment of Impacts	47
9. Summary of Consultation Questions	48
10. The Consultation Process	51
Annex: Relevant (current) Government Legislation	54

Foreword

At Spring Budget in March 2020, the government announced that it would be legislating in Finance Bill 2020-21 to take further action against those who promote and market tax avoidance schemes. These changes would help to reinforce HM Revenue and Customs' existing anti-avoidance powers, so that the remaining small population of unscrupulous promoters and enablers are unable to profit by sidestepping the rules.

HMRC have a strong record of tackling avoidance. The measures that they have introduced have helped drive the avoidance tax gap down from £3.7 billion in the tax year 2005 to 2006 to £1.7 billion in the tax year 2018 to 2019.

During this time, many promoters and enablers have left the avoidance market. However, the government recognises that there is still more to be done. That is why it published a call for evidence at Spring Budget 2020 on raising standards in the tax advice market; it is why HMRC published their Promoter Strategy on 19 March outlining further steps; and it is why the call for evidence on tackling disguised remuneration schemes is being published alongside the present document.

All are part of a coordinated strategy. As part of that strategy, this document and the parallel call for evidence on tackling disguised remuneration schemes both seek views on further action the government should take to tackle promoters, and on other issues which may contribute to the continued use of disguised remuneration schemes.

As the tax avoidance market has moved away from bespoke avoidance schemes designed for the wealthy and towards mass-marketed schemes, HMRC have an increasingly important role to play in informing taxpayers, in order to reduce the risk that they enter into schemes without necessarily understanding the repercussions.

Promoters are often deliberately silent in their marketing to taxpayers about the risks of successful challenge by HMRC, meaning taxpayers are not always sufficiently informed about what they are getting into. A key part of tackling this problem is to address it at source and act swiftly and directly against promoters, which is what the measures in this consultation are designed to do.

The powers proposed in this document are necessarily far-reaching, especially as promoters often exploit every opportunity to frustrate HMRC's efforts to tackle their behaviour, by abusing corporate structures or exploiting legal safeguards. The government fully recognises the need to ensure that any extension of HMRC powers is properly constrained and targeted to promoters and enablers of tax avoidance schemes, and does not affect tax advisers who adhere to high professional standards. That is what these measures seek to achieve.

It is important to say that though this work is important, it alone is not enough. HMRC are also taking steps to provide taxpayers with better and more timely information on the dangers of avoidance schemes; a recent example is the quick action taken by HMRC recently to publish information in 'Spotlight 54' when unscrupulous promoters of tax avoidance schemes

were targeting key workers returning to the National Health Service to help respond to the Covid-19 outbreak.

It is a cardinal principle of tax policy that taxpayers are responsible for their own tax affairs, one sometimes forgotten even in Parliament. But the government has an important role to play in helping taxpayers to take informed decisions. Effective communication is important in order to maintain transparency and public confidence in government.

This consultation sets out the detail of each measure, alongside the proposed draft legislation. It seeks views on the application of these changes, so as to ensure that they are both effective and proportionate.

Rt Hon Jesse Norman

Financial Secretary to the Treasury

1. Executive Summary

Promoters and enablers of tax avoidance schemes

- 1.1 Tax avoidance is bending the tax rules to gain a financial advantage never intended by Parliament and deprives important public services of the funding they need.
- 1.2 HMRC has powers to tackle promoters of tax avoidance schemes, which seek to ensure tax avoidance schemes are disclosed to HMRC and to change the behaviours of those involved in promoting and enabling them. However, promoters are prepared to use every opportunity to sidestep the rules that have been introduced to govern their activities, so that they can continue to market their schemes. This consultation sets out proposals, which are designed to strengthen the existing anti-avoidance regimes.
- 1.3 **Chapter two** introduces the background to the changes being made. It highlights previous steps to tackle these promoters and the problems HMRC now faces in tackling their activities.
- 1.4 In particular, chapter two highlights that promoters of tax avoidance schemes are rarely members of professional bodies. **Many tax advisers adhere to high professional standards and are a very useful source of advice and support to taxpayers. The changes in this document are not aimed at such professionals.** Rather, these proposals aim to tackle promoters who continue to promote tax avoidance schemes, and whose actions lead taxpayers to build up large tax bills.
- 1.5 The majority of tax avoidance schemes do not work. Taxpayers who enter into them will eventually need to pay the tax they always owed, often having already paid out substantial fees to scheme promoters or other intermediaries. The proposed changes would ensure that HMRC could take action more quickly against these promoters and enablers. They would also enable HMRC to name promoters and enablers at an earlier stage to help taxpayers to steer clear of them.

The proposals for tackling promoters and other enablers of tax avoidance schemes.

- 1.6 The government seeks views on proposals to strengthen the regimes that target those who promote or enable tax avoidance arrangements and proposes changes to the following anti-avoidance regimes:

- Disclosure of Tax Avoidance Schemes (DOTAS)
- Promoters of Tax Avoidance Schemes (POTAS)
- Penalties for Enablers of Defeated Tax Avoidance
- General Anti Abuse Rule (GAAR)
- Disclosure of Avoidance Schemes: VAT and other indirect taxes (DASVOIT)

1.7 These regimes, the activity of the promoters in these areas and the changes being proposed for those regimes are discussed in chapters three to seven.

1.8 **Chapter three** proposes changes to the DOTAS regime. These changes would ensure that HMRC can act decisively where promoters fail to provide information on their avoidance schemes, and make taxpayers aware at an earlier stage where it suspects a tax avoidance scheme is being sold.

1.9 **Chapter four** proposes changes to the POTAS regime. These changes would ensure HMRC can more effectively issue 'stop notices' to promoters to make it harder for them to continue to promote schemes to taxpayers that do not work.

1.10 **Chapter five** proposes changes that would prevent promoters from abusing corporate structures to avoid their obligations under the POTAS rules. The chapter also proposes further technical amendments to the POTAS regime so that it continues to operate effectively in tackling the promotion of tax avoidance.

1.11 **Chapter six** proposes changes to the regime of penalties for enablers of defeated avoidance schemes. In particular they would ensure HMRC can obtain information about the enabling of abusive schemes as soon as they are identified, and further ensure that enabler penalties are felt without delay when a scheme has been defeated at tribunal.

1.12 **Chapter seven** proposes changes to the GAAR to ensure that it can be used as intended to counteract tax avoidance schemes marketed at partnerships.

Responding to the consultation

1.13 The government's focus is on those promoters and other enablers who seek to sidestep the rules. It recognises the importance of ensuring that these changes are appropriately targeted. This consultation and the draft legislation published alongside this document (as part of the draft Finance Bill) provide an opportunity to respond on these proposed changes. In particular it provides an opportunity for interested parties to help ensure the measures are appropriately targeted and that they include appropriate safeguards when considered alongside the existing safeguards and governance, while allowing HMRC to be able to act quickly to reduce the risk of taxpayers being drawn in to tax avoidance schemes.

1.14 **Chapter eight** provides a summary of the impacts from these changes. **Chapter nine** includes a list of all the questions on which responses are sought and **chapter ten** details how to respond or ask questions.

2. Introduction

Background

- 2.1 Tax avoidance is bending the tax rules to gain a financial advantage never intended by Parliament. It often involves contrived or artificial transactions that serve little or no purpose, other than to reduce the amount of tax someone pays. This deprives important public services of the funding they need. The majority of tax avoidance schemes do not deliver the tax benefits they promise and individuals who use such schemes can end up with big tax bills on top of any fees they paid to the promoters they used to take part.
- 2.2 In recent years, successive governments have taken robust action to tackle tax avoidance, as well as those that promote and enable avoidance schemes. This has changed the market for tax avoidance, and the annual amount of tax lost through avoidance has fallen from £3.7 billion in the tax year 2005 to 2006 to an estimate of £1.7bn in 2018-2019.¹
- 2.3 The legislation introduced since 2004 to tackle promoters of tax avoidance has helped change the market for tax avoidance schemes and some promoters have left the market. The legislation significantly increased HMRC's ability to act in this area. HMRC continues to take action to ensure its operations maintain and build public trust in the tax system, with appropriate checks and balances complementing the statutory safeguards. This includes engaging with taxpayers, tax agents and their representatives to evaluate HMRC's implementation of powers introduced since 2012, including those targeting tax avoidance, against the powers and safeguards principles as part of the powers and safeguards programme.
- 2.4 Meanwhile, the tax avoidance market constantly evolves and HMRC continues to see promoters marketing tax avoidance at scale, particularly to those on middle incomes with a view to avoiding employment taxes.
- 2.5 In December 2019, the government published its response to the independent Loan Charge Review. This included an announcement of further measures to tackle promoters of tax avoidance schemes. In Budget 2020 the Chancellor announced that these measures would be legislated in Finance Bill 2020-21. Draft legislation is published alongside this consultation document.
- 2.6 On 19 March 2020, HMRC published its strategy for tackling promoters of mass-marketed tax avoidance schemes.² This sets out how HMRC will tackle promoters, including working closely with partner bodies to do so, and how HMRC will support taxpayers to steer clear of avoidance. The strategy sets out the package of measures included in this consultation document. It makes clear the government's commitment to take action to ensure HMRC gets the information it needs to investigate tax avoidance schemes and to reduce the scope for promoters to market tax avoidance schemes, whilst

¹ [Measuring Tax Gaps 2020 Edition](#)

² [Tackling promoters of mass-marketed tax avoidance schemes](#)

enabling tax advisers who adhere to high professional standards to go about their business unhindered. The strategy also provided details of the future steps that the government have committed to take. The document signalled that additional policy measures would be announced at Autumn Budget 2020 that would:

- disrupt the business model of promoters
- disrupt the economics of tax avoidance
- give HMRC additional powers to tackle promoters

More detail will be published on these policy measures at Autumn Budget 2020.

Promoters, enablers and advisers

2.7 A promoter of a tax avoidance scheme is generally someone who designs or markets the tax avoidance scheme or is responsible for its organisation.

2.8 Enablers are any person who facilitates the use of a tax avoidance scheme. They are broadly defined as anyone who plays a part in designing, marketing, managing or financing these schemes.

2.9 Promoters of tax avoidance schemes are rarely members of professional bodies. **Many tax advisers adhere to high professional standards and are a very useful source of advice and support to taxpayers. The measures in this note are not aimed at such professionals.**

2.10 On 19 March 2020 the government launched a call for evidence into raising standards in the tax advice market. The government is seeking views through that call for evidence on a range of potential approaches to tackling issues of poor performance in the tax advice and wider tax services market³.

2.11 While that call for evidence covers the services provided by promoters, it raises broader questions on standards of competence and behaviour across the wider tax advice market, whereas the proposals that follow in this consultation document are focussed on strengthening the existing anti-avoidance regimes. The proposals here aim to directly tackle promoters who continue to promote tax avoidance schemes, the majority of which do not work, whose actions lead taxpayers to build up large tax bills, and to tackle those promoters who take every opportunity to sidestep the rules or delay their impact so that they can continue to market their schemes.

2.12 Promoters often seek to sidestep the rules or delay their impact by exploiting the structures and safeguards included in the legislation aimed against them. They might, for example, simply deny that they are promoters and assert they do not need to comply with requirements to provide HMRC with information; or strongly discourage their clients from

³ [Call for Evidence into Raising Standards in the Tax Advice Market](#)

settling with HMRC, even when they want to, in order for the promoter to avoid meeting a threshold that would enable HMRC to take action against them.

- 2.13 Generally, the onus is on HMRC to demonstrate tax arrangements are an avoidance scheme before action can be taken. Promoters make every effort to avoid providing information to HMRC and prolong discussion for as long as possible. This makes it difficult for HMRC to demonstrate the arrangements are avoidance and take prompt action to stop a tax avoidance scheme being sold.
- 2.14 These promoters are often fleet of foot, swiftly moving their activities from one legal entity to another, or to entities offshore, for example by moving their business to a different and newly formed company and then continuing trading. This makes it difficult for HMRC to scrutinise them or to warn potential clients at an early stage of the possible consequences should they use a scheme.
- 2.15 Promoters rarely tell their clients that the product they are offering is an avoidance scheme, and they do not explain the risks of entering the schemes they sell. Instead, promoters may promise implausibly low tax bills and give assurances that their arrangements cannot be successfully challenged by HMRC. However, individual taxpayers are legally responsible for getting their tax right and will eventually need to pay the additional tax they owe, often having already paid out substantial fees to the promoters they used.

This consultation

- 2.16 The government recognises the need for targeted and proportionate regimes that enable HMRC to identify avoidance and to tackle quickly those promoters who do not comply with their obligations, whilst ensuring tax advisers who adhere to high professional standards can go about their business unhindered. The measures proposed would help strike an appropriate balance, helping ensure those regimes operate effectively.
- 2.17 The proposals are designed to strengthen the existing anti-avoidance regimes, which provide a mechanism for ensuring there is transparency for taxpayers and others around avoidance schemes, and to change the behaviours of those involved in promoting and enabling schemes. The proposals described in this document make changes to those regimes and would work in conjunction with the guidance and governance already attached to those regimes. The annex to this document includes links to all relevant legislation and guidance on these regimes.
- 2.18 The government recognises that there are many people who provide good quality advice and support to taxpayers, particularly in the tax and accountancy profession, who will have an interest in these measures and is keen to hear their views.
- 2.19 Please send any comments on this consultation document to ca.consultation@hmrc.gov.uk. The closing date for replies is the 15th September 2020.
- 2.20 The following regimes are the subject of this consultation:

- Disclosure of Tax Avoidance Schemes (DOTAS) and Disclosure of Avoidance Schemes: VAT and other indirect taxes (DASVOIT), under which promoters of schemes have to give HMRC certain information about both their schemes and their clients.
- Promoters of Tax Avoidance Schemes (POTAS), which enables HMRC to monitor the activities of those who repeatedly sell schemes which fail, and to make it hard for them to do so.
- Enablers of Tax Avoidance, which allows HMRC to take action against those engaged in design and sale of abusive tax arrangements.
- The General Anti-Abuse Rule (GAAR), which enables HMRC to take action in relation to both the promotion and use of abusive tax arrangements. This document deals in particular with the application of the GAAR to partnerships.

2.21 This document explains the proposed changes to these regimes and how they would operate to enhance their effectiveness. It asks for the views of those with an interest in these regimes and is intended to promote a dialogue to make sure these changes are clearly focused and targeted.

2.22 The government is also publishing today a call for evidence on tackling disguised remuneration schemes, which seeks views on what further action the government should take to tackle promoters of tax avoidance schemes. The government welcomes views from stakeholders on whether further action is required beyond the proposals to tighten the existing regimes which are set out in this consultation. The call for evidence is available at <https://www.gov.uk/government/consultations/call-for-evidence-tackling-disguised-remuneration-tax-avoidance> and will close on 30 September 2020.

3. Tackling promoters who do not disclose avoidance schemes to HMRC

Background

3.1 DOTAS was introduced in 2004 and seeks to provide HMRC with early information about new tax avoidance schemes, how they work and those who use them. Early knowledge of tax avoidance schemes informs and can accelerate policy and legislative change and helps identify which taxpayers have used the scheme to inform HMRC's operational work. It relies on a set of prescribed "hallmarks" to describe what type of schemes need to be disclosed. Tax avoidance schemes must be disclosed when they fall within a hallmark and the main benefit, or one of the main benefits expected from them, is the obtaining of a tax advantage.

3.2 DOTAS has four elements:

- Disclosure – a promoter is required to provide information to HMRC about tax avoidance schemes, including describing how they work. Where schemes are disclosed HMRC issues a Scheme Reference Number (SRN).
- Ongoing obligations – a promoter must give the SRN to any client who has used the scheme and must provide HMRC with information about users to whom they have given an SRN.
- Information powers – to enable HMRC to obtain the information it needs to investigate suspected failure to comply with the DOTAS rules and to decide whether an SRN is required.
- Penalties – due where someone fails to comply with various aspects of DOTAS.

3.3 As noted in paragraph 2.9 above, the proposals here are not focussed on those tax advisers who adhere to high professional standards. On the rare occasions where HMRC has a need to seek information from such advisers about tax avoidance schemes, the existing DOTAS powers work well. Box 3.1 describes how DOTAS enquiries would typically work with such advisers.

Box 3.1 - Case study, DOTAS enquiry to a tax adviser with high professional standards

Taxation Advisers ABC develops some arrangements which it believes will offer tax efficiencies for its clients. The firm analyses its idea carefully, refers to DOTAS legislation and HMRC guidance and concludes that its idea does not meet any of the DOTAS criteria and need not be disclosed to HMRC. It begins to market the idea to clients and show it on its website.

Subsequently, HMRC finds out about the arrangements, which it believes meet one of the hallmarks in the DOTAS regime and should have been disclosed to them. They contact Taxation Advisers ABC, ask whether the arrangements should have been disclosed and if not, why not. The firm responds promptly to HMRC's request and after further discussion accepts that a disclosure is required. Without further prompting it makes a disclosure which HMRC accepts and HMRC issues a scheme reference number which the firm passes to its clients.

In cases such as this the adviser may also conclude that advising on such a tax avoidance scheme is no longer appropriate for it as a professional firm or for its clients.

3.4 However, a number of promoters are increasingly failing to voluntarily meet their obligations to disclose tax avoidance schemes and are not responsive to any engagement by HMRC, requiring HMRC to take action to force the disclosure. Promoters use tactical manoeuvres such as restructuring in the face of challenge by HMRC (for example, moving their business to new companies), protracted circular correspondence and simply denying they are promoters when evidence suggests otherwise. Enforcing existing information powers is time consuming and requires applications to a tribunal which can significantly add to the time it takes to investigate thoroughly. During this time, there is no effective bar to promoters continuing to promote their schemes, meaning that new clients continue to get involved in avoidance that in many cases is destined to fail and leave them with big tax bills. The proposals detailed at paragraphs 3.13 to 3.25 below would amend the DOTAS legislation to tackle these issues and ensure that DOTAS continues to work effectively. The case study in box 3.2 gives a typical example of the challenges in enforcing the current rules.

Box 3.2 - Case study, DOTAS enquiry to a non-co-operative promoter

Promoter XYZ develops some arrangements which it believes will offer considerable tax gains to its potential clients, but which it thinks HMRC is likely to challenge as it believes the arrangements would be caught by the DOTAS criteria. As a DOTAS scheme reference number would make the product less attractive to potential clients, Promoter XYZ decides not to disclose the arrangements to HMRC. It decides to keep the product confidential, and so does not publicise it on its website, instead relying on contact with existing clients and through trusted intermediaries.

HMRC subsequently finds out about the arrangements, which it believes should have been disclosed. HMRC contacts Promoter XYZ to ask whether the arrangements should have been disclosed and if not, why not. Promoter XYZ responds via a legal

representative contending that the arrangements are not disclosable. The company fails to engage in a meaningful way with ensuing HMRC enquiries, while continuing to charge fees for selling the arrangements and not telling new clients of the risks. To progress the case HMRC must apply to the First-tier Tribunal (FTT) for a disclosure order. It issues Promoter XYZ with a letter before taking action setting out the HMRC case, which the promoter ignores.

HMRC applies for the disclosure order and some months later the FTT hearing takes place. The FTT decision is subsequently issued some time later. During this period, which could be 18 months plus, Promoter XYZ continues to sell the scheme and still does not inform its clients of HMRC's concerns about the scheme. The FTT decides that the scheme should have been disclosed but Promoter XYZ continues not to comply, leading to separate penalty litigation.

Current position

- 3.5 The information powers in DOTAS currently require a person suspected of promoting a scheme to state whether arrangements, or proposed arrangements, which form the scheme, are notifiable by them, and their reasons for their opinion. Where someone states that the scheme they are promoting does not need to be disclosed, HMRC can then apply to a tribunal to ask for evidence in support of the reasons given.
- 3.6 DOTAS also provides a power for HMRC to request a tribunal to require someone suspected of introducing clients to the scheme (an 'introducer'), to identify who they have sold the arrangements to and the promoter of the scheme.
- 3.7 Where a person, such as a promoter or introducer, provides no information after a tribunal has required it, penalties can be imposed but that requires a further tribunal hearing.
- 3.8 There are penalties within the regime to encourage compliance. However, the requirement for HMRC to approach a tribunal to obtain the information it needs, and again to secure penalties where that information is not provided takes time – often months and sometimes more than a year. While HMRC is seeking to obtain the information, which it needs to decide whether a disclosure is needed, the promoter continues to sell the scheme to new clients.
- 3.9 Increasingly, promoters are basing themselves offshore (or purporting to do so) which makes it easier to sidestep the requirements of DOTAS and effectively put themselves beyond reach. In these instances, obligations to disclose are currently passed on to the users of the schemes, and the tax avoidance scheme may continue to be sold by promoters unchallenged.
- 3.10 The aim of exercising the existing information powers is to put HMRC in a position to obtain an order from a tribunal that a scheme is disclosable. The route to receiving such information is not a smooth one, with promoters resisting the exercise of the powers. For example, some promoters will mount an argument, not on the basis of the scheme itself

but instead, on the question of whether they are a promoter. Box 3.2 above described some of the difficulties experienced by HMRC. A further overview of how this process commonly operates is set out in box 3.3:

Box 3.3 – overview of typical difficulties experienced by HMRC when engaging promoters under the DOTAS regime

- HMRC spots something that might need to be disclosed and asks informally for information
- Promoter does not provide the information, fails to respond or claims not to be a promoter
- HMRC requires the promoter to give information about its role and the scheme formally
- HMRC goes to tribunal for information power
- Promoter still does not provide information
- HMRC goes back to tribunal for penalties
- Promoter finally provides information, typically after 12-18 months
- Promoter does not disclose
- HMRC goes to tribunal for a disclosure order. Such an order considerably increases the maximum penalty for failure to disclose.
- Promoter finally discloses

3.11 Even where HMRC manages to obtain some information about a scheme, it can take a long time to build a case that disclosure is required. There is then further time to take the matter to a tribunal and obtain a decision. During this time the promoter behind the scheme in question is still able to sell that scheme and to side-step their obligations, for example by making the entity selling the scheme insolvent. Additionally, there is no legal obligation for that promoter to tell their clients of HMRC's interest in its scheme meaning that clients, both existing and new, will often know little or nothing of the risks associated with the scheme.

3.12 Currently HMRC can only name promoters and inform the public about their activity in limited circumstances⁴. This limits HMRC's ability to inform taxpayers about undisclosed schemes, such as those described in boxes 3.2 and 3.3, to steer clear of through publicly naming the scheme and the promoter.

⁴ See Section 316C Finance Act 2004

Legislative changes proposed for Finance Bill 20/21

- 3.13 The key proposal here is for changes to DOTAS to require information to be provided at an earlier stage. The proposed changes are an important component of this package of proposals for tackling promoters of tax avoidance. Box 3.4 below provides an overview of how the proposals would work in practice.
- 3.14 The changes to DOTAS would enable HMRC to obtain information and documents about arrangements that it suspected were notifiable at a much earlier stage. This would be achieved through a proposed new information power, which would require the provision of all documents and information that relate to the arrangements or proposed arrangements in question. This would include details of all parties that are involved in the selling and operation of the scheme. An example of how the new power would operate follows the description of the proposed changes in box 3.4 below.

Box 3.4 – how the proposed powers would operate

Promoter XYZ develops some new arrangements which it believes will offer considerable tax gains to its clients, but which it thinks HMRC is likely to challenge as the promoter believes the scheme will be within the DOTAS criteria. As this challenge would make the product less attractive to potential clients, Promoter XYZ decides not to disclose the arrangements to HMRC.

Subsequently, HMRC finds out about the arrangements which it believes should have been disclosed to it. Having considered Promoter XYZ's previously limited co-operation with HMRC, HMRC issues an information notice to Promoter XYZ giving it 30 days to provide information to satisfy HMRC that the arrangements are not disclosable and do not have a tax advantage as their main purpose. At this point, HMRC also publishes the fact that it has issued an information notice regarding this scheme as it believes the arrangements are disclosable (but Promoter XYZ is not named at this time).

After 28 days, Promoter XYZ provides very limited information that is insufficient to dissuade HMRC of its belief that the scheme should be disclosed. Accordingly, three days later HMRC issue a Scheme Reference Number on the arrangements to Promoter XYZ.

At the same time, HMRC writes to Promoter XYZ to say it intends to publish details of the scheme and the promoter and asks if there are any reasons why Promoter XYZ should not be named. It receives no reply and so publish those details, enabling potential purchasers of the scheme to make a properly informed decision.

HMRC must ensure that it has evidence to substantiate the issue of the information notice to Promoter XYZ. The evidence must satisfy HMRC's reasonable suspicion that the scheme is notifiable, at least one hallmark exists, and a tax advantage is the main purpose or one of the main purposes of the scheme arrangements. There must also be clear evidence that Promoter XYZ is involved in the supply chain of the arrangements.

Clear guidance, including governance procedures, would be followed by HMRC on all of the procedures before issuing a notice or any of the subsequent steps against Promoter XYZ.

3.15 Under the proposals, where a scheme is not disclosed and HMRC has reason to suspect that the main purpose, or one of the main purposes, of the scheme is the obtaining of a tax advantage, it would be able to issue a notice requiring information about the scheme to be provided within 30 days. The proposed time period is 30 days so that HMRC can get information about the scheme quickly with a view to informing taxpayers promptly.

Q1. Would 30 days give a reasonable amount of time to furnish HMRC with information on the schemes that the promoters or enablers have been promoting or enabling?

3.16 If the new proposal only applied to promoters as defined in DOTAS it is likely that HMRC would continue to face challenges from promoters claiming that they were not a promoter. Similarly, where the promoter was offshore there could be further difficulties in ensuring the promoter complied with a notice. As such it is proposed that the notice could be issued to any party that HMRC believed to be in the supply chain for the scheme. This is wider than the definition of a promoter in the DOTAS regime to ensure that any recipient of a notice would be obliged to respond and either provide the information or set out their reasons why they do not hold that information, for example, because they do not have a role in the supply chain.

Q2. Would the proposed approach prevent persons from obstructing enquiries by claiming not to be a promoter, or in other ways such as by restructuring or moving offshore? If not, why not?

3.17 The proposals would enable HMRC to publish details about the scheme in question, to warn taxpayers that HMRC reasonably believes that the arrangements are a tax avoidance scheme. This would include details of the scheme, including its name if known, how it purports to operate and why HMRC believe it fails. However, HMRC would not publish the name of the promoter or enabler at this initial notice stage.

Q3. How useful would information on the scheme be, without the name of the promoter, to help potential purchasers of the scheme understand the risks of using it? How might this information be published in order to be most helpful?

3.18 The government proposes that, if no information is received by the end of the 30-day period, or the information provided is not sufficient to satisfy HMRC that the scheme is not disclosable, HMRC would be able to issue a Scheme Reference Number (SRN) to all parties involved in the designing, marketing, organisation, and management of the scheme at that time. All those in receipt of the SRN would be required to pass it on to anyone else using or involved in the scheme, in the same way they are currently required to when an SRN is issued under DOTAS. Recipients of the notice that *had* shown that they were not part of the supply chain for the scheme would not receive an SRN.

3.19 Once an SRN is issued under the proposed process, HMRC would have a new ability to publish further information about the scheme at any point over the next 12 months. This might include the names of the promoters and any enablers, and other relevant information about all those in the supply chain to whom the SRN was sent. Where HMRC

planned to name a promoter, enabler or other person involved in the scheme, the proposed safeguard here would ensure that HMRC would first give them the opportunity to give reasons why they should not be named.

3.20 There are no proposals to change the existing obligations and duties within DOTAS, such as the requirement to notify HMRC of proposals and arrangements, to pass on the SRN and to notify HMRC of each use of the scheme. Instead, under the proposals, these obligations would continue to operate for schemes to which the new rules applied. The scheme would also be a 'DOTAS scheme' for the purposes of Accelerated Payments (APs) although APs would only be considered when the relevant statutory tests are met.

Safeguards

3.21 These changes would extend HMRC's powers under DOTAS. The government recognises the importance of having robust safeguards in place. The government proposes that promoters, enablers and others subject to these proposed rules would have a right of appeal against the issue of an SRN under this procedure. The grounds of appeal would be that HMRC did not have "reasonable grounds for believing" that the arrangements are notifiable and had not met the conditions for issuing an SRN under this procedure.

Q.4. Are the grounds of appeal against the issue of a new SRN the right ones?

Q.5 Are there any other grounds that should be considered?

3.22 The government does not propose that there should be a right of appeal against an information notice. This is because there is provision for a right of appeal against the potential consequence of not complying with the notice, the issue of an SRN. Anyone who believes they should not have to provide any information requested by HMRC, or that they do not hold any such information, would have the opportunity to make those representations for HMRC to consider.

3.23 HMRC would publish guidance on the types of factors it would take into account when deciding whether to issue an information notice. It would also apply strong internal governance to ensure the process is properly overseen and its use authorised at the appropriate levels.

3.24 The government proposes that the launching of an appeal against the issue of an SRN would *not* prevent HMRC from publishing details of the scheme and naming those who receive an SRN. That is because delaying the publication of these details until after an appeal had been finalised would re-introduce opportunities for promoters to frustrate and delay HMRC's efforts to tackle the avoidance and would mean that taxpayers would continue to be in the dark about HMRC's concerns about the scheme. Additionally, if the recipient of a notice provides sufficient information within the 30 day window then naming would not be necessary; so, the best way for the recipient to avoid being named is to cooperate with HMRC. If an appeal is lodged and that appeal is ultimately successful, HMRC would be required to remove those details from the public domain.

3.25 Anyone HMRC intends to name would be given the opportunity to make representations to HMRC before being named, in line with other existing powers to name taxpayers by HMRC.

Q.6 Would naming those in the supply chains for promoting tax avoidance schemes help make taxpayers aware that they risk falling into a scheme that HMRC suspects does not work?

Q.7 Are there any other specific procedural safeguards which you think should apply to this power but which would not dilute the effectiveness of the proposed measure?

Q.8 To what extent do the safeguards proposed achieve a balance between ensuring that the new power would be used appropriately and ensuring that the new powers are not sidestepped by promoters and others, allowing them to continue to market their scheme to taxpayers?

Disclosure of Avoidance Schemes: VAT and other indirect taxes (DASVOIT) – further consequential proposal

3.26 DASVOIT was introduced by Finance (No2) Act 2017 to enable HMRC to obtain early information about indirect tax avoidance schemes, including how they are intended to work and those who use them. DASVOIT has been designed to be structurally and conceptually similar to the DOTAS regime and the government further propose that the changes described here for DOTAS would also apply to DASVOIT in the same way.

Q9. Do you agree that the proposed new rules, as described above, should also apply to DASVOIT?

Q10. Are there any modifications to the proposals for the new power in DOTAS that would be needed in order for it to work appropriately in the DASVOIT regime?

Commencement

3.27 If the proposals were implemented in the next Finance Bill it is proposed that the amendments to require provision of information would come into effect in relation to any arrangements promoted on or after Royal Assent of the Finance Bill, including existing arrangements that continue to be promoted on or after that date.

4. Dealing with promoters who sell schemes that do not work

Background

- 4.1 POTAS was introduced in 2014 to enable HMRC to tackle promoters of tax avoidance schemes who display high-risk behaviour. The objectives of the regime are to change the behaviour of promoters and to deter the development and availability of tax avoidance schemes. The legislation gives promoters a chance to change their behaviour voluntarily or to face an escalating series of sanctions.
- 4.2 While the regime has been successful in deterring some promoters, others use a number of methods to frustrate HMRC's enquiries. Promoters often fail to comply with, or seek to avoid or delay the application of, the legislation designed to deal with them. Commonly, promoters play for time, providing half answers or no answers at all to HMRC enquiries, and using the procedural safeguards to further delay HMRC from getting final court decisions. Often, once HMRC has all the information it needs to take action against such promoters, they move their business to new companies or stop selling one scheme and introduce a new one.
- 4.3 This behaviour means that HMRC is often unable to tackle or restrict the sale of tax avoidance schemes at an early stage, despite HMRC being confident that they do not work and having a reasonable suspicion that the sole or main purpose of the arrangements is to achieve a tax advantage. Any delay in HMRC being able to take action increases the time during which the scheme can be sold. This means more clients buy into the scheme or continue to use it for multiple tax years, and end up facing big tax bills on top of the fees they paid the promoters.
- 4.4 The government is looking to make a number of changes to the POTAS regime to strengthen its effectiveness against high-risk promoters selling tax avoidance schemes.

Early requirement to stop promoting schemes--current position

- 4.5 HMRC can currently give notice to a promoter to stop selling arrangements provided certain conditions are met, by issuing a 'stop notice'. A stop notice can only be issued to a person who promotes a scheme which has been subject to at least one follower notice. Follower notices are issued by HMRC to those who use a tax avoidance scheme which has already been defeated in another person's litigation, with no prospect of further appeal. Given that a scheme needs to be finally defeated in this way before a follower notice can be issued, this means HMRC can only issue a stop notice after each of the following have occurred:
- a scheme has been identified, all the necessary information obtained, and it has been investigated;
 - HMRC has opened an enquiry into one person who used the scheme – typically this can only be done once an individual has filed their Self-

Assessment return, which can be more than 20 months since they first used the scheme; and

- HMRC has issued a follower notice to another user of the scheme.

Only when all of these steps have taken place can a stop notice be issued.

4.6 Completing all these steps can take a long time – often years – and this prevents HMRC making an early intervention to prevent the promotion of a scheme, even though HMRC can be confident at an early stage that the scheme does not work. During this period, the promoter can continue to sell the scheme and more people use it for more years, leading to big tax bills on top of the fees they pay the promoter. An example of the challenges experienced by HMRC is included in box 4.1 below

4.7 A promoter who does not comply with a stop notice meets a ‘threshold condition’ as set out in the POTAS regime. This may lead to HMRC giving the promoter a conduct notice under section 237 Finance Act 2014. A conduct notice imposes conditions on the promoter which require it to change its behaviour. If the promoter does not change its behaviour, HMRC can – subject to the agreement of a tribunal – take further steps that can lead to strong sanctions.

4.8 If the promoter transfers their promoting activities to a different but connected company, then that connected company as a separate entity cannot be given a stop notice as it was not the original promoter of the defeated scheme. If the first company carried out no further promoting activity after the stop notice was issued, it would not meet a threshold condition as they have not breached the requirements of the stop notice. This means neither entity could be issued with the stop notice and the scheme can continue to be sold to new users through the new entity.

Box 4.1 Typical example of the current stop notice process

Promoter A has been behind a number of tax avoidance schemes, each being shut down after a year or so, with clients then transferred into each successive new scheme. Promoter A creates companies to run its promotion activities through. HMRC identifies the latest such company, Company Z, which HMRC believes is simply the latest company that is promoting a scheme that does not work. HMRC has to investigate the scheme and open enquiries into the users of the scheme. HMRC then has to wait until the enquiries are concluded by agreement with an individual, or more likely until HMRC has argued the case in front of a tribunal and received judgement in HMRC’s favour. HMRC then has to issue a follower notice to another user of the scheme. Only after this process has taken place can a stop notice be issued to the promoter.

Typically, the company used by Promoter A would have ceased before this point with activity moved into another new company. Completing these steps can take a long time, often years, and this prevents HMRC making an early intervention to prevent the promotion of the scheme, even though HMRC can be confident at an early stage that the scheme does not work.

During this period the promoter can continue to sell the scheme and it is used by more people, leading to large tax bills on top of the fees they pay the promoter.

Proposed changes

- 4.9 The government wants to stop tax avoidance schemes at an earlier stage and as soon as HMRC has a reasonable suspicion that there is a scheme being sold with the sole or main purpose of achieving a tax advantage, and that it does not work.
- 4.10 The proposals would introduce amendments, as outlined in the draft legislation, to the existing power to issue stop notices so that HMRC would be able to issue them earlier to stop the sale of tax avoidance schemes (see here box 4.2).
- 4.11 Under the proposals, the changes would provide that a stop notice can be issued for new schemes where HMRC has reason to suspect that (i) a person is a promoter, (ii) that the promoter is promoting arrangements where at least one of the benefits is a tax advantage, and (iii) that HMRC has reasonable grounds to suspect do not deliver the tax advantage promised.
- 4.12 Under the proposals, the changes would also provide that a stop notice can be issued for new schemes where both (i) HMRC has reason to suspect that a person is a promoter and that promoter is promoting arrangements where at least one of the benefits is a tax advantage, and (ii) the promoter meets a number of conditions which include the promoter meeting any one of the following criteria, namely that the promoter:
- has previously been found to have breached the POTAS regime
 - promotes schemes that are caught by the loan charge (see here, schedule 11 Finance (No 2) Act 2017) or are caught by Part 7A Income Tax (Earnings and Pensions) Act 2003 or sections 23A-H Income Tax (Trading and Other Income) Act 2005 for schemes where there are loans made on or after 6 April 2017
 - is issued with a scheme reference number in relation to any scheme under DOTAS, including under the new provisions in Chapter 3
- 4.13 These criteria would ensure the measure is aimed at high-risk promoters who are promoting tax avoidance schemes that HMRC has good reason to consider do not work. The changes would enable HMRC to intervene earlier in the promotion of such schemes, before the issue of follower notices, so that taxpayers cannot be drawn into buying schemes that do not work. Whilst no changes are proposed to the penalties for selling schemes covered by a stop notice (or any other condition associated with stop notices), because the stop notices would be issued at a much earlier point in the process these proposals would also accelerate the penalties and other consequences for any promoter who does not comply with a stop notice and continues to sell schemes.

Box 4.2 The proposed new process for stop notices

- Under the new legislation, HMRC would be able to issue stop notices at an earlier stage as soon as HMRC has reasonable suspicion that there is a scheme that does not work. Full guidance would be published on how these decisions are made.
- A stop notice would be sent to the promoter, who would also be informed that a POTAS Conduct Notice would be considered by HMRC if the stop notice is not complied with.
- HMRC would be able to act promptly - this means that the scheme would stop being sold at earlier point in time, which would mean that there are fewer taxpayers drawn into schemes that do not work.
- A person subject to a stop notice can make a request to HMRC for the notice to cease to have effect if they will discontinue promotion of the scheme in question or if they consider the arrangements specified in the notice do not meet the criteria for issuing a stop notice.
- The person can appeal to a tribunal if the request for the stop notice to cease to have effect is refused by HMRC.
- An Authorised Officer may publish the fact that a person is subject to a stop notice once they are satisfied that all the criteria for publishing have been met and once any appeal has been considered by the First-tier Tribunal or withdrawn.

Q11. Do the conditions for issuing earlier stop notices achieve a sensible balance between ensuring appropriate safeguards are in place, whilst ensuring that HMRC is able to promptly tackle schemes that are destined to fail, for the benefit of taxpayers? If not, how could they be better targeted to achieve this balance?

Q12. Are there any other conditions that should be considered?

4.14 A review of a stop notice can be requested where a person can provide evidence that there is not a scheme, or that the person the notice has been issued to is not the promoter. This is in addition to the existing safeguards that remain in place under the proposals. If the person is not satisfied with the outcome of the review they can appeal to a tribunal.

Q13. How can HMRC best ensure that the internal review and appeals process work appropriately for recipients of stop notices?

4.15 Under the proposals, where a stop notice is issued, the names of the promoters, the details of the scheme and the reasons for the stop notice would be published under the proposed legislation but only after any a decision has been reached by the First-tier Tribunal (if there is an appeal against the notice being issued) or after that appeal is withdrawn. This is to ensure that taxpayers are aware of which promoters are high risk and to discourage them from entering into any tax avoidance scheme that promoter promotes.

Q14. To what extent would publishing stop notices help inform taxpayers of the risks of entering into that scheme?

Q15. If the notice is appealed (and not subsequently withdrawn) – when would publishing of the details of the promoter best provide taxpayers with the information they need? Should this be after the First-tier Tribunal has reached a decision or later?

4.16 As described above (paragraph 4.8), some promoters seek to avoid their obligations by changing their organisational structure (see here also chapter 5) so the government further proposes that the existing POTAS rules on associated and successor bodies be extended so that they apply at an earlier point in time for stop notices. Where a stop notice is issued in relation to the sale of a particular scheme, it would apply to both the entity to which it is issued, as well as to any entities which it was associated with, or successors to that entity. This would help to tackle the small number of individuals involved in promoting tax avoidance who try to circumvent the legislation by creating new entities.

Q16. Would the proposal be a suitable way to achieve the government's objective (as set out in para 4.9)? Are there any modifications that would help deliver that objective more effectively?

Q17. Are there any other specific procedural safeguards which you think should apply to this power but which would not dilute the effectiveness of the proposal?

Commencement

4.17 If the proposals described above are implemented at the next Finance Bill the changes would come into effect on or after the date of Royal Assent of the Finance Bill 20/21 and would apply to schemes being sold after that date (including those where sales began before Royal Assent but continued after it).

5. Dealing with promoters who seek to sidestep the Promoters of Tax Avoidance Schemes Regime

Background

- 5.1 Chapter four explained that POTAS was brought in to enable HMRC to tackle promoters of tax avoidance schemes who display high-risk behaviour. The objectives of the regime are to change the behaviour of promoters of avoidance and to deter the development and availability of tax avoidance schemes. Whilst some promoters have changed the way they operate as a result that is not universally the case.
- 5.2 As described above, some promoters have sought ways to sidestep the POTAS scheme. In particular HMRC continue to see examples of promoters using contrived organisational structures to distance the person behind the promotion of the schemes from the legal body responsible for the scheme.

Removing the ability of high-risk promoters to hide behind corporate or other entities

The current position

- 5.3 Some promoters of tax avoidance schemes continually rearrange the entities they use to promote avoidance schemes to frustrate or slow down HMRC's challenge to them and their schemes. For example, the individuals who are the controlling minds behind one or more avoidance schemes quite often act as "puppet masters", remaining in the shadows and using multiple and different companies and other legal bodies, through which they promote avoidance schemes. Often the underlying promoter sets up companies with stooge directors. The company then sells the schemes designed by the underlying promoter. Once the schemes are sold, and particularly when HMRC raises challenges, the company is closed down or its activity significantly reduced, and new entities are set up to continue the activities.
- 5.4 Some promoters also artificially separate out their promoting activities so that no single entity meets the current description of a promoter, even if collectively all entities would do so by virtue of playing roles which are vital to the design, marketing, organisation or management of a scheme.

5.5 There have been previous amendments to the POTAS regime to address this type of behaviour, but some promoters continue to seek new ways to circumvent those rules. The current rules do not always succeed in enabling HMRC to hold the individual directly accountable for the actions of the entities over which they have control or significant influence. This means that the individual is able to manipulate entities, setting them up and collapsing them at will. The example in box 5.1 below describes the way some promoters are operating.

5.6 The government wants to tackle promoters who carry out their activities by rearranging the entities they use in face of HMRC's challenge, or who artificially separate out their activities to avoid the legislation.

Box 5.1 Case study – example of an individual using company structures to distance themselves from the impact of POTAS

Mr. A has a history of designing and promoting tax avoidance schemes but sets up his operations to create a legal distance between himself and the structure of the business (even though he remains involved in the running of that business).

Mr. A has chosen a specific set up for his business because he knows that under the current attribution rules, an individual with control or significant influence will usually not fall to be treated as a promoter in their own right even if it is their actions which have orchestrated the promoting of the arrangements.

HMRC is aware that Mr. A controls Company B, a promoter of contractor loan arrangements. HMRC challenges Company B which in turn enters administration. Mr. A then simply sets up Company C to continue the activity of Company B. HMRC challenges Company C. Company C enters administration and Mr. A continues to set up new entities to promote avoidance and escape the obligations of the POTAS regime.

The proposals for change

5.7 The proposals here would see the responsibility for the obligations within POTAS, and for any failure to comply with them, placed on the people behind the kind of manipulative behaviour described in box 5.1. This would be achieved by widening the existing legislation to include individuals who control, or significantly influence, entities that carry on promotion activities, as well as the people they work through in the UK (as described in box 5.2) and other entities (as described in box 5.3) that have been set up in a fragmented way to frustrate HMRC's ability to tackle them.

Box 5.2 Case study – example of how the proposed changes would work where an offshore promoter operates through UK intermediaries.

Mr. B is an overseas promoter. He has an associate in the UK, Company Z, which markets the scheme for him. Company Z is carrying out activities under the guidance and instruction of Mr. B. Despite the activity of company Z in the UK, it falls short of being classed as a promoter under the existing rules so HMRC would be unable to challenge it.

Under the proposals to change the attribution rules the actions of company Z would mean that it would be caught by the widened definition of what constitutes carrying on a business as a promoter.

HMRC would therefore take action under POTAS against company Z.

- 5.8 Where a person with significant influence or control sets up a new entity into which they transfer their promoting activities (as in box 5.1), HMRC would, under the proposed changes, be able to attribute POTAS threshold conditions, conduct notices, and monitoring notices to the new entity where HMRC had reason to believe that the new entity was a promoter of tax avoidance.
- 5.9 The proposed changes would enable HMRC to more effectively challenge persons who use separate entities to avoid their legal obligations. The aim of these changes is to tackle the person ultimately responsible for the promotion of schemes, as well as the entities they control or have significant influence over. These changes are not targeted at genuine tax advisers. Any person challenged as a consequence of these amendments would not be subject to the new rules where they demonstrate to HMRC that they are not a person of significant influence or control over a promoter or company.

Box 5.3 Case study – example of how the proposed powers would allow HMRC to tackle promoters who fragment their activity across more than one company.

Mr. C owns three companies, he set the companies up to undertake the promotion of avoidance schemes. Mr. C chose this structure in part to fragment the operations across the three companies (with different elements of its activities in each company) and he knows that, in doing so, evidencing any one company in isolation as a promoter for the purpose of POTAS would be difficult for HMRC.

HMRC wishes to pursue a POTAS action against these companies as they are collectively suspected by HMRC of carrying out promoting activities for Mr. C. Under the current rules this would not be possible but under these proposals HMRC would now be able to consider the application of POTAS by looking collectively at their activity and bringing all three companies and Mr. C into the POTAS regime.

As now, prior to the issue of a conduct notice, the Authorised Officer must provide an opportunity for Mr. C, and any other recipient of the notice, to comment on its proposed terms.

Q18. Are the proposals to deal with promoters who hide behind other business structures/entities or individuals appropriately targeted?

Q19. Does the opportunity to comment on the proposed terms of the conduct notice continue to provide an appropriate safeguard?

Q20. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals (paragraphs 5.7-5.9)?

Tightening the application of the two-year period for conduct notices

The current position

5.10 When a person disagrees with a decision of the government or an administrative body such as HMRC which affects them, they may in certain circumstances apply for a Judicial Review (JR) of that decision. JR is an important safeguard. However, while a JR is in progress, HMRC is often unable to give practical effect to a decision unless and until the court makes a final decision. The government is concerned that promoters may be using the JR process to stymie HMRC's actions under POTAS.

Proposed changes

5.11 The government does not want such litigation to delay or prevent HMRC's scrutiny of promoter behaviour under a conduct notice, which currently can last no longer than two years. Therefore, the draft legislation reflects the government's proposal to extend the two-year period by the time taken for any judicial review. Similarly, other litigation challenges during the two-year period can delay or prevent HMRC's scrutiny of promoter behaviour under a conduct notice and as such the proposals here would also extend the conduct notice time period to take account of these.

5.12 The proposals include the following changes (as outlined in the draft legislation):

- The time taken for any legal challenge would be factored into the length of the conduct notice (so that its effect is actually realised for a full two years by extending the period by the time taken for the challenge).
- HMRC would still be able to go to a tribunal to apply for a monitoring notice after a conduct notice has ended where it is discovered that the breach was during the period the notice was live.
- Where a promoter breached the most serious, or multiple, POTAS threshold conditions the length of conduct notices would be extended up to a maximum of five years. For example, where a promoter failed to comply with the DOTAS legislation and had also been subject to disciplinary action by a professional body, the conduct notice would be extended up to maximum of five years.

- HMRC would be able to transfer the requirements of a conduct or monitoring notice to any entities used by the promoter in the promotion of schemes.

5.13 These changes ensure promoters can still take legal action when they choose to but would allow conduct notices to have a greater impact in changing the behaviours of high-risk promoters and in turn reduce the opportunities for selling schemes that do not work to taxpayers. Box 5.4 describes both the experience of HMRC in dealing with promoters under the current rules and how that experience would change under these proposals.

Box 5.4 – The interaction of Judicial Reviews and conduct notices issued under POTAS

Promoter D is issued with a conduct notice for having met a threshold condition under POTAS. Promoter D sends a pre-action letter for application for Judicial Review (JR).

HMRC seeks meetings with Promoter D to discuss matters but the promoter often cancels meetings at the last minute. When ultimately a meeting takes place, the information provided leads to minor changes being made to the conduct notice but by now six months of the two year conduct notice period have elapsed.

Notwithstanding the earlier discussions the promoter submits an application for Judicial Review into the modified conduct notice. The promoter again delays meeting with HMRC and by the time the permission hearing takes place a year has elapsed.

A JR hearing is scheduled and while waiting for the hearing the promoter makes no contact with HMRC until two weeks before the JR hearing when the promoter withdraws their claim.

By this point in time, under the current POTAS rules there is only one month left for the conduct notice to run as the maximum length of the conduct notice is two years. Therefore, Promoter D has put the effect of the notice on “hold” or restricted its application.

The proposals here would provide that in future the two year time period for a conduct notice would be extended so that it *applies* for its full term. The promoter’s legal challenge can still go ahead but would not prevent HMRC’s scrutiny of promoter behaviour while the conduct notice applies.

Q21. Do the proposed changes achieve an appropriate balance between providing a clear window for those in receipt of a conduct notice and the need to ensure that promoters cannot continue to manipulate the rules to prevent HMRC taking action against them?

Q22. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals (paragraphs 5.11-5.13)?

Conduct notice threshold condition amendments

The current position

5.14 Currently not all failures under DOTAS bring promoters within the POTAS regime. For example, where a promoter fails to disclose a scheme under DOTAS but a tribunal has determined that it was disclosable; or where a promoter fails to comply with a DOTAS information notice, this would not meet the threshold conditions for the POTAS regime.

Proposed changes

5.15 The proposals here would amend the DOTAS threshold condition to include DOTAS disclosure failures of any nature. This would be subject to the existing safeguards in POTAS that require any failure to be significant before action under POTAS can be taken. The proposals would also amend the information powers threshold condition in the POTAS regime, so that information notices issued under DOTAS and other disclosure regimes' information powers would be included. This is to ensure that the high-risk promoters that the POTAS regime is seeking to tackle are correctly brought into the POTAS regime. Box 5.5 includes an example of how these proposals would change the circumstances in which HMRC would be able to take action on a promoter under POTAS.

Box 5.5 – Taking action under POTAS where a promoter has failed to disclose a tax avoidance scheme under DOTAS failures.

Promoter E fails to disclose their scheme under DOTAS. HMRC becomes aware of the scheme and after compiling evidence on the scheme it presents its case to a tribunal who determines that it was disclosable.

Currently, although a tribunal has found that the scheme should have been disclosed, this is not in itself a trigger for POTAS and as such action under POTAS cannot be taken.

Under the new legislation, once HMRC had satisfied itself that the failure to disclose was significant under the terms of the existing POTAS rules and processes, it would be able to issue Promoter E with a conduct notice based on that failure.

Q23. Are the proposed updates to the POTAS threshold conditions to include further DOTAS failures proportionate?

Q24. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals (paragraph 5.15)?

Other technical amendments

5.16 As part of the package to tackle promoters effectively, the draft legislation also contains further minor technical amendments to ensure the efficiency of the POTAS regime such as allowing HMRC the ability to withdraw and reissue conduct notices. These proposed minor changes are explained in the Explanatory Note that accompanies the draft legislation.

Commencement

5.17 If the proposed changes are implemented in the next Finance Bill the changes would come into effect on or after the date of Royal Assent which would be expected to be in 2021.

6. Penalties for those who enable tax avoidance schemes that fail

Background

- 6.1 The penalty for enablers of tax avoidance (termed ‘abusive tax arrangements’ in the legislation) was introduced by Schedule 16 Finance (No. 2) Act 2017. The aim of the legislation is to influence and promote behavioural change in the minority of tax agents, intermediaries and others who design, market or facilitate the use of abusive tax arrangements, by ensuring that such enablers are held accountable for their activities if the arrangements they have enabled are later defeated.
- 6.2 HMRC is using the legislation to tackle enablers of marketed tax avoidance schemes which are sold to and used by multiple individuals and businesses (referred to here as “multi-user schemes”). However, the intention of the legislation in relation to such schemes is currently being frustrated by:
- HMRC’s inability to enquire at an early stage into who enabled the schemes that were used by the taxpayers that HMRC is investigating, because in practice the legislation does not work in the way we had expected. Specifically, we had expected the information power to work in the same way as the information powers to check a person’s tax position (Schedule 36 Finance Act 2008) but in practice the legislation requires that we defeat the scheme before we can issue an information notice, and
 - the need for more than 50% of the cases in which a taxpayer has used the scheme to have been defeated before HMRC can charge penalties.
- 6.3 The proposed changes to the legislation would ensure that HMRC can obtain the relevant information at an earlier stage. This reflects what was intended when the legislation was brought in: to engage with potential enablers at the earliest possible moment, and to use the information powers in much the same way as in a normal tax intervention. The proposed changes would also enable HMRC to assess penalties at an earlier point, when a multi-user scheme was shown not to work. The proposed changes would also allow HMRC to name enablers who have received penalties under the regime earlier than under the current rules, where those penalties relate to multi-user schemes.
- 6.4 Tax professionals who already adhere to professional standards, and those who provide clients with services in respect of genuine commercial arrangements, would not be impacted by the proposals outlined below. The proposed changes would not alter the existing safeguards already in the legislation that ensure that the regime is appropriately targeted. In particular, the GAAR Advisory Panel provides an important safeguard for the purpose of applying the legislation: no penalty can be charged unless the tax arrangements are defeated and HMRC has obtained an opinion from the GAAR Advisory Panel in relation to those tax arrangements or equivalent arrangements. In addition,

where, having considered the relevant GAAR Advisory Panel opinion, HMRC charges a penalty the enabler would still be able to appeal against that to a tribunal. An enabler would also still be able to make representations, which HMRC must consider, before their name is published. Importantly, under the proposed changes to the information power, HMRC would still only issue a notice where an officer of HMRC suspects a taxpayer has used abusive tax arrangements, and suspects that the recipient of the information notice enabled that use.

Information powers

The current position

- 6.5 To reach a view on whether someone has enabled an abusive tax arrangement HMRC needs detailed information about that scheme (for example, contracts, payment details, supporting correspondence) and details of the enablers who sold the scheme or facilitated its use. Once HMRC has evidence of an abusive tax arrangement being used, it would use the information powers to gather the required information to decide whether an enabler was involved in the arrangements or not.
- 6.6 Before HMRC can charge a penalty in relation to an enabler it needs to be able to demonstrate that:
- a person has enabled arrangements – HMRC might reach this view by reviewing contracts and payment details
 - the person met the knowledge condition (where appropriate) – for example, the manager of a scheme when carrying out their work, knew or could reasonably be expected to have known, that the scheme was abusive tax arrangements
 - the scheme being sold involves abusive tax arrangements that meet the ‘double reasonableness test’ set out in the General Anti Abuse Rule: that the scheme cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions
 - the enabler received a fee or other consideration for their role.
- 6.7 When the penalty for enablers was introduced, HMRC committed to engage with potential enablers at the earliest practicable point in the investigation process, usually once HMRC has become aware of schemes that it thinks may be abusive, and to issue information notices to enablers under the existing compliance information powers (Schedule 36 powers). We believed that the legislation would allow HMRC to use this power in any case where an officer suspects a taxpayer has used an abusive tax arrangement and one or more particular persons have enabled the use of those arrangements.
- 6.8 It now appears that the legislation does not fully deliver this aim. In the first cases where HMRC thought enablers might be subject to penalties, HMRC tried to obtain information to help ascertain whether or not the suspected enabler had in fact enabled the abusive tax arrangements. Some refused to voluntarily provide the information requested (see case study in box 6.1). Even where a suspected enabler said they wanted to co-

operate, they claimed client confidentiality prevented them from voluntarily providing client information without an information notice, and that HMRC has no power to issue an information notice before the arrangements being enquired into have been defeated.

Box 6.1 - Case study

HMRC identifies a Stamp Duty Land Tax (SDLT) avoidance scheme being used by a taxpayer through its normal compliance work on SDLT returns.

HMRC opens investigations into the SDLT return and collects evidence regarding the steps taken and the tax advantage claimed in the SDLT return. From an examination of the evidence HMRC concludes that it is likely to be an instance of abusive tax arrangements.

At this point, from the information it has, HMRC identifies a number of potential promoters and other enablers and writes to them to explain that HMRC are checking whether the recipients may be liable to penalties for enabling abusive tax arrangements. As part of these checks HMRC requests information from the recipients to help it in its enquiries.

The promoters do not respond to the letter and the other suspected enablers refuse to provide any information until they are served with a formal information request. HMRC does have information powers to ask for this information formally but is unable to use these powers until the taxpayer's return has been fully investigated and the enquiry settled.

The enquiry into the taxpayer continues for 12 months until all matters have been finalised. Only at this point can HMRC use the formal information power and get the information it needs to enquire into the enabler.

6.9 Furthermore, enablers of multi-use schemes have argued that HMRC must have defeated each case in which an individual or business has used the arrangements before an information notice can be issued regarding that particular use. HMRC accepts that there are grounds on which to argue that the legislation does not allow it to gather information at the earliest point in the investigation before it has successfully challenged the use of that scheme by a taxpayer.

Proposed changes

6.10 The proposal here would put beyond doubt that HMRC can use the Schedule 36 information powers in much the same way as we are able to use these powers in a compliance intervention: to check whether a person is, or may become, liable to enablers penalties and, if so, how much those penalties would be. That is, HMRC would be able to use the powers without the need for there first to have been a defeat of the arrangements concerned.

6.11 HMRC is committed to engage with potential enablers at the earliest practical opportunity to obtain enough information to either discount them from further action or to

confirm that a penalty is due. HMRC would, under this proposal, be able to obtain information from persons they reasonably suspect of being enablers at the earliest possible point in the investigation (including where enquiries into the taxpayer who used the scheme are still underway). As a minimum HMRC would need to identify arrangements that they think may be abusive and at least one individual or business who has enabled its use. The legislation would allow HMRC to utilise the information powers to engage with suspected enablers only where there is supporting evidence. It would also provide a clear statutory requirement to provide information for those enablers concerned about client confidentiality.

Q25. Do you agree that this change would enable HMRC to engage with potential enablers and get the required information from them to determine whether an enablers penalty is appropriate?

6.12 As part of these changes, it is proposed that HMRC would also be able to use Schedule 36 powers to allow it to request information from one enabler about other enablers involved in the same scheme. The request would only apply to one or more particular occasions on which HMRC is aware that taxpayers used the abusive tax arrangements. By extending the information power to ask about other enablers in the supply chain, HMRC would be able to better understand and engage early with those who are enabling the abusive tax arrangements. The example in box 6.2 describes how the amended power would operate in practice.

Box 6.2 Proposed model example

Having defeated the SDLT scheme in box 6.1 above, HMRC identifies a new avoidance scheme through its routine compliance work and opens enquiries into the taxpayers who used the scheme. HMRC again concludes that it is likely to be an instance of abusive tax arrangements.

HMRC writes to the promoter of the scheme asking for details about the scheme and also for details of any other enabler who is involved in facilitating the abusive tax arrangements. HMRC issues an information notice to the promoter. The promoter provides the details of an Independent Financial Adviser (IFA) and a conveyancing solicitor who were involved in setting up the scheme.

HMRC writes to the IFA and the conveyancing solicitor to check whether they may be liable to penalties for enabling abusive tax arrangements. Both respond to the requests accordingly, HMRC concludes on the evidence provided that the knowledge test was met and they both facilitated abusive tax arrangements and would be liable to a penalty if the scheme is defeated.

The conveyancing solicitor is surprised to learn that the scheme is an example of abusive tax arrangements and immediately takes steps to strengthen their internal systems to prevent accepting similar business on future occasions. The promoter struggles to find conveyancing solicitors who will facilitate their SDLT avoidance scheme and so withdraws from selling it.

Q26. Where an enabler receives a notice from HMRC seeking information on other enablers in the avoidance chain how readily would the recipient have that information? Would it cause any problems for the recipient of the information notice?

The multi-user scheme percentage condition

The current position

- 6.13 Currently, where the same scheme (that is classed as an abusive tax arrangement) has been used by more than one individual or business, HMRC cannot charge penalties on an enabler of that scheme the first time HMRC successfully defeats it. HMRC cannot charge penalties on anyone involved in enabling those arrangements until it reasonably believes that it has successfully defeated more than half of the cases where an individual or business has used the scheme. This rule is called the '50% threshold' (see here the case study in box 6.3 for a description of how the rule delays HMRC's ability to make progress in tackling an enabler using these powers).
- 6.14 Some promoters of multi-user avoidance arrangements discourage those who have used the arrangements from settling their disputes with HMRC. This has the effect of delaying the assessment of enablers penalties. This in turn means that where the scheme continues to be sold, the threshold will continue to grow and HMRC will not be able to take action, even where it has defeated the scheme, for example by settling with some of the taxpayers who first used it. Enablers sometimes make HMRC aware of additional taxpayers who have used their scheme as the 50% threshold is approached. That increases the baseline for applying the 50% threshold, and further delays the assessment of penalties on the enabler.

Box 6.3 Case study

HMRC has identified an income tax avoidance scheme through its normal compliance work reviewing the Self-Assessment tax return of one individual. It then learns of an additional 150 users of the same scheme.

HMRC opens multiple investigations into the tax returns of taxpayers who used the scheme. HMRC collects evidence regarding the steps taken and the tax advantage claimed. After successfully working through the first batch of enquiry cases and seeking the view of the independent General Anti Abuse Rule Panel, it determines that the scheme is an instance of abusive tax arrangements.

HMRC is not able to issue penalties to the enablers and promoter involved at this stage because HMRC must have first 'defeated' over 50% of the cases where the scheme was used.

After 24 months HMRC is successful in defeating the scheme in the Upper Tribunal. A total of 50 taxpayers have agreed with HMRC that the scheme does not work and have settled their cases accordingly. This though is still not enough. Even though a third of the cases have settled, and the courts have agreed that the scheme does

not work, HMRC is still unable to issue a penalty on the promoter or any of the enablers of the scheme as the 50% threshold has not been met.

The promoter pressurises the remaining taxpayers who used the scheme not to settle their cases with HMRC. Until HMRC can defeat at least another 25 of those additional cases in the tribunals and courts, the promoter and enablers will not face any penalty.

Proposed changes

- 6.15 Under these changes, the first proposal would be that for multi-use abusive tax arrangements HMRC would be able to assess enablers penalties following a judicial ruling in relation to any taxpayer who has used that scheme (where it is final and not subject to appeal, this would include a ruling by the First-tier Tribunal (FTT)). That is, the percentage defeated threshold rule for multi-use arrangements would be removed once one taxpayer who has used the scheme in question had been defeated in court. HMRC would also be able to issue an enabler penalty on the enabler in relation to any subsequent cases where a taxpayer had used that scheme and the taxpayer settles with HMRC.
- 6.16 The threshold percentages are an important aspect of the current legislation. They ensure that penalties are not raised too early in HMRC's enquiries at a time when there is still a possibility that the scheme will work. However, once there is a judicial ruling that is final, the government proposes that this is sufficient grounds to issue a penalty. Making this change would enable HMRC to charge a penalty at an earlier stage, and not wait until the required threshold is achieved. HMRC would also be able to issue penalties subsequently, where the enabler has enabled the same scheme in respect of other taxpayers who used the same scheme who settle without going to a tribunal, without reaching the threshold percentage.

Q27 Do you agree that penalties should be raised in all cases once there is a final judicial ruling confirming that the scheme is abusive avoidance?

- 6.17 Under these changes the second element of this proposal would see the introduction of a tiered approach to determining when HMRC can issue penalties to an enabler. These would apply where there is no final judicial defeat, for example, because taxpayers agree to settle their enquiries with HMRC:
- for schemes used by 20 taxpayers or less, where HMRC had defeated 50% or more of the cases in which a taxpayer had used the scheme (as applies currently),
 - for schemes used by between 21 and 43 taxpayers, HMRC had defeated a minimum of 11 of the cases where a taxpayer had used the scheme,
 - for schemes used by 44 or more taxpayers but fewer than 200, HMRC had defeated 25% or more of known cases where a taxpayer had used the scheme, or
 - for schemes used by 200 taxpayers or more, HMRC had defeated 50 or more cases.

- 6.18 Given the tiered approach the majority of smaller enablers would be unaffected by these changes, the proposals would only apply to those who have enabled a scheme which was used by over 20 individuals or companies.
- 6.19 To issue an assessment HMRC would still have to reasonably believe that the scheme was abusive and have a GAAR Advisory Panel opinion. An example of how this would work under these proposals is set out in box 6.4 below.

Box 6.4 Proposed model example

HMRC has identified a contractor loan tax avoidance scheme through its normal compliance risking work on Self-Assessment tax returns. HMRC identifies 450 users.

HMRC opens investigations and after successfully working through the first batch of enquiry cases and seeking the view of the independent General Anti Abuse Rule Advisory Panel, it determines that this is an instance of abusive tax arrangements.

From the first batch of enquiry cases 55 people settle their tax affairs by agreement with HMRC. As this is greater than 50 cases (and meets the final threshold of 200 or more uses), HMRC would issue enabler penalties for the 55 cases to the promoter.

As part of the second batch of enquiry work a further 80 people settle their tax affairs with HMRC. HMRC would then issue a further 80 enabler penalties to the promoter.

Further penalties would be issued to the promoter when further progress is made on the outstanding cases.

Q28. To what extent do the proposed tiered threshold percentages provide a suitable balance between ensuring that penalties can be issued to enablers promptly while providing sufficient time for enough 'defeats' to confirm that the scheme is likely to fail?

- 6.20 Where HMRC secured a penalty on an enabler, and a taxpayer who used the scheme subsequently won their case in tribunal or the courts, in a decision which was not subject to further appeal, the legislation would provide for an appropriate repayment to the enabler.

Naming enablers

The current position

- 6.21 Under existing legislation, HMRC may only publish information about a person who is assessed to an enablers penalty which has become final, when either:

- 50 or more penalties have been incurred in the last 12 months, or
- the total value of penalties incurred is more than £25,000 in the last 12 months.

6.22 Where a penalty relates to a multi-user scheme it is disregarded for these purposes unless and until HMRC has defeated **all** cases in which that scheme has been used by an individual or company.

6.23 It can take a long time to compete all the steps needed to meet the conditions set out above. As a result, HMRC has not yet named an enabler under these provisions. Being able to name enablers at an earlier stage would help HMRC advise and deter taxpayers from buying into the scheme. Box 6.5 illustrates the kind of case in which we would currently see a significant delay to penalties being issued.

Box 6.5 Case study

In the example 6.4 above HMRC would, without further modifications to the legislation, be unable to publish information about the promoter when it receives its first 55 penalties. Nor would HMRC be able to publish information when the promoter received the second batch of 80 penalties, even though the combined value of the 135 penalties exceeded £25,000.

Despite receiving more than 50 penalties in a single year (135) and the total value of penalties significantly exceeding £25,000, HMRC is only able to publish details once HMRC has defeated **all** cases in which that scheme has been used by an individual or company. In this case once HMRC has defeated all 450 cases.

Proposed changes

6.24 The changes proposed here would remove the restriction noted in paragraph 6.22 so that as now HMRC could publish information about an enabler as soon as they had received either 50 penalties or penalties exceeding £25,000 in any one year but that under the proposal HMRC would no longer have to defeat all related uses of the scheme. This would allow HMRC to name large promoters of defeated schemes, making it easier to encourage individuals and companies who have used the scheme to settle with HMRC and to warn off potential new users.

Q29. To what extent do the conditions in paragraph 6.21 provide a suitable threshold for naming enablers of tax avoidance schemes who have received penalties if the addition threshold in paragraph 6.22 is removed (in order to ensure that HMRC can advise taxpayers of that enabler's penalty position)?

Q30. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals?

Commencement

- 6.25 The new information power outlined in paragraphs 6.10 to 6.12 would apply to all current and future investigations into potential enablers.
- 6.26 HMRC would be able to issue penalties to enablers, in multi-user cases following a final judicial defeat (paragraph 6.15) in relation to all taxpayers who used a scheme enabled and defeated after Royal Assent to this legislation. Similarly, the new threshold tiers (paragraph 6.17) would apply in relation to all cases where a taxpayer uses a multi-user scheme that was enabled and defeated after Royal Assent to this legislation.
- 6.27 The proposed change to publishing information about enablers would apply to penalties raised after Royal Assent to this legislation, where the enabling and defeat also occurred after Royal Assent to this legislation.
- 6.28 However, where there are clearly abusive tax arrangements which have been enabled since the introduction of the enablers regime, there is a case for saying that issuing penalties to the enablers who sold the schemes should not be delayed. Therefore, the government is interested in views on whether to apply these changes retrospectively, from when the enablers regime was implemented on 17 November 2017.

Q31. What factors should the government consider in determining whether it would be appropriate to apply these measures from the introduction of the penalty regime in 2017?

7. Maintaining the General Anti Abuse Rule

Background

- 7.1 The GAAR was introduced in 2013 in response to the recommendations in Graham Aaronson QC's report published on 21 November 2011. It provides HMRC with the ability to challenge "abusive" tax arrangements where those arrangements are designed to achieve a tax outcome clearly outside the intention of the legislation.
- 7.2 Tax advantages that arise from abusive arrangements are counteracted by the making of adjustments. Such adjustments may be made by way of an assessment, the modification of an assessment, amendment or disallowance of a claim or otherwise. The adjustments may be made in respect of the tax in question or any other tax. The relevant tax assessment machinery provisions are then triggered under the legislation for each relevant tax.
- 7.3 The current GAAR legislation makes no specific mention of partnerships or any particular steps needed to impose the regime on partners or partnerships who enter into abusive arrangements. The legislation does not, for example, provide for the giving of notices to the representative partner, making amendments to the partnership return or feeding any counteraction through to the partners' tax returns. The proposal here would be to change the legislation to make it clearer how the GAAR procedure is applied to partnerships and to ensure that GAAR works effectively and as originally intended in respect of partnerships. The proposals do not change the way the underlying taxation liabilities that are properly due are calculated.
- 7.4 Changes to the GAAR procedure would ensure that all circumstances are catered for and reduce the risk of promoters looking to take advantage of any ambiguities in the GAAR legislation.

Current position

- 7.5 The current GAAR legislation only refers to the person who received the tax advantage. This causes difficulties when considering a partnership case. Usually HMRC enquiries will be made into the partnership return. The final figure would be agreed with the partnership and individual partners would then be informed of the relevant adjustments required to their personal tax returns.

- 7.6 However, the GAAR lacks an express mechanism to issue GAAR notices to partnerships in such a way that each partner can be made responsible for their share of any liability arising through the partnership.
- 7.7 In particular, if amendments are required to the partnership return, existing legislation provides that a closure notice is issued to the partnership via the representative partner and then each partner must amend their return based on the revised partnership statement. HMRC's position is that it is not open to individual partners to amend their share of partnership profits unilaterally. The amendment must be made via the partnership statement. The GAAR provides for the service of notices directly on the person who is the taxpayer – which runs counter to the partnership taxation framework (described above).

The proposed changes

- 7.8 As described above, making changes such as these to the GAAR legislation is an important component of this package of measures designed to tackle promoters of tax avoidance and would prevent anyone from exploiting ambiguities in the legislation in order to frustrate HMRC's attempts to tackle avoidance. Additionally, the ability to pursue the GAAR in appropriate partnership cases would have the consequential effect of enabling HMRC to use the POTAS legislation in relation to the promoters involved, in appropriate cases, which in turn could lead to further sanctions served under a conduct notice.
- 7.9 The draft legislation proposes an express mechanism in the GAAR legislative framework to allow HMRC to deploy the GAAR at partnership level, with counteraction taking place via the partnership statement and then carried through to each relevant partner.
- 7.10 The proposals would mean that GAAR notices could be issued to the representative partner in a partnership, mirroring the way partnership enquiries are conducted under the Income Tax Self-Assessment regime.

Paragraph 3 notice

- 7.11 The proposal would see a notice provided to the representative partner which would set out the reason(s) for the counteraction, ways to take corrective action to avoid the counteraction and that the representative partner has responsibility to take corrective action (or make representations on behalf of the partnership, within the same 45-day time limits as for individual or corporates counteracted under the GAAR). Once corrective action or an adjustment has been made to the partnership return, additional profits or reduced losses would flow through to the partners' returns. The individual partners would then be responsible for paying any additional tax due as a consequence.

Notice of decision to refer

7.12 We propose that in line with existing practice on all other GAAR cases, where a HMRC Designated Officer (DO) decides to refer a partnership case to the independent GAAR Advisory Panel, in future the Panel would consider the partnership representations and HMRC's referral which may include comments on the representations. Only the representative partner (rather than all the partners), would be able to provide representations and/or, on request from the Panel, further information to the Panel.

7.13 The draft legislation provides for the Advisory Panel opinion to be issued to the representative partner rather than to each individual partner, in order to keep the process manageable.

Decision to counteract and issue penalties

7.14 Where a decision is made to counteract the tax advantage under the GAAR, the draft legislation sets out how the proposal would work for counteractions. A counteraction notice would be given to the representative partner and it would have the same effect as if it were given to all the partners benefitting from the tax advantage.

7.15 The level of tax assessed on partners as a result of counteraction under the GAAR and penalties against the partners would depend on each partner's individual tax position, allowing for the use of losses and reliefs, for example. The GAAR penalty would work in the same way for partners as it does for individual and corporate taxpayers, with the same 60% penalty based on the value of each partner's counteracted advantage.

Taxpayer safeguards

7.16 We recognise the importance of having robust taxpayer safeguards in place. The GAAR framework provides for these protections by way of rights to make representations, appeal rights and the role of the independent Advisory Panel. The representative partner (or any successor), on behalf of the partnership, would therefore have the same rights as individuals or corporate entities to whom the GAAR is applied. These proposals do not change these important safeguards.

How it would work

7.17 The draft legislation published today sets out how these changes would work in practice.

7.18 Example 7.1 below gives an example of how the GAAR would operate if the proposed changes are implemented:

Box 7.1 – Example of how the proposals would work

- If a HMRC designated officer believes that one or more partners within a partnership have received a tax advantage from a tax arrangement that was abusive they could issue the representative partner with a notice in a similar way to how the GAAR operates for an individual person.
- As with the normal GAAR process, this would inform the representative partner of why the officer considers that the counteraction ought to be taken and how the representative partner can make representations and take steps to avoid the counteraction. It would also specify details such as the nature of the arrangements and the tax advantage.
- Any appeal against any adjustment that is made would be made by the representative partner on behalf of the partnership in question.
- Should a penalty be charged, the normal 60% GAAR penalty would be calculated at partner level, based on each partner's counteracted tax advantage. So, each penalty is calculated by reference to the tax advantage/tax liability borne by each partner giving them access to any reliefs and allowances they may have. However, the appeal right against the GAAR penalty remains with the representative partner.

Commencement

7.19 The government proposes that the changes above, as outlined in the draft legislation published today, would come into effect in relation to any GAAR notices issued to partnerships on or after Royal Assent of the next Finance Bill which would be expected to be in 2021.

General questions for consultation

Q32. Do the proposed changes to the legislation make it sufficiently clear as to how the GAAR would apply to partnerships?

Q33. To what extent are the existing safeguards within the GAAR suitable for cases involving a partnership, and for a responsible partner?

Q34. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals?

Q35. Are there any additional amendments that are required to the draft legislation in respect of partnerships to ensure the changes are effective?

8. Assessment of Impacts

Summary of Impacts

Exchequer impact (£m)	2020 -2021	2021 - 2022	2022 - 2023	2023 - 2024	2024 – 2025	2025 - 2026
	Nil	Nil	Nil	Nil	Nil	Nil
Economic impact	This measure is not expected to have any significant economic impacts.					
Impact on individuals, households and families	This measure has no impact on those who do not engage in, promote or otherwise facilitate tax avoidance. Those that are involved in promoting or enabling tax avoidance would find that these measures aim to restrict that market. There would also be an impact on partnerships who participate in abusive tax arrangements. The measure is not expected to impact on family formation, stability or breakdown.					
Equalities impacts	<p>HMRC does not hold information about the protected characteristics of designated promoters but there is no reason to suppose that there is any particular equality impact.</p> <p>It is not anticipated that this measure would have an impact on any group with protected characteristics.</p>					
Impact on businesses and Civil Society Organisations	<p>This measure has no impact on compliant businesses and partnerships. Those impacted would be businesses who promote or enable tax avoidance, and partnerships who participate in abusive tax arrangements.</p> <p>This measure would have no impact on civil society organisations.</p>					
Impact on HMRC or other public sector delivery organisations	These changes are not expected to have an operational impact on HMRC. We are assessing the impact on HM Courts and Tribunal Service.					
Other impacts	Other impacts have been considered and none have been identified.					

9. Summary of Consultation Questions

Chapter 3. Tackling promoters who do not disclose avoidance schemes to HMRC

Q1. Would 30 days give a reasonable amount of time to furnish HMRC with information on the schemes that the promoters or enablers have been promoting or enabling?

Q2. Would the proposed approach prevent persons from obstructing enquiries by claiming not to be a promoter, or in other ways such as by restructuring or moving offshore? If not, why not?

Q3. How useful would information on the scheme be, without the name of the promoter, to help potential purchasers of the scheme understand the risks of using it? How might this information be published in order to be most helpful?

Q4. Are the grounds of appeal against the issue of a new SRN the right ones?

Q5. Are there any other grounds that should be considered?

Q6. Would naming those in the supply chains for promoting tax avoidance schemes help make taxpayers aware that they risk falling into a scheme that HMRC suspects does not work?

Q7. Are there any other specific procedural safeguards which you think should apply to this power but which would not dilute the effectiveness of the proposed measure?

Q8. To what extent do the safeguards proposed achieve a balance between ensuring that the new power would be used appropriately and ensuring that the new powers are not sidestepped by promoters and others, allowing them to continue to market their scheme to taxpayers?

Q9. Do you agree that the proposed new rules, as described above, should also apply to DASVOIT?

Q10. Are there any modifications to the proposals for the new power in DOTAS that would be needed in order for it to work appropriately in the DASVOIT regime?

Chapter 4. Dealing with promoters who sell schemes that do not work

Q11. Do the conditions for issuing earlier stop notices achieve a sensible balance between ensuring appropriate safeguards are in place, whilst ensuring that HMRC is able to promptly tackle schemes that are destined to fail for the benefit of taxpayers? If not, how could they be better targeted to achieve this balance?

Q12. Are there any other conditions that should be considered?

Q13. How can HMRC best ensure that the internal review and appeals process work appropriately for recipients of stop notices?

Q14. To what extent would publishing stop notices help inform taxpayers of the risks of entering into that scheme?

Q15. If the notice is appealed (and not subsequently withdrawn) – when would publishing of the details of the promoter best provide taxpayers with the information they need? Should this be after the First-tier Tribunal has reached a decision or later?

Q16. Would the proposal be a suitable way to achieve the government's objective (as set out in para 4.9)? Are there any modifications that would help deliver that objective more effectively?

Q17. Are there any other specific procedural safeguards which you think should apply to this power but which would not dilute the effectiveness of the proposal?

Chapter 5. Dealing with promoters who seek to sidestep the Promoters of Tax Avoidance Schemes Regime

Q18. Are the proposals to deal with promoters who hide behind other business structures/entities or individuals appropriately targeted?

Q19. Does the opportunity to comment on the proposed terms of the conduct notice continue to provide an appropriate safeguard?

Q20. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals (paragraphs 5.7-5.9)?

Q21. Do the proposed changes achieve an appropriate balance between providing a clear window for those in receipt of a conduct notice and the need to ensure that promoters cannot continue to manipulate the rules to prevent HMRC taking action against them?

Q22. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals (paragraphs 5.11-5.13)?

Q23. Are the proposed updates to the POTAS threshold conditions to include further DOTAS failures proportionate?

Q24. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals (paragraph 5.15)?

Chapter 6. Penalties for those who enable tax avoidance schemes that fail

Q25. Do you agree that this change would enable HMRC to engage with potential enablers and get the required information from them to determine whether an enablers penalty is appropriate?

Q26. Where an enabler receives a notice from HMRC seeking information on other enablers in the avoidance chain how readily would the recipient have that information? Would it cause any problems for the recipient of the information notice?

Q27. Do you agree that penalties should be raised in all cases once there is a final judicial ruling confirming that the scheme is abusive avoidance?

Q28. To what extent do the proposed tiered threshold percentages provide a suitable balance between ensuring that penalties can be issued to enablers promptly while providing sufficient time for enough 'defeats' to confirm that the scheme is likely to fail?

Q29. To what extent do the conditions in 6.21 provide a suitable threshold for naming enablers of tax avoidance schemes who have received penalties if the addition threshold in 6.22 is removed (in order to ensure that HMRC can advise taxpayers of that enabler's penalty position)?

Q30. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals?

Q31. What factors should the government consider in determining whether it would be appropriate to apply these measures from the introduction of the penalty regime in 2017?

Chapter 7. Maintaining the General Anti Abuse Rule

Q32. Do the proposed changes to the legislation make it sufficiently clear as to how the GAAR would apply to partnerships?

Q33. To what extent are the existing safeguards within the GAAR suitable for cases involving a partnership, and for a responsible partner?

Q34. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals?

Q35. Are there any additional amendments that are required to the draft legislation in respect of partnerships to ensure the changes are effective?

10. The Consultation Process

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

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

This consultation is taking place during stage 2 of the process. The purpose of the consultation is to seek views on the detailed policy design and a framework for implementation of specific proposals, rather than to seek views on alternative proposals. Alongside this document HMRC has today published draft legislation for Finance Bill 20/21 as a stage 3 of the process. The draft Bill includes proposed legislation to support these proposals. The purpose of that consultation alongside this one is to seek views on draft legislation in order to confirm, as far as possible, that it will achieve the intended policy effect described in this document with no unintended effects.

How to respond

A summary of the questions in this consultation is included at chapter 9.

Responses should be sent by 15 September 2020, by e-mail to ca.consultation@hmrc.gov.uk

Please do not send consultation responses to the Consultation Coordinator.

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

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

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018, General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be

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

Consultation Privacy Notice

This notice sets out how we will use your personal data, and your rights. It is made under Articles 13 and/or 14 of the General Data Protection Regulation.

Your Data

The data

We will process the following personal data:

Name
Email address
Postal address
Phone number
Job title

Purpose

The purpose(s) for which we are processing your personal data is: *Tackling Promoters of Tax Avoidance*

Legal basis of processing

The legal basis for processing your personal data is that the processing is necessary for the exercise of a function of a government department.

Recipients

Your personal data will be shared by us with HM Treasury

Retention

Your personal data will be kept by us for six years and will then be deleted.

Your Rights

- You have the right to request information about how your personal data are processed, and to request a copy of that personal data.
- You have the right to request that any inaccuracies in your personal data are rectified without delay.
- You have the right to request that any incomplete personal data are completed, including by means of a supplementary statement.
- You have the right to request that your personal data are erased if there is no longer a justification for them to be processed.

- You have the right in certain circumstances (for example, where accuracy is contested) to request that the processing of your personal data is restricted.

Complaints

If you consider that your personal data has been misused or mishandled, you may make a complaint to the Information Commissioner, who is an independent regulator. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF
0303 123 1113
casework@ico.org.uk

Any complaint to the Information Commissioner is without prejudice to your right to seek redress through the courts.

Contact details

The data controller for your personal data is HM Revenue and Customs. The contact details for the data controller are:

HMRC
100 Parliament Street
Westminster
London SW1A 2BQ

The contact details for HMRC's Data Protection Officer are:

The Data Protection Officer
HM Revenue and Customs
7th Floor, 10 South Colonnade
Canary Wharf, London E14 4PU
advice.dpa@hmrc.gsi.gov.uk

Consultation Principles

This consultation is being run in accordance with the government's Consultation Principles.

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

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

John Pay, Consultation Coordinator, Budget Team, HM Revenue and Customs, 100 Parliament Street, London, SW1A 2BQ.

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

Annex: Relevant (current) Government Legislation and guidance

The main DOTAS legislation and guidance can be found here:

Legislation: <http://www.legislation.gov.uk/ukpga/2004/12/part/7>

Guidance: <https://www.gov.uk/guidance/disclosure-of-tax-avoidance-schemes-overview>

The main DASVOIT legislation and guidance can be found here:

Legislation: <http://www.legislation.gov.uk/ukpga/2017/32/schedule/17/enacted>

Guidance: <https://www.gov.uk/guidance/disclosure-of-tax-avoidance-schemes-overview>

Guidance: [Disclosing VAT and other indirect tax avoidance schemes \(VAT Notice 799\)](#)

The main POTAS legislation and guidance can be found here:

Legislation: <http://www.legislation.gov.uk/ukpga/2014/26/part/5/enacted>

Legislation: <http://www.legislation.gov.uk/ukpga/2014/26/schedule/34/enacted>

Legislation: <http://www.legislation.gov.uk/ukpga/2014/26/schedule/35/enacted>

Legislation: <http://www.legislation.gov.uk/ukpga/2014/26/schedule/36/enacted>

Guidance: <https://www.gov.uk/government/publications/promoters-of-tax-avoidance-schemes-guidance>

The main Enablers Penalty legislation and guidance can be found here:

Legislation: <http://www.legislation.gov.uk/ukpga/2017/32/schedule/16/enacted>

Guidance: <https://www.gov.uk/government/collections/tax-avoidance-enablers>

The main GAAR legislation and guidance can be found here:

Legislation: <http://www.legislation.gov.uk/ukpga/2013/29/part/5>

Guidance: <https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules>