Promoters of Tax Avoidance Schemes

This guidance describes the draft legislation in Part 5 and Schedules 30 to 32 Finance (No 2) Bill.

Introduction

HRP 1.1 Overview

Part 5 contains new rules that apply to promoters of tax avoidance schemes and which aim to deter the development and use of avoidance schemes by influencing the behaviour of promoters, their intermediaries and clients.

The objectives of the regime are to:

- deter the development and use of high risk avoidance schemes
- change the behaviour of the small number of such promoters
- force monitored promoters (see below) to disclose details of their products and clients to HMRC
- force monitored promoters to tell clients, potential clients and intermediaries that they are a monitored promoter
- minimise the risk of tax loss via avoidance schemes developed by promoters of tax avoidance schemes
- make sure that clients and intermediaries are fully aware of the risks of engaging in avoidance schemes.

The regime builds on the existing regime for the disclosure of tax avoidance schemes (DOTAS), drawing on and reinforcing existing disclosure obligations and sharing many similar definitions. This guidance frequently refers to the existing DOTAS guidance that may be found on the HMRC website:

http://www.hmrc.gov.uk/aiu/dotas-guidance.pdf

The regime involves a graduated series of sanctions, which carefully balances the rights of promoters against the need to prevent and defeat tax avoidance. There are two key steps:

- a conduct notice – which may be issued by HMRC where a promoter meets a threshold condition (HRP2.1) and
- a monitoring notice – which may be issued by HMRC where a promoter breaches a requirement in a conduct notice and approval is obtained from the First-tier Tribunal (HRP3.1). A promoter that is subject to a monitoring notice is referred to in the legislation and in this guidance as a monitored promoter.

A conduct notice is issued by an authorised officer of HMRC and imposes conditions on a promoter that must be complied with. There is no right of appeal against the issue of a conduct notice, which can last for up to two years.

If a promoter breaches one or more conditions in a conduct notice an authorised officer of HMRC may ask the First-tier Tribunal for approval to issue a monitoring notice. There is a right of appeal against a decision of the

First-tier Tribunal to do so. If a monitoring notice is issued the monitored promoter is subject to a more stringent regime that includes:

- publication by HMRC of information about the promoter
- publication by the promoter of its status on the internet and in publications and correspondence
- a duty on the promoter to tell clients that it is a monitored promoter and to provide them with a promoter reference number (PRN)
- a duty on clients to put the PRN on their returns or otherwise to report the PRN to HMRC
- enhanced information powers for HMRC, backed by new penalties
- preventing any attempt by a promoter to impose confidentiality on clients in relation to disclosure to HMRC
- limitations to the defences of reasonable care and reasonable excuse against the imposition of penalties
- extended time limits for assessment on clients
- a criminal offence of concealing, destroying or disposing of documents.

HMRC expects that few promoters will be issued with conduct notices and the great majority of those will comply with the conditions in the notices. So the much more significant sanctions consequent on a monitoring notice will only be imposed in very few cases and subject to prior approval by the First-tier Tribunal that the issue of the notice is justified. Further, the provisions that would publicly identify a monitored promoter do not apply until the promoter's appeal rights have been exhausted.

The regime is operated only by authorised officers and is subject to strict governance. No-one who is not authorised can use the provisions in the regime or suggest to a customer, agent or promoter that the use of the sanctions in the regime would be appropriate. If you feel that Counter-Avoidance should consider the use of the regime in relation to a particular promoter please send a short report setting out your concerns to the Promoter Channel. Particular indicators to look out for include failing to disclose relevant information or attempting to mislead HMRC and preventing clients from disclosing relevant information.

An authorised officer is a person who has been authorised by the Commissioners in accordance with Clause 276(2). All authorised officers are part of the Counter-Avoidance promoter channel.

HRP1.2 lists the key parts of the legislation in Part 5 that applies to promoters of tax avoidance schemes.

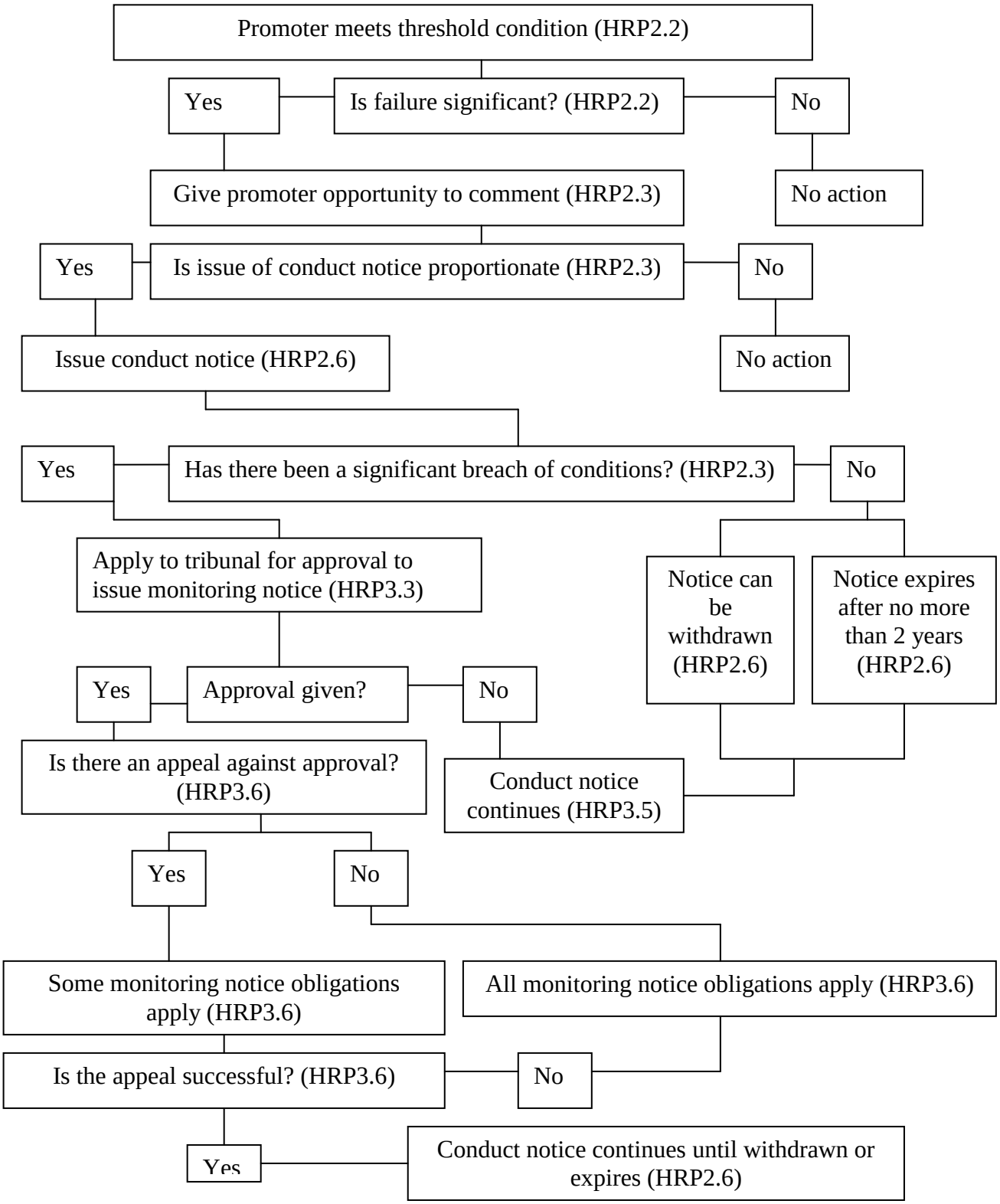
HRP1.3 is a flowchart to illustrate the steps leading to the issue of a monitoring notice.

HRP1.2 Overview of the legislation

The legislation in Part 5 and schedules 30 to 32 that applies to promoters of tax avoidance schemes is laid out as follows:

- Clauses 227 to 229 – definitions (HRP1.4 onwards)
- Clauses 230 to 234 – conduct notices (HRP2.1 onwards)
- Clauses 235 to 242 – monitoring notices (HRP3.1 onwards)
- Clauses 243 to 246 – allocation, distribution and use of promoter reference numbers (HRP3.10 to HRP3.13)
- Clauses 247 to 266 – information powers (HRP4.1 onwards)
- Clauses 267 to 269 – provisions relating to penalties (HRP5.1 onwards)
- Clause 270 – extended time limit for assessment (HRP6.1 onwards)
- Clauses 271 to 273 – offences of concealing, destroying or disposing of documents (HRP5.10)
- Clauses 274 to 276 – supplemental and definitions
- Schedule 30 – the threshold conditions (HRP Appendix 1)
- Schedule 31 – penalties for failing to comply with obligations of the regime (HRP5.1 onwards)
- Schedule 32 – promoters carrying on business in partnership (HRP7.1 onwards).

HRP1.3 How the regime that applies to promoters of tax avoidance schemes works



HRP1.4 Definitions: promoter

The definition of 'promoter' for the purpose of Part 5 is at Clause 228. A promoter is defined in terms of the activities it carries out in the course of a business that includes the design, marketing or implementation of avoidance schemes. The definition is modelled closely on the existing DOTAS definition at s307 FA 2004 (DOTAS guidance, paragraph 3.2).

This guidance uses the term 'avoidance scheme' to mean any 'relevant proposal' or 'relevant arrangement' (HRP1.5) that a promoter has promoted in the course of its business.

A person is a promoter of a relevant proposal if it

- takes part in the design of the proposed arrangements, or
- makes a 'firm approach' (HRP1.6) to a person in order to make that proposal available to that person or anyone else, or
- makes the proposal available for implementation by anyone.

A person is a promoter of relevant arrangements if it

- is a promoter of a relevant proposal that is implemented by the arrangements, or
- takes part in the design, organisation or management of the arrangements.

The business of a promoter may be carried on through a collection of concurrent or successor entities, for example the business may be carried on by an individual, a partnership or a company, or by several associated entities. There is a risk that promoters may try to nullify the effects of the regime, for example by passing the business on to a new company. This risk will be tackled by a new threshold condition for associated and successor businesses of a monitored promoter. Specific provisions apply to a promoter that conducts its business via a partnership (HRP7.1 onwards) or via a controlled company (HRP Appendix 1.13).

There is also a risk that promoters move offshore to try to undermine the impact of the regime. The regime can apply to any promoter, wherever resident. If a non-resident monitored promoter fails to comply with requests for information that information may be sought from any other persons who have been involved in the avoidance scheme (HRP4.6). This may include both intermediaries and clients.

The promoter definition is supported by a power at Clause 275 to make regulations. That power will be used to make regulations to implement the safeguard at Clause 228(6) to exclude from the promoter definition any person who is involved in an avoidance scheme in prescribed circumstances. This power can only be used to narrow the promoter definition. The current intention is that draft regulations will be published for consultation in June 2014.

Regulations here may have retrospective effect so that a person is not brought within the definition of promoter between the enactment of the

legislation and the date on which the regulations come into effect if the prescribed circumstances are present.

HRP1.5 Definitions: relevant proposal and relevant arrangement

The terms 'relevant proposal' and 'relevant arrangements' are defined at Clause 227 and describe avoidance schemes in order to determine whether a person is a promoter for the purpose of Part 5. The promotion of avoidance schemes is not enough by itself to impose any of the regime sanctions on a promoter. Those sanctions only begin to apply when a promoter meets one or more threshold conditions (HRP2.2).

A 'relevant proposal' is a proposal for arrangements that would be 'relevant arrangements' if they were implemented. This is so whether the proposal is made to a particular person or to anyone who might wish to implement it. The definition is drawn from the 'notifiable proposal' definition at s306(2) FA 2004 that applies for the purpose of the DOTAS regime.

Arrangements are 'relevant arrangements' if

- they might enable any person to obtain a tax advantage and
- that tax advantage is the main benefit, or one of the main benefits, that might be expected from the arrangements.

This is a familiar test, used for example in broadly similar terms at s306 FA 2004 for DOTAS.

The definition of 'arrangements' is at Clause 227(4) and is not intended to be exhaustive. It includes:

- any agreement, scheme, arrangement or understanding of any kind,
- whether or not legally enforceable and
- involving a single transaction or more than one transaction.

The definition of 'tax advantage' is at Clause 227(3) and is very similar to the definition at s318 FA 2004 for DOTAS (DOTAS Guidance, paragraph 6.2.2].

The comments at paragraph 6.3 of the DOTAS guidance discussing when a tax advantage might be one of the main benefits of arrangements are equally relevant here. This is not intended to include cases in which a course of action is chosen to some extent because a client may wish to obtain a tax relief by straightforward transactions that are consistent with the purpose for which the relief exists. For example, it will not apply where a client chooses to invest in an ISA rather than some other savings product.

Any tax advantage must relate to one or more of the following taxes:

- income tax
- capital gains tax
- corporation tax
- petroleum revenue tax
- inheritance tax
- stamp duty land tax

- stamp duty reserve tax
- annual tax on enveloped dwellings.

HRP1.6 Definitions: firm approach

A person may be a promoter for the purpose of Part 5 if they make a 'firm approach' to any person in order to make a 'relevant proposal' (HRP1.5) available for implementation. The definition is at Clause 228(4) and (5).

The purpose of this part of the promoter definition is to ensure that a promoter can be recognised as such by the regime when avoidance schemes are being developed and marketed, even if that is before any schemes are implemented.

A promoter is treated as making a firm approach when it

- communicates information to a person about a scheme that has been 'substantially designed' and
- the communication is to encourage that person or any other person to enter into transactions to implement the scheme and
- the information provided includes an explanation of the intended tax advantage.

For this purpose a scheme has been substantially designed when the nature of the transactions involved in implementing the scheme has been developed to the point at which someone who wants to obtain a tax advantage could implement those transactions or similar transactions. This definition draws on the DOTAS definition of the same term at s307(4C) FA 2004. Paragraph 3.6.2 of the DOTAS guidance provides some practical commentary on how the definition is expected to be used.

HRP1.7 Definitions: intermediary

The promoter regime in Part 5 imposes obligations on three classes of person:

- the promoter – who develops and markets avoidance schemes
- the client – typically the user of the avoidance scheme and
- the intermediary – who sits between the promoter and the client and typically provides the client with information and other support in relation to the scheme.

The term 'intermediary' is defined at Clause 229. A person is an intermediary in relation to a relevant proposal (HRP1.4) if the person:

- provides information about the proposal to another person in the course of business
- the information is provided so that the other person, or anyone else, can enter into transactions to implement the proposal and
- the person providing the information is not a promoter.

An intermediary may have obligations to pass on promoter reference numbers (HRP3.12) and may be subject to obligations to provide information (HRP4.1 onwards). A promoter who is subject to a conduct notice (HRP2.1) may be

required to ensure that adequate information (HRP2.3) about avoidance schemes is provided to intermediaries.

An intermediary will typically be a tax agent, such as a solicitor or accountant, or a financial adviser, but the definition is not confined to these professions. For example, an estate agent may be an intermediary in relation to an SDLT scheme. An intermediary may also be a person who, although not themselves a promoter, may have a business that involves providing information to potential users about avoidance schemes developed by a promoter. A person who provides information about avoidance schemes to another person but not in the course of business will not be an intermediary.

It is possible that an intermediary who does more than provide information to potential users may itself fall within the definition of promoter (HRP1.4). This will clearly be the case if the intermediary is to any extent responsible for the design, management or implementation of an avoidance scheme. An intermediary will also be a promoter if it makes a firm approach (HRP1.6) to a person in relation to a relevant proposal, explaining the expected tax advantages with the aim of encouraging that person or another person to enter into the scheme.

A client (HRP1.8) of the promoter may also be an intermediary, for example if it provides information to other potential clients.

HRP1.8 Definitions: client

The promoter regime at Part 5 contains several different definitions of client, each tailored to the purpose for which that term is used in the relevant provision. In each case a client is broadly a person who is the end user of an avoidance scheme developed by the promoter.

The client will typically be the person with which the promoter engages in the course of the promoter's business, However, in some cases the client will not be the person to whom the tax advantage intended to flow from the avoidance scheme will apply. For example, the client may be:

- a director of a company, where another associated or group company is intended to benefit from the scheme
- an employer whose employees are intended to benefit from the scheme
- a trustee of a trust or settlement in circumstances in which the beneficiaries are intended to benefit from the scheme.

The term 'client' is defined for the following purposes:

- Clause 232(3) defines client for the purpose of ensuring that a promoter subject to a conduct notice (HRP2.1) provides adequate information to its clients (HRP2.4)
- Clause 242(7) defines client for the purpose of determining who a promoter must tell that they are a monitored promoter (HRP3.9)
- Clause 244(3) defines client for the purpose of determining to whom a monitored promoter must notify its promoter reference number (HRP3.11)

- Clause 245(3) defines client for the purpose of imposing a duty on clients who have received a promoter reference number to pass that number on to other clients (HRP3.13)
- Clause 252(5) defines client for the purpose of imposing a duty on monitored promoters to provide information about clients (HRP4.7)
- Clause 253(5) defines client for the purpose of imposing a duty on intermediaries to provide information about clients (HRP4.8).

In each case the guidance on those provisions explains how the term 'client' is defined and used in that context.

Conduct notices

HRP2.1 Conduct notices: overview

An authorised officer of HMRC may issue a conduct notice to a promoter where the promoter has met one or more of the threshold conditions listed in HRP2.2. The only officers authorised to issue conduct notices are in Counter-avoidance. The conduct notice imposes conditions on the promoter (HRP1.4) and the officer may apply to the First-tier Tribunal for approval to issue a monitoring notice if any of those conditions are not met (HRP3.2). The duration of a conduct notice cannot exceed two years (HRP2.6).

HMRC expects that in most circumstances there will be discussions with a promoter that has met a threshold condition, with the aim of understanding why that happened and agreeing on appropriate standards for the future. HMRC will aim to develop a working relationship with promoters that will lead to issues being resolved informally and without the need for the issue of a conduct notice. If an authorised officer is considering the issue of a conduct notice they will typically raise concerns with the promoter and listen to representations before proceeding. The exceptions will be where action needs to be taken urgently to prevent significant loss of tax, or where a promoter has proved unwilling to develop a working relationship to the extent required to apply the Part 5 regime.

There is no right of appeal against the issue of a conduct notice. If an authorised officer applies to the First-tier Tribunal to approve the issue of a monitoring notice a promoter can make representations to the Tribunal about the content of the conduct notice. The Tribunal will not agree to the issue of a monitoring notice where the conduct notice had only one condition and the Tribunal considers that the condition was unreasonably imposed (HRP3.5).

HRP2.2 Conduct notices: the duty to issue a conduct notice

Clause 230 governs the issue of conduct notices. An authorised officer can issue a conduct notice where a threshold condition has been met at any time in the preceding three years. That can include a period prior to the legislation being enacted.

Threshold conditions

The threshold conditions are set out in schedule 30 and there is detailed guidance on those conditions at HRP Appendix 1. The conditions are summarised here so that officers are aware of them, but only an authorised officer is able to determine whether or not a threshold condition has been met.

The threshold conditions are:

1. HMRC publishing information about the promoter as a deliberate tax defaulter
2. the promoter breaches the Banking Code of Practice in respect of schemes that it promotes
3. the promoter is given a conduct notice as a dishonest tax agent
4. the promoter fails to meet DOTAS obligations
5. the promoter is charged with a relevant criminal offence
6. arrangements that the promoter has promoted are regarded as unreasonable by the GAAR Advisory Panel
7. a professional body of which the promoter is a member takes certain disciplinary action against it
8. a regulatory authority imposes certain sanctions on the promoter
9. the promoter fails to comply with an information notice
10. the promoter imposes certain restrictive contractual terms on clients
11. the promoter continues to promote arrangements despite being given a stop notice in respect of those arrangements.

Although the legislation imposes a duty on an authorised officer to issue a conduct notice if one or more threshold conditions are met, this is subject to safeguards relating to significance and tax impact.

Wherever possible an authorised officer will discuss with the promoter any case in which a threshold condition appears to be met before considering whether to issue a conduct notice.

Significance test

The officer must consider whether or not it is significant that the promoter has met the condition, taking into account the purpose of the legislation. The officer cannot regard the meeting of any of conditions 1, 2, 3, 5 or 6 above as insignificant. If any of those conditions are met the officer must issue a conduct notice to the promoter unless the tax impact safeguard applies.

The officer should consider whether cases in which the following conditions are met are significant (or, if more than one is met, whether the conditions in combination are significant)

- the promoter failing to meet DOTAS obligations
- disciplinary action by a professional body of which the promoter is a member
- sanctions imposed on the promoter by a regulatory authority
- the promoter failing to comply with an information notice
- the promoter imposing restrictive contractual terms on clients

- the promoter continuing to promote arrangements despite receiving a stop notice.

In considering whether it is significant that a promoter has met a condition an officer will be realistic and will take into account that all organisations will make mistakes from time-to-time that will result in isolated or trivial failures to meet obligations. The purpose of the legislation is to deal with a small number of promoters who operate in a culture of non-disclosure, non-co-operation and secrecy. For such promoters the meeting of threshold conditions will be a recognisable part of continuing and deliberate patterns of behaviour.

So, for example, an officer may decide that isolated or trivial failures to meet DOTAS obligations, such as being a few days late with a disclosure, are not significant.

Significance examples

DOTAS

Promoter A only makes one or two disclosures a year under DOTAS. The promoter makes a firm approach to a potential customer about a notifiable arrangement on 1 August 2015 and should have disclosed it by 6th August to HMRC. The person who usually makes the DOTAS disclosures is on leave and no-one else can make the disclosure, consequently the disclosure is made a week late on the 13th August. Although a threshold condition has been met this would not be regarded as significant.

Promoter B makes around 15 disclosures under DOTAS each calendar year and has regular contact with the HMRC DOTAS team as well as several people who are able to make disclosures. The promoter makes a firm approach to a potential customer about a notifiable arrangement on 1 August 2015 and should have disclosed it by 6th August to HMRC. The person who usually makes the disclosures is on leave. The disclosure is made by their deputy but it is a week late on the 13th August. Although a threshold condition has been met this would not be regarded as significant.

Following on from the failure in August, Promoter B misses the deadlines for another four disclosures between August and December 2014. The promoter has met the threshold condition and it is significant. The failures indicate that Promoter B's system for making disclosures is not fit for purpose. The tax impact test will be considered before deciding whether to issue a conduct notice. Any subsequent conduct notice will focus on ensuring that the disclosure procedure in Promoter B works effectively.

Promoter C also makes around 15 disclosures under DOTAS each calendar year and has regular contact with the HMRC DOTAS team as well as several people able to make disclosures. It suffers a disastrous

computer failure on 8 March 2015 for two weeks and as a result misses the deadlines for three separate disclosures. The disclosures are eventually made in April. Promoter C does not contact the HMRC DOTAS team to inform them of the computer failure and to make alternative arrangements for making disclosures. If Promoter C had contacted the HMRC DOTAS team about the computer failure alternative methods of making a disclosure could have been agreed and the risk of missing DOTAS deadlines minimised. In the absence of remedial action the promoter has met the threshold condition and it is significant. The tax impact test will be considered before deciding whether to issue a conduct notice.

Through compliance activity HMRC discovers a number of users of a tax avoidance scheme marketed by Promoter D which has not been disclosed. From the evidence available HMRC considers that the scheme should have been disclosed and successfully applies to the tribunal for an order under s314A Finance Act 2004 that the scheme is notifiable. The promoter has met the threshold condition and it is significant. The tax impact test will be considered before deciding whether to issue a conduct notice.

If HMRC applies to a tribunal for an order under s306A Finance Act 2004 on the grounds that it suspects that a scheme is notifiable and the scheme is found to have been notifiable after the issue of the order, the promoter has met the threshold condition and it is significant. The tax impact test will be considered before deciding whether to issue a conduct notice.

Promoter E has made its first disclosure and has to provide its first quarterly client list to HMRC. It misjudges the final date for submitting the client list and as a consequence submits the list two days late. Although a threshold condition has been met this would not be regarded as significant.

Promoter F provides its client lists to HMRC every quarter and has done so since April 2012. However Promoter F misses the deadline for provision of the client list twice in 2012 and three times in 2013. The consistent pattern would be regarded as significant. The tax impact test will be considered before deciding whether to issue a conduct notice.

Information notices

Promoter G is subject to an information notice under Schedule 36 in respect of its own tax position. Promoter G complies with each item on the information notice apart from the requirement to provide its bank statements for 2011. It has approached its bank for duplicate statements but they had not been provided before the time limit for providing the information under the notice has expired. Although a threshold condition has been met this would not be regarded as significant.

Promoter H is subject to a similar information notice and fails to supply the majority of the information before the time limit expires on the information notice and offers no evidence that it is attempting to obtain the information. This would be significant. The tax impact test will be considered before deciding whether to issue a conduct notice.

Tax impact test

The tax impact safeguard is at Clause 230(8). It applies where the promoter's meeting of one or more threshold conditions is significant. An authorised officer should not issue a conduct notice where the impact of the promoter's activities on the collection of tax makes a conduct notice inappropriate. A conduct notice will not be issued if the authorised officer considers that the promoter's activities will not have any significant tax impact.

The impact of the promoter's activities on the collection of tax will depend on the circumstances under which the promoter met the threshold condition. On this basis it is not possible to provide comprehensive examples. However there are some circumstances in which the impact on the collection of taxes is minimal. For example, if the promoter fails to disclose a notifiable proposal under DOTAS and this is significant but there are no users of the proposal then it would not be appropriate to issue a conduct notice.

In contrast if the promoter omits three hundred clients from a DOTAS client list then this will probably have a significant impact on the collection of tax.

Promoter controlled companies and partnerships

Schedule 30 paragraph 13 provides for a company controlled by a promoter to be treated as meeting a threshold condition at a time at which the promoter has met a threshold condition if certain conditions are met (HRP Appendix 1.13).

Schedule 32 provides for a partnership to be treated as having met a threshold condition at a time when a controlling partner or managing partner has met a threshold condition, or for a conduct notice to be imposed on a former partner (HRP7.4).

HRP2.3 Conduct notices: Conditions that may be imposed by a conduct notice

Clause 231 sets out the purposes for which conditions may be imposed by a conduct notice. These are listed below and are to ensure that the promoter:

- supplies adequate information (HRP2.4) to its clients (HRP2.4) about schemes that it is promoting
- provides adequate information to intermediaries (HRP1.7) about schemes that it is promoting
- meets its obligations under specified disclosure provisions (HRP2.4)
- does not discourage others from meeting obligations to disclose information to HMRC of a description specified in the notice

- does not enter into agreements with other persons in relation to a scheme promoted by the promoter that impose restrictive contractual terms of the sort described in paragraphs 11(2) or (3) Schedule 30, or both of the sort described in paragraph 11(4) and the sort described in paragraph 11(5) Schedule 30 (HRP Appendix 1.11)
- does not promote schemes that rely on one or more contrived or abnormal steps to produce a tax advantage
- does not fail to comply with any stop notice that has taken effect in accordance with paragraph 12 schedule 30 (HRP Appendix 1.12).

Clause 231 does not specify the actual conditions that can be imposed in a conduct notice. The authorised officer has discretion to specify conditions for any of the purposes listed above as long as they meet the safeguards set out below and the HMRC governance arrangements are followed. Governance arrangements are currently being developed and will be made available as soon as possible. A key requirement of the governance arrangements will be the need for independent scrutiny of decisions.

The conditions should be chosen to address the poor conduct of a small minority of promoters who may, for example:
- promote schemes that have very little chance of working but without letting clients have an adequate assessment of risk
- rely on failing to disclose relevant information to HMRC
- provide misleading descriptions in marketing material.

Although there is no appeal against the issue of a conduct notice there are three important safeguards. These are:
- the authorised officer must give the promoter an opportunity to comment in writing or at a meeting on the proposed terms of the conduct notice before finalising its terms. The officer must then consider fairly any comments made, taking into account the purpose of the legislation.
- the notice may include only conditions that are reasonable and proportionate for the purposes listed above.
- when making representations to the First-tier Tribunal on an application by an authorised officer to approve the issue of a monitoring notice the promoter can ask the Tribunal to refuse approval on the basis that the condition was not reasonably imposed in the conduct notice (HRP3.5).

The term ‘contrived or abnormal steps’ is also used in the GAAR legislation at s207(2)(b) FA 2013, see paragraph C5.8 in the GAAR Guidance and the illustrative examples at Part D of the guidance. That guidance is also relevant here.

HRP2.6 provides guidance on when a conduct notice comes into effect. It also covers the duration of the conduct notice and the powers to amend or withdraw it.

HRP 2.5 provides guidance on the information powers that are available to an authorised officer to monitor compliance with a conduct notice for the period during which it is in force.

HRP2.4 Conduct notices: definitions relating to the conditions that may be imposed by a conduct notice

Specific definitions are provided for several of the terms used in Clause 231. These are provided below.

Adequate information *Clause 231(4) and Clause 232(2)*

Adequate information to be provided to clients or to intermediaries includes:

- adequate description of the proposed scheme
- adequate assessment of the risk that the scheme may fail and
- not creating a false impression that HMRC has, whether formally or informally, considered, approved or expressed an opinion on the scheme.

And adequate for these purposes means what a client or intermediary might reasonably expect. It is not possible to be prescriptive in guidance about what may be adequate to meet the reasonable expectations of a client or intermediary in every circumstance. The information provided must take into account the level of tax understanding of the recipient, so that a more detailed description of the scheme and more focus on clear and prominent explanation of risk may be needed for a recipient with little relevant tax knowledge. This does not mean that the promoter must provide any information a client might request, however unreasonable that request may be and whatever the cost of meeting that request. Authorised officers will be available to discuss with a promoter what information would be adequate.

The risk that a scheme may fail means the risk that the scheme will not result in the tax advantage that the scheme might have been expected to deliver (Clause 231(6)).

Client *Clause 232(3) to (5)*

A person is a client of a promoter if one or more of the following events takes place during the time in which a conduct notice is in effect (HRP2.6). The promoter:

- makes a firm approach (HRP1.6) to that person with a view to making a relevant proposal (HRP1.5) available for implementation by that person or anyone else
- makes a relevant proposal available for implementation by that person
- takes part in the organisation or management of relevant arrangements (HRP1.5) entered into by that person.

The promoter promotes a relevant proposal if it

- takes part in designing it, or
- makes a firm approach to a person to make it available for implementation by that person or anyone else
- makes it available to anyone for implementation.

The promoter promotes relevant arrangements if it takes part in designing, organising or managing the arrangements.

Specified disclosure provisions Clause 231(5)
If a conduct notice is to require that the promoter must comply with obligations under specified disclosure provisions it must relate to one or more of the following obligations:

- the DOTAS obligation on a promoter to provide information to HMRC in accordance with s308 FA 2004 (DOTAS Guidance paragraph 14.2)
- the DOTAS obligation on a promoter to provide scheme reference numbers to clients in accordance with s312 FA 2004 (DOTAS Guidance paragraph 17.2)
- the DOTAS obligation on a promoter to provide details of clients to HMRC in accordance with s313ZA and 313ZB FA 2004 (DOTAS Guidance paragraph 16)
- the obligation to provide information and documents to HMRC in accordance with Part 1 Schedule 36 FA 2008 (CH20150 onwards).

There is a power at Clause 231(7) to amend the list of disclosure obligations by regulation.

HRP2.5 Conduct notices: information powers
There is a specific information power at Clause 255 that will be used to help HMRC to monitor compliance with the conditions imposed in a conduct notice.

The power may be used by an authorised officer or by any other officer with the approval of an authorised officer. That person may issue a notice in writing to the promoter requiring it to

- provide information or
- produce documents

that are reasonably required to check that the promoter is complying with the conduct notice.

There is no limit on the number of times or the frequency with which this power can be used, subject to the requirement that the power must be used reasonably. The authorised officer will balance the need for proper oversight of the conditions imposed in the conduct notice with the cost and inconvenience to the promoter of complying with requests for information and documents.

An authorised officer may make a request for information and documents in writing but it may often be more convenient for the promoter's compliance with a conduct notice to be discussed at a meeting.

A promoter can appeal against an information notice issued under Clause 255. The appeal can be against the notice itself or against any of the requirements in the notice. Further guidance on appeals against information notices is at HRP4.13.

In common with the other information powers available under Part 5 there are provisions that govern the use of these powers. These provisions:

- govern how and where information and documents are to be supplied (Clause 260, see HRP4.14)

- permit the production of a copy of a document unless the original document is required (Clause 261, see HRP4.14)
- provide an exception for certain documents (Clause 262, see HRP4.15)
- confirm that a promoter does not need to produce documents that are not in its possession or power, or documents that originated more than six years before the issue of the notice (Clause 263, see HRP4.15)
- confirm that a promoter does not need to disclose any privileged information (Clause 264, see HRP4.15).

Schedule 31 imposes penalties for failure to comply with notices under Clause 255. The penalties are:

- an initial penalty of up to a maximum of £5,000 for failure to provide information and documents specified in the notice (paragraph 2, subject to abatement under paragraph 2(4), see HRP5.2)
- further penalties of up to a maximum of £600 per day for continuing failure to provide information and documents after an initial penalty has been imposed (paragraph 3(2)(b), see HRP5.4)
- a penalty of up to £5,000 if the promoter supplies inaccurate information or documents (paragraph 4(8)(c), see HRP5.5).

Detailed guidance about the use of the information powers in Part 5 is at HRP4.1 onwards...

HRP2.6 Conduct notices: duration, amendment and withdrawal

Clause 234 deals with the duration of a conduct notice and Clause 233 provides an authorised officer with powers to amend or withdraw a conduct notice.

A conduct notice will take effect from the date specified as the commencement date in the conduct notice. The date cannot be earlier than the date on which the conduct notice is issued.

The conduct notice will cease to have effect at the earliest of the following dates:

- the date on which it is withdrawn by an authorised officer – see below
- the date on which a monitoring notice takes effect in relation to the same promoter, see HRP3.4
- the termination date specified in the conduct notice.

All conduct notices must include a termination date, which cannot in any circumstances be later than two years from the date on which the notice takes effect.

An authorised officer may amend a conduct notice at any time during the period in which the conduct notice has effect. An amendment may add conditions to the notice or remove them. If an authorised officer proposes to add conditions to the notice the promoter will be given an opportunity to comment before the amendment is made. Any proposal by an authorised

officer to add to a conduct notice will be subject to the same governance as applies to the issue of a conduct notice.

An authorised officer may also withdraw a notice if it is no longer necessary for it to continue. This may be appropriate where the promoter has fully complied with the conditions imposed in the notice and there are no other causes for concern. The promoter is free to ask an authorised officer to withdraw a conduct notice at any time. Such a request should be supported by evidence that the conditions in the notice have been met and assurance that the promoter will take reasonable steps to ensure that the failures that led to the issue of the conduct notice will not recur.

Once a conduct notice has expired or been withdrawn there will be no conditions placed on the conduct of a promoter unless a monitoring notice has effect. However, if the promoter again meets a threshold condition (HRP Appendix 1) an authorised officer will consider whether a new conduct notice should be issued.

Monitoring notices

HRP3.1 Monitoring notices: overview

In the small number of cases in which a promoter of tax avoidance schemes has failed to comply with conditions in a conduct notice an authorised officer of HMRC will seek approval from the First-tier Tribunal for the issue of a monitoring notice to that promoter. A monitoring notice imposes significant new obligations on the promoter and can only be issued if approval is given by the First-tier Tribunal. A promoter is entitled to make representations to the tribunal and to appeal against any decision by the tribunal to approve the issue of a monitoring notice.

The flowchart at HRP1.3 illustrates the processes that relate to the issue of monitoring notices.

A promoter who is subject to a monitoring notice is referred to as a monitored promoter in the legislation (Clause 237(5)) and in this guidance. The guidance is organised as follows:

- action to take where there is a failure to comply with conditions in a conduct notice – HRP3.2
- approval of First-tier Tribunal to issue of monitoring notice – HRP3.3 to HRP3.5
- appeal against Tribunal approval – HRP3.6
- content and issue of monitoring notice – HRP3.4
- publication of information by HMRC about a monitored promoter – HRP3.8
- publication of information by a monitored promoter – HRP3.9
- allocation and use of promoter reference number – HRP3.10 to HRP3.13
- information powers that apply to monitored promoters, clients and intermediaries – HRP4.1 onwards
- limitation on duty of confidentiality placed by promoter on clients and intermediaries – HRP4.17

- extended time limit for assessment on clients of a monitored promoter – HRP6.1 onwards
- restrictions on defence of reasonable care for monitored promoters and their clients – HRP5.8
- withdrawal of monitoring notice – HRP3.14 to HRP3.15
- appeal against refusal to withdraw monitoring notice – HRP3.16.

HRP3.2 Monitoring notices: failure to meet a condition in a conduct notice

If a promoter fails to meet one or more conditions imposed by a conduct notice an authorised officer of HMRC will consider whether to approach the First-tier Tribunal for approval to issue a monitoring notice to the promoter. Clause 235(1) makes it mandatory for the officer to do so unless the exception for minor failures applies.

The authorised officer will not apply to the tribunal if the officer considers that the promoter's failure to comply with the condition or conditions is minor and the conditions with which the promoter has not complied are one or more of:

- failure to provide adequate information to clients (Clause 231(3)(a))
- failure to provide adequate information to intermediaries (Clause 231(3)(b))
- failure to comply with disclosure obligations (Clause 231(3)(c)) (HRP2.3).

The promoter's failure to comply with certain conditions imposed by a conduct notice is not to be regarded as minor under any circumstances. These conditions are that the promoter:

- does not discourage others from meeting obligations to disclose information to HMRC of a description specified in the notice
- does not enter into agreements with other persons in relation to a scheme promoted by the promoter that impose restrictive contractual terms of the sort described in paragraphs 11(2) or (3) Schedule 30, or both of the sort described in paragraph 11(4) and the sort described in paragraph 11(5) Schedule 30 (HRP Appendix 1.11)
- does not promote schemes that rely on one or more contrived or abnormal steps to produce a tax advantage
- does not fail to comply with any stop notice that has taken effect in accordance with paragraph 12 schedule 30 (HRP Appendix 1.12).

Any breach of such conditions will automatically lead to the officer asking the tribunal for approval to issue a monitoring notice.

When making representations to the tribunal the promoter can ask the tribunal to agree that it was unreasonable to include a condition or conditions in the conduct notice. If the tribunal agrees it will not approve the issue of a monitoring notice for a failure by the promoter to comply with conditions that were not reasonably imposed (HRP3.5).

Whether a failure to comply with a condition imposed under Clause 231(3)(a) to (c) is a minor failure is a matter for the discretion of the authorising officer. The officer will take into account whether the failure:

- was deliberate or inadvertent
- was repeated
- was no more than a failure to miss a deadline by a few days
- was unlikely to result in any significant risk of tax loss.

It is unlikely that an officer would consider a promoter failing to properly explain to clients or intermediaries that the scheme might fail, or giving a false impression that HMRC has approved a scheme, as a minor matter (HRP2.4).

The actions to take if the authorised officer decides to apply to the tribunal for approval to issue a monitoring notice are set out at HRP3.3.

HRP3.3 Monitoring notices: applying to the tribunal for approval

An authorised officer who wishes to apply to the First-tier Tribunal for agreement to issue a monitoring notice must carry out the following steps:

- include a copy of the draft monitoring notice (Clause 235(2). HRP3.4 provides guidance on how to draft a monitoring notice
- tell the promoter about the application to the tribunal at the same time, which conditions the officer considers the promoter has failed to comply with and what reasons the officer has for reaching that conclusion (Clause 235(4) and (5)). In practice this requirement can be met by providing the promoter with a copy of the draft monitoring notice at the same time as it is sent to the tribunal.

HRP3.4 Monitoring notices: the content of a monitoring notice

Clause 237 requires that any monitoring notice must include the following

- an explanation of the effect of the monitoring notice (Clause 237(2)(a)). It is important that the promoter is aware of all of the implications of being a monitored promoter and so in all cases the explanation provided below should be used.
- the date from which the monitoring notice will take effect, which cannot be earlier than the date on which the notice is given to the promoter (Clause 237(2) and (4)). The date should be left blank in any draft notice sent to the tribunal (HRP3.3)
- a list of the conditions in the conduct notice that the officer considers have not been met and an explanation of the evidence that has led the officer to that conclusion (Clause 237(3)(a))
- an explanation of the right to request withdrawal of the monitoring notice (Clause 238) (HRP3.14).

The monitoring notice will take effect from the date specified in the notice whether or not there is an appeal against the approval by the tribunal to the issue of the notice. References in this guidance to the date from which the monitoring notice takes effect are always to the date specified in the notice. A draft notice is not relevant for this purpose. For example, a draft notice is given to a promoter in June 2015 before an application is made to the tribunal. In August 2015 the tribunal agrees to the issue of a monitoring notice and a monitoring notice is given to the promoter on 15 September 2015. The notice cannot take effect before 15 September 2015.

Unlike in the case of a conduct notice (HRP2.6) there is no requirement to set a termination date for a monitoring notice. It will have effect indefinitely until:

- any appeal against the tribunal approval of the monitoring notice is finally settled in the promoter's favour (HRP3.6)
- an authorised officer agrees to a request from the monitored promoter to withdraw the monitoring notice, or
- an authorised officer withdraws a monitoring notice because it is no longer necessary for it to continue (HRP3.14)
- the tribunal directs on an appeal against HMRC refusal to withdraw a monitoring notice that the notice should cease to have effect (HRP3.16).

The requirements are modified where a monitoring notice is given to a promoter who was formerly a partner in a partnership that was itself a monitored promoter (HRP7.5).

The following explanation of the effect of a monitoring notice should be included in all monitoring notices.

"This is to inform you that the First-tier Tribunal has approved the issue of this monitoring notice and you will be a monitored promoter for the purpose of Part 5 with effect from [insert date]. A monitored promoter is defined by Clause 237(5) as a person in relation to whom a monitoring notice has effect.

I would be happy to discuss the implications of this monitoring notice at your convenience but, in broad terms, they are

- we will publish information about you, including that you are a monitored promoter
- we will require you to publish the fact that you are a monitored promoter on your website and in certain publications and correspondence
- we will require you to tell your clients that you are a monitored promoter
- we will provide you with a promoter reference number that you must provide to your clients and that they must pass on to other clients
- we will require your clients to put the promoter reference number on their returns or other communications with us
- we will be able to use information powers to ensure we receive information about any tax avoidance schemes that you promote or about any clients
- your clients will not be bound by any confidentiality clause you impose when they are dealing with us
- your right to rely on defences of reasonable care or reasonable excuse will be limited
- your clients will be subject to extended assessing time limits
- you will be subject to sanctions if you conceal, destroy or dispose of documents.

There is detailed guidance at ….

If you fail to comply with any of these requirements we can impose penalties that may be as much as £1m.

You are entitled to appeal against the decision of the tribunal to approve the issue of this notice. If you appeal HMRC will not publish information about you, nor provide you with a promoter reference number until the appeal is resolved. You will not be required to tell clients that you are a monitored promoter, nor to publish that information, until the end of the period permitted for an appeal, or until any appeal is resolved.

You will be entitled to request the withdrawal of this notice at any time after the expiry of 12 months from the end of the appeal period."

HRP3.5 Monitoring notices: proceedings of the First-tier Tribunal

Once an authorised officer has applied to the First-tier Tribunal to approve the issue of a monitoring notice the tribunal has discretion to determine how that application should be dealt with.

Clause 236 requires that:

- the tribunal must be satisfied that the officer would be justified in issuing a monitoring notice (Clause 236(1)(a)) and
- the promoter must be given a reasonable opportunity to make representations to the tribunal (Clause 236(1)(b)).

The tribunal is entitled to consider all of the circumstances of the case and will need to be satisfied on the balance of the evidence that the issue of a monitoring notice is reasonable, justified and proportionate, taking into account the purpose of the legislation and the behaviour of the promoter.

The tribunal will also consider how the promoter should be permitted to make representations. This could involve a hearing, with each side represented, or merely representations on paper, see ARTG7520. Given the commercial implications for a promoter it may be that some will apply for hearings to be held in private. The tribunal may agree to that request if it considers it appropriate, see ARTG8610.

Clause 236(3) permits a promoter to make representations to the tribunal to the effect that a condition in the conduct notice with which it has not complied ought not to have been imposed in the first place. If the tribunal agrees that it was unreasonable to impose that condition it will not approve the issue of a monitoring notice solely because of the promoter's failure to comply with that condition. However, if the tribunal is satisfied that the promoter has failed to comply with more than one condition in the conduct notice, and it was reasonable to impose at least one of the conditions with which the promoter has failed to comply, the tribunal may approve the issue of a monitoring notice because of the promoter's failure to comply with the conditions that were reasonably imposed.

> Example 1: a conduct notice imposes five conditions on a promoter, who fails to comply with one of them. The tribunal agrees that the condition with which the promoter has failed to comply should not have been imposed. So it refuses to approve the issue of a monitoring notice.

Example 2: a conduct notice imposes 5 conditions on a promoter, who fails to comply with four of them. The tribunal agrees that one of those four should not have been imposed, but having considered all of the circumstances it approves the issue of a monitoring notice because of the failure to comply with the other three conditions.

The tribunal also has authority to amend the draft monitoring notice. If the tribunal has determined that one or more of the conditions in the conduct notice were not reasonably imposed it will amend the monitoring notice to remove those conditions from the list of conditions with which the promoter has failed to comply.

If the tribunal does not approve the issue of a monitoring notice the existing conduct notice will continue to have effect until the termination date, or until it is withdrawn (HRP2.6). HMRC will not take any action to ensure compliance with any conditions in a conduct notice that the tribunal has decided were not reasonably imposed. If the tribunal considered that none of the conditions in the conduct notice were reasonably imposed HMRC will withdraw it.

A promoter is entitled to appeal against the tribunal's decision to approve the issue of a monitoring notice (HRP3.6).

HRP3.6 Monitoring notices: appeal rights

A decision of the First-tier Tribunal in relation to an application for approval to issue a monitoring notice is final unless either the promoter or HMRC:

- asks the tribunal to set aside or remake its decision, or part of its decision, see ARTG8970 or
- asks the tribunal for permission to appeal against the decision to the Upper-tier Tribunal, see ARTG8990 and ARTG9000.

The Upper-tier Tribunal can be approached directly if the tribunal does not grant permission to appeal. Any appeal must be on a point of law. There may in due course be a further appeal against any decision of the Upper-tier Tribunal, see ARTG10010.

If the First-tier Tribunal approves the issue of a monitoring notice an authorised officer will arrange for the notice to be issued without delay (Clause 237(1)). Many of the obligations imposed on a monitored promoter will come into effect as soon as the monitoring notice takes effect, regardless of whether there is an appeal. Some aspects of the monitored promoter regime are deferred until the end of the period in which an appeal could be brought or, if there is an appeal, until the appeal is settled. These are the aspects that would lead to a promoter being publicly identified:

- publication of information by HMRC about a monitored promoter (Clause 241(5)) (HRP3.8)
- the obligation on a promoter to tell clients that it is a monitored promoter and to publish information about its status (Clause 242(4)) (HRP3.9)
- the allocation and use of a promoter reference number (Clause 243(1) and (3)) (HRP3.10 to HRP3.13).

The period in which an appeal against approval given by the First-tier Tribunal could be brought is referred to as the 'appeal period' and consists of:

- the period of 56 days from the date on which the tribunal provides its reasoned decision, plus
- if permission is refused by the First-tier Tribunal, the period of one month from the date of refusal within which a person may petition the Upper Tribunal directly for permission to appeal, plus
- if the Upper Tribunal grants permission to appeal, the further period of one month from the date on which permission is granted within which a notice of appeal must be filed.

So the appeal period may be four months or more where the Upper Tribunal grants permission for an appeal.

There is a risk that the promoter will be publicly identified in any event unless the tribunal or Court agree to hold hearings in private and to anonymise decisions. That is entirely a matter for the tribunal or Court to consider.

If the promoter's appeal is successful the monitoring notice is treated as never having had effect. The existing conduct notice will continue to have effect until the termination date, or until it is withdrawn (HRP2.6). HMRC will not take any action to ensure compliance with any conditions in a conduct notice that the courts have decided were not reasonably imposed. If the courts considered that none of the conditions in the conduct notice were reasonably imposed HMRC will withdraw it.

HRP3.7 Monitoring notices: the regime that applies to monitored promoters

Once a monitoring notice takes effect in relation to a promoter it will have far-reaching implications, which aim to ensure that clients and potential clients are aware of the promoter's status, that HMRC has all of the information and tools it needs to tackle avoidance schemes promoted by the promoter and that the promoter is encouraged to change its behaviour. There are significant financial penalties if the promoter fails to comply with obligations that apply to monitored promoters. Some aspects of the monitored promoter regime do not take effect until the promoter's appeal rights are exhausted (HRP3.6).

The key aspects of the monitored promoter regime are:

- publicity and notification
  - publication of information about the promoter by HMRC (HRP3.8)
  - publication by the promoter of its status as a monitored promoter (HRP3.9)
  - allocation of promoter reference number (PRN) by HMRC to promoter (HRP3.10)
  - duty of promoter to pass PRN on to clients (HRP3.11)
  - duty of client to pass PRN on to other clients and to provide the PRN to HMRC (HRP3.13)
- information powers

  - power to obtain information or documents relating to avoidance schemes from promoter or intermediary (HRP4.3)
  - power to obtain information on an ongoing basis from a promoter about avoidance schemes (HRP4.5)
  - power to obtain information from intermediaries of non-resident promoters (HRP4.6)
  - power to obtain client details from a promoter or intermediary on a regular basis (HRP4.7 and HRP4.8)
  - power to obtain information about persons who are not clients and who have taken part in avoidance schemes (HRP4.9)
  - duty of a promoter to tell HMRC its current address (HRP4.10)
  - duty of a client or intermediary to provide information to a monitored promoter (HRP4.12)
- tools
  - no duty of confidentiality imposed by a promoter will prevent a client or intermediary from disclosing information to HMRC (HRP4.17)
  - restrictions on defence of reasonable excuse and reasonable care (HRP5.7 and HRP5.8)
  - extended time limit for assessment (HRP6.1 onwards)
  - criminal offence of concealing, destroying or disposing of documents (HRP5.10).

These powers will typically only apply during the period in which the monitoring notice has effect. When considering whether and when to withdraw a monitoring notice (HRP3.14) an authorised officer should take into account whether any of these powers continues to be needed. For example, although a promoter may have ceased promoting avoidance schemes there may be a continuing need for information about clients who have made use of schemes that were promoted during the period in which the monitoring notice has effect (HRP4.1).

Schedule 32 modifies the monitoring notice regime for partnerships. Where a monitoring notice has applied to a partnership an authorised officer may issue a monitoring notice to a departing partner (HRP7.5).

HRP3.8 Monitoring notices: publication by HMRC of information about a monitored promoter

A key principle of the regime that applies to monitored promoters is that clients, potential clients and intermediaries should be aware of the promoter's status. For that reason there are several ways in which information about a monitored promoter may be published. None of these can be used until the promoter's appeal rights against the initial tribunal decision have been exhausted.

Clause 241 permits HMRC to publish information about a monitored promoter, which HMRC will do unless there are compelling reasons not to do so.

The information that HMRC may publish is:

- the promoter's name, including any name under which it carries on business, or any previous name under which it has done so

- the promoter's business address, or registered office address if it is a company
- the nature of the promoter's business
- any other information that helps to make clear the promoter's identity
- a statement of the conditions in the conduct notice that the promoter has failed to comply with. This should be clear from the approval given by the First-tier Tribunal (HRP3.5).

The manner of publication is left to the discretion of the authorised officer, but as a general rule HMRC will publish the information on its website with due prominence. In considering how the information is published HMRC will take into account the need to make sure that clients and potential clients are able to find out about the promoter's status.

If HMRC publishes information about the nature of a monitored promoter's business it will typically consist of summary information about the types of avoidance schemes that the promoter has been known to promote. Where a decision of the First-tier Tribunal or the higher courts in relation to a scheme promoted by that promoter discloses the promoter's name, HMRC may also make reference to that decision in discussing the nature of the promoter's business.

The power to publish other information about a promoter is limited to what an authorised officer considers it appropriate to publish to make clear the identity of the promoter (Clause 241(2)(d)). There is no power to publish information for any other purpose.

Publication must not take place before the end of the appeal period (HRP3.6).

If the monitoring notice is withdrawn (HRP3.14) HMRC will publish the fact of withdrawal in the same way and with the same prominence as it published information about the promoter being a monitored promoter.

HRP3.9 Monitoring notices: publication of information by a monitored promoter

A monitored promoter is required by Clause 242 to provide certain information to existing and new clients.

The monitored promoter must:
- give notice to existing and new clients that it is a monitored promoter and which conditions in a conduct notice it has failed to meet (Clause 242(1))
- publish the same information on its website, together with its promoter reference number (PRN) (HRP3.10) (Clause 242(3))
- publish the same information, together with its PRN, in publications and correspondence (Clause 242(10)).

The requirements on monitored promoters to publish information on their websites, or in publications and correspondence do not yet apply. They will only apply once HMRC has published regulations to that effect. Those regulations will also prescribe

- the form and manner of the notice to be given to clients
- the form and manner of the information to be published on the promoter's website
- which publications and correspondence of the promoter need to contain the information and the form and manner in which they must do so (Clause 242(10) and (11)).

The publications and correspondence that will be prescribed in regulations may include documents that are not only made available to clients. It may include, for example, documents provided to intermediaries or to potential clients.

The obligations imposed by Clause 242 do not apply until the end of 10 days following the end of the appeal period (HRP3.6).

The end of the appeal period is modified where the monitoring notice is a replacement monitoring notice for a monitoring notice that had been issued to a partnership (HRP7.5). it will be the later of:
- the end of the appeal period for the original monitoring notice and
- the date on which the replacement monitoring notice takes effect (Clause 242(12)).

The notice to clients is to be given to:
- existing clients – any person who has been a client of the promoter at any time in the period between the date on which the conduct notice took effect and the date on which the monitoring notice takes effect
- new clients – any person who becomes a client of the promoter while the monitoring notice has effect.

See below for the definition of 'client' for this purpose.

The obligation to give notice to any person who was a client when the monitoring notice takes effect applies even where that person has ceased to be a client by the end of the appeal period.

In relation to persons who become clients of the promoter during the period in which it is a monitored promoter the obligations must be met within 10 days of the person first becoming a client, if that is later than the deadline for meeting the obligations that would otherwise apply.

> Example 1: The First-tier Tribunal releases its decision to approve the issue of a monitoring notice on 12 July 2016. Any appeal by the promoter against that decision must be made within 56 days of that date, by 6 September 2016 (regulation 39 SI2009/273). No appeal is made. The promoter must meet its obligations to provide information to its existing clients by the end of 16 September 2016. The promoter obtains a new client on 5 November 2016 and must meet its obligations to provide information to that client by 15 November 2016.

The definition of client for this purpose is at Clause 242(7) and (8). A person is a client of a monitored promoter at the time the monitoring notice takes effect if

- during the period between the date on which the conduct notice took effect and the date on which the monitoring notice took effect
- the promoter
  - made a firm approach (HRP1.6) to that person in order to make a relevant proposal (HRP1.5) available for implementation by that person or any other person
  - made a relevant proposal available for implementation by that person
  - took part in the organisation or management of relevant arrangements (HRP1.5) entered into by that person.

The conduct notice here is the conduct notice referred to in the monitoring notice. The effect of this definition is that a person may be treated as a client of the promoter at the time the monitoring notice takes effect even though the relevant actions by the promoter took place during the earlier period in which the conduct notice had effect and there was no longer a business relationship between that person and the promoter at the time the monitoring notice took effect.

> Example 2: A promoter is given a conduct notice that takes effect from 20 July 2014. In January 2015 the promoter makes a firm approach to a person with a view to that person implementing a scheme the promoter has developed. Nothing comes of it and the promoter has no contact with that person after March 2015. In November 2015 the First-tier Tribunal approves the issue of a monitoring notice to that promoter and it is issued by an authorised officer on 25 November 2015 to take effect on that date. The clients of the promoter are treated as including the person to whom it made a firm approach in January 2015.

A person is a new client of the promoter if the promoter takes any of the three relevant actions listed above in relation to that person at any time during the period in which the monitoring notice has effect.

HRP3.10 Monitoring notices: allocation of promoter reference numbers (PRNs)

The promoter reference number (PRN) plays an important role in the controls that are placed on the activities of a monitored promoter. It ensures that HMRC will be made aware that a person has made use of a scheme promoted by the promoter, so that effective counteraction can be taken.

The relevant steps needed to ensure that outcome are set out below.

1. At the end of the appeal period HMRC allocates a unique PRN to each monitored promoter, or to the intermediaries of that promoter if it is not resident in the UK (Clause 243).

2. The promoter must provide the PRN to its clients (Clause 244) (HRP3.11).

3. The clients must provide the PRN to other clients that it knows about and that may not have received the PRN (Clause 245) (HRP3.13).

4. Intermediaries who have received a PRN must provide it to clients (Clause 245) (HRP3.12).

5. Clients must provide the PRN to HMRC in their tax returns or in such a way as HMRC will prescribe (Clause 246) (HRP3.13).

Penalties may apply where there is a failure by promoters, intermediaries or clients to meet any of the obligations placed on them in relation to PRNs (HRP5.2).

The PRN is not allocated and notified to the promoter until the end of the appeal period (HRP3.6).

The end of the appeal period is modified where the monitoring notice is a replacement monitoring notice for a monitoring notice that had been issued to a partnership (HRP7.5). it will be the later of:
- the end of the appeal period for the original monitoring notice and
- the date on which the replacement monitoring notice takes effect (Clause 243(6)).

The rules for the issue of PRNs are modified where the monitored promoter is not resident in the UK. Clause 243(2)(b) requires the PRN to be provided to any person that HMRC knows is an intermediary (HRP1.7) in relation to any relevant proposal (HRP1.5) of the promoter. The intermediary is then required to pass the PRN on to clients (HRP3.12).

HRP3.11 Monitoring notices: duty of promoter to provide the promoter reference number to intermediaries and clients

Once a monitored promoter receives a promoter reference number (PRN) from HMRC it is obliged by Clause 244 to provide that PRN to its intermediaries and clients.

The PRN must be provided to three classes of clients:
- existing clients (Clause 244(2)(a))
- new clients (Clause 244(2)(b)) and
- some former clients (Clause 244(2)(c)).

A person is an existing client if one of the relevant actions listed below takes place during the period between the date on which the monitoring notice takes effect and the date on which the promoter received the PRN. The promoter must provide the PRN to these clients within 30 days of receiving it (Clause 244(5)(a)).

A person is a new client if one of the relevant actions listed below takes place during the period in which the promoter is a monitored promoter, but after the date on which the promoter received the PRN. The promoter must provide

the PRN to new clients within 30 days after the date on which the earliest relevant action takes place (Clause 244(5)(b)).

The relevant actions by the promoter in relation to that client are listed in Clause 244(3) and are:

- making a firm approach (HRP1.6) to that person in order to make a relevant proposal (HRP1.5) available for implementation by that person or any other person
- making a relevant proposal available for implementation by that person
- taking part in the organisation or management of relevant arrangements (HRP1.5) entered into by that person.

A person is a former client if the promoter could reasonably be expected to know that they have entered into certain transactions described in Clause 244(4). The transactions:

- must be transactions that form part of relevant arrangements (HRP1.5) and
- must enable, or be likely to enable, the person to obtain a tax advantage (HRP1.5) during the period in which the monitoring notice has effect and
- must be relevant arrangements in relation to which the monitored promoter is a promoter, or must implement a relevant proposal (HRP1.5) in relation to which the monitored promoter is a promoter.

Those transactions must have occurred during the period beginning with the date the conduct notice took effect and ending with the date the monitoring notice took effect. The conduct notice here is the conduct notice referred to in the monitoring notice. The promoter must provide the PRN to these clients within 30 days of receiving it, or within thirty days of the date on which the promoter first became aware that the former client has entered into transactions that form part of relevant arrangements, if that is later (Clause 244(5)).

Although the definition of a former client includes events that took place before the promoter became a monitored promoter those events are only relevant if the resulting tax advantage is obtained during the period that the promoter is a monitored promoter. The promoter is not required to provide the PRN to former clients who have implemented schemes that were intended to lead to tax advantages before the period in which the promoter became a monitored promoter.

> Example: a conduct notice is issued to a promoter on 23 July 2014. One of the conditions imposed by the conduct notice is that the promoter must stop promoting particular schemes that rely on contrived or abnormal steps to create a capital loss in circumstances in which there is no commercial loss (HRP2.3). The promoter makes one such scheme available to a client, who enters into the transactions necessary to create the loss between 13 and 15 October 2014. The promoter has no subsequent dealings with that client.
>
> As a result of the promoter continuing to promote capital loss schemes the First-tier Tribunal approves the issue of a monitoring notice on 7

November 2014 and an authorised officer issues a monitoring notice to the promoter on 14 November 2014. The appeal period expires on 2 January 2015, 56 days from the date on which the tribunal gave approval (regulation 39 SI2009/273). HMRC provided a PRN to the promoter on 9 January 2015 and the promoter must pass the PRN on to its former client by 8 February 2015.

Although the transaction entered into by that client took place before the promoter became a monitored promoter the intended tax advantage is that the client will be able to use the allowable loss against chargeable gains made in 2014-15 and in later years if the loss is not used in full in that year. The promoter was a monitored promoter during 2014-15 and so the tax advantage arose during a period in which the promoter was a monitored promoter.

The monitored promoter must also pass the PRN to relevant intermediaries (Clause 244(2)(d)). A relevant intermediary is any person that is an intermediary (HRP1.7) in relation to a relevant proposal (HRP1.5) at any time during the period in which the promoter is a monitored promoter. The monitored promoter must pass the PRN on to any relevant intermediary within 30 days of the later of:

- the date the monitored promoter received the PRN, or
- the date the monitored promoter first became aware that the person was a relevant intermediary.

Where the monitoring notice is a replacement monitoring notice (HRP7.5) the promoter is not required to provide the PRN to former clients.

HRP3.12 Monitoring notices: duties of intermediaries who receive promoter reference numbers

Where a monitoring notice is given to a promoter that is not resident in the United Kingdom any promoter reference number (PRN) is to be given not only to the promoter but also to any intermediary (HRP1.7) of the promoter of which HMRC is aware. The intermediary is then obliged by Clause 245 to pass the PRN on to clients of the monitored promoter within thirty days of receiving it.

The obligation placed on an intermediary that has received a PRN extends to three classes of persons. These are:

- persons who the intermediary might reasonably be expected to know have become, or are likely to have become, clients of the monitored promoter during the period in which the monitoring notice has effect (Clause 245(2) and (3))
- persons to whom the intermediary, as part of its business, has provided information about a relevant proposal (HRP1.5) of the monitored promoter during the period in which the monitoring notice has effect (Clause 245(4)(a))
- persons who the intermediary might reasonably be expected to know have entered into, or are likely to have entered into, transactions during the period in which the monitoring notice has effect that are part of relevant

arrangements (HRP1.5) promoted by the monitored promoter (Clause 245(4)(b)).

In order to comply with this obligation an intermediary must be able to determine who might be clients of the promoter. For this purpose a person is a client of the monitored promoter if the promoter has done any of the following in relation to that person:

- made a firm approach (HRP1.6) to that person in order to make a relevant proposal (HRP1.5) available for implementation by that person or any other person
- made a relevant proposal available for implementation by that person
- taken part in the organisation or management of relevant arrangements (HRP1.5) entered into by that person (Clause 245(3)).

The intermediary does not need to pass on the PRN to any person that it reasonably believes has already been given the PRN by someone else (Clause 245(5)). The intermediary cannot simply assume that another person must have been given the PRN, but must take reasonable steps to establish that fact. That may, for example, be done by seeking verbal or written confirmation.

The intermediary has no ongoing obligations in relation to the PRN, for example to pass the PRN to persons that it may be aware have become new clients of the promoter after the end of the thirty day period in which it must pass on the PRN it has received. An intermediary may be required to make quarterly returns providing information about clients (HRP4.8).

HRP3.13 Monitoring notices: duties of clients who receive promoter reference numbers

Clients of monitored promoters who receive a promoter reference number (PRN) have two responsibilities:

- to pass the PRN on to other clients of the promoter (Clause 245(2))
- to report the PRN to HMRC in their tax returns or in whatever other form and manner is required (Clause 246).

Clause 245(2) requires a person who receives a PRN in accordance with Clause 244 (HRP3.11) to pass that PRN on within 30 days of receiving it to any other person who they might reasonably be expected to know has become, or is likely to have become, a client of the monitored promoter during the period in which the monitoring notice has effect. The definition of client for this purpose is at Clause 245(3) (HRP3.12). Clients have no ongoing responsibility to pass on the PRN, for example to persons who become clients after the 30 day period from receiving the PRN has expired.

Clause 246 sets out the duty of clients to provide the PRN to HMRC if the client expects to obtain a tax advantage (HRP1.5) from the scheme of the monitored promoter into which the client has entered. This covers the reporting obligations for each of the taxes (HRP1.5) in relation to which there may be a tax advantage. HMRC will publish regulations to cover how the PRN is to be provided to HMRC and how the client is to report to HMRC

where they have no existing reporting obligations in relation to the tax concerned.

The report to HMRC is to be made in one of three ways:

- in or with a tax return (Clause 246(2)(a))
- in a separate report in a form prescribed by HMRC (Clause 246(2)(b))
- in a claim that is not contained in a tax return (Clause 246(5)).

Where the client is required to make one or more of the following tax returns for a period in which a tax advantage arises from a scheme promoted by the monitored promoter the report must be made in that return or returns, or with that return or returns.

The relevant returns are:

- a personal return for income tax and capital gains tax under s8 TMA 1970
- a trustee's return for income tax and capital gains tax under s8A TMA 1970
- a partnership return for income tax and corporation tax under s12AA TMA 1970
- a company tax return under paragraph 3 Schedule 18 FA 1998
- returns for the annual tax on enveloped dwellings under Ss159 or 160 FA 2013 (Clause 246(6)).

Where a tax return is required to be made the notification of the PRN must be made in or with that return, whether the tax advantage relates to the tax that is subject to the return or to some other tax. There is an exception for certain taxes for which the report to HMRC must always be made in a separate report, see below. If the tax return is not made by the filing date, or by any other date by which it is required by law to be submitted, then the PRN must be notified to HMRC in a separate report (Clause 246(3)).

A separate report of the PRN to HMRC must be made in a form and at a time that will be prescribed in regulations in the following circumstances:

- if the client is not required to make a tax return
- if the client has been required to make a tax return but has not done so by the filing date or other statutory deadline
- if the tax advantage relates to one or more of the following taxes:
  - inheritance tax
  - stamp duty land tax
  - stamp duty reserve tax
  - petroleum revenue tax (Clause 246(4)).

Where the tax advantage from the scheme that the client has entered into results in a claim:

- to treat a trade loss as a capital loss under s261B TCGA 1992
- to loss relief under Part 4 ITA 2007

and that claim is not required to be made in a tax return, the notification of the PRN to HMRC is to be made in the claim and in a form and at a time that HMRC will prescribe in regulations.

HRP3.14 Monitoring notices: withdrawal of monitoring notices

At any time after 12 months from the end of the appeal period a monitored promoter may ask an authorised officer to withdraw the monitoring notice (Clause 238). The promoter is entitled to appeal against any refusal of that request (Clause 240) (HRP3.16).

The appeal period ends:

- at the end of the period permitted for an appeal against the decision of the First-tier Tribunal to approve the issue of a monitoring notice, see ARTG8900 onwards
- if there is an appeal, when that appeal is finally disposed of, whether it is determined or withdrawn (Clause 238(2)).

Any request to an authorised officer to withdraw a monitoring notice must be made in writing (Clause 238(3)). If such a request is received it will be considered by an authorised officer, who must decide whether or not to agree to the request within 30 days from the date on which it was received (Clause 238(4)). The authorised officer who considers the request may not be the same officer who issued the monitoring notice.

The authorised officer's response to a request to withdraw a monitoring notice must meet the requirements of Clause 239 (HRP3.15).

In deciding whether or not to agree to withdraw the monitoring notice the officer must take the following into account:

- whether, during the period in which the monitoring notice has had effect, the promoter has engaged in behaviour of a sort that could be regulated by imposing conditions in a conduct notice (HRP2.3)
- whether it is likely that the promoter will engage in such behaviour in future
- whether the promoter has complied, or failed to comply, with all of the obligations imposed on it as a monitored promoter since the monitoring notice took effect (Clause 238(5)).

In deciding whether a monitored promoter may engage in future in behaviour that could be regulated by the issue of a conduct notice an authorised officer must make a reasonable exercise of judgement based on evidence of past behaviour and any undertakings that might be given.

An authorised officer may also decide to withdraw a monitoring notice without having received a request to do so from the promoter (Clause 238(6)) if he or she considers that it is no longer necessary, taking into account the promoter's behaviour and likely future behaviour in the same way.

If an authorised officer decides to withdraw a monitoring notice, whether on a request from the promoter or otherwise, the officer will consider whether to give the promoter a conduct notice (HRP2.1) that will be referred to as a follow-on conduct notice (Clause 238(7) and (8)). The follow-on conduct notice will take effect immediately after the date on which the monitoring notice ceases to have effect and can include any of the conditions that can be imposed by a conduct notice (HRP2.3).

In considering whether to withdraw a monitoring notice, or in deciding from what date the monitoring notice should be withdrawn, the authorised officer should consider whether there is a continuing need to make use of the powers available in the monitored promoter regime (HRP3.7).

The circumstances in which a request may be made to withdraw a monitoring notice, or to agree to that withdrawal, are modified if the monitoring notice is a replacement monitoring notice (HRP7.5). The end of the appeal period will be the later of:

- the end of the appeal period for the original monitoring notice and
- the date on which the replacement monitoring notice takes effect (Clause 238(9)(a)).

The period that the authorised officer needs to take into account begins at the time that the original monitoring notice took effect (Clause 238(9)(b)).

HRP3.15 Monitoring notices: how to notify a decision whether or not to withdraw a monitoring notice

The response of an authorised officer to a request by a promoter in accordance with Clause 238(1) for the withdrawal of a monitoring notice (HRP3.14) must meet certain requirements set out in Clause 239.

If the authorised officer agrees to withdraw the monitoring notice the requirements are:

- to specify the date from which the monitoring notice will cease to have effect and
- to tell the promoter whether or not a follow-on conduct notice will be given (HRP3.14) (Clause 239(2)).

The date on which the monitoring notice is to cease to have effect is to be as early as is reasonably practicable, taking account whether there is any continuing need to make use of information powers (HRP4.1 onwards) before the monitoring notice is withdrawn. Delay in withdrawing a monitoring notice should be exceptional but might be appropriate, for example, where a promoter has agreed to cease behaviours that might need to be regulated by the Part 5 regime but is currently promoting or managing a scheme in relation to which HMRC requires continuing information.

If the authorised officer refuses to withdraw the monitoring notice the requirements are:

- to explain to the promoter the reasons why the request has been refused and
- to explain the right to appeal under Clause 240 (Clause 239(3)) (HRP3.16).

In either case the response to the promoter can be made by an authorised officer or by another person with the approval of an authorised officer. If the response is to be made by a person other than an authorised officer the response and particularly the reasons given for any refusal to withdraw the monitoring notice must be reviewed and approved by an authorised officer

before release. Where the response is by a person other than an authorised officer that response must name the authorised officer who has given approval and must provide an address to which any appeal should be sent.

HRP3.16 Monitoring notices: appeal against refusal to withdraw a monitoring notice

A promoter has a right to appeal against any refusal by an authorised officer to agree to withdraw a monitoring notice (Clause 240).

The notice of appeal must be in writing and must be given within 30 days of the date on which the notice of refusal was given, to the authorised officer who made the decision to refuse to agree to withdraw the monitoring notice (Clause 240(2)). This may not be the person who notified the promoter that the request for withdrawal was being refused, but that notification should provide a name and address for the authorised officer to whom any appeal should be sent (HRP3.15).

Any appeal must state the grounds on which the appeal is being made (Clause 240(3)).

All of the provisions of Part 5 TMA 1970 apply to these appeals (Clause 240(5)). So, for example, a promoter can ask for a review of the authorised officer's decision, see ARTG2000 onwards. If the promoter does not notify the appeal to the tribunal within the time allowed and subject to the rules relating to late notifications (ARTG8240) the appeal is treated as settled by agreement (ARTG2010).

If an appeal is notified to the First-tier Tribunal the tribunal may either decide that the monitoring notice should cease to have effect or may confirm the refusal of the authorised officer to withdraw the notice. The decision of the tribunal may also be subject to appeal.

<u>Information powers</u>

HRP4.1 Information powers: overview

Where a monitoring notice has effect in relation to a promoter that promoter is referred to in this guidance as a monitored promoter (HRP3.1). A monitored promoter, intermediaries and clients are subject to obligations at Clauses 247 to 266 to provide information and documents. The aim is to make sure HMRC has all of the information it needs to tackle avoidance schemes promoted by the promoter.

The information powers cover

- information or documents relating to monitored proposals and monitored arrangements (HRP4.2) to be provided by the monitored promoter or intermediary (HRP4.3 and HRP4.4)
- information to be provided on an ongoing basis by a monitored promoter about monitored proposals and monitored arrangements (HRP4.5)
- information to be provided by intermediaries of non-resident monitored promoters (HRP4.6)

- obtaining client details from a monitored promoter or intermediary on a regular basis (HRP4.7 and HRP4.8)
- obtaining information from a monitored promoter or intermediary about persons who have taken part in avoidance schemes (HRP4.9)
- duty of a monitored promoter to tell HMRC its current address (HRP4.10)
- duty of a client to provide information to a monitored promoter (HRP4.12).

Where appropriate the information powers cover both the production of documents as well as the provision of information. Penalties may be due where the information or documents are not provided (HRP5.2). There is a criminal offence of concealing, destroying or disposing of documents (HRP5.10).

The information powers apply on or after the date on which a monitoring notice takes effect and regardless of whether there is an appeal against the decision of the tribunal to approve the issue of the monitoring notice (HRP3.6). The information powers cease to apply if the monitoring notice is withdrawn (HRP3.14). The promoter may then be subject to other information powers, for example if there is a conduct notice (HRP2.5), or under DOTAS.

Most of the information powers apply only to any monitored proposal or to monitored arrangements. These terms are defined in Clause 247 (HRP4.2). In broad terms these are avoidance schemes that the promoter begins to promote during the period in which the monitoring notice has effect. Other information powers relate to all of the schemes promoted during that period, or to all clients of the promoter during that period (HRP4.7 and HRP4.8). And a promoter may continue to be subject to DOTAS requirements.

HRP4.2 Information powers: monitored proposals and monitored arrangements

Clause 247 defines the terms ‘monitored proposal’ and ‘monitored arrangements’. The terms are used to limit the application of some of the information powers in Part 5 to avoidance schemes that are promoted by a monitored promoter for the first time during the period in which the monitoring notice has effect or which first give rise to a tax advantage during that period.

<u>Monitored proposal</u>

A relevant proposal (HRP1.5) promoted by the monitored promoter is a monitored proposal if one or more of the following events takes place on or after the date on which a monitoring notice takes effect and during the period in which the monitoring notice has effect (Clause 247(1)).

The events are:
- the promoter first makes a firm approach (HRP1.6) to a person in relation to that relevant proposal
- the promoter first makes the relevant proposal available for implementation by any person
- the promoter first becomes aware that any person has entered into any transaction that forms part of arrangements that implement a proposal.

The limitation to the first such event means that a relevant proposal will not be a monitored proposal if the first time each of these events took place predates the monitoring notice taking effect. Thus a relevant proposal may still be promoted during that period but will not be a monitored proposal.

> Example 1: a promoter markets a scheme to individuals that includes a subscription for shares in a company. The scheme is a relevant proposal. A monitoring notice is issued to the promoter with effect from 2 November 2015. In each of the following examples the proposal will be a monitored proposal.
>
> - Example 1A: on 16 November 2015 the promoter for the first time holds a seminar attended by potential clients, during the course of which the working of the scheme is described, the tax advantages explained and attendees are encouraged to take advantage of it
> - Example 1B: on 7 December 2015 the promoter for the first time provides an individual with a set of completed scheme documents to sign that will implement the proposal
> - Example 1C: on 14 December 2015 the promoter hears from an intermediary that a person to whom completed scheme documents were provided in September signed them in October and implemented the scheme. This is the first time the promoter has heard that someone has implemented the scheme. If the promoter had first heard that a person had implemented the scheme before 2 November 2015 this would not be a monitored proposal.

Monitored arrangements

Relevant arrangements (HRP1.5) promoted by the monitored promoter are monitored arrangements if one or more of the following events takes place on or after the date on which a monitoring notice takes effect and during the period in which the monitoring notice has effect (Clause 247(2)).

The events are drawn from the definition of promoter in relation to relevant arrangements at Clause 228(2) and (3) (HRP1.4). If the promoter has made a relevant proposal available for implementation by a person, or has made a firm approach (HRP1.6) to a person to make that proposal available for implementation, then the arrangements that implement that proposal will be monitored arrangements if:

- the promoter first makes a firm approach to a person in relation to that relevant proposal, or
- the promoter first makes the relevant proposal available for implementation by any person, or
- the promoter first becomes aware that a person has entered into any transaction that forms part of arrangements that implement a proposal.

If the monitored promoter takes part in the design, organisation or management of the arrangements they will be monitored arrangements if any part of that activity takes place for the first time during the period in which the monitoring notice has effect.

If the arrangements are intended to result in a tax advantage (HRP1.5) for the person entering into the arrangements then the arrangements will be monitored arrangements if the tax advantage is obtained during the period in which the monitoring notice has effect.

> Example 2: a promoter is issued with a monitoring notice that takes effect on 4 January 2016. During 2015-16 the promoter has developed an avoidance scheme that is intended to provide scheme users with losses that they can set against their other income in 2015-16. The scheme involves the use of a number of limited companies each controlled by a scheme user, but with the support of the promoter to acquire the companies, provide directors, arrange finance and draft documents for signature by scheme users and by third parties who will implement the scheme. The scheme involves a number of transactions, with the intended effect that losses will arise in March 2016. The arrangements made by the promoter will be monitored arrangements because the tax advantage is obtained in March 2016, which is during the period in which the promoter is a monitored promoter. If the first occasion of any of the activities of the promoter described above took place for the first time on or after 4 January 2016 the arrangements would be monitored arrangements regardless of when the tax advantage was intended to be obtained. For example, if the promoter first became aware on or after that date that a person had entered into transactions that form part of the arrangements then the arrangements would be monitored arrangements.
>
> Example 2A: a person completed scheme documents before the monitoring notice came into effect in January 2016. The tax advantage arises when the transactions take place in March 2016 – the arrangement is a monitored arrangement.

HRP4.3 Information powers: power to obtain information and documents from a monitored promoter or intermediary

Clause 248 provides a power to obtain information and documents from a monitored promoter or from certain intermediaries in order to resolve the tax liabilities of clients who have used avoidance schemes promoted by the promoter.

An information notice will be issued in writing by an authorised officer, or by a person nominated by an authorised officer. The notice should explain as clearly as possible the information or the documents that the promoter or intermediary must produce. Officers should only request information or documents that are reasonably needed to understand the scheme or to resolve the tax liabilities of clients.

In most cases the promoter or intermediary should be asked informally to provide the information or documents. The exception will be where giving that opportunity might prejudice the assessment or collection of tax. In such cases an officer may choose to issue a notice under Clause 248 without advance

notice to the monitored promoter, or may apply directly to the tribunal in accordance with Clause 249(5) without giving advance notice (HRP4.4).

The person who receives the notice must provide the information or documents required within 10 days of the date on which the notice was given, unless the notice specifies a longer period. Officers may wish to specify a longer period if the information and documents required are extensive and it can reasonably be assumed that it would take more than 10 days to comply.

A notice can be issued to:
- any monitored promoter, or
- any person who is an intermediary (HRP1.7) in relation to a monitored proposal (HRP4.2) and has received a promoter reference number (HRP3.10) of a person who is a promoter of that proposal.

The notice must request information and/or documents relating to monitored proposals or monitored arrangements for one of the following purposes:
- considering the consequences of implementing the scheme for the persons who implement it
- checking the tax position of any person who the officer reasonably believes has entered into transactions to implement the scheme.

The two types of notice are intended for different purposes. When an officer requests information or documents concerning the consequences of implementing the scheme the officer is trying to understand how the scheme is intended to work, so that appropriate counteraction can be put in place. Here the names of the scheme users may not be known, or there may not yet be any scheme users.

An officer who is checking the tax position of a person will be carrying out an investigation or enquiry into that person's tax liability, the nature of which will depend on the tax in question. HRP1.5 lists the taxes that may be relevant. Clause 248(6) provides a very broad definition of tax position to include:
- past, present and future liability
- penalties and other amounts in connection with tax, such as interest
- any claims, elections, applications and notices in connection with a person's tax liability
- deductions or repayments of tax, or sums representing tax such as PAYE liability
- the withholding of any part of another person's income for the purpose of PAYE (defined at s683 ITEPA 2003).

The notice can relate to a person's tax position at any time or for any period. So, for example, it need not relate to the tax position of a specific person in a particular year.

A notice can be issued to a promoter or intermediary to check the tax position of a company that has ceased to exist. So, for example, the fact that a company that took part in arrangements no longer exists does not prevent the issue of a notice to a promoter for information relating to that company.

A notice can be issued in relation to the tax position of a person who has died, but no notice intended to check the tax position of a person who has died can be issued more than four years after the person's death (Clause 248(8)).

If a notice under Clause 248 is given to a monitored promoter who is not resident in the UK and that promoter fails to comply a notice may instead be given to certain intermediaries or clients (HRP4.6).

In some cases approval must be obtained from the First-tier Tribunal before a notice is given to a person (HRP4.4).

The use of information powers is subject to:

- a right of appeal in some cases (HRP4.13)
- rules covering how information and documents are to be provided (HRP4.14)
- exceptions and safeguards (HRP4.15)
- restrictions on any attempt by a promoter to impose a duty of confidentiality (HRP4.17) and
- penalties for failing to comply with an information notice, or for supplying inaccurate information or documents (HRP5.1 onwards).

HRP4.4 Information powers: approval of the tribunal is needed in certain cases

Clause 249 requires approval from the First-tier Tribunal before certain information notices can be given under Clause 248 (HRP4.3).

This is the only information power in Part 5 that requires prior approval from the tribunal. Prior approval is not required for the use of the power in Clause 248 where the notice requests information or documents that relate wholly to

- the monitored promoter or intermediary, or
- any undertaking for which the promoter or intermediary is a parent undertaking.

The terms 'undertaking' and 'parent undertaking' are drawn from the Companies Act 2006 (Clause 249(6)). They will most commonly mean a parent company and its subsidiaries.

In practice this will mean that it should often be possible to issue a notice to obtain information and documents to understand the intended consequences of an avoidance scheme, particularly where the scheme does not yet have any known users, without prior approval from the tribunal. If the scheme is to be implemented by special purpose vehicles that are not controlled by the monitored promoter or the intermediary, approval will be needed from the tribunal before giving a notice requesting information or documents that relate to some extent to the special purpose vehicles. Approval of the tribunal will always be needed when the notice is for information or documents that relate to the tax position of a scheme user.

In most cases an application to the tribunal will only be made after the monitored promoter or intermediary has been given an opportunity to provide the information or documents. The exception will be where giving that opportunity might prejudice the assessment or collection of tax.

An application to the tribunal may be made without giving notice to the monitored promoter or intermediary who is affected by it (Clause 249(2)). The tribunal may give approval if:

- the application for approval is made by an authorised officer, or by a person nominated by an authorised officer and
- the tribunal is satisfied that in the circumstances the giving of the notice is justified and
- the person to whom the notice is to be given has been asked for the information and documents and given an opportunity to make representations and
- any such representations are provided to the tribunal.

The requirements to give advance notice to the person affected and to provide the tribunal with any representations do not apply if the tribunal is satisfied that to do so might prejudice the assessment or collection of tax. This will be exceptional and might apply where, for example, there is a real risk that a promoter may destroy key documents, liquidate companies, or leave the UK.

If the tribunal approves the giving of an information notice that notice should state that approval has been given.

Any decision by the tribunal to approve the giving of an information notice is final (Clause 249(7)). The giving of approval cannot be challenged on appeal. Nor can the monitored promoter or intermediary appeal against the notice itself (HRP4.13).

Any decision by the tribunal to refuse approval is also final. The decision of the tribunal may explain why approval was refused. A renewed application that meets the tribunal's objections may then be made if appropriate.

HRP4.5 Information notices: ongoing duty to provide information

Clause 250 permits an authorised officer, or an officer nominated by an authorised officer, to issue a notice to a monitored promoter (HRP3.1) to provide information and documents on an ongoing basis about schemes that the promoter is promoting.

The information and documents to be provided will be specified in regulations. The aim will be to ensure that HMRC has all of the information and documents it needs to ensure that it understands how a scheme is intended to work and what tax advantages are expected to flow.

The information and documents required by the notice will relate to all monitored proposals and monitored arrangements (HRP4.2) of the monitored promoter:

- at the time of the notice and
- after that time but during the period in which the monitoring notice has effect.

The notice will include a time limit for providing information and documents in relation to schemes being promoted at the time of the notice. It will also include time limits within which information and documents must be provided for future schemes. This will typically be a set number of days from the first date on which a proposal becomes a monitored proposal or the first date on which arrangements become monitored arrangements.

A notice cannot be given after the date on which the monitoring notice is withdrawn (HRP3.14). An existing notice will cease to have effect after that date in relation to any proposals or arrangements in respect of which the promoter first became a promoter after that date. The notice will continue to have effect in relation to any information or documents that relate to monitored proposals or monitored arrangements promoted during the period in which the monitoring notice had effect.

This information power will be used together with the power to obtain ongoing information about clients in Clause 252 (HRP4.7). The aim is to ensure that HMRC has information about both the schemes being promoted by the monitored promoter and the clients who are making use of those schemes.

If a notice under Clause 250 is given to a monitored promoter who is not resident in the UK and that promoter fails to comply, a notice may instead be given to certain intermediaries or clients (HRP4.6).

The use of information powers is subject to:
- a right of appeal in some cases (HRP4.13)
- rules covering how information and documents are to be provided (HRP4.14)
- exceptions and safeguards (HRP4.15)
- restrictions on any attempt by a monitored promoter to impose a duty of confidentiality (HRP4.17) and
- penalties for failing to comply with an information notice, or for supplying inaccurate information or documents (HRP5.1 onwards).

> Example: a promoter is issued with a monitoring notice that takes effect on 2 February 2015. On 2 March 2015 the promoter is issued with an information notice under Clause 250 that requires, among other things, production of copies of all marketing literature or presentation material provided to or used in presentations to clients or intermediaries. The notice requires those documents in relation to current monitored proposals or monitored arrangements (HRP4.2) to be provided by 16 March 2015.
>
> At that time the promoter was marketing seven avoidance schemes. One of these was a monitored proposal, because the promoter had first made a firm approach to a person in respect of that proposal on 5

February 2015. Three others are monitored arrangements because the persons who have entered into the transactions that make up those arrangements expect to obtain a tax advantage by 4 April 2015. The promoter must supply marketing literature for those four schemes by 16 March 2015. There is no obligation to provide information about the other schemes, even though the promoter is still promoting them, because they are not monitored proposals or monitored arrangements.

The notice also requires the monitored promoter to supply copies of marketing literature for future monitored proposals or monitored arrangements within 10 days of that literature being prepared.

The monitoring notice is withdrawn on 7 November 2016. At that time the promoter had been working on the design of a new scheme but had not begun to market it. The promoter is a promoter of that scheme by virtue of being involved in its design (HRP1.4) and so the notice applies to that scheme. The promoter must provide the marketing literature for that scheme within 10 days of it being produced, even though the promoter is not a monitored promoter at that time.

HRP4.6 Information notices: non-resident monitored promoters

Information notices under Clause 248 (HRP4.3) or Clause 250 (HRP4.5) may be given to a monitored promoter who is not resident in the United Kingdom. If that promoter fails to comply with the notice, or with any part of that notice, Clause 251 permits a notice to be given to certain intermediaries or clients requiring them to provide any information that the monitored promoter has failed to provide.

A notice under Clause 251 may be given by an authorised officer, or by a person nominated by an authorised officer and will:

- specify or describe the information that the monitored promoter has failed to supply and
- require that the information should be provided by the recipient of the notice and
- specify the date by which the information must be provided.

A notice under Clause 251 can only require information. There is no power to require documents. The information that can be required is limited to any part of the information required in Clause 248 or Clause 250 notices that has not been provided.

The information required should be provided within 10 days of the notice being given, unless the officer who has given the notice has specified a longer period (Clause 251(7)). A longer period may be permitted where it would be unduly onerous to provide all of the information requested within 10 days.

The issue of a notice under Clause 251 where information required under Clause 248 has not been provided does not require prior approval by the tribunal. Where necessary approval to the original notice will already have been given (HRP4.4).

An information notice under Clause 251 should only be given to a person that the officer giving the notice reasonably believes will be able to provide the information required (Clause 251(6)).

If the information required relates to a monitored proposal (HRP4.2) an information notice under Clause 251 may be issued to

- any person who is an intermediary in relation to that monitored proposal, or
- any person to whom the monitored promoter has made a firm approach (HRP1.6) in relation to that monitored proposal with a view to it being implemented by another person, or

if the officer issuing the notice is not aware of any such persons:

- any person who has implemented the proposal.

If the information relates to monitored arrangements (HRP4.2) an information notice under Clause 251 may be issued to any person who has entered into transactions that form part of the arrangements.

The use of information powers is subject to:

- a right of appeal in some cases (HRP4.13)
- rules covering how information is to be provided (HRP4.14)
- exceptions and safeguards (HRP4.15)
- restrictions on any attempt by a promoter to impose a duty of confidentiality (HRP4.17) and
- penalties for failing to comply with an information notice, or for supplying inaccurate information (HRP5.1 onwards).

The use of the information power in Clause 251 is also restricted in some cases where it relates to advice given by a tax adviser (HRP4.16).

A person may be liable to penalties in relation to an information notice under Clause 251 in addition to the monitored promoter being liable to penalties in relation to earlier notices under Clause 248 or Clause 250 in respect of the same information.

HRP4.7 Information notices: ongoing duty of promoter to provide client returns

Clause 252 provides for a notice to be given to a monitored promoter requiring specified information about clients to be provided to HMRC on a quarterly basis during the period in which the monitoring notice has effect.

The notice will be given by an authorised officer or by a person nominated by that authorised officer. It is expected that the issue of a notice under Clause 252 will be a routine part of the regime to which a monitored promoter is subject and that it will be issued at the same time as, or soon after, the issue of the monitoring notice.

The information required by the notice must be provided for each relevant period and will be:

- the name and address of each person who is a client of the monitored promoter during that period and
- other information about that person that will be set out in regulations (Clause 252(9)).

Clause 252 can only be used to obtain information about clients, but in many cases the person who enters into the transactions will not be the client. For example, the client may be an employer but the employees may be the scheme users. Clause 254 provides an additional power to obtain information about persons other than clients that an officer suspects have been party to transactions that implement an avoidance scheme (HRP4.9).

A relevant period is:
- the period beginning with the date on which the monitoring notice took effect and ending on the day before the start of the calendar quarter in which the Clause 252 notice was issued
- the calendar quarter during which the Clause 252 notice was issued, but not including any date before the monitoring notice was issued
- each calendar quarter after the end of that quarter and ending on the date that the monitoring notice ceases to have effect (Clause 252(3)).

A calendar quarter is a period of three months beginning on 1 January, 1 April, 1 July or 1 October (Clause 276(1)).

Where a monitored promoter is required by a notice under Clause 252 to make client returns those returns must be made
- within thirty days of the end of the relevant period, or if longer
- within thirty days from the giving of the Clause 252 notice (Clause 252(4)).

> Example 1: a promoter is issued with a monitoring notice on 8 June 2015 and with a Clause 252 notice on 22 June 2015. The relevant periods for which the promoter must make returns and the time limit for making the returns are:
> - 8 June 2015 to 30 June 2015, time limit 30 July 2015
> - 1 July 2015 to 30 September 2015, time limit 30 October 2015,
>
> and every quarter after that until the monitoring notice is withdrawn.
>
> Example 2: a promoter is issued with a monitoring notice on 21 September 2015 and with a Clause 252 notice on 5 October 2015. The relevant periods for which the promoter must make returns and the time limit for making the returns are:
> - 21 September 2015 to 30 September 2015, time limit 4 November 2015
> - 1 October 2015 to 31 December 2015, time limit 30 January 2016
>
> and every quarter after that until the monitoring notice is withdrawn.
>
> In this example the return deadline is extended because the time limit that would otherwise apply for the first relevant period (30 October 2015)

is less than 30 days after the date on which the Clause 252 notice was issued.

The definition of client for the purpose of Clause 252 is set out below but it is subject to an important exception. The monitored promoter does not need to report details of any client in a return for a relevant period where:

- the promoter has provided information for that client in a return under Clause 252 for an earlier relevant period and
- the information provided remains accurate (Clause 252(8)).

Thus, for the most part, returns can be limited to information about new clients. HMRC also would need to be told where an existing client has changed its name or address, if the monitored promoter has that information, or where new information about that client needs to be reported. For example, if the information to be provided includes information about avoidance schemes that the client has implemented, the return for a period will need to include information about new schemes entered into in that period by existing clients.

A person will be a client of a monitored promoter in a relevant period if during the relevant period the promoter:

- made a firm approach (HRP1.6) to that person in order to make a relevant proposal (HRP1.5) available for implementation by that person or any other person
- made the proposal available for implementation by that person, or
- took part in the organisation or management of relevant arrangements (HRP1.5) entered into by that person.

A person will also be a client of a monitored promoter during a relevant period if during that relevant period the person enters into transactions that form part of relevant arrangements and those transactions:

- are intended to give rise to a tax advantage for the person in that period or a later period and
- are relevant arrangements of the promoter, or implement a relevant proposal of the promoter.

It is not necessary for the proposal to be a monitored proposal, or the arrangements to be monitored arrangements (HRP4.2). Thus returns under Clause 252 will relate to all schemes that are being promoted during the period in which the monitoring notice has effect and not only to schemes that are newly promoted during that period.

Where a monitoring notice is a replacement monitoring notice (HRP7.5) the obligation to provide client returns is removed in relation to a client who has taken part in relevant arrangements if the promoter reasonably believes that information about that client in relation to the arrangements has been provided under the original monitoring notice.

The use of information powers is subject to:

- a right of appeal in some cases (HRP4.13)

- rules covering how information is to be provided (HRP4.14)
- exceptions and safeguards (HRP4.15)
- restrictions on any attempt by a promoter to impose a duty of confidentiality (HRP4.17) and
- penalties for failing to comply with an information notice, or for supplying inaccurate information or documents (HRP5.1 onwards).

HRP4.8 Information powers: ongoing duty of intermediary to provide client returns

The obligation on monitored promoters in Clause 252 (HRP4.7) to provide quarterly returns providing information about clients is supported by a similar but narrower obligation on intermediaries in Clause 253. An intermediary may be given a notice requiring it to make quarterly returns to HMRC.

The notice will be given by an authorised officer or by a person nominated by that authorised officer. Before issuing a notice under Clause 253 the officer will consider whether adequate information about clients is being obtained under Clause 252.

The notice is to be given to a person who is an intermediary (HRP1.7) in relation to a monitored proposal (HRP4.2) of a monitored promoter.

The information required by the notice must be provided for each relevant period and will be:
- the name and address of each person who is a client of the intermediary during that period and
- other information about that client that will be set out in regulations (Clause 253(7)).

Clause 253 can only be used to obtain information about clients, but in many cases the person who enters into the transactions will not be the client. For example, the client may be an employer but the employees may be the scheme users. Clause 254 provides an additional power to obtain information about persons other than clients that an officer suspects have been party to transactions that implement an avoidance scheme (HRP4.9).

A relevant period is:
- the period beginning with the date on which the intermediary was given the promoter reference number (PRN) of the monitored promoter (HRP3.10 to HRP3.12) and ending on the day before the start of the calendar quarter in which the Clause 253 notice was issued
- the calendar quarter during which the Clause 253 notice was issued, but not including any date before the intermediary was given the PRN of the monitored promoter
- each calendar quarter after the end of that quarter and ending on the date that the monitoring notice ceases to have effect (Clause 253(3)).

A calendar quarter is a period of three months beginning on 1 January, 1 April, 1 July or 1 October (Clause 276(1)).

Where an intermediary is required by a notice under Clause 253 to make client returns those returns must be made

- within thirty days of the end of the relevant period, or if longer
- within thirty days from the giving of the Clause 253 notice (Clause 253(4)).

> Example: an intermediary is issued with a PRN on 21 December 2015 in accordance with Clause 243 because the monitored promoter is not resident in the UK (HRP3.10). On 11 January 2016 the intermediary is given a Clause 253 notice. The relevant periods for which the intermediary must make returns and the time limit for making the returns are:
>
> - 21 December 2015 to 31 December 2015, time limit 10 February 2016
> - 1 January 2016 to 31 March 2016, time limit 30 April 2016
>
> and every quarter after that until the monitoring notice is withdrawn.
>
> In this example the return deadline is extended because the time limit that would otherwise apply for the first relevant period (30 January 2016) is less than 30 days after the date on which the Clause 253 notice was issued.

The definition of client for the purpose of Clause 253 is set out below but it is subject to an important exception. The intermediary does not need to report details of any client in a return for a relevant period where:

- the intermediary has provided information for that client in a return for an earlier relevant period and
- the information provided remains accurate (Clause 253(6)).

Thus, for the most part, returns can be limited to information about new clients. HMRC would also need to be told where an existing client has changed its name or address, if the monitored promoter has that information, or where new information about that client needs to be reported. For example, if the information to be provided includes information about avoidance schemes that the client has implemented, the return for a period will need to include information about new schemes entered into in that period by existing clients.

A person is a client of an intermediary for a relevant period if:

- the intermediary, in the course of its business, has communicated information to that person during the relevant period about a monitored proposal and
- the communication was made with a view to that person, or any other person, entering into transactions forming part of the arrangements that implement that proposal.

The obligation on an intermediary to provide quarterly client returns is narrower than that applying to monitored promoters. It only applies to the extent that the intermediary is an intermediary of the monitored promoter in relation to monitored proposals (HRP4.2). Thus returns under Clause 253 will

be limited to schemes that are newly promoted during the period in which the monitoring notice has effect.

The use of information powers is subject to:
- a right of appeal in some cases (HRP4.13)
- rules covering how information is to be provided (HRP4.14)
- exceptions and safeguards (HRP4.15)
- restrictions on any attempt by a promoter to impose a duty of confidentiality (HRP4.17) and
- penalties for failing to comply with an information notice, or for supplying inaccurate information or documents (HRP5.1 onwards).

HRP4.9 Information powers: returns relating to persons who have taken part in avoidance schemes

Clause 254 supplements Clause 252 (HRP4.7) and Clause 253 (HRP4.8) and provides for returns relating to persons for whom information has not been provided under those provisions but who have been party to an avoidance scheme promoted by the monitored promoter.

An authorised officer may issue a notice under Clause 254 to:
- a monitored promoter who has provided information under Clause 252
- an intermediary who has provided information under Clause 253.

The officer may suspect that there is some other person, about whom information has not been provided, who is likely to have been a party to transactions that implement the avoidance scheme. The usual case in which this will be so is where the client about whom information is provided is not the person who is taking part in the avoidance scheme. For example, the client may be:
- a director of a company that is intended to benefit from the scheme
- an employer whose employees are intended to benefit from the scheme
- a trustee of a trust or settlement in circumstances in which the beneficiaries are intended to benefit from the scheme
- a group company where another group company is intended to benefit from the scheme.

In other cases the client may be taking part in the avoidance scheme but there may be other persons who are also involved and who are not clients.

Where an authorised officer suspects the existence of such third parties the officer may issue a notice in writing under Clause 254 to the monitored promoter or intermediary requiring information about:
- any person who is likely to have been a party to the transactions that implement a relevant proposal (HRP1.5), or
- any person who is party to a transaction that forms part or all of relevant arrangements (Clause 254(2)).

The nature of the information that is to be provided will be set out in regulations.

The notice does not need to specify the persons about whom information is requested. The officer may well not be aware of the existence or names of all of those persons. The notice will apply to all persons that the monitored promoter or intermediary might reasonably be expected to know were party to those transactions.

The recipient of the notice must comply with it within 10 days, or such longer time as the officer permits (Clause 254(4)). A longer time should be permitted where the officer considers that it would be unduly onerous to provide the information requested within 10 days. The recipient does not need to provide information that has already been provided in accordance with Clause 252 or Clause 253.

The use of information powers is subject to:

- a right of appeal in some cases (HRP4.13)
- rules covering how information is to be provided (HRP4.14)
- exceptions and safeguards (HRP4.15)
- restrictions on any attempt by a promoter to impose a duty of confidentiality (HRP4.17) and
- penalties for failing to comply with an information notice, or for supplying inaccurate information or documents (HRP5.1 onwards).

In principle Clause 254 could be used to require information about a client that has been omitted from a return under Clause 252 or Clause 253. However, where there is a failure to provide client information, or that information is inaccurate, HMRC will usually seek to impose penalties in accordance with Schedule 31.

HRP4.10 Information powers: duty of monitored promoter to provide HMRC with its address

Clause 256 requires a monitored promoter to provide its address to an authorised officer within 30 days of the end of each calendar quarter in which the monitoring notice has effect. For a monitored promoter that is a company or a limited liability partnership this would be the registered office. For any other monitored promoter it would be the business address, or any other address at which the promoter would expect to be contacted.

This obligation applies to all monitored promoters and is not dependent on an authorised officer issuing a notice requiring the promoter to provide the information.

A calendar quarter is a period of three months beginning on 1 January, 1 April, 1 July or 1 October (Clause 276(1)). So, for example, if a monitoring notice has effect in relation to a promoter on 30 June 2016 the promoter has to provide its address to an authorised officer by 30 July 2016. If the notice still has effect on 30 September 2016 the promoter has to provide its address again on 30 October 2016.

HRP4.11 Information powers: application to tribunal for order requiring the production of information or documents

Various sanctions are available where a person fails to comply in full with an information notice given to them in accordance with Part 5. In most cases the appropriate sanction will be to charge penalties in accordance with Schedule 31 (HRP5.1 onwards). However, an additional sanction is provided by Clause 257; an application to the First-tier Tribunal to ask the tribunal to make an order requiring the production of information or documents.

The powers in Clause 257 will be used in those cases in which a financial penalty is not considered to be enough by itself to encourage compliance. It may also be used to obtain further evidence where an authorised officer believes that the person has failed to comply with an information notice. The tribunal can make use of additional powers available to the courts to compel the production of the information or documents.

The powers in Clause 257 can be used where any person has been given a notice under one of the provisions below and has provided information or produced documents as required by the notice, but an authorised officer suspects that they have not provided all of the information or documents required. The person concerned could be a monitored promoter, an intermediary or a client.

The provisions are:

- Clause 248 – power to obtain information or documents from a monitored promoter or intermediary (HRP4.3)
- Clause 250 – ongoing duty of a monitored promoter to provide information (HRP4.5)
- Clause 251 – power to obtain information from an intermediary or client where a non-resident monitored promoter fails to provide information (HRP4.6)
- Clause 252 – ongoing duty of monitored promoter to provide client returns (HRP4.7)
- Clause 253 – ongoing duty of intermediary to provide client returns (HRP4.8)
- Clause 254 – power to obtain information from monitored promoter or intermediary about persons who have taken part in avoidance schemes (HRP4.9)
- Clause 255 – power to obtain information and documents from a promoter who is subject to a conduct notice (HRP2.5).

In this case an authorised officer, or an officer nominated by an authorised officer, may apply to the First-tier Tribunal for an order requiring the person to:

- provide specific information about its clients
- provide specific information, or information of a specified description, about a monitored proposal or monitored arrangements (HRP4.2)
- produce specific documents relating to a monitored proposal or monitored arrangements (Clause 257(2)).

Example: a promoter provides HMRC with a description of a monitored arrangement but does not provide the name of the bank facilitating the arrangement through a loan. HMRC applies to the Tribunal for an order requiring the promoter to supply that specific information.

A promoter provides HMRC with a description of a monitored proposal but not how the proposal is being financed. HMRC applies to the Tribunal requiring the promoter to provide information describing how the arrangement will be financed.

If the tribunal is satisfied that the information or documents are required under the relevant provision, or will help to support or explain information required under the relevant provision, it may make an order requiring their provision. This requirement is treated as being part of the person's existing obligation under the relevant provision.

The information or documents must be provided within 10 days of the date on which the order was given. An authorised officer may direct that a longer period should be given if that seems appropriate. Officers may wish to specify a longer period if the information and documents required are extensive and it can reasonably be assumed that it would take more than 10 days to comply.

HRP4.12 Information notices: duty of client or intermediary to provide information to a monitored promoter

Clause 258 requires clients and certain intermediaries to provide information to a monitored promoter. This obligation applies where the client or intermediary has received a promoter reference number (PRN) and must be met within 10 days of receiving the PRN.

This obligation applies to:

- intermediaries of non-resident monitored promoters who have received a PRN from HMRC (HRP3.10)
- clients who have received a PRN from a monitored promoter (HRP3.11)
- clients who have received a PRN from an intermediary or from another client (HRP3.12 and HRP3.13).

The information that must be provided by the client or intermediary is:

- their National Insurance number and
- their unique tax reference number provided by HMRC.

If the client or intermediary does not have either of those numbers they must tell that to the monitored promoter within 10 days. The numbers do not need to be provided to the promoter where the client or intermediary has already provided them.

HRP4.13 Information notices: appeals against information notices

A person who is given notice to produce information or documents may appeal against that notice, or against any requirement in the notice, in accordance with Clause 259. The person concerned could be a monitored promoter, an intermediary or a client.

The right of appeal relates to notices under:

- Clause 248 – power to obtain information or documents from a monitored promoter or intermediary (HRP4.3)
- Clause 250 – ongoing duty of a monitored promoter to provide information (HRP4.5)
- Clause 251 – power to obtain information from an intermediary or client where a non-resident monitored promoter fails to provide information (HRP4.6)
- Clause 252 – ongoing duty of monitored promoter to provide client returns (HRP4.7)
- Clause 253 – ongoing duty of intermediary to provide client returns (HRP4.8)
- Clause 254 – power to obtain information from monitored promoter or intermediary about persons who have taken part in avoidance schemes (HRP4.9)
- Clause 255 – power to obtain information and documents from a promoter who is subject to a conduct notice (HRP2.5).

There is no right of appeal against a notice under Clause 248 that has been issued with the approval of the First-tier Tribunal under Clause 249 (HRP4.4) (Clause 259(3)(b)).

There is no right of appeal against a notice that requires a person to produce information or documents that are part of statutory records that a person is required to keep under the Taxes Acts or any other tax legislation (CH21700). A person is entitled to appeal against a requirement to produce statutory records if the period for which they must be kept has expired ((Clause 259(5)).

A notice of appeal must be in writing and must be sent within 30 days of the date on which the notice was given, to the officer who gave the notice (Clause 259(6)). It must state the grounds on which the appeal is being made (Clause 259(7)).

All of the provisions of Part 5 TMA 1970 apply to these appeals (Clause 259(11)). So, for example, a person can ask for a review of the officer's decision to issue the notice or to include a particular requirement in a notice, see ARTG2000 onwards. If the person does not notify the appeal to the tribunal within the time allowed and subject to the rules relating to late notifications (ARTG8240) the appeal is treated as settled by agreement (ARTG2010).

If an appeal is notified to the First-tier Tribunal the tribunal may:

- confirm the notice or confirm the disputed requirement
- vary the notice or vary the disputed requirement
- set aside the notice or set aside the disputed requirement (Clause 259(8)).

The decision of the tribunal on the appeal is final (Clause 259(10)).

HRP4.14 Information notices: how information and documents are to be provided

Clause 260 permits the Commissioners of HMRC to specify the form or manner in which information or documents must be provided if an information requirement in Part 5 is to be complied with.

Where a person is required to produce a document:

- the commissioners may specify that the document should be produced for inspection at a place agreed between the person and an officer, or at a place specified by an officer (Clause 260(2))
- subject to certain exceptions, a copy of the document will satisfy the requirement (Clause 261).

In specifying a place at which a document may be produced for inspection the officer must be reasonable and must not specify a place that is used solely as a dwelling.

A copy of the document will not be enough to meet the requirement where:

- regulations require the original document to be provided (Clause 261(1)), or
- the notice requires the person to produce the original document (Clause 261(2)(a)).

After having examined the copy document an authorised officer may decide that it is necessary to see the original document. If so, the authorised officer, or an officer nominated by the authorised officer, will make a request for the original in writing to the person who was required to produce the copy. That person must then produce the document at a time and location and within a time limit reasonably required by the officer (Clause 261(3)).

HRP4.15 Information notices: information or documents that do not need to be provided

The information powers in Part 5 are subject to safeguards to ensure that they are proportionate and do not infringe a person's rights. These are similar to the safeguards that apply to the information powers in Schedule 36 FA2008 (CH22100).

A person is not required to produce a document that is not in their possession or power (Clause 263(a)). CH22120 explains what these terms mean.

In addition there are restrictions relating to

- old documents (Clause 263(b))
- appeal material (Clause 262(1)(a))
- personal records (Clause 262(1)(c))
- journalistic material (Clause 262(1)(b))
- legally privileged information (Clause 264)
- tax advisers' papers giving advice (Clause 265) (HRP4.16).

An old document is a document the whole of which originates more than six years before the date on which a person would otherwise be required to

produce it. So, for example, an information notice could be used to obtain a contract that had been first drafted more than six years ago, but then amended within the previous six years.

An information notice cannot be used to obtain information or documents that relate to a pending tax appeal. CH22160 provides guidance on the equivalent restriction in the information powers in Schedule 36.

An information notice cannot be used to obtain personal records as defined in section 12 of the Police and Criminal Records Act 1984, or information contained in such records. However, a person can be required to produce such documents with the information that makes the documents personal records removed, or to provide information contained in such records that is not personal information. CH22180 provides guidance on the equivalent restriction in the information powers in Schedule 36.

An information notice cannot be used to obtain journalistic material as defined in section 13 of the Police and Criminal Records Act 1984, which consists of material acquired or created for the purpose of journalism. CH22220 provides guidance on the equivalent restriction in the Schedule 36 information powers.

An information notice cannot be used to obtain information to which a claim to legal professional privilege or, in Scotland, confidentiality of communications, could be maintained. CH22240 provides guidance on the equivalent restriction in the information powers in Schedule 36.

HRP4.16 Information notices: restriction for tax advisers' papers

There is an additional restriction in the information powers in Part 5 for advice given by a tax adviser. This restriction applies solely where a monitored promoter is not resident in the UK and a notice under Clause 251 has been issued to:

- a person who has implemented a monitored proposal (HRP4.2), or
- any person who has entered into a transaction that forms part of monitored arrangements (HRP4.6)

and that person is a tax adviser. A tax adviser is a person who has been appointed to give tax advice (Clause 265(5)).

This restriction does not apply where the notice under Clause 251 has been given to an intermediary.

The tax adviser is not required to:

- provide information about relevant communications, or to
- produce documents that are the property of the tax adviser and consist of relevant communications (Clause 265(2))..

Relevant communications are defined at Clause 265(5) and are described in the guidance on the equivalent provision in Schedule 36 FA2008 at CH22320.

The restriction for relevant communications does not apply to information or documents that the tax adviser has assisted a person in preparing for, or

delivering to, HMRC while acting as a tax accountant (Clause 265(3)). The restriction will apply for relevant communications that have already been provided to, or produced for, an officer of HMRC, so that these cannot be required under Clause 251.

> Example: a tax adviser has prepared the tax return of their client who has used an arrangement provided by a monitored promoter. In preparing the return the tax adviser and his client prepared a schedule of transactions between his client and the other parties in the monitored arrangement that enabled the tax adviser to identify the impact of the tax advantage on his client's return and advise his client accordingly. This document has not been provided to HMRC as part of the tax return.
>
> The schedule is a relevant communication within Clause 265(2) but it has not been provided to HMRC as part of the client's tax return. The schedule could be subject to an information notice under Clause 251(4) or (5).

HRP4.17 Information notices: restriction on duty of confidentiality

One of the aims of the Part 5 regime in relation to monitored promoters (HRP3.1) is to prevent lack of co-operation and unwillingness to provide information being used to frustrate HMRC's attempts to tackle avoidance schemes. Some promoters impose confidentiality requirements on their clients and on intermediaries to try to stop HMRC finding out about avoidance schemes. Clause 266 ensures that attempts by monitored promoters to impose confidentiality on clients or intermediaries in their dealings with HMRC will not be effective. Clients and intermediaries must be freely able to disclose information and documents to HMRC.

No duty of confidentiality, nor any other restriction on disclosure, is to prevent the voluntary disclosure of information or documents to HMRC by a client or intermediary about:

- a monitored promoter, or
- relevant proposals or relevant arrangements (HRP1.5) promoted by a monitored promoter (Clause 266(1)).

A client is a person in relation to whom the monitored promoter:

- has made a firm approach (HRP1.6) with a view to making a relevant proposal available for implementation by that person or any other person, or
- has made a relevant proposal available for implementation by that person, or
- has taken part in the organisation or management of relevant arrangements entered into by that person (Clause 266(2)).

An intermediary here is a person who is an intermediary (HRP1.7) in relation to a relevant proposal of the monitored promoter.

The definitions of client and intermediary here are not specific about when the events that create the relationship with the promoter are to have taken place.

The client might have become a client and become subject to an attempt to impose confidentiality before the promoter became a monitored promoter. And the scheme about which the client or intermediary voluntarily discloses information or documents need not be the scheme that has created the relationship with the promoter. So, for example, a client may have received a firm approach from a promoter about one scheme but may wish to make a voluntary disclosure about that and other schemes of the promoter of which the client is aware.

This does not require any person to disclose to HMRC any privileged information (HRP4.15).

Penalties

HRP5.1 Penalties: overview

Schedule 31 provides for penalties for failure to comply with the requirements of Part 5 or for inaccuracies in information or documents provided. The provisions that are subject to penalties for failure to comply, together with the maximum amount of penalty in each case, are listed at HRP5.2. There is a continuing, daily penalty in the event of a continuing failure to comply with an information power (HRP5.4). The penalties that apply to inaccuracies in information or documents are described at HRP5.5. There is a power to increase the maximum amount of any penalty by regulation (HRP5.3). In each case except that of certain daily penalties the amount of a penalty is to be determined by the First-tier Tribunal (HRP5.6).

A person will generally not be liable to a penalty under Schedule 31 if they took reasonable care, or had a reasonable excuse, but in some cases the standard for this defence is modified (HRP5.8). The defence will also not be available for certain failures in relation to DOTAS and for certain cases in which other penalties are charged for providing inaccurate documents to HMRC.

Paragraphs 6 and 7 Schedule 31 impose penalties for concealing, destroying or disposing of a document that has been or may be required to be produced by certain information notices(HRP5.9). Where the documents that have been concealed, destroyed or disposed of are, or are to be, required by a notice under Clause 248 (HRP4.3) approved by the tribunal under Clause 249 (HRP4.4) there are additional sanctions (HRP5.10).

HRP5.2 Penalties: maximum penalties for failure to comply

Schedule 31 paragraph 2 lists the maximum penalties that may be imposed for failure to comply with the provisions of Part 5. These are:

Legislation	Obligation	Maximum penalty
Clause 242(1)	Duty of monitored promoter (HRP3.1) to tell clients (HRP3.9)	£5,000 (Note 1)
Clause 242(3)	Duty of monitored promoter to publicise monitoring notice (HRP3.9)	£1,000,000
Clause 242(10)	Duty of monitored promoter to include information in publications and correspondence (HRP3.9)	£1,000,000
Clause 244	Duty of monitored promoter to pass promoter reference number (PRN) to clients and intermediaries (HRP3.11)	£5,000 (Note 1)
Clause 245	Duty of intermediaries and clients to pass PRN to other clients (HRP3.12 and HRP3.13)	£5,000 (Note 1)
Clause 246	Duty of clients to report the PRN to HMRC (HRP3.13)	Variable amount – see note 2 below
Clause 248	Duty of monitored promoter or intermediary to provide information and documents (HRP4.3)	£1,000,000
Clause 250	Ongoing duty of monitored promoter to provide information and documents (HRP4.5)	£1,000,000
Clause 251	Duty of intermediary or client of non-resident promoter to provide information (HRP4.6)	£1,000,000
Clause 252	Ongoing duty of monitored promoter to provide information about clients (HRP4.7)	£5,000 (Note 1)
Clause 253	Ongoing duty of intermediary of monitored promoter to provide information about clients (HRP4.8)	£5,000 (Note 1)
Clause 254	Duty of monitored promoter or intermediary to provide information about persons who have taken part in avoidance schemes (HRP4.9)	£10,000
Clause 255	Duty of promoter subject to conduct notice to provide information and documents (HRP2.5)	£5,000
Clause 256	Ongoing duty of monitored promoter to provide HMRC with its address (HRP4.10)	£5,000
Clause 258	Duty of client or intermediary to provide information to monitored promoter (HRP4.12)	£5,000

Notes

1. In each of these cases the maximum penalty that can be imposed is for each person to whom the failure relates (paragraph 2(2) Schedule 31). For example, if a monitored promoter has 500 clients and it fails to meet its obligation under Clause 253 to pass the PRN to its clients, the maximum penalty of £5,000 will be multiplied by the number of clients to whom the promoter has failed to pass the PRN. In this example the maximum penalty could be 500 x £5,000 = £2,500,000.

2. The maximum amount of the penalty that can be imposed on a client that has failed to report the PRN to HMRC depends on how often the client has failed to do so. The maximum is
   - £10,000 where there have been two or more previous failures in the three year period ending with the date of the latest failure to report
   - £7,500 where there has been one previous failure to report during that period
   - £5,000 where there have been no previous failures to report during that period (paragraph 2(3) Schedule 31).

   Example: a client is a serial user of avoidance schemes, making use of one or more schemes each year. He consistently fails to report PRNs he has received from monitored promoters.
   - In 2015-16 he makes use of arrangements intended to result in a tax advantage in that year, but does not include in his return the PRN he has been given. This is the first such failure and he is liable to a penalty up to a maximum of £5,000.
   - In 2016-17 he again uses the same arrangements, but again does not include in his return the PRN he has been given. This is the second failure within three years and he is liable to a penalty up to a maximum of £7,500.
   - In 2017-18 he uses the same arrangements for a third time, but again does not include in his return the PRN he has been given. This is the third failure within three years and he is liable to a penalty up to a maximum of £10,000.

For
- changes to the maximum amount of any penalty HRP5.3
- daily penalties for ongoing failure to comply HRP5.4
- penalties for inaccurate information or documents HRP5.5
- the offence of concealing, destroying or disposing of documents HRP5.9 and HRP5.10
- cases in which penalties will not be charged HRP5.7
- penalty assessments, appeals and interest payments HRP5.6.

HRP5.3 Penalties: changes to the maximum amount of a penalty

Paragraph 5, Schedule 31 provides a power to change the maximum amount of any penalty in Schedule 31 by regulation.

The power can only be used where inflation or deflation has changed the value of the penalty amount either:
- since the legislation was enacted, or
- since any previous regulations have been made under this power.

The amount of the change will be whatever amount seems to be justified by the change in the value of the penalty. This power can be used to increase or to decrease the maximum amounts and it applies to the following penalties:
- failure to comply (HRP5.2)
- ongoing daily penalties (HRP5.4)
- inaccurate information or documents (HRP5.5).

HRP5.4 Penalties: ongoing daily penalties

Paragraph 3 schedule 31 provides for ongoing daily penalties for continuing failure to comply with an information duty after an initial penalty has been imposed in accordance with paragraph 2 (HRP5.2).

An information duty is defined by paragraph 1 as an obligation to provide information or produce documents under one of the following provisions:

- for promoters who are subject to a conduct notice (HRP2.1)
  - Clause 255 requiring the production of information or documents (HRP2.5)
- for monitored promoters (HRP3.1)
  - Clause 248 requiring the production of information or documents (HRP4.3)
  - Clause 250 requiring ongoing production of information or documents (HRP4.5)
  - Clause 252 requiring ongoing provision of information about clients (HRP4.7)
  - Clause 254 requiring information about persons who have taken part in avoidance schemes (HRP4.9)
  - Clause 256 requiring information about the promoter's address (HRP4.10)
- for intermediaries (HRP1.7) of monitored promoters
  - Clause 248 requiring the production of information or documents (HRP4.3)
  - Clause 251 requiring the production of information that has not been supplied by a non-resident promoter (HRP4.6)
  - Clause 253 requiring ongoing provision of information about clients (HRP4.8)
  - Clause 254 requiring information about persons who have taken part in avoidance schemes (HRP4.9)
- for clients of monitored promoters
  - Clause 251 requiring the production of information that has not been supplied by a non-resident promoter (HRP4.6)

The amount of the ongoing daily penalty is not to exceed the relevant sum for each day on which the failure continued after the day on which the initial penalty was imposed. The relevant sum is:

- £10,000 where the maximum penalty for the initial failure was set at £1,000,000 (HRP5.2). This applies to
  - Clause 242(3) - duty of monitored promoter to publicise monitoring notice (HRP3.9)
  - Clause 242(10) - duty of monitored promoter to include information in publications and correspondence (HRP3.9)
  - Clause 248 - duty of monitored promoter or intermediary to provide information or documents (HRP4.3)
  - Clause 250 - ongoing duty of monitored promoter to provide information or documents (HRP4.5)
  - Clause 251 - duty of intermediary or client of non-resident promoter to provide information (HRP4.6)

- £600 in any other case.

For
- changes to the maximum amount of any penalty HRP5.3
- cases in which penalties will not be charged HRP5.7
- penalty assessments, appeals and interest payments HRP5.6.

The daily penalty not to exceed £600 is the only penalty within Schedule 31 for which the amount is set by an officer of HMRC rather than by the First-tier Tribunal (HRP5.6). The amount that may be set is determined in accordance with s100 TMA as the amount the officer considers to be correct or appropriate.

HRP5.5 Penalties: inaccurate information or documents

Paragraph 4 Schedule 31 provides for a penalty if in complying with an information duty (HRP5.4) a person provides inaccurate information or produces a document that contains an inaccuracy.

One of the following conditions must be met before a penalty can be charged:
- the inaccuracy was careless or deliberate, or
- the person knew about the inaccuracy when the information or document was provided but did not tell HMRC about it at that time, or
- the person discovered the inaccuracy at some later date but did not take reasonable steps to tell HMRC about it at that time.

An inaccuracy is careless if it results from the person failing to take reasonable care. A monitored promoter (HRP3.1) cannot rely on taking legal advice as evidence of reasonable care if:
- the advice was not based on a full and accurate description of the facts, or
- the conclusions in the advice were unreasonable (paragraph 4(4)).

An intermediary or client of a non-resident promoter cannot rely on legal advice provided or procured by that promoter as evidence of having taken reasonable care in complying with an information notice under Clause 251 (HRP4.6) (paragraph 4(5)).

These limitations to the defence of reasonable care should not be taken to imply that in other circumstances it will be enough to demonstrate that legal advice has been obtained in order to establish a defence of reasonable care. These provisions automatically deny that defence in the circumstances described. In other cases it will still be necessary to demonstrate that obtaining and relying on legal advice was sufficient to establish a defence of reasonable care in the circumstances of that case.

This rule does not prevent the client or intermediary arguing they have a reasonable excuse where they are not relying on legal advice. For example a client may argue that they have a reasonable excuse for not providing a document within the time required under an information notice because they were unexpectedly hospitalised. The client complies with the obligation as soon as possible after returning home.

The amount of the penalty for providing inaccurate information or documents is not to exceed:

- £1,000,000 in relation to the following information duties:
  - Clause 248 - duty of monitored promoter or intermediary to provide information or documents (HRP4.3)
  - Clause 250 - ongoing duty of monitored promoter to provide information or documents (HRP4.5)
  - Clause 251 - duty of intermediary or client of non-resident promoter to provide information (HRP4.6)
- £10,000 in relation to a duty imposed under Clause 254 (Duty of monitored promoter or intermediary to provide information about persons who have taken part in avoidance schemes (HRP4.9))
- £5,000 in relation to the following information duties:
  - Clause 252 - ongoing duty of monitored promoter to provide information about clients (HRP4.7)
  - Clause 253 - ongoing duty of intermediary of monitored promoter to provide information about clients (HRP4.8)
  - Clause 255 - duty of promoter subject to conduct notice to provide information or documents (HRP2.5)
  - Clause 256 - ongoing duty of monitored promoter to provide HMRC with its address (HRP4.10).

The same maximum penalty applies regardless of the number of inaccuracies in the information or documents provided (paragraph 4(9)).

For

- changes to the maximum amount of any penalty HRP5.3
- cases in which penalties will not be charged HRP5.7
- penalty assessments, appeals and interest payments HRP5.6.

HRP5.6 Penalties: assessment, appeal and interest payable

Paragraph 10 Schedule 31 applies the provisions of Part 10 TMA 1970 as machinery for the assessment of penalties. The power given by s100 TMA to an authorised officer of HMRC to impose a penalty and to determine the amount of a penalty is disapplied for penalties under Schedule 31 except for ongoing daily penalties for which the maximum penalty is set at £600 (HRP5.4) (paragraph 10(b)). So in order to charge a penalty under any other part of Schedule 31 an authorised officer must institute proceedings before the First-tier Tribunal in accordance with s100C TMA.

Where an authorised officer has determined the amount of an ongoing daily penalty the amount charged is to be paid within 30 days of the date of issue of the notice of determination (s100A TMA). There is a right of appeal against a penalty determination in accordance with s100B TMA. If the penalty payment is made late interest will be payable as if the penalty payment was a payment of tax (paragraph 11).

Where penalty proceedings are instituted before the First-tier Tribunal the tribunal has discretion to determine whether to impose a penalty and to

determine the amount of that penalty in any case. When the tribunal is setting the amount of a penalty for failure to comply with the requirements of Part 5 (HRP5.2) it must take into account the considerations set out in paragraph 2(4) Schedule 31. These are intended to ensure that the amount of penalty acts as a deterrent to future failures.

The tribunal must take into account:

- that it is desirable to set the penalty at a level that seems likely to deter that person, or other persons, from similar failures to comply in future
- where the failure is
  - a failure under Clause 248 (HRP4.3) by a monitored promoter (HRP3.1) or intermediary (HRP1.7) to provide information or documents, or
  - a failure under Clause 250 (HRP4.5) by a monitored promoter to meet an ongoing obligation to provide information or documents

  the amount of fees received, or likely to have been received by that person in relation to the monitored proposal or arrangements to which the information notice relates
- where the failure is a failure under Clause 251 (HRP4.6) by an intermediary or client of a non-resident monitored promoter, the amount of the tax advantage intended to be gained from the arrangements that were implemented.

In these cases, subject to the maximum amount of penalty that may be charged (HRP5.2), it is expected that the tribunal will determine penalties in a larger amount where:

- there is a very large amount of fee income, or
- the intended tax advantage is very large.

Where the tribunal has determined the amount of a penalty the amount charged is treated as if it is tax that is due and payable (s100C(3) TMA). There is a right of appeal against a penalty determination on a point of law, but also in relation to the amount of the penalty imposed (s100C(4) TMA). The Upper Tribunal then has discretion to confirm the penalty, set it aside, or to increase or decrease the amount (s100C(5) TMA). If the penalty payment is made late interest will be payable as if the penalty payment was a payment of tax (paragraph 11).

For cases in which penalties may not be charged see HRP5.7.

HRP5.7 Penalties: cases in which penalties may not be charged

Schedule 31 removes liability to a penalty in some cases. Of these the most important is that no penalty will arise in respect of a failure if there was a reasonable excuse for that failure (paragraph 9) but that defence is limited, see below.

If the failure is a failure to meet a deadline, no penalty will be due if the person has been given a longer deadline by an officer of HMRC and has met that longer deadline (paragraph 8).

No penalty will be due under Schedule 31 where the person concerned has been convicted of an offence in relation to the failure that has given rise to that penalty (paragraph 12). This is to prevent two sanctions applying for the same offence.

Paragraph 13 Schedule 31 prevents a double charge to penalties for the same failure by a client. Clause 246 requires a client of a monitored promoter (HRP3.1) that has received a promoter reference number (PRN) to provide that PRN to HMRC in a return or in some other form (HRP3.13). Paragraph 2 Schedule 31 imposes a penalty on the client if it fails to do so (HRP5.2).

If such a penalty is imposed there will not be a penalty under:

- Schedule 24 FA 2007 (penalty for submitting an inaccurate return), or
- Part 7 FA 2004 (DOTAS obligation on client to notify HMRC), or
- any other penalty regime that is prescribed in regulations for this purpose

resulting from the failure to provide the PRN.

Otherwise a failure to put the PRN on a return when required to do so would mean that the client has submitted an incorrect return as well as failing to meet the obligation imposed by Clause 246. in some cases in which we receive a return that is incorrect because it is incomplete we may return it for completion. If the return is incomplete because a client has failed to disclose a PRN penalties under Schedule 31 will usually be appropriate.

Although the obligations imposed by DOTAS are not quite the same as those imposed by Clause 246 they are intended to achieve a similar aim; that HMRC is made aware of avoidance schemes that the client has made use of. So it is appropriate that penalties should only be imposed under one regime.

The defence of reasonable excuse is denied in the following circumstances:

- insufficiency of funds is not a reasonable excuse unless it results from events that are outside the person's control
- relying on another person to do something is not a reasonable excuse unless reasonable care has been taken to ensure that the other person did what they were required to do
- if the person had a reasonable excuse, but no longer has it, the failure must be put right without unreasonable delay or the person will be treated as not having a reasonable excuse
- a monitored promoter (HRP3.1) may not rely on legal advice for a reasonable excuse if
  - the advice was not based on a full and accurate description of the facts, or
  - the conclusions in the advice were unreasonable.
- an intermediary or client of a non-resident monitored promoter Clause 251 (HRP4.6) cannot rely on legal advice given or procured by the promoter for the defence of reasonable excuse.

These limitations to the defence of reasonable excuse should not be taken to imply that in other circumstances it will be enough to demonstrate that legal advice has been obtained in order to establish a defence of reasonable

excuse. These provisions automatically deny that defence in the circumstances described. In other cases it will be necessary to demonstrate that obtaining and relying on legal advice was sufficient to establish a defence of reasonable excuse in the circumstances of that case.

HRP5.8 Penalties: limitations to defence of reasonable excuse and reasonable care

Schedule 31 limits the circumstances in which a monitored promoter (HRP3.1), or the intermediaries or clients of that promoter, can rely on legal advice as a defence against a charge to penalties, either:

- by arguing that obtaining legal advice demonstrates reasonable care (HRP5.4), or
- by arguing that relying on legal advice is a reasonable excuse (HRP5.7).

The same limitation is extended by Clause 268 and Clause 269 to other penalty regimes. The aim is to modify the defences to penalty charges in three ways.

The first is that monitored promoters will not be permitted to rely on legal advice that is not based on a realistic view of the facts, that reaches unrealistic conclusions, or that is subject to caveats that render it irrelevant.

The second is that clients and intermediaries of monitored promoters will be prevented from arguing that they have discharged their responsibilities by relying on legal advice provided by the promoter. Clients should take additional steps to test whether the tax advantages that the promoter claims will arise from avoidance schemes are realistic.

The third is to prevent monitored promoters from claiming to have relied on legal advice, but refusing to release that advice because of legal professional privilege (HRP4.15). These provisions do not require the production of privileged information or documents but when considering whether or not the promoter has a reasonable excuse in any penalty proceedings the Tribunal will need to consider if the legal advice is based on a realistic view of the facts and reaches a reasonable conclusion, Consequently, prevent undisclosed legal advice cannot be used as a defence against penalties.

These limitations to the defence of reasonable care and reasonable excuse should not be taken to imply that in other circumstances it will be enough to demonstrate that legal advice has been obtained in order to establish that defence. These provisions automatically deny that defence in the circumstances described. In other cases it will be necessary to demonstrate that obtaining and relying on legal advice was sufficient to establish a defence of reasonable care or reasonable excuse in the circumstances of that case.

Clause 268 extends this limitation to the penalties that apply for failing to notify under the DOTAS regime in part 7 FA 2004. It does this by adding two new provisions to the DOTAS penalty rules at s98C TMA 1970.

The first is s98C(2EA) TMA 1970, which applies where:

- a client of a non-resident monitored promoter fails to notify HMRC in accordance with s309 FA 2004, or
- any person who has entered into a transaction that is part of arrangements for which there is no promoter under DOTAS, for example because the information that the promoter would disclose is subject to legal professional privilege and that person fails to provide information to HMRC in accordance with s310 FA 2004.

Any legal advice given or procured by the monitored promoter is to be ignored in determining whether the person has a reasonable excuse for that failure for the purpose of s118(2) TMA.

The second is s98(2EB) TMA 1970, which prevents a monitored promoter from relying on legal advice as a reasonable excuse for a failure to meet any of the obligations listed in s98C(2) TMA 1970 if

- the advice was not based on a full and accurate description of the facts, or
- the conclusions in the advice were unreasonable.

Clause 269 extends this limitation to cases in which a person provides HMRC with a document of a kind listed in paragraph 1 Schedule 24 FA 2007 and there is a liability to a penalty under that schedule because of an inaccuracy in that document.

Penalties may be due under Schedule 24 where the inaccuracy is careless or deliberate. An inaccuracy is careless if it is due to a failure to take reasonable care by the person who has provided that document (paragraph 3(1) Schedule 24). For this purpose legal advice given or procured by a monitored promoter and relating to relevant arrangements (HRP1.5) of that promoter is to be ignored. The person who has submitted an inaccurate document is not permitted to argue that they relied on legal advice from the promoter and that in doing so they have taken reasonable care.

HRP5.9 Penalties: offence of concealing, destroying or disposing of documents

If a monitored promoter, a promoter subject to a conduct notice or, in certain cases, an intermediary of a monitored promoter, is required to produce a document, or is likely to be required to produce a document, and conceals, destroys or disposes of that document, that person is treated by paragraphs 6 and 7 Schedule 31 as having failed to comply with the obligation to produce the document.

Paragraph 6 applies to the following:

- Clause 248 - where a monitored promoter or an intermediary of that promoter has been required to produce a document (HRP4.3)
- Clause 250 – where a monitored promoter has been required to produce documents on an ongoing basis (HRP4.5)
- Clause 255 – where a promoter that is subject to a conduct notice has been required to produce documents (HRP2.5).

Once any of those duties have been imposed the promoter or intermediary must not:

- conceal, destroy, or otherwise dispose of the document that is to be produced
- arrange for that document to be concealed, destroyed or otherwise disposed of (paragraph 6(1)).

If the promoter or intermediary does so they will be treated as having failed to comply with the requirement to produce the document and will be subject to penalties as a result (paragraph 6(4)). An alternative criminal sanction is available if the document was required under Clause 248 and the notice was subject to approval by the First-tier Tribunal (HRP5.10).

There are two exceptions. The promoter or intermediary is permitted to conceal, destroy or dispose of such a document if:

- the requirement to produce the document has been complied with, unless an officer of HMRC has told the promoter or intermediary in writing that the document must continue to be available for inspection (paragraph 6(2))
- the promoter or intermediary has produced a copy of the document (HRP4.14) and a period of 6 months has passed from the date on which the copy was produced, unless an officer of HMRC has within that period made a request in writing for the original document (paragraph 6(3)).

If the document concerned was subject to a requirement to produce under more than one of the listed provisions then:

- if one of the provisions was Clause 248 the monitored promoter or intermediary will be treated as only having failed to comply with Clause 248
- if the provisions are Clause 250 and Clause 255 the promoter will be treated as only having failed to comply with Clause 250 (paragraph 6(5)).

The purpose of this priority rule is partly to ensure that a single offence only attracts a single penalty, but also

- to ensure that when there is a failure to comply with Clause 248 the sanctions under Clause 273 apply, where required, instead of penalties under Schedule 31 (HRP5.10), and
- to ensure that the penalty imposed is subject to the Clause 250 maximum amount rather than the Clause 255 maximum amount (HRP5.2).

Paragraph 6 is extended by paragraph 7 to cover the case in which no information notice has been issued but the promoter or intermediary has been informed in writing that they will, or are likely to, receive such a notice that will, or is likely to, require production of that document under one or more of the three information powers referred to above. The promoter or intermediary is not permitted to conceal, destroy or dispose of that document, or to arrange for someone else to do so. If the promoter or intermediary does so they will be treated as having failed to comply with the requirement to produce the document. The same priority order as in paragraph 6 is followed where more than one information power applies.

The ban on the promoter or intermediary concealing, destroying or disposing of such a document expires if 6 months have passed since the person has been told about the likely issue of an information notice and no such notice has been issued (paragraph 7(2)(a)). And paragraph 7 will not apply if a notice is issued under Clauses 248, 250 or 255, because paragraph 6 will apply instead (paragraph 7(2)(b)). There may, of course, be other reasons why the document should not be destroyed, for example if it is part of statutory records.

HRP5.10 Penalties: offence of concealing, destroying or disposing of documents required under Clause 248 notice approved by tribunal

Where the requirement to produce a document is imposed on a monitored promoter or an intermediary of that promoter under Clause 248 and the information notice has been approved by the tribunal there is an alternative criminal sanction to that imposed by paragraphs 6 and 7 Schedule 31 that is imposed in priority by Clauses 271 to 273.

Clause 271 applies if:

- a monitored promoter or an intermediary of that monitored promoter has been required to produce a document by a notice under Clause 248 (HRP4.3) and
- the First-tier Tribunal has approved the giving of that notice in accordance with Clause 249 (HRP4.4) and
- the monitored promoter or intermediary conceals, destroys or disposes or that document, or arranges for someone else to do so.

In these circumstances the monitored promoter or intermediary is guilty of an offence that is subject to the sanctions in Clause 273.

Thus if a monitored promoter or intermediary conceals, destroys or disposes of documents they are required to produce under Clause 248 penalties may be charged under Schedule 31 by virtue of paragraph 6 (HRP5.9). However, if the giving of the Clause 248 notice was approved by the tribunal the greater sanction of Clause 273 applies instead.

There are two exceptions in which the concealing, destroying or disposing of a document will not be an offence under Clause 271. The monitored promoter or intermediary is permitted to conceal, destroy or dispose of such a document if:

- the requirement to produce the document has been complied with, unless an officer of HMRC has told the promoter or intermediary in writing that the document must continue to be available for inspection (Clause 271(2))
- the promoter or intermediary has produced a copy of the document (HRP4.14) and a period of 6 months has passed from the date on which the copy was produced, unless within that period an officer of HMRC has made a request in writing for the original document (Clause 271(3)).

The offence described in Clause 271 is extended by Clause 272 to cover the case in which:

- an officer of HMRC has told the monitored promoter or intermediary in writing that a document is, or is likely to be, subject to a notice under Clause 248 and
- the officer is to seek approval for that notice from the First-tier Tribunal and
- the monitored promoter or intermediary then conceals, destroys or disposes of the document or arranges for someone else to do so.

In these circumstances also the monitored promoter or intermediary is guilty of an offence that is subject to the sanctions in Clause 273.

The ban on the promoter or intermediary concealing, destroying or disposing of such a document expires if 6 months have passed since the person has been told about the likely issue of an information notice and no such notice has been issued (Clause 272(2)). There may, of course, be other reasons why the document should not be destroyed, for example if it is part of statutory records.

If a monitored promoter or an intermediary commits an offence under Clause 271 or Clause 272 they may be liable under Clause 273:
- on summary conviction to
  - a fine in England or Wales, or
  - a fine not exceeding the statutory maximum in Scotland or Northern Ireland
- on conviction on indictment to a term of imprisonment not exceeding two years, or to a fine, or both, see CH27200.

The amount of the fine that may be imposed in England or Wales on summary conviction is limited to the statutory maximum in cases in which the offence is committed before s85(1) of the Legal Aid, Sentencing and Punishment or Offenders Act 2012 comes into force.

Paragraph 12 Schedule 31 ensures that a person cannot be liable to a penalty under Schedule 31 in respect of any action for which that person has been convicted of an offence. So where a monitored promoter is convicted in accordance with Clause 273 the promoter cannot also be liable for a financial penalty under paragraphs 6 and 7 Schedule 31.

Extended time limit for assessment

HRP6.1 Extended time limit for assessment: overview

Where a client of a monitored promoter (HRP3.1) is required by Clause 246 (HRP3.13) to provide a promoter reference number (PRN) to HMRC in a return or otherwise, but fails to do so, there will be an extended time limit for assessing each of the taxes to which Part 5 applies. The taxes are listed in Clause 276(1) (HRP1.5).

The extended time limit provisions for each tax are described as follows:
- income tax and capital gains tax (HRP6.2)
- corporation tax, including corporation tax on chargeable gains (HRP6.3)
- stamp duty land tax (HRP6.4)

- stamp duty reserve tax (HRP6.5)
- annual tax on enveloped dwellings (HRP6.6)
- petroleum revenue tax (HRP6.7)
- inheritance tax (HRP6.8).

HRP6.2 Extended time limit for assessment: income tax and capital gains tax

Clause 270(1) extends s36(1A) TMA 1970 by introducing a new category to which the 20 year assessing time limit for income tax and capital gains tax applies. This will be s36(1A)(d) TMA 1970 and it applies where there is a loss of income tax or capital gains tax attributable to a failure by a person to notify a promoter reference number (HRP3.13) to HMRC in relation to arrangements that are intended to give rise to a tax advantage.

The assessing time limit will be 20 years from the end of the year of assessment to which the loss of tax relates, see CH53600.

HRP6.3 Extended time limit for assessment: corporation tax

Clause 270(3) extends paragraph 46 Schedule 18 FA 1998 by introducing a new category to which the 20 year assessing time limit for corporation tax applies. This will be paragraph 46(2A)(d) and it applies where there is a loss of corporation tax, including corporation tax on chargeable gains, attributable to a failure by a person to notify a promoter reference number (HRP3.13) to HMRC in relation to arrangements that are intended to give rise to a tax advantage.

The assessing time limit will be 20 years from the end of the accounting period to which the loss of tax relates, see CTM95100.

HRP6.4 Extended time limit for assessment: stamp duty land tax

Clause 270(4) extends paragraph 31 Schedule 10 FA 2003 by introducing a new category to which the 20 year assessing time limit for stamp duty land tax applies. This will be paragraph 31(2A)(d) and it applies where there is a loss of stamp duty land tax attributable to a failure by a person to notify a promoter reference number (HRP3.13) to HMRC in relation to arrangements that are intended to give rise to a tax advantage.

HRP6.5 Extended time limit for assessment: stamp duty reserve tax

The 20 year extended time limit for stamp duty reserve tax will be made by amending the stamp duty reserve tax regulations (SI1711/1986). This guidance will be updated at that point.

HRP6.6 Extended time limit for assessment: annual tax on enveloped dwellings

Clause 270(5) extends paragraph 25 Schedule 33 FA 2013 by introducing a new category to which the 20 year assessing time limit for the annual tax on enveloped dwellings applies. This will be paragraph 25(4)(d) and it applies where there is a loss of tax attributable to a failure by a person to notify a promoter reference number (HRP3.13) to HMRC in relation to arrangements that are intended to give rise to a tax advantage.

The assessing time limit will be 20 years from the end of the chargeable period to which the loss of tax relates.

HRP6.7 Extended time limit for assessment: petroleum revenue tax

Clause 270(2) extends paragraph 12B Schedule 2 OTA 1975 by introducing a new category to which the 20 year assessing time limit for petroleum revenue tax applies. This will be paragraph 12B(2A) and it applies where a relevant situation is brought about by arrangements that were expected to give rise to a tax advantage and there is a failure by a participator, or by a person acting on behalf of a participator, to notify a promoter reference number (HRP3.13) to HMRC.

An assessment, or an amendment of an assessment, may be made on the participator at any time up to 20 years from the end of the chargeable period to which the tax advantage relates.

HRP6.8 Extended time limit for assessment: inheritance tax

Where an IHT account has been delivered and there is a loss of inheritance tax attributable to arrangements in respect of which a person was obliged to report a promoter reference number to HMRC (HRP3.13) the time limit in s240 IHTA 1984 for proceedings to recover the underpayment is extended to 20 years from the latest of:

- the date on which the original payment of inheritance tax was made and accepted,
- if the inheritance tax was paid in instalments, the date on which the last instalment was paid and accepted
- the date on which the original payment of inheritance tax, or the last instalment, was due.

IHTM30462 provides guidance on time limits for IHT liability.

<u>Partnerships</u>

HRP7.1 Partnerships: overview

The provisions of Part 5 applying to the promoters of tax avoidance schemes are adapted by Schedule 32 to apply to promoters acting in partnership. The additional provisions are needed because a partnership will in some cases not be a person and because the partners of a partnership may change over time.

The key modifications made by Schedule 32 are:

- a partnership is deemed to be a person for the purpose of Part 5 (HRP7.2)
- the responsibilities and liability of partners are defined and the roles of representative partner and nominated partner created to meet responsibilities of the partnership (HRP7.3)
- a partnership may be deemed to have met a threshold condition (HRP2.2) at an earlier time at which a partner met a threshold condition (HRP7.4)
- a conduct notice (HRP2.1) that is given to a partnership may impose requirements on current and future partners (HRP7.4)

- where a partnership is subject to a conduct notice that notice may continue to apply to a partner who leaves the partnership but continues as a promoter (HRP7.4)
- where a partnership is subject to a monitoring notice (HRP3.1) that notice may continue to apply to a partner who leaves the partnership but continues as a promoter (HRP7.5).

Schedule 32 refers to the 'members' of a partnership in describing the persons who are partners. This guidance refers to 'partners' because that is the term used in other HMRC guidance, such as BIM82000 onwards.

HRP7.2 Partnerships: partnership is deemed to be a person

Schedule 32 applies to partnerships. It treats persons who are carrying on business in partnership as a person for the purposes of Part 5 (paragraph 1(1). BIM82001 onwards provide guidance on the meaning of partnership and of carrying on a business in partnership.

Paragraph 1(2) excludes from the definition of partnership and thus from Schedule 32 any body of persons that form a distinct legal person. Thus a limited liability partnership (BIM82100) is not brought within Schedule 32. The rules that treat a partnership as having met threshold conditions (HRP7.4) do not apply to limited liability partnerships but, as a limited liability partnership is a body corporate, the rules at paragraph 13 Schedule 30 apply (HRP Appendix 1.13).

Similarly, as a Scottish partnership is a legal person (BIM82035) it is not subject to Schedule 32. Nor is a Scottish partnership a body corporate.

Paragraph 2 Schedule 32 treats a partnership as the same person despite changes in the partners making up the partnership, as long as at least one person who was a partner before the change remains a partner after the change. For example, A, B and C carry on a business in partnership as A Promoters. B and C leave the partnership and A carries on the business with new partners D, E and F. The partnership is treated for Schedule 32 as the same person throughout.

Because the partnership is treated as the same person, despite changes in partners, it is treated as having

- done anything that was done in their capacity as partners by the persons who were partners at the time
- failed to do anything that the persons who were partners at the time failed to do in that capacity.

This is limited by paragraph 3(3), which only permits action to be taken at a later time in relation to an action or omission by a partner at an earlier time if that partner, or any other person who was a partner at the earlier time, remains a partner at the later time. For example, a partnership meets a threshold condition because of a criminal offence committed by a partner acting in that capacity (HRP Appendix 1.6). Two years later, when an authorised officer is considering whether to issue a conduct notice (HRP2.2),

that partner and all of the other persons who were partners at the time the offence was committed, has left the partnership. The partnership is no longer to be treated as having met that threshold condition.

In considering whether the actions of a partner are to be attributed to a partnership, for example in considering whether the partnership has met a threshold condition, it is important to consider in what capacity the partner was acting. For example, if inaction by a partner acting on behalf of the partnership results in the partnership failing to comply with DOTAS obligations (HRP Appendix 1.5) the partnership has met a threshold condition. By contrast, if a partner commits a relevant criminal offence (HRP Appendix 1.6), but acting in a private capacity and not as a partner, the partnership has not met a threshold condition.

Similarly any action or inaction by a person who is an employee of a partnership will only result in the partnership meeting a threshold condition if the person was acting as an employee of the partnership.

HRP7.3 Partnerships: responsibility of partners

Paragraphs 15 to 17 Schedule 32 define the responsibility of partners for the compliance of the partnership with the requirements of Part 5. These are founded upon the principle of joint and several liability (BIM82001) but also permit certain things to be done on behalf of the partnership by a representative or nominated partner.

Where a notice is given to a partnership in accordance with Part 5, for example

- a conduct notice (HRP2.1)
- a monitoring notice (HRP3.1)
- an information notice (HRP4.1)

it has effect in relation to all of the persons who are partners at the time at which the notice is issued. These partners are referred to as the 'responsible partners' (paragraph 15(1)). Anything that is required to be done by the responsible partners is to be done by all of the responsible partners (paragraph 15(3)), unless they put forward a 'nominated partner' to act on their behalf, see below.

A person who has ceased to be a partner at that time is not a responsible partner, even though the notice may relate to something that happened while that person was a partner (paragraph 15(2)).

Where Part 5 confers any rights on a person, for example a right of appeal against a decision of the First-tier Tribunal to approve the issue of a monitoring notice (HRP3.6), that right is to be exercised by all of the persons who were responsible partners at the time, unless there is a nominated partner (see below). So, for example, if a partnership had six responsible partners when a monitoring notice was issued to the partnership, any appeal must be made by all six of those partners acting together. (paragraph 15(4)).

Where the partnership is liable to a penalty under Part 5 and Schedule 31 (HRP5.1), or to interest on such a penalty, the persons who were the responsible partners at the time at which the event took place that gave rise to the liability are jointly and severally liable for payment (paragraph 16). This means that partners:

- are not liable for penalties in relation to acts or omissions that took place before they became a partner, or for any interest on such penalties, and
- are only liable for ongoing daily penalties (HRP5.4), or for interest on such penalties, from the day on which they became a partner.

> Example: a partnership that is subject to a monitoring notice receives an information notice under Clause 248 (HRP4.3) on 8 February 2016. The partnership is given until 18 February 2016 to comply, but fails to do so. At a hearing on 16 June 2016 the First-tier Tribunal imposes a penalty of £250,000 for the failure. The partnership continues to fail to comply and on 6 October 2016 the tribunal imposes a further penalty of £5,000 per day for each day since 16 June 2016 for the further failure to comply. A new partner who joins the partnership after 18 February 2016 is not liable for the initial penalty of £250,000 but is jointly and severally liable for the ongoing daily penalties, together with any interest.

A majority of the responsible partners may nominate a person to act as the 'nominated partner'. That nominated partner will act as the representative of the partnership for the purpose of Part 5 and so can carry out any obligation that would otherwise be carried out by all of the responsible partners. The nomination takes effect once notice has been given to an authorised officer and it can be revoked by giving notice to an authorised officer (paragraph 18).

Instead of giving notices under Part 5 to every partner, an officer of HMRC may serve notice on a representative partner. This could be the nominated partner, or if no-one has been nominated, could be a partner designated by an authorised officer. If an authorised officer wishes to nominate someone as representative partner, or to revoke a nomination, they must do so by notice given to the partnership.

HRP7.4 Partnerships: conduct notices

Schedule 32 modifies how conduct notices (HRP2.1) apply in the case of a partnership. This can result in a conduct notice being imposed

- on a partnership where a controlling partner or managing partner (HRP7.6) of the partnership has met a threshold condition
- on a person who has left a partnership and is carrying on part or all of the business that was formerly carried on by the partnership
- on a former controlling partner of a partnership who has left the partnership and is carrying on a business as a promoter.

A conduct notice that is given to a partnership must state that it is a partnership conduct notice (paragraph 5(1)). The conditions imposed by a conduct notice (HRP2.3) can apply to any person who is a partner when the conduct notice is issued and to any person who becomes a partner at a later date and during the period in which the conduct notice has effect (paragraph

5(2)). For this reason a promoter that is subject to a conduct notice should inform HMRC whenever new partners join or existing partners leave.

Paragraph 4 imposes a rule for partnerships that is similar to the rule in paragraph 13 Schedule 30 that applies to companies controlled by a promoter (HRP Appendix 1.13). A partnership is treated as having met a threshold condition on an earlier date where the following conditions are met:

- a promoter met a relevant threshold condition at a time when the promoter was a controlling partner or managing partner of a partnership and
- at a later date an authorised officer has determined under Clause 230 that the partnership has met a threshold condition and that this was significant, although if there is no risk of substantial tax loss the officer may not have issued a conduct notice to the partnership, (HRP2.2) and
- the promoter is a controlling partner or managing partner of the partnership at that later time.

If these conditions are met the partnership is treated as having met the threshold condition that the promoter met and at the earlier time at which the promoter met that threshold condition.

For this to apply the promoter must have met one or more of the following threshold conditions:

- deliberate tax defaulters (paragraph 2 Schedule 30)
- dishonest tax agents (paragraph 4 Schedule 30)
- criminal offences (paragraph 6 Schedule 30)
- opinion notice of GAAR Advisory Panel (paragraph 7 Schedule 30)
- disciplinary action by a professional body (paragraph 8 Schedule 30)
- disciplinary action by a regulatory authority (paragraph 9 Schedule 30)
- failure to comply with information notice (paragraph 10 Schedule 30).

It is irrelevant whether the promoter has met any of the other threshold conditions.

Paragraph 7 provides for a conduct notice to apply to a former partner who is carrying on the promoter business formerly carried on by the partnership. This is extended by paragraph 10, with some modifications, to deal with the case in which a former partner carries on part of the business of the partnership.

Paragraph 7 applies where:

- one or more persons have ceased to be partners in a partnership and
- immediately before they ceased to be partners the partnership was subject to a conduct notice and
- immediately after that time a former partner is carrying on the business of the partnership but no longer in partnership.

The former partner who is carrying on the business of the partnership automatically continues to be subject to the conduct notice that formerly

applied to the partnership. There is no change in the duration of that conduct notice (HRP2.6).

> Example 1: A and B are in partnership as Z Promoters. Z Promoters is subject to a conduct notice. B leaves the partnership and A carries on the business of Z Promoters. The conduct notice that had applied to the business as a partnership now applies automatically to the business carried on by A as Z Promoters.

Paragraph 10 extends this to the case in which a former partner carries on part of the former partnership business, but in this case the original conduct notice is not automatically applied to the new business. Paragraph 10 applies where:

- one or more partners leave a partnership and no longer carry on the partnership business and
- immediately before that time the partnership was subject to a conduct notice and
- the departing partners continue to carry on part but not the whole of the partnership business.

A part of the business must have some connection with the business that was previously carried on. For example, the partnership business may have been operated through a series of regional branches and the departing partners may take over one or more of those branches. Or the partnership business might have had a number of different elements, such as the design of avoidance schemes, their marketing, management and maintaining client relationships. Departing partners may take over some elements of the business but not others. By contrast, where departing partners only take over fittings or similar assets and begin to carry on a wholly different business they will not have taken on part of the partnership business. If the wholly different business is a promoter business paragraph 8 may apply, see below.

An authorised officer may give the departing partners:

- a conduct notice if there is a single partner now carrying on that part of the business (paragraph 10(3)(a)), or
- a partnership conduct notice if there is more than one former partner and the former partners are now carrying on that part of the business in partnership (paragraph 10(4)(a)).

These are referred to as ‘replacement conduct notices’ (paragraph 11(1)). A replacement conduct notice cannot be given after the date on which the original conduct notice expires (paragraph 10(6)) and, if given earlier, it will expire on that date and the notice must state that it will do so (paragraph 12).

Where a replacement conduct notice is a partnership conduct notice it will cease to have effect if all of the persons who were partners of the former partnership cease to be partners of the new partnership (paragraph 10(5)).

> Example 2: A, B, C and D are in partnership as Z Promoters. Z Promoters is subject to a conduct notice that will expire on 30 November

2016. The business is split on 1 July 2015, with A and B setting up a new partnership to take on the promotion of new schemes, while C and D service users of existing schemes. A and B take on new partners E and F and trade as Z Promotions. On 8 July 2015 an authorised officer issues a replacement conduct notice to Z Promotions that will expire on 30 November 2016. On 14 September 2016 A and B cease to be partners in Z Promotions. The conduct notice that applies to Z Promotions ceases to have effect on that date. If the partnership left as Z Promoters remains a promoter (HRP1.4) the existing conduct notice will continue to apply until it expires or is withdrawn.

Paragraph 8 provides for a different scenario. It applies where a partner leaves a partnership that is subject to a conduct notice and carries on business as a promoter. In this case the promoter business carried on by the former partner is different from the business carried on by the partnership. Paragraph 8 applies where:

- a person, who was a controlling partner of a partnership when a conduct notice was issued, leaves that partnership and
- the conduct notice had effect at the time the partner left and
- the departing partner is carrying on a business as a promoter.

In these circumstances an authorised officer may

- give the departing partner a conduct notice (paragraph 8(2)), or
- if the business is being carried on by that person is a partnership and the person is a controlling partner of that partnership, give the partnership a conduct notice (paragraph 8(3)).

These are also referred to as replacement conduct notices and will expire in the circumstances described above.

Example 3: A is the controlling partner of a partnership that runs Z Promoters. Z Promoters is subject to a conduct notice that expires on 31 December 2016. On 1 January 2016 A leaves Z Promoters to expand a business in his own name as a promoter. On 8 January 2016 an authorised officer issues A with a conduct notice in relation to the business carried on in his own name. The conduct notice will expire on 31 December 2016. If the partnership left as Z Promoters remains a promoter (HRP1.4) the existing conduct notice will continue to apply until it expires or is withdrawn.

HRP7.5 Partnerships: monitoring notices

Schedule 32 modifies how monitoring notices (HRP3.1) apply in the case of a partnership. A monitoring notice that is given to a partnership must state that it is a partnership monitoring notice (paragraph 6).

Where a monitored promoter is a partnership the information that HMRC can publish in accordance with Clause 241 (HRP3.8) is information about the partnership and not information about individual partners (paragraph 14). A monitored promoter that is a partnership should tell HMRC whenever a new partner joins or an existing partner leaves.

There are three circumstances in which a monitoring notice can be issued to a partner who is leaving a partnership that has been subject to a monitoring notice. These are:

- where a person has left a partnership and is carrying on the business that was formerly carried on by the partnership (paragraph 7)
- where a person has left a partnership and is carrying on part of the business that was formerly carried on by the partnership (paragraph 10)
- where a former controlling partner of a partnership has left the partnership and is carrying on a business as a promoter (paragraph 9).

Paragraph 7 provides for a monitoring notice to apply to a former partner who is carrying on the promoter business formerly carried on by the partnership. This is extended by paragraph 10, with some modifications, to deal with the case in which a former partner carries on part of the business of the partnership.

Paragraph 7 applies where:

- one or more persons have ceased to be partners in a partnership and
- immediately before they ceased to be partners the partnership was subject to a monitoring notice and
- immediately after that time a former partner is carrying on the business of the partnership but no longer in partnership.

The former partner who is carrying on the business of the partnership automatically continues to be subject to the monitoring notice that formerly applied to the partnership.

> Example 1: A and B are in partnership as Z Promoters. Z Promoters is subject to a monitoring notice. B leaves the partnership and A carries on the business of Z Promoters. The monitoring notice that had applied to the business as a partnership now applies automatically to the business carried on by A as Z Promoters.

Paragraph 10 extends this to the case in which a former partner carries on part of the former partnership business, but in this case the original monitoring notice is not automatically applied to the new business. Paragraph 10 applies where:

- one or more partners leave a partnership and no longer carry on the partnership business and
- immediately before that time the partnership was subject to a monitoring notice and
- the departing partners continue to carry on part but not the whole of the partnership business.

An authorised officer may give the departing partners:

- a monitoring notice if there is a single partner now carrying on that part of the business (paragraph 10(3)(b)), or

- a partnership monitoring notice if there is more than one former partner and the former partners are now carrying on that part of the business in partnership (paragraph 10(4)(b)).

These are referred to as 'replacement conduct notices' (paragraph 11(1)).

Where a replacement monitoring notice is a partnership monitoring notice it will cease to have effect if all of the persons who were partners of the former partnership cease to be partners of the new partnership (paragraph 10(5)).

> Example 2: A, B, C and D are in partnership as Z Promoters. Z promoters is subject to a monitoring notice. The business is split on 1 April 2016, with A and B setting up a new partnership to take on the promotion of new schemes, while C and D service users of existing schemes. A and B take on new partners E and F and trade as Z Promotions. An authorised officer issues a replacement monitoring notice to Z Promotions on 8 April 2016. On 14 September 2016 A and B cease to be partners in Z Promotions. The monitoring notice that applies to Z Promotions ceases to have effect on that date.

Paragraph 9 provides for a different scenario. It applies where a partner leaves a partnership that is subject to a monitoring notice and carries on business as a promoter. In this case the promoter business carried on by the former partner is different from the business carried on by the partnership.

Paragraph 9 applies where:
- a person, who was a controlling partner (HRP7.6) of a partnership when a monitoring notice was issued, leaves that partnership and
- the monitoring notice had effect at the time the partner left and
- the departing partner is carrying on a business as a promoter.

In these circumstances an authorised officer may
- give the departing partner a monitoring notice (paragraph 9(2)), or
- if the business is being carried on by that person is a partnership and the person is a controlling partner of that partnership, give the partnership a monitoring notice (paragraph 9(3)).

These are also referred to as 'replacement monitoring notices' (paragraph 11(1)).

Where a replacement monitoring notice is a partnership monitoring notice it will cease to have effect if the person who was a partner of the former partnership ceases to be a partner of the new partnership (paragraph 9(4)).

> Example 3: A is the controlling partner of a partnership that runs Z Promoters. Z Promoters is subject to a monitoring notice. On 1 January 2016 A leaves Z Promoters to expand a business in his own name as a promoter. On 8 January 2016 an authorised officer issues A with a monitoring notice in relation to the business carried on in his own name.

HRP7.6 Partnerships: controlling member and managing partner

Paragraph 19 defines the term 'controlling member' for the purposes of Schedule 32. The controlling member is referred to in this guidance as a controlling partner. Paragraph 20 defines 'managing partner'.

A controlling partner of a partnership is a person who has a right to a share of:

- more than half of the assets of the partnership, or
- more than half of the income of the partnership (paragraph 19(1)).

The controlling partner must be a single person. Two or more persons cannot be treated as a single controlling partner by combining their interests.

BIM82058 explains how to determine whether an asset is an asset of the partnership.

In testing whether a person is a controlling partner the following interests are to be attributed to the partner:

- if the partner is an individual, any interests or rights of any connected person and
- the interests or rights of any body corporate (CTM00510) that is controlled by the partner (paragraph 19(2)).

The following are connected persons of a partner who is an individual:

- the partner's spouse or civil partner
- any relative of the partner, where relative means any brother, sister, ancestor or lineal descendant
- the spouse or civil partner of a relative of the partner
- any relative of the partner's spouse or civil partner
- the spouse or civil partner of any relative of the partner's spouse or civil partner (paragraph 19(3) and (4)).

This is usefully illustrated by the diagram that explains the equivalent rule for capital gains tax at CG14580.

The partner, who may be a natural or legal person, controls a body corporate if the partner has power to secure that the affairs of the body corporate are conducted in accordance with the partner's wishes. This power may be secured by:

- the holding of shares in the body corporate or some other body corporate
- the possession of voting power in the body corporate or some other body corporate
- the powers conferred by the articles of association or other document regulating the body corporate or some other body corporate (paragraph 19(5)).

The guidance at CTM60200 onwards illustrates how these tests should be applied.

A managing partner of a partnership is a partner who directs the management of the partnership's business, or who is on a day-to-day level in control of the management of the partnership's business (paragraph 20). The managing partner may or may not be the same person as the controlling partner.

HRP Appendix 1 Conduct notices: the threshold conditions

HRP Appendix 1.1 An authorised officer of HMRC may issue a conduct notice where one or more threshold conditions is met. The threshold conditions are set out in schedule 30. There is guidance on the issue of conduct notices at HRP2.1 onwards.

Paragraph 13 Schedule 30 modifies the date on which a threshold condition is treated as being met for a company controlled by a promoter, see HRP Appendix 1.13 below.

Paragraph 14 Schedule 30 provides a power to make regulations to amend the schedule to vary or remove any of the conditions, or to add new conditions. The power extends to amendments to Part 5 that are consequential upon amendments to the threshold conditions.

The threshold conditions

HRP Appendix 1.2 Deliberate tax defaulters (Schedule 30 paragraph 2)
A promoter meets this condition if HMRC publishes information about the promoter as a deliberate tax defaulter in accordance with section 94 FA2009. There is guidance on deliberate tax defaulters at CH190000 onwards.

HRP Appendix 1.3 Breach of the Banking Code of Practice (Schedule 30 paragraph 3)
A promoter meets this condition if it is named in a report published by HMRC as a person breaching the Code of Practice on Taxation for Banks by promoting arrangements that the promoter cannot reasonably have believed achieved a tax result intended by Parliament. Other breaches of the code are not relevant for this purpose.

Recent guidance on the Banking Code of Practice describes when a bank will be regarded as a promoter for the purpose of the code:

http://www.hmrc.gov.uk/thelibrary/taxation-banks.pdf

HRP Appendix 1.4 Dishonest tax agents (Schedule 30 paragraph 4)
A promoter meets this condition if it has been given a conduct notice as a dishonest tax agent in accordance with paragraph 4 Schedule 38 FA2012. There is guidance on dishonest tax agents at CH180000 and on conduct notices at CH182100. The condition is only met if there is no open appeal against the conduct notice, either because the time limit for an appeal has

expired, or because an appeal has been made and the Tribunal has confirmed the conduct notice.

HRP Appendix 1.5 Non-compliance with DOTAS obligations (Schedule 30 paragraph 5)

A promoter meets this condition if it fails to comply with certain obligations imposed by DOTAS. These are obligations:

- on the promoter to provide HMRC with information within the relevant time limit about notifiable proposals or arrangements (s308(1) and (3) FA2004, see DOTAS Guidance section 14)
- on the client of a promoter that is not resident in the UK to provide HMRC with information within the relevant time limit about notifiable arrangements (s309(1) FA2004, see DOTAS Guidance paragraph 14.4). This obligation is only relevant in this context where the client is itself a promoter.
- on the promoter to provide client details to HMRC in accordance with s313ZA FA2004, see DOTAS Guidance section 16.2.

In each of these cases the condition is met even where the person had a reasonable excuse for the failure to comply. Where there is a reasonable excuse and this is the only threshold condition that has been met an authorised officer will consider whether the meeting of the condition is significant, taking into account whether failures are isolated or trivial and whether there is a risk of substantial loss of tax (HRP2.2).

HRP Appendix 1.6 Criminal offences (Schedule 30 paragraph 6)

A promoter meets this condition if it has been charged with a relevant criminal offence. The relevant offences are:

- an offence at common law of cheating in relation to the public revenue
- in Scotland, an offence at common law of fraud or uttering
- false accounting (s17(1) Theft Act 1968 or s17 Theft Act (Northern Ireland) 1969)
- fraudulent evasion of income tax (s106A TMA 1970)
- false statements, Scotland (s107 TMA 1970)
- an offence under any of the following provisions of CEMA 1979:
  - improper importation of goods with intent to defraud or evade duty (s50(2))
  - untrue declarations, etc (s167)
  - counterfeiting documents, etc (s168)
  - fraudulent evasion of duty (s170)
  - taking steps for the fraudulent evasion of duty (s170B)
- an offence under any of the following provisions of VATA 1994
  - being knowingly concerned in the evasion of VAT (s72(1))
  - false statement, etc (s72(3))
  - conduct involving commission of other offence under s72 (s72(8))
- fraud (s1 Fraud Act 2006)
- an offence under any of the following provisions of CRCA 2005:
  - impersonating a Commissioner or officer of Revenue and Customs (s30)
  - obstruction of officer of Revenue and Customs, etc (s31)
  - assault of officer of Revenue and Customs (s32)

- money laundering (regulation 45(1) Money Laundering Regulations 2007 (SI2007/2157))
- possession of articles for use in fraud (s49(1) Criminal Justice and Licensing (Scotland) Act 2010.

In each of these cases the fact that a promoter has been charged with an offence is disregarded if the promoter has been acquitted, unless that acquittal is under appeal, and is disregarded if the charge has been dismissed or the proceedings discontinued.

Action can be taken in respect of this condition even though the promoter has not yet been convicted of the offence with which it has been charged.

This threshold condition is only met if the person who is carrying on business as a promoter is the person who is charged with an offence. Thus where the promoter is a legal person, such as a company or an LLP, it is that legal person that must be charged. The threshold condition is not met if the person charged is a director or employee of a company, or a member of an LLP. This is modified for partnerships that are deemed to be a person (HRP7.2).

HRP Appendix 1.7 Opinion notice of GAAR Advisory Panel (Schedule 30 paragraph 7)

A promoter meets this condition if the GAAR Advisory Panel considers that arrangements promoted by the promoter are not reasonable.

Part E of the GAAR Guidance describes the procedures for the application of the GAAR. If a designated officer of HMRC considers that tax arrangements are abusive the officer can refer them to the GAAR Advisory Panel once the taxpayer who has made use of those arrangements has been given an opportunity to make representations (Schedule 43 FA 2013, GAAR Guidance Part E3.4).

The Chair of the GAAR Advisory Panel will then appoint a sub-panel of three members to consider the arrangements. Each of the sub-panel members will consider the arrangements and either the panel will offer a single collective view, or a single majority view and a minority view, or members will offer individual views, on whether the arrangements are a reasonable course of action in relation to the relevant tax provisions (Part E3.6).

If arrangements promoted by the promoter are referred by a designated officer to the GAAR Advisory Panel and either all of the sub-panel members, or two of the sub-panel members, decide the arrangements are not a reasonable course of action, then this condition has been met.

HRP Appendix 1.8 Disciplinary action by a professional body (Schedule 30 paragraph 8)

A promoter meets this condition if it is subject to certain disciplinary action by a professional body of which it is a member. Paragraph 8(3) specifies the professional bodies to which this condition relates, see below.

There are safeguards that limit the circumstances in which this condition is met. The condition is only met if the professional body

- decides that the promoter is guilty of misconduct of a kind that will be prescribed in regulations
- takes action of a kind that will be prescribed in regulations
- imposes a penalty of a kind that will be prescribed in regulations.

Until the regulations prescribing the misconduct, action and penalties for the professional body have effect the threshold condition cannot be satisfied.

Misconduct in matters that relate solely to the promoter's relationship with the professional body, such as in the payment of fees, is to be ignored for this purpose.

The professional bodies to which this condition relates are:

- the Institute of Chartered Accountants in England and Wales
- the Institute of Chartered Accountants of Scotland
- the General Council of the Bar
- the Faculty of Advocates
- the General Council of the Bar of Northern Ireland
- the Law Society
- the Law Society of Scotland
- the Law Society for Northern Ireland
- the Association of Accounting Technicians
- the Association of Chartered Certified Accountants
- the Association of Taxation Technicians.

HMRC has a power to add to this list by prescribing other bodies with regulatory functions in relation to a trade or profession.

HRP Appendix 1.9 Disciplinary action by a regulatory authority (Schedule 30 paragraph 9)

A promoter meets this condition if a regulatory authority imposes on the promoter a relevant sanction.

The following are regulatory authorities for the purpose of this condition:

- the Financial Conduct Authority
- the Financial Services Authority.

HMRC has a power to add to this list by prescribing other regulatory authorities, but only in relation to authorities that have functions relating to the regulation of financial institutions.

A relevant sanction is a sanction that is to be prescribed in regulations and is imposed in relation to misconduct. Misconduct in matters that relate solely to the promoter's relationship with the regulatory authority, such as in the payment of fees, is to be ignored for this purpose. Until the regulations prescribing the sanctions have effect the threshold condition cannot be satisfied.

HRP Appendix 1.10 Exercise of information powers (Schedule 30 paragraph 10)

A promoter meets this condition if it fails to comply with an information notice.

The relevant notices are:

- requests for information or documents from a taxpayer (paragraph 1, Schedule 36 FA 2008)
- requests for information or documents from a third party (paragraph 2, Schedule 36 FA 2008)
- requests for information or documents from a third party about persons whose identity is not known to the HMRC officer (paragraph 5, Schedule 36 FA 2008)
- requests for information or documents from a third party about persons whose identity is not known, but where it can be ascertained from information held by the officer (paragraph 5A, Schedule 36 FA 2008).

The threshold condition is only met when it is the promoter that is obliged to provide information and documents and has failed to do so. This may be in relation to its own tax affairs or to its activities as a promoter.

There is guidance about information notices at CH23060 onwards.

The time at which the failure to comply occurs, and so at which the threshold condition is met, is the time at which the deadline for complying with the information notice has passed without the recipient of the notice complying with it.

HRP Appendix 1.11 Restrictive contractual terms (Schedule 30 paragraph 11)

A promoter meets this condition if it imposes certain restrictive contractual terms relating to an avoidance scheme on a client or on any other person.

The restrictive contractual terms are:

- preventing a person from disclosing to HMRC information relating to the avoidance scheme (paragraph 11(2)), this may be by referring to HMRC specifically, or by referring to a wider class of persons that includes HMRC, or
- requiring a person to impose an obligation on any tax adviser to whom that person discloses information about the scheme preventing the tax adviser from disclosing information about the scheme to HMRC (paragraph 11(3)), or
- requiring the person to:
  - meet or contribute to the costs of any proceedings relating to any scheme promoted by the promoter, or take out insurance to insure against the costs of proceedings relating to a scheme promoted by the promoter and implemented by that person and
  - obtain the consent of the promoter before entering into an agreement with HMRC in relation to a scheme promoted by the promoter and

implemented by that person, or withdrawing or discontinuing any appeal against a decision relating to that scheme.

The normal payment of fees by a client to an adviser for the purpose of discussions or correspondence with HMRC to agree the client's tax position is not relevant to this threshold condition. The usual case to which the condition about contributing to costs will apply is where a promoter requires a scheme user to contribute to a fighting fund intended to pay for a lead appeal to be litigated.

The threshold condition is only met for conditions relating to costs and to obtaining consent before reaching agreement with HMRC if the promoter imposes both conditions. If the promoter only requires a person to contribute to a fighting fund or take out insurance, or only requires a person to obtain consent before reaching agreement with HMRC, the threshold condition is not met.

Proceedings includes any process for resolving disputes, not only appeal proceedings, and includes proceedings that have not yet begun.

HRP Appendix 1.12 Continuing to promote certain arrangements (Schedule 30 paragraph 12)

A promoter meets this condition if it continues to promote an avoidance scheme that is substantially the same as a scheme in relation to which HMRC has issued a follower notice under Clause 197. An authorised officer will issue the promoter with a stop notice and the condition is met if the promoter continues to promote the scheme after 30 days.

An authorised officer may issue a promoter with a stop notice where:

- a person has been given a follower notice in relation to an avoidance scheme and
- the promoter has been a promoter of a proposal that has been implemented in that scheme and
- 90 days have passed since the follower notice was given and
- it has not been withdrawn and
- if any representations were made about the follower notice it has been confirmed by HMRC.

The stop notice must:

- specify the scheme that is subject to the follower notice and
- specify the judicial ruling identified in the follower notice and
- specify the proposal that has been promoted by the promoter and that was implemented in that scheme and
- explain the effect of the stop notice.

The authorised officer must also specify the date from which the stop notice will take effect.

Once a stop notice has been given the promoter will meet this threshold condition if after a period of 30 days from the date on which the stop notice is given it

- makes a firm approach (HRP1.6) to a person with a view to making a scheme that is in substance the same as the scheme identified in the stop notice available to be implemented, or
- makes such a scheme available to be implemented.

An authorised officer can by notice in writing to the promoter determine at any time that a stop notice is to cease to have effect.

Modification for company controlled by a promoter

HRP Appendix 1.13 Paragraph 13 Schedule 30 applies to treat a company (more precisely a 'body corporate', which has a broader meaning and can include, for example, a limited liability partnership) as having met a threshold condition at an earlier date where the following conditions are met:

- a promoter met a relevant threshold condition at a time when the promoter had control of a company, although if this was not significant or there was no risk of substantial tax loss no conduct notice may have been issued to the promoter (HRP2.2) and
- at a later date an authorised officer has determined under Clause 230 that the company has met a threshold condition and
- the promoter controls the company at that later time.

If these conditions are met the company is treated as having met the threshold condition that it actually met, but at the earlier time at which the promoter met a threshold condition. An authorised officer will consider whether to issue a conduct notice that will apply with effect from that earlier time.

For this to apply the promoter must have met one or more of the following relevant threshold conditions:

- deliberate tax defaulters (paragraph 2)
- dishonest tax agents (paragraph 4)
- criminal offences (paragraph 6)
- opinion notice of GAAR Advisory Panel (paragraph 7)
- disciplinary action by a professional body (paragraph 8)
- disciplinary action by a regulatory authority (paragraph 9)
- failure to comply with information notice (paragraph 10).

It is irrelevant whether the promoter has met any of the other threshold conditions.

For this provision to apply the promoter must control the company both at the date the promoter met a threshold condition and at the date the company met a threshold condition. The test of control is that the promoter is able to ensure that the company acts in accordance with the promoter's wishes. This control may be secured by:

- holding shares or voting rights in that company or in any other company (for example a holding company), or
- powers in the articles of association or in any other document that regulates the company or any other company.

The meeting of a threshold condition by an employee or director of a company, or by a member or employee of a limited liability partnership, does not automatically mean that the company or limited liability partnership is to be treated as meeting a threshold condition. For example, if an employee of a company commits a criminal offence, or is subject to disciplinary proceedings by a professional body, that does not mean the company has met a threshold condition. If the company is carrying on business as a promoter and the employee or director meets a threshold condition while discharging responsibilities relating to that business, for example by failing to meet DOTAS obligations, then the company will have met that threshold condition.