



HM Revenue
& Customs

Follower Notices and Penalties

Consultation

16 December 2020

Closing date for comments: 27 January 2021

Subject of this consultation:	This consultation asks for comments on proposed changes to penalties for failing to take corrective action in response to Follower Notices, reducing the maximum rate of penalty but maintaining the higher rate for those whose continued refusal to settle with HMRC is deemed to be time wasting.
Scope of this consultation:	The consultation seeks views on proposals to revise the Follower Notice penalty so that its effects are felt most strongly by those whose refusal to settle their dispute with HMRC is simply an attempt to unreasonably prolong their case.
Who should read this:	We would like views from professional bodies and tax advisers as well as businesses and individuals who have used avoidance schemes, especially from those who have received Follower Notices.
Duration:	The consultation runs from 16 December 2020 to 27 January 2021
Lead official:	Peter Woodham, Counter Avoidance, HMRC
How to respond or enquire about this consultation:	Responses should be made by email to peter.woodham@hmrc.gov.uk by 27/01/21.
Additional ways to be involved:	HMRC would welcome meetings with interested parties to discuss these proposals
After the consultation:	A summary of responses will be published.
Getting to this stage:	Follower Notices were introduced by Part 4 Chapter 2 Finance Act 2014

Template version: September 2019

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1. Introduction

Background to Follower Notices

- 1.1. A Follower Notice (FN) is a legal request by HMRC to a taxpayer who has used a tax avoidance scheme to remove the tax advantage they have claimed, for example by amending their tax return. FNs can only be issued when the scheme has been defeated in another person's litigation. A person receiving an FN will incur a penalty if they do not take the corrective action by the deadline set out in the notice.
- 1.2. The government introduced Follower Notices (FNs) in Finance Act 2014, following a consultation titled 'Raising the Stakes on Tax Avoidance' which ran in the autumn of 2013. The problem FNs were designed to address was described in that consultation as follows:

Buyers of a tax avoidance scheme will submit their returns to HMRC on the assumption that the scheme reduces their tax liability. Where a tax avoidance scheme is mass-marketed, as they often are, HMRC is presented with a large number of returns all based on the same assumption that the scheme will have reduced the person's tax liability in a particular way. Where HMRC holds that the scheme does not work, it follows that it will argue that any returns based on that scheme are incorrect.

When faced with a large number of very similar cases, it is sometimes most efficient for HMRC to investigate 'representative cases', taking them to litigation if necessary. However, when HMRC wins a representative case in the courts, other taxpayers who have used the same or very similar schemes sometimes see little incentive to settle their cases with HMRC. When HMRC pursues litigation in a number of very similar cases the Tribunal rules allow for the cases to be heard together in certain circumstances, but this only applies to cases which have been notified to the Tribunal. To get to this stage HMRC has to investigate these cases to litigation standard and close them. Not only does this use up the Tribunal's resources, but it also places a strain on HMRC's compliance resources, wastes HMRC's time and delays the collection of the right tax.

- 1.3. The government introduced FNs to address this issue by requiring taxpayers in dispute with HMRC over their use of an avoidance scheme to make a decision about whether or not they wish to continue their dispute. They are put on notice that if they do not wish to settle with HMRC, they risk a penalty if they are ultimately unsuccessful when the dispute is resolved.
- 1.4. Accelerated Payment Notices (APNs) were introduced at the same time as FNs. These notices ensure that any sums involved in a tax avoidance dispute sit with the exchequer while the dispute plays out, rather than with the taxpayer as is the normal position in the direct taxes. APNs do not form part of this consultation.

How FNs work

- 1.5. FNs can only be issued where specific criteria, set out in the legislation, are met. They are that:
 - There is an enquiry open into a person's tax return or claim (referred to in this document as an enquiry case); or that the person has made a tax appeal which has not been resolved (an appeal case);
 - The return, claim or appeal is made on the basis that a tax advantage results from tax arrangements;
 - HMRC are of the opinion that there is a judicial ruling which is relevant to those arrangements—this includes decisions in the First-tier Tribunal; and
 - No previous FN has been issued to the person in respect of the same tax advantage, arrangements, judicial ruling and period, unless that FN has been withdrawn.
- 1.6. A judicial ruling is 'relevant' for FNs if it provides reasons or principles as to why the scheme in question did not work and those reasons or principles, if applied to the person's arrangements, would defeat them.
- 1.7. If these conditions are met, HMRC may issue FNs. On receipt of a FN the recipient has 90 days in which to take corrective action. In an enquiry case, this means amending the return or claim to give up the claimed tax advantage. In an appeal case, it means taking all necessary steps to reach agreement with HMRC to relinquish the claimed advantage. In practical terms, this means withdrawing from the appeal, or giving up those grounds to which the relevant judicial ruling applies.
- 1.8. If corrective action is not taken in this time, HMRC may issue a penalty of 50% of the disputed tax advantage, which can be reduced to no less than 10% to reflect any co-operation given by the recipient in respect of the notice. An example of co-operation which could help reduce the penalty rate is helping HMRC to quantify the amount in dispute if needed.
- 1.9. There is no right of appeal against a FN as this would at best restore the delays in settlement that FNs were designed to address and at worst would add to them. However, there is a right to make formal representations to HMRC within the 90-day period in paragraph 1.7 above. HMRC must consider those representations and while they do, the 90-day period for corrective action is suspended. Once HMRC conclude their review of representations and notify the taxpayer of their conclusions, if the FN is confirmed there is a further 30 days for corrective action to be taken without risk of a penalty.

- 1.10. Anyone who is charged a penalty has a full right of appeal to the Tribunal against it, including on the grounds that it was reasonable in all the circumstances for the person not to have taken corrective action. There is no definition in the legislation of what is reasonable in all the circumstances and each case will depend on its own facts.

2. Follower Notices and Access to Justice

- 2.1. The government considers that the FN regime is an important element in the legal framework available to HMRC to tackle the use of tax avoidance schemes, reducing the incentive to taxpayers to continue their dispute where the Courts have already made a decision on the same or very similar cases, and ensuring an efficient use of public money in the judicial system and HMRC.
- 2.2. Since 2015, HMRC have issued approximately 22,000 FNs. Of those where the time for corrective action (the specified time) has been reached over 60% of recipients took action on time. Of the penalties that have been issued for failing to take action on time, just under two thirds were charged at 50%.
- 2.3. Some commentators have expressed concerns that FNs act to deny taxpayers access to justice because, although recipients still have a choice of actions, the high penalty makes it difficult for most to do anything other than settle their cases with HMRC, even if they believe strongly in the correctness of their position.
- 2.4. In December 2018 the House of Lords Economic Affairs Committee published its report ['The Powers of HMRC: Treating Taxpayers Fairly'](#). In that report, the Committee were critical of FNs and recommended that the penalties be abolished. Commenting on the report, Lord Judge suggested that the safeguards in the FN and APN regimes should be overseen by the courts. Lord Judge said that it should be left to the courts to decide if litigation were frivolous or time-wasting and whether to penalise litigants in such cases.
- 2.5. The Financial Secretary to the Treasury gave evidence to the Committee in June 2019. In that evidence, the government rejected the recommendation to abolish FN penalties as this would render the regime ineffective. However, the government acknowledges the concerns raised by the Committee and so undertook that HMRC would examine the possibility of providing greater judicial oversight of the APN and FN safeguards. This work was done with help from the Ministry of Justice.
- 2.6. A range of options was considered, including creating a right of appeal against the issue of a FN, or replacing FNs with a requirement for taxpayers in relevant circumstances to apply to the Tribunal for leave to contest HMRC's decision that a relevant judicial ruling applied to their arrangements. The government has been unable to identify any effective means of providing greater judicial oversight of the FN regime which would not re-introduce or even worsen the delays in settlement and payment of disputed tax, which the regime was designed to address, and which would not significantly increase the administrative costs of both HMRC and HM Courts and Tribunal Service and their equivalent bodies in the devolved administrations.

- 2.7. However, the government takes on board the concerns that exist around FNs. Having listened to these concerns, the government accepts that a better balance can be struck between encouraging taxpayers who have used tax avoidance schemes which are shown not to work to reach agreement with HMRC, and allowing those who genuinely believe their case is different to continue to pursue their dispute. This can best be achieved with a stronger focus on those whose continuation of their dispute even once they have received a Follower Notice, is without merit.
- 2.8. Therefore, the government proposes that the standard FN penalty should be reduced to 30%, which is the same as the maximum penalty for a careless inaccuracy on a tax return. It is important to note that the existing ground for appealing against a penalty, that it was reasonable in all the circumstances for the person not to have taken corrective action, would remain for this penalty. This proposal would maintain the effectiveness of the FN regime while at the same time ensuring that its stongest effects are felt by the least compliant.

Q1. Do you agree that reducing the penalty rate would better balance the objective of FNs to discourage further litigation of points already settled with the rights of taxpayers to continue genuine disputes?

Q2. Do you have any further suggestions to better achieve this balance?

- 2.9. However, the government believes that there should still be a strong sanction to discourage those who would persist in prolonging their dispute with HMRC, even when their case is without merit. Such disputes waste the time and resources not just of HMRC but also of HM Courts & Tribunals Service.
- 2.10. The government proposes that in such cases the highest total rate of penalty should remain at 50%. This highest rate of FN penalty could apply, for example:
- if the tax tribunal or court strikes out a taxpayer's appeal on the grounds either that it has no reasonable prospect of success or that there is an abuse of process; or
 - if the tax tribunal or court makes a statement that the taxpayer has acted unreasonably in bringing or conducting the proceedings. This statement could be made at the Tribunal's or court's volition or on application from HMRC.
- 2.11. Litigation can be struck out by a Tribunal or court as an abuse of process in cases where, for example, the court concludes the proceedings were vexatious or pointless and wasteful; the litigation was being pursued for an improper purpose; or that one of the parties has delayed matters to an extent which can be regarded as abusive.

2.12. The 50% total rate of penalty would be achieved by charging the existing 30% penalty and a further, new, 20% penalty in these circumstances.

Q3. How effective do you believe a further penalty would be as a deterrent to time-wasting litigation of avoidance schemes?

Q4. Are the suggested criteria the correct ones to adopt? Do you have any further suggested criteria to apply?

2.13. The government proposes that a further penalty of 20% should be chargeable only when:

- A FN has been issued
- Corrective action has not been taken
- A FN penalty has been issued under s208 Finance Act 2014 and not withdrawn
- One of the conditions in paragraph 2.10 applies

2.14. This would be charged as a further penalty to that already issued under s208 but would be wholly dependant on it. If the penalty under s208 was withdrawn for any reason, the further penalty would also be withdrawn.

Q5. Are these the correct conditions to apply before such a further penalty can be issued? If not, what other criteria do you suggest?

2.15. This further penalty would only be applied in cases where it is evident that the person has carried on their dispute, even once it has obviously become hopeless or is being pursued for time-wasting or other improper purposes as described above. Therefore, it does not seem appropriate to offer any reduction for co-operation and the government proposes that the additional amount of penalty should be applied at a fixed 20% in all cases. This would not prevent the possibility of reduction for co-operation for the penalty under s208.

Q6. Do you believe the further penalty should be reducible to reflect further co-operation by the recipient of a FN? If so, what factors should be taken into account?

Example

Avoidance Follower Ltd uses a marketed avoidance scheme on its tax return for 2021/22. In litigation with another person, Avoidance Leader Ltd, HMRC defeat the scheme in the First-Tier Tax Tribunal. In its decision the Tribunal provide their reasons for concluding the scheme does not deliver the asserted tax advantage. HMRC then successfully win the taxpayer's appeal against this finding at the Upper Tribunal. HMRC therefore issue FNs to other users of the scheme for whom there are open tax enquiries, including Avoidance Follower Ltd.

Avoidance Follower Ltd does not make representations against the FN and does not take corrective action. HMRC issue a penalty of 30% of the tax advantage they claimed as a result of using the scheme (the asserted advantage). Shortly after this, HMRC close the enquiry into the company's return and amend it to remove the asserted advantage.

Avoidance Follower Ltd appeals against the notice closing the enquiry. The grounds of its appeal are solely matters which were resolved in the decision of Avoidance Leader Ltd and HMRC apply to the Tribunal for the case to be struck out. The Tribunal agrees that there is no reasonable prospect of the case succeeding given the fact that there is a relevant binding precedent and strikes out the case.

HMRC issue a further penalty of 20%. The total of penalties incurred by Avoidance Follower Ltd in relation to its Follower Notice is thus 50% of the denied advantage.

Appeals

- 2.16. Under the existing legislation anyone who receives a FN penalty can appeal against it on a number of grounds, including that it was 'reasonable in all the circumstances' for the person not to have taken corrective action. Reasonable in all the circumstances is not defined in the legislation and every case turns on its own facts, but at its heart is the concept that, on occasion and when taking all relevant factors into account, it can be viewed as reasonable for the recipient of the notice to decline to act on it.
- 2.17. The further penalty proposed in this document would only be issued when a Tribunal or court had ruled that the litigant had not acted reasonably in pursuing their challenge. Therefore, the government does not believe it would be appropriate to include 'reasonable in all the circumstances' or the similar 'reasonable excuse' as grounds of appeal against this penalty.
- 2.18. There should still be a right of appeal against any further penalty as a safeguard for taxpayers to ensure they can challenge any further penalty they think has been charged inappropriately, for example, if HMRC has issued it in error.
- 2.19. Therefore, the government proposes that it should only be open to appeal against this further penalty on the grounds that the statutory grounds for issuing it have not been met (see paragraph 2.12). This would be a separate appeal right from that against the penalty under s208, though in many instances it is likely such appeals would be heard together.

Q7. Would these grounds of appeal provide sufficient safeguards for taxpayers incurring this penalty? Are there any other appeal grounds you think should be applicable?

3. Assessment of Impacts

Summary of Impacts

Exchequer impact (£m)	2020 -21	2021 -22	2022 -23	2023 -24	2024 – 25	2025-26
	negligible	negligible	negligible	negligible	negligible	negligible
Economic impact	This measure is not expected to have any significant economic impacts.					
Impact on individuals, households and families	<p>This proposal will impact on a small number of individuals who have used avoidance schemes by reducing the maximum rate of penalty they incur for not taking action in response to a Follower Notice to 30%, unless they are found to have been wasting the Tribunals and HMRC’s time by perpetuating their dispute. In such cases, the maximum total penalty will remain at the present 50%.</p> <p>Customer experience for individuals who have not used avoidance schemes is expected to remain the same as it does not change how they interact with HMRC.</p> <p>The measure is not expected to impact on family formation, stability or breakdown.</p>					
Equalities impacts	It is not anticipated that there will be impacts for those in groups sharing protected characteristics.					
Impact on businesses and Civil Society Organisations	<p>This proposal will impact on a small number of businesses who have used avoidance schemes by reducing the maximum rate of penalty they incur for not taking action in response to a Follower Notice to 30%, unless they are found to have been wasting the Tribunals and HMRC’s time by perpetuating their dispute. In such cases, the maximum total penalty will remain at the present 50%.</p> <p>There are not expected to be any impacts for businesses that do not use avoidance schemes. Customer experience is therefore expected to remain broadly the same.</p> <p>There are not expected to be any impacts on civil society organisations.</p>					
Impact on HMRC or other public sector delivery organisations	This proposal is not expected to have operational impact on HMRC. We are assessing the impact on HM Courts & Tribunals service					

Other impacts	Other impacts have been considered and none identified.
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4. Summary of Consultation Questions

Q1. Do you agree that reducing the penalty rate would better balance the objective of FNs to discourage further litigation of points already settled with the rights of taxpayers to continue genuine disputes?

Q2. Do you have any further suggestions to better achieve this balance?

Q3. How effective do you believe a further penalty would be as a deterrent to time-wasting litigation of avoidance schemes?

Q4. Are the suggested criteria the correct ones to adopt? Do you have any further suggested criteria to apply?

Q5. Are these the correct conditions to apply before such a further penalty can be issued? If not, what other criteria do you suggest?

Q6. Do you believe the further penalty should be reducible to reflect further co-operation by the recipient of a FN? If so, what factors should be taken into account?

Q7. Would these grounds of appeal provide sufficient safeguards for taxpayers incurring this penalty? Are there any other appeal grounds you think should be applicable?

5. The Consultation Process

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

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

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

How to respond

A summary of the questions in this consultation is included at chapter 4.

Responses should be sent by 27 January 2021, by e-mail to peter.woodham@hmrc.gov.uk

Telephone enquiries 03000 586533 (from a text phone prefix this number with 18001)

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 (*delete/add as appropriate*):

Name

Email address

Postal address

Phone number

Job title

Purpose

The purpose(s) for which we are processing your personal data is: Follower Notices and Penalties

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.gov.uk

Consultation Principles

This call for evidence 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:

If you have any comments or complaints about the consultation process, please contact the Consultation Coordinator using the following link:

<https://www.tax.service.gov.uk/submissions/new-form/make-a-comment-or-complaint-about-hmrc-consultations>

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

Annex: Relevant (current) Government Legislation

Relevant (current) legislation

Follower Notices and Accelerated Payment Notices can be found in [Part 4 of Finance Act 2014](#) together with Schedules [30](#), [31](#), [32](#) and [33](#) of that Act