HM Revenue
& Customs

Technical consultation on draft hallmarks for the Disclosure of Tax Avoidance Schemes regime

Summary of Responses

February 2016

Contents

1	Executive Summary	1
2	Introduction	2
3	Responses	3
4	Next steps	4
5	List of stakeholders consulted	5

On request this document can be produced in Welsh and alternative formats including large print, audio and Braille formats

Foreword

The Government is committed to ensuring that everyone makes a fair contribution towards reducing the deficit. The vast majority of people and businesses pay their fair share of tax, but there is a small minority who enter into schemes that are often contrived and artificial in order to try to avoid paying the amount of tax that Parliament intended.

The Disclosure of Tax Avoidance Schemes (DOTAS) regime plays a key role in tackling attempts to avoid tax. Promoters and users of schemes that contain defined hallmarks of avoidance are required to notify HMRC. This helps HMRC identify cases that need to be investigated and challenged.

The DOTAS regime also underpins the Accelerated Payment regime that the Government has introduced to ensure that disputed tax sits with the Exchequer during the investigation of an avoidance scheme. And it provides the foundations for the new regime which the Government announced in the Autumn Statement in November 2015 to deter and tackle serial avoiders.

In the Budget in March 2015, the Government announced a package of measures to ensure that the DOTAS regime keeps pace with the current avoidance market. As part of this the Government said that it would launch a consultation on the detail of changes to strengthen the DOTAS hallmarks.

The regulations, which will be laid today, will make it harder for would-be promoters and users of avoidance schemes to go undetected and unchallenged.

David Gauke
Financial Secretary to the Treasury

1. Executive Summary

1.1 The Government announced a package of measures to strengthen the Disclosure of Tax Avoidance Schemes (DOTAS) regime at the March 2015 Budget. This included its intention to strengthen the descriptions (hallmarks) of schemes which must be disclosed and to expand the scope of the Inheritance Tax (IHT) hallmark.

1.2 In July 2015 the Government published draft changes to the hallmark regulations describing Standardised Tax Products, Loss Schemes and IHT. The drafts also brought arrangements involving IHT into the scope of the existing Confidentiality and Premium Fee hallmarks. Updated draft regulations for a new hallmark describing certain Financial Products were also included following a previous consultation in 2014.

1.3 Responses were generally supportive of the intentions behind the proposed changes. Many respondents provided suggestions for ways in which the regulations might be framed differently to achieve the policy objectives while ensuring that the changes did not inadvertently result in the disclosure of ordinary tax planning.

1.4 The Government has looked carefully at these suggestions and made a number of amendments to the regulations for the Standardised Tax Products and Financial Products hallmarks. Few comments were received in relation to the Loss Schemes, Confidentiality and Premium Fee hallmarks. The Government does not believe it is necessary to amend the drafting of the regulations covering these hallmarks.

1.5 A copy of the regulations which include revisions in the light of this consultation can be found at Annex A. The Government intends to lay these alongside the publication of this response document.

1.6 Proposed changes to the IHT hallmark were included in the consultation. Respondents were consistent in their view that the drafting of these goes too wide and risks catching ordinary IHT tax planning products that are not abusive. The Government recognises these concerns. It remains committed to updating the IHT hallmark, but in a way that is tightly targeted and does not catch ordinary, non-abusive, tax planning.

1.7 To achieve this the Government intends to develop a revised draft IHT hallmark for further consultation in 2016. The Government will, however, include IHT arrangements within the Confidentiality and Premium Fee hallmarks as planned.

2. Introduction

The consultation

2.1 The Government announced, at the first Budget in 2015, that the hallmarks describing schemes which must be disclosed would be strengthened. A technical consultation on changes to the DOTAS hallmark regulations ran from 16 July until 10 September 2015.

Standardised Tax Products

This hallmark is aimed at schemes which can be sold to and implemented by a wide population of clients with little variation. The changes to the rules seek to ensure that promoters cannot argue that small changes to documentation, to a sequence of transactions or the way in which a product is described make the product non-standardised and remove the requirement to disclose.

In addition the changes remove an existing “grandfathering” provision, which exempts schemes from disclosure under this hallmark if the same or a substantially similar scheme was made available by any person before the hallmark was introduced.

Loss schemes

This hallmark is aimed at schemes which generate tax losses for individuals to offset against their other taxable income or gains. The changes seek to ensure that promoters cannot argue that the projection of a theoretical profit under the arrangements at some point in the distant future exempts them from disclosing the scheme.

Financial Products

This is a new hallmark aimed at schemes using financial products that include terms unlikely to have been entered into were it not for the tax advantage and schemes using financial products which include contrived or abnormal steps without which the tax advantage could not be obtained.

Inheritance Tax

The changes seek to strengthen and expand the existing hallmark to ensure that all types of IHT avoidance have to be disclosed, i.e. schemes seeking to avoid IHT charges following death as well as during a person’s lifetime.

In addition the changes remove an existing “grandfathering” provision, which exempts schemes from disclosure under this hallmark if the same or a substantially similar scheme was made available by any person before the hallmark was introduced.

Confidentiality and Premium Fee hallmarks

These hallmarks currently apply only to schemes involving Income Tax, Capital Gains Tax and Corporation Tax and National Insurance Contributions. The changes expand these to include schemes involving IHT.

2.2 The regulations the Government now intends to lay are set out in Annex A.

Overview of responses

2.3 HMRC received 38 responses including written responses and comments during meetings. A breakdown of the capacities in which respondents made their comments is below:

- 11 from representative bodies
- 2 from consultants
- 7 from accountancy firms
- 8 from law firms
- 4 from individuals
- 6 from other businesses

2.4 A list of respondents, excluding individuals, is at Annex B.

2.5 The Government is grateful to the respondents, particularly to those who attended meetings with HMRC. The points made on the detail of the regulations were valuable and a number of changes have been made as a result.

2.6 The Government intends to lay the regulations included in Annex A alongside the publication of this response document. These will change the Standardised Tax Products, Loss Schemes, Confidentiality and Premium Fee hallmarks, and will introduce a new hallmark describing arrangements including certain Financial Products.

2.7 The Government understands the importance of ensuring the hallmarks remain tightly focused and provide certainty as to what must be notified to HMRC so that ordinary tax planning is not caught. The Government is confident that the regulations in Annex A achieve this.

2.8 Responses to the proposed changes to the IHT hallmark suggest that further consideration is needed. The Government remains committed to updating the IHT provisions in DOTAS to ensure that the regime operates more effectively, but recognises concerns of respondents that the draft was drawn too widely. The Government intends to consult again on a revised IHT hallmark in 2016.

3. Standardised Tax Products

Background

3.1 This hallmark is intended to catch what are often referred to as marketed avoidance schemes. The policy objective is to identify schemes where the client effectively purchases a prepared avoidance product that requires little modification to suit their circumstances.

3.2 The changes proposed to this hallmark are intended to deal with situations where promoters adopt a narrow interpretation of what needs to be disclosed under this hallmark. A minority of determined promoters argue that to be caught by this hallmark a scheme offered to more than one client requires an extremely high degree of similarity such that small changes to any aspect of documentation or arrangements to suit a client's circumstances means that a scheme is not caught.

3.3 The changes retain the overall targeting of the hallmark but change the emphasis of the tests. In order for a standardised tax product to be disclosable under the draft it must be reasonable to expect an informed observer (having regard to all relevant circumstances) to conclude that certain conditions are met – in particular that the main purpose of the standardised arrangements is to enable a person to obtain a tax advantage or that the arrangements would be unlikely to be entered into but for the expectation of obtaining a tax advantage.

3.4 Rather than restricting an informed observer to considering only the purpose of the arrangements, the wording requires consideration of the arrangements as a whole having regard to "all relevant circumstances". This includes consideration of the substance of documentation as well as its form. The wording also requires an informed observer to consider both whether the main purpose of the product is the obtaining of the tax advantage and also, whether in the absence of such an advantage, anyone would use the scheme.

3.5 In addition to these changes, the "grandfathering" provisions which exempt arrangements from disclosure if they are substantially the same as anything made available before the hallmark was introduced have been removed.

Consultation responses

Concerns about arrangements which might be inadvertently caught

3.6 A small number of respondents were concerned that arrangements involving Social Investment Tax Relief, Seed Enterprise Investment Schemes, Quoted Eurobonds and Excluded Securities might be caught by the reframed hallmark.

Government's response

3.7 Arrangements involving these types of product are unlikely to fall within the redrafted hallmark:

- Social Investment Tax Relief (SITR)
- Seed Enterprise Investment Schemes (SEIS)
- Quoted Eurobonds
- Excluded Indexed Securities

3.8 The Government has considered these in the context of each of them being entered into for ordinary, genuinely commercial or investment reasons and has concluded that these arrangements should not be notifiable under the Standardised Tax Product hallmark unless they are used as part of wider arrangements which are structured in such a way that their main purpose becomes the generation of a tax advantage. This might arise for example where one of the above is part of wider and more complex arrangements which seek to obtain more relief than would otherwise be due absent those additional arrangements or transactions. The Government believes it is reasonable to leave these products within scope of the hallmark to guard against the possibility of wider arrangements being put in place to avoid tax.

3.9 HMRC has 90 days in which to consider whether to issue a Scheme reference Number (SRN). Where arrangements involving any of the above reliefs are disclosed, this will enable HMRC to issue SRNs only in appropriate cases

3.10 Arrangements involving these types of reliefs are not covered explicitly in the regulations. HMRC will provide more detail in revised DOTAS guidance.

Debt versus equity

3.11 One respondent questioned whether the decision of a company to fund activities by issuing debt rather than equity may be caught because obtaining a deduction for interest may be a factor in making that choice.

Government's response

3.12 The Government is satisfied that the simple funding of activities using debt rather than equity is outside the scope of the Standardised Tax Product hallmark, as the decision to raise finance by a company will be a commercial one which is not driven by tax considerations. Where debt funding is used as part of wider arrangements structured in such a way that their main purpose becomes the generation of a tax advantage then those arrangements must be assessed against the hallmark in the usual way.

Interaction with the Financial Products hallmark and banks

3.13 Representations were made during the consultation from the banking sector welcoming the exclusion in the Financial Products hallmark for arrangements

which are, or could reasonably be expected to be, acceptable transactions under the Code of Practice on Taxation for Banks. They suggested that many of the products excluded from that hallmark may nonetheless be caught by the Standardised Tax Product hallmark and suggested an exclusion should be made from the Standardised Tax Product hallmark in those circumstances.

Government's response

3.14 The Government agrees that products excluded from the Financial Products hallmark by virtue of the exemption relating to the Code of Practice on Taxation for Banks may also be caught by the Standardised Tax Product hallmark. It has therefore amended the regulations to provide that arrangements that are excluded from the former by virtue of regulation 21 are also excluded from the latter.

4. Losses hallmark

Background

4.1 This hallmark targets schemes designed to create tax losses for individuals to set against other personal income or gains. It applies where a promoter expects more than one individual to use the same (or substantially the same) scheme, the main benefit of which is to generate losses. It is intended to catch schemes where it would be reasonable to expect that the tax relief for those using the scheme is greater than the amount the individual has, in economic substance, contributed.

4.2 The changes to this hallmark aim to reduce the margin for dispute and uncertainty on the existing "main benefit" test as to whether, on the facts of the scheme, the main benefit to the individuals is short-term tax losses or potential future profits. This is particularly key for this hallmark as even the most contrived schemes purport to provide investors with profits over the longer term.

4.3 The change widens the "main benefit" test to "one of the main benefits". It does so in conjunction with requiring the informed observer, having regard to all relevant circumstances, to consider whether the arrangements and the way in which they are structured contain elements which are unlikely to have been entered into by those involved with the scheme were it not for the provision of those losses. The revised test looks at the arrangements as a whole to consider whether a loss is part of a tax avoidance scheme or an ordinary consequence of starting up a new business venture.

Consultation responses

4.4 Two responses asked for clarification on how the revised hallmark would provide a clearer focus on the extent to which the tax loss differed from the economic cost to the client and how genuine business investments and start-ups were protected.

Government's response

4.5 The changes in the hallmark allow an informed observer to "have regard to all the relevant circumstances" in consideration of whether there are elements of the arrangements that would be unlikely to be entered into were it not for the provision of losses. This would include the extent to which economic losses differ from tax losses and whether incurring losses is a commercial reality or contrived as part of an avoidance scheme. Genuine business start-up losses therefore remain outside the scope of this hallmark.

5. Financial Products hallmark

Background

5.1 The 2012 ‘Lifting the Lid on Tax Avoidance Schemes’ consultation noted that HMRC has received disclosures, primarily under Confidentiality and Premium Fee hallmarks, of schemes that use structured financial products to reduce Corporation Tax (CT) liability. In that document the Government confirmed its intention to make it clear that such schemes are notifiable and its commitment to creating a Financial Products hallmark.

5.2 The purpose of this hallmark is to catch schemes using financial products where there is a direct link between the financial product and the gaining of the tax advantage, i.e. where the inclusion of the financial product is not merely incidental to the tax advantage.

5.3 Under the draft regulations, in order for a financial product to be disclosable it must be reasonable to expect an informed observer (having regard to all relevant circumstances) to conclude that certain conditions are met. The first step is that the informed observer would have to be reasonably expected to conclude that both of the following conditions are met:

- condition 1 (that arrangements include at least one of the specified financial products) and
- condition 2 (that the main benefit, or one of the main benefits, of including a specified financial product in the arrangements is to give rise to a tax advantage)

The second step is that the informed observer would also have to be reasonably expected to conclude that either of the following conditions are met:

- condition 3 (a specified financial product included in the arrangements contains at least one term unlikely to have been entered into but for the tax advantage)
- condition 4 (arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained)

5.4 The inclusion of “having regard to all relevant circumstances” makes it clear that the informed observer, in reaching their decision, would consider information beyond the confines of legislation – including both commercial factors and HMRC guidance.

Consultation responses

Scope of the hallmark

5.5 Four respondents were concerned that arrangements designed with a view to accessing tax advantages expressly created by specific legislative provisions to support commercial activity might be caught by the hallmark.

Government’s response

5.6 The Government recognises the importance of ensuring the hallmark is correctly drafted, catching schemes that are designed to avoid tax, while ensuring that ordinary tax planning is not caught.

5.7 During the consultation HMRC had a number of very helpful discussions with stakeholders to understand areas of particular concern. The Government considers that the hallmark as drafted is effective in catching the schemes that are causing concerns but recognises that there may be potential for it to catch what might be described as ordinary tax planning. The drafting has been amended to exclude certain arrangements (see paragraph 5.20) and further clarity will be provided in the DOTAS guidance on areas where it was considered unnecessary to provide a legislative exclusion.

Combine “unlikely to have been entered into” and “contrived or abnormal” conditions

5.8 Three respondents suggested that a scheme should only be notifiable where both conditions 3 and 4 are met. They considered that doing so would effectively catch arrangements about which the Government was likely to have concerns.

Government’s response

5.9 The Government is grateful for the suggestion but does not consider this appropriate. Condition 3 considers the financial product itself and asks whether it contains terms unlikely to have been entered into but for the tax advantage. Condition 4 considers the arrangements as a whole and asks whether they contain steps which are abnormal or contrived and without which the tax advantage could not arise. Each condition tests different and important elements and it would not be appropriate for both these conditions to be met in order to require disclosure.

Intentions of Parliament and Codes of Practice

5.10 Several respondents suggested alternative conditions. Two suggested an express provision that schemes should only be notifiable if they involved transactions structured in a way that gives a tax result which is contrary to the intentions of Parliament. A further suggestion was made that schemes should not be notifiable which would not contravene the proposed draft Code of Practice on Taxation for Large Business.

5.11 One respondent suggested that the exclusion for schemes promoted by banks which would be compliant with the Code of Practice on Taxation for Banks could be applied to non-bank promoters. This would apply where HMRC could reasonably be expected to confirm arrangements were acceptable under the Code if the promoter had been a bank.

Government's response

5.12 The Government does not propose to introduce conditions requiring knowledge of the "intentions of Parliament". The hallmarks are designed to describe the characteristics of avoidance schemes which need to be disclosed rather than to describe or define avoidance itself. This approach has been a long standing feature of DOTAS legislation and changing it by reference to one hallmark would not be appropriate.

5.13 The exclusion for those within the Code of Conduct for Banks is appropriate and coupled with significant consequences under that Code for any bank breaching it. The Government does not consider it appropriate to seek to infer what would have happened had a Code applied which does not, and where there would be no consequences for any theoretical breech

Magnitude of the tax advantage and mass marketing

5.14 One respondent suggested additions to the conditions in the form of a requirement that arrangements be 'mass marketed' and a requirement that condition 3 apply only where the financial product included a term which was unlikely to have been entered into but for the tax advantage and where the inclusion of the product in question materially increased the magnitude of the tax advantage.

Government's response

5.15 The Government does not agree that introducing a variable of 'material increases' would be workable within this framework. What constituted a "material" increase would be uncertain and would create uncertainty for both taxpayers and HMRC.

Linking to GAAR

5.16 One respondent suggested an exclusion for arrangements which are of a type mentioned in HMRC's GAAR Guidance as not meriting GAAR counteraction.

Government's response

5.17 The GAAR serves the specific purpose of defining whether or not tax arrangements are "abusive". The DOTAS rules require the early notification of tax avoidance schemes to HMRC by users and promoters of those schemes, have a different function from the GAAR and have no relevance to the operation of the GAAR.

Specific products which should not be caught by the Financial Products hallmark

5.18 Having considered the issues raised the Government considers that non-abusive use of the arrangements detailed below would not be caught by the Financial Products hallmark. HMRC will include examples in guidance in due course.

- entering into a loan of less than 12 months which is 'short' for income tax purposes where there is no requirement to deduct tax from interest distributions
- investing under the EIS (or SEIS)
- choosing debt rather than equity to fund a particular activity/transaction
- investing in a Self-Invested Pension Plan
- investing in Excluded Indexed Securities
- setting up and operating a tax-advantaged employee share scheme
- listing securities which benefit from the Quoted Eurobond exemption
- using discounted bonds
- using/entering/agreeing to earn-out rights (i.e. disposal of shares in a company in pursuance of relief at section 138A TCGA 1992)
- carrying out a partition demerger (involving creating new classes of shares with rights to specific assets
- setting up an Employee Ownership Trust
- implementing an Employee Ownership Schemes
- structuring a joint venture arrangement so a particular group is created under the CGT groups legislation (section 170 TCGA 1992), consistent with investing companies receiving a fair stake in the joint venture in the form of conventional shares as a result of the arrangements and given the respective values of their contributions
- joining the Real Estate Investment Trust regime

The Government has considered these in the context of each of them being entered into for ordinary, genuinely commercial, reasons and has concluded that these arrangements should not be notifiable under the Financial Products hallmark. This would not apply where they are used as part of wider arrangements which are structured in such a way that their main purpose becomes the generation of a tax advantage. HMRC will provide more detail in revised DOTAS guidance.

Specific arrangements raised for which the Government is introducing exclusions

5.19 Several respondents raised concerns about a number of arrangements which they considered might inappropriately be caught by the Financial Products hallmark.

Government's response

5.20 Having carefully considered these representations the Government agrees that a number of specific exclusions are justified to ensure the ordinary use of

certain financial products or arrangements is not caught by this hallmark. These are for:

- The sale of a business in exchange for financial products which allow deferral (roll-over) of a gain until later disposal.

- Setting the term over which a long-dated debt matures to below 50 years, so that it is not subject to the equity note legislation.

- Arrangements comprising the hiving down of a trading division to obtain the benefit of the substantial shareholding exemption which would otherwise meet condition 4, so long as condition 3 is not met.

- Arrangements consisting only of the issuing of shares to hedge the currency risk from a loan relationship or a derivative contract, where the shares are accounted for as a liability. This would not however apply where condition 3 is met (e.g. where the shares contain terms unlikely to have been entered into but for the tax advantage).

- Financial Products including a term providing for conversion into, or redemption in, a foreign currency which would otherwise meet conditions 3 and 4 (this would apply in particular to a term included to ensure that a security or loan agreement is not treated as a Qualifying Corporate Bond (QCB) for chargeable gains purposes).

HMRC will include these exceptions in its guidance.

6. Inheritance Tax hallmark

Background:

6.1 The Inheritance Tax (IHT) hallmark was introduced with effect from 6 April 2011. It is designed only to detect a specific type of IHT avoidance involving the use of trusts. Arrangements which are the same, or substantially the same, as arrangements which were made available before that date do not need to be disclosed under the current hallmark – i.e. they are “grandfathered”.

6.2 The Government confirmed in its response to the 2014 ‘Strengthening the Tax Avoidance Disclosure Regimes’ consultation its intention to extend the IHT provisions in DOTAS by:

- extending the scope of the existing hallmark so that arrangements that seek to avoid IHT charges following death have to be disclosed. At present, only arrangements that seek to avoid IHT charges during a person’s lifetime have to be disclosed;

- removing the current grandfathering provision so that schemes which are implemented or sold to clients after the proposed changes take effect have to be disclosed even if they were first made available before 6 April 2011;

- including IHT within the scope of other hallmarks such as confidentiality and premium fee, so that schemes which are innovative or where a promoter seeks to design their way around the detail of the revised IHT hallmark would have to be disclosed;

- ensuring the hallmark is appropriately targeted so that the normal use of reliefs and exemptions does not have to be disclosed.

6.3 The revisions published on 16 July 2015 sought to achieve this by adopting the approach taken elsewhere in DOTAS of requiring an informed observer, having regard to all relevant circumstances, to consider whether or not various conditions are met.

6.4 In so doing, the Government emphasised that an Accelerated Payment notice can only charge tax from the date IHT would have been payable. Where someone enters a scheme to avoid IHT on death, a notice could not accelerate the tax payment to before death. An IHT Accelerated Payment can only be due before death when someone is trying to avoid IHT that is due before death on transfers during a person’s lifetime. This would be unchanged by the revised hallmark.

6.5 The Government remains committed to updating the IHT provisions in DOTAS to ensure that the regime operates more effectively, but recognises concerns of respondents that the draft was drawn too widely. The Government intends to publish a revised draft IHT hallmark in 2016 for further comment.

Consultation responses

The conditions included in the hallmark

6.6 The IHT hallmark received a significant number of comments with most suggesting that the hallmark is drafted too widely and would catch ordinary tax planning products.

6.7 In particular, eight comments considered that the reference in condition 1 of the draft hallmark to "a tax advantage" was too broad in the context of IHT. Those responding on this point commented that, in this context, the straightforward removal of an asset from a person's estate by whatever means arguably constitutes a tax advantage because of the implications for IHT.

6.8 Two respondents also commented that the time allowed to make comments on the draft was too short given the complexity of the underlying issues.

6.9 A variety of comments were made from ten respondents in respect of conditions 2 (that one or more elements of the arrangements would be unlikely to have been entered into but for the tax advantage) and 3 (that arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained). Respondents were concerned at the scope of condition 2 and the potential to draw in lifetime gifts and other acceptable uses of reliefs. Four respondents in particular suggested that more links and reliance should be made to condition 3 which, it was suggested, was a better filter for the types of arrangement HMRC should be concerned about.

6.10 Two respondents suggested the hallmark be refocused on much narrower areas where HMRC is aware of abuse.

Government's response

6.11 The starting point for the regulations is the obtaining of an advantage in relation to IHT. The Government recognises that the words 'obtaining a tax advantage' may have a wide scope in the context of IHT.

6.12 The Government considers it important to read the draft in the context of the other elements for notifiability purposes. The Government's interpretation of the provisions as published is that lifetime gifts, the ordinary settlement of property into trust and use of the normal out of income exemption would not be notifiable. However it is grateful for the valuable feedback provided and recognises that the drafting is open to misinterpretation. The Government will consider the draft hallmark in the light of consultation responses.

Business Property Relief (BPR) and Agricultural Property relief (APR)

6.13 A number of respondents were concerned that the draft regulations caught arrangements that qualify for BPR.

6.14 Similar concerns were raised about settling agricultural land into trust and claiming APR.

Government's response

6.15 The Government does not seek to discourage the legitimate use of reliefs and it is not intended that non-abusive arrangements should be caught. The Government will consider whether clarification is required in these areas to confirm that non-abusive arrangements do not need to be disclosed.

Deeds of Variation

6.16 One respondent queried whether using a Deed of Variation to increase bequests to a charity would fall under the scope of the hallmark.

Government response

6.17 The Government does not seek to discourage charitable bequests or the use of other exemptions. Nor does the Government consider the use of Deeds of Variation to be abnormal or contrived in isolation. Where they are used in connection with wider arrangements then those arrangements might be more abnormal or contrived and rightly notifiable. The Government will consider revising the draft hallmark in the light of consultation responses to make the position clearer.

Gifts of property with retained rights of use

6.18 Two respondents raised concerns that the gifting of a house to a relative allied with the payment of market rents in order to retain the use of the asset would be caught.

Government's response

6.19 The Government does not intend to catch arrangements entered into on a clear market value basis and will consider revising the draft hallmark to ensure that such arrangements are not caught.

Loan trusts

6.20 Three respondents queried whether the use of loan trusts would be notifiable due to reliance on a "disposition of property" for the exception included for 'gift and loan trusts'. The point was made that many modern insurance products have dispensed with the "gift element" and are comprised only of an interest free loan.

Government response

6.21 Non-abusive arrangements involving 'loan trusts' are excepted from being prescribed by regulation 3(4) of the published draft. A "disposition" is a wide

term and the making of the interest-free loan is considered to be a disposition. It is not the Government's intention to catch such straightforward loan only arrangements involving loan trusts.

Bare trust versions of loan trusts

6.22 Some respondents raised concerns that regulation 3(4) would not apply to bare trust versions of loan trusts as bare trusts are not within the definition of "settlement" or "settled property" and hence that such arrangements would be caught by the hallmark.

Government's response

6.23 The Government can confirm that it is not the policy intention to catch bare trust variations of loan trusts. It will reconsider the wording of the hallmark to ensure they are not caught.

Discounted Gift Trusts (DGTs) and bare trust versions of Discounted Gift Trusts

6.24 A total of five comments were received on the exception at regulation 3(3), suggesting that it should be extended to apply to DGTs holding any investments rather than only those using life assurance policies.

6.25 Similar concerns were reported that bare trust version of DGTs would not be excepted, and hence would be caught, as regulation 3(3) is dependent on a disposition of property that becomes "comprised in a settlement" which does not include a bare trust.

6.26 One respondent queried the treatment of schemes similar to DGTs where trustees have the option to defer the maturity dates and whether such schemes should be excepted under the terms of regulation 3(3)(b)(i).

Government's response

6.27 The Government is aware of a number of variants of DGTs using different types of investments. There are different aspects to consider with regard to valuations relating to non-insurance based schemes in comparison with valuations where an insurance bond is used. The Government confirms that it is not the policy intent for non-insurance based schemes to be included in the exceptions in regulation 3 and HMRC will wish to consider whether the correct valuation is applied in these cases.

6.28 The Government can confirm that it is not the policy intention to catch bare trust variations of DGTs and will reconsider the hallmark to ensure that they are not.

6.29 With regard to DGT-style arrangements with maturity dates which can be deferred by the trustees, the settlor makes a gift which is not discounted. In the Government's view the settlor is in a similar position to someone who has made a lifetime gift of the property. The Government confirms that it is not intended to

catch these arrangements and will further consider whether clarification or amendment to the hallmark is required.

Other points raised in relation to specific schemes

6.30 There were a substantial number of comments on a wide variety of other arrangements. In summary these concerned:

- Flexible reversionary trusts
- Gift trusts
- “Split” or “retained interest” trusts
- Trust arrangements for insurance policies with maturity dates
- Capital redemption insurance policies
- Insurance policies where the settlor’s interest can be defeated

Government response

6.31 The Government was grateful for the detailed points made in connection with each of the above and will consider whether clarification of the position in guidance or amendment of the hallmark is required.

7. Confidentiality and Premium Fee hallmarks

Background:

7.1 The draft regulations bring arrangements involving IHT into the Confidentiality and Premium Fee hallmarks.

7.2 There were no concerns raised around the application of the confidentiality and premium fee hallmarks to IHT. One major representative body suggested that the application of these hallmarks to IHT may in fact go some way to ensuring schemes that might concern HMRC are notified in the absence of changes to the IHT hallmark itself.

Government response

6.1 The Government will retain the proposed wording and bring arrangements involving IHT into the Confidentiality and Premium Fee hallmarks.

8. Next steps

8.1 The Government is grateful for contributions and suggestions and intends to lay the regulations included in Annex A alongside the publication of this response document. They are expected to come into force by the end of February 2016. As with all the DOTAS hallmarks, the regulations will be kept under review.

8.2 HMRC will update the DOTAS guidance reflecting where necessary some of the issues raised during the consultation covered in this response document, and will consult stakeholders to do so. The Government has provided information it considers would be helpful to consultation respondents in this response document in the interim.

8.3 Separately, the Government will publish a further draft of the Inheritance Tax hallmark for a 12 week technical consultation early in 2016.

STATUTORY INSTRUMENTS

2016 No. ****

CAPITAL GAINS TAX

CORPORATION TAX

INCOME TAX

INHERITANCE TAX

The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) (Amendment) Regulations 2016

Made - - - -	*XXXX*
Laid before the House of Commons	*XXXX*
Coming into force - -	*XXXX*

The Treasury make the following Regulations in exercise of the powers conferred by sections 306(1)(a) and (b) and 317(2) of the Finance Act 2004([1]).

Citation, commencement and effect

—8.4 These Regulations may be cited as the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) (Amendment) Regulations 2016 and come into force on [XXXX 2016].

These Regulations do not have effect—

for the purposes of section 308(1) of the Finance Act 2004 (duties of promoter relating to any notifiable proposal)([2]), if the relevant date([3]) falls before [*];

for the purposes of section 308(3) of the Finance Act 2004 (duties of promoter relating to any notifiable arrangements), if the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements falls before [*];

for the purposes of section 309(1) of the Finance Act 2004 (duty of person dealing with promoter outside United Kingdom), and of section 310 of that Act (duty of parties to notifiable arrangements not involving promoter), if the date on which any transaction forming part of notifiable arrangements is entered into falls before [*].

(**1**) 2004 c.12. Section 317(2) was amended by section 56 of, and paragraphs 1 and 8 of Schedule 17 to, the Finance Act 2010 (c.13).
(**2**) Section 308 was amended by paragraph 2 of Schedule 38 to the Finance Act 2008 (c.9).
(**3**) Relevant date is defined in section 308(2) of Finance Act 2004 (c.12). Section 308(2) was amended by paragraphs 1 and 2 of Schedule 38 to Finance Act 2008 and paragraphs 1 and 3 of Schedule 17 to Finance Act 2010.

Amendment of the Tax Avoidance Schemes (Prescribed Description of Arrangements) Regulations 2006

The Tax Avoidance Schemes (Prescribed Description of Arrangements) Regulations 2006(**4**) are amended as provided for in regulations 3 to 9.

—8.5 Regulation 2 (interpretation: general) is amended as follows.

In paragraph (1) insert the following definitions in the appropriate places—

““CTA 2009” means the Corporation Tax Act 2009(**5**);”,

““CTA 2010” means the Corporation Tax Act 2010(**6**);”, and

““ITA 2007” means the Income Tax Act 2007(**7**);”.

In paragraph (2) after the definition of “business” insert—

““generally accepted accounting practice” has the meaning given by section 1127 of CTA 2010;”.

—8.6 Regulation 5 (prescribed descriptions of arrangements)(**8**) is amended as follows.

For paragraph (1) substitute—

“(1) The following arrangements are prescribed for the purposes of Part 7 of the FA 2004 (disclosure of tax avoidance schemes)—

(a) in relation to income tax, corporation tax and capital gains tax, any arrangements which fall within any description specified in a provision of these Regulations listed in paragraph (2);

(b) in relation to inheritance tax, any arrangements which fall within any description specified in a provision of these Regulations listed in paragraph (2)(a) or (c).”

In paragraph (2)—

omit the “and” after sub-paragraph (g);

after sub-paragraph (h) insert—

“and

(i) regulation 19 (description 9: financial products).”

In regulation 7(1)(e)(iii)(bb) (Description 2: Confidentiality where no promoter is involved)(**9**) for “Income Tax Act 2007” substitute “ITA 2007”.

For regulation 10 (Description 5: standardised tax products) substitute—

“**Description 5: standardised tax products**

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

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

(a) the arrangements have standardised, or substantially standardised, documentation—

(i) the purpose of which is to enable a person to implement the arrangements;

(ii) the form of which is determined by the promoter; and

(iii) the substance of which does not need to be tailored, to any material extent, to enable a person to implement the arrangements;

(**4**) S.I. 2006/1543, relevantly amended by S.I. 2009/2033, S.I. 2010/2834 and S.I. 2013/2595.
(**5**) 2009 c.4.
(**6**) 2010 c.4.
(**7**) 2007 c.3.
(**8**) Regulation 5 was amended by regulation 2 of S.I. 2009/2033, regulation 4 of S.I. 2010/2834 and regulation 9 of S.I. 2013/2595.
(**9**) Regulation 7 was amended by regulation 6 of S.I. 2010/2834 and regulations 6 to 8 of S.I. 2013/2595.

(b) a person implementing the arrangements must enter into a specific transaction or series of specific transactions;

(c) the transaction or series of transactions is standardised, or substantially standardised, in form; and

(d) either the main purpose of the arrangements is to enable a person to obtain a tax advantage or the arrangements would be unlikely to be entered into but for the expectation of obtaining a tax advantage."

—8.7 Regulation 11 (arrangements excepted from Description 5) is amended as follows.

Omit paragraph (1).

In paragraph (2)—

for "The arrangements referred to in paragraph (1)(a) are" substitute "The following arrangements are excepted from being prescribed under regulation 10";

in sub-paragraph (b) for "Chapter 3 of Part 7 of ICTA 1988 and Schedules 5B and 5BA" substitute "Part 5 of ITA 2007 and Schedule 5B";

in sub-paragraph (c) for "section 842AA of, and Schedule 15B to, ICTA 1988" substitute "Part 6 of ITA 2007";

after sub–paragraph (n) insert—

"(o) arrangements which would be prescribed by regulation 19 but for regulation 21."

In regulation 12 (Description 6: Loss schemes) for paragraph (b) substitute—

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

(i) the main benefit or one of the main benefits which could be expected to accrue to some or all of the individuals participating in the arrangements is the provision of losses, and

(ii) the arrangements (including the way they are structured) contain an element which is, or elements which are, unlikely to have been entered into by the individuals concerned were it not for the provision of those losses, and

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

After regulation 18 (Description 8: Employment income provided through third parties)(**10**) insert—

"**Description 9: Financial products**

19.—(1) Subject to regulation 21, arrangements are prescribed if—

(a) condition 1 is met, and

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

(i) condition 2 is met, and

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

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

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

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

(**10**) Regulation 18 was substituted for regulation 17A by regulation 10 of S.I. 2013/2595.

(5) Condition 4 is that the arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained.

(6) For the purposes of this regulation condition 3 is treated as not having been met if—

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

(i) section 135 or 136 of TCGA 1992(**11**) applies to the specified financial product, and

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

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

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

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

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

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

(a) that step involves only the transfer of an asset to which the condition in paragraph 15A(2)(b) of Schedule 7AC to TCGA 1992(**12**) applies; or

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

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

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

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

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

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

20.—(1) The financial products specified in this paragraph are—

(a) a loan,

(b) a share,

(c) a derivative contract within the meaning given by section 576 of CTA 2009,

(d) a repo in respect of securities within the meaning given by section 263A(A1) of TCGA 1992(**13**),

(e) a creditor repo, creditor quasi-repo, debtor repo or a debtor quasi-repo (within the meanings given by sections 543, 544, 548 and 549 of CTA 2009(**14**) respectively),

(f) a stock lending arrangement within the meaning given by section 263B(1) of TCGA 1992(**15**),

(g) an alternative finance arrangement within Chapter 6 of Part 6 of CTA 2009 or Part 10A of ITA 2007(**16**),

(h) a contract which, whether alone or in combination with one or more other contracts—

(**11**) 1992 c.12. Sections 135 and 136 were substituted by paragraphs 7 and 9 of Schedule 45 to the Finance Act 2002 (c.23). Section 135 was amended by paragraph 23 to the Corporation Tax Act 2010.

(**12**) Schedule 7AC was inserted by paragraph 1 of Schedule 8 to the Finance Act 2002.

(**13**) Section 263A was inserted by section 80(4) of the Finance Act 1995 (c.4) and subsection (A1) was inserted by paragraph 9(2) of Schedule 12 to the Finance Act 2013 (c.29).

(**14**) Section 549 was amended by article 6(5) of S.I. 2009/2860.

(**15**) Section 263B was inserted by paragraph 5(1) of Schedule 10 to the Finance Act 1997 (c.16).

(**16**) Part 10A of the Income Tax Act 2007 was inserted by Part 1 of Schedule 2 to the Taxation (International and Other Provisions) Act 2010 (c.8).

(i) is in accordance with generally accepted accounting practice required to be treated as a loan, deposit or other financial asset or obligation, or

(ii) would be required to be so treated by the person entering into the arrangements were that person a company to which the Companies Act 2006(**17**) applies.

(2) Paragraph (1) does not specify a financial product held within an account which satisfies the conditions in regulation 4 of the Individual Savings Account Regulations 1998(**18**).

Arrangements excepted from Description 9

21. Arrangements are excepted from being prescribed under regulation 19 if—

(a) a promoter is a participating entity, or is part of a participating group, within the meaning of section 286 of the Finance Act 2014(**19**); and

(b) HMRC has confirmed, or could reasonably be expected to confirm, to the promoter that the arrangements are acceptable transactions under the Code of Practice on Taxation for Banks (as published by the Commissioners for Her Majesty's Revenue and Customs on 31 May 2013)(**20**)."

Name 1
Name 2
Date — Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (S.I. 2006/1543) ("the 2006 Regulations"). They extend the scope of the confidentiality and premium fee hallmarks to include inheritance tax; make changes to aspects of the standardised tax products and losses hallmarks; and introduce a new hallmark relating to financial products.

Regulation 1 provides for citation, commencement and effect.

Regulation 2 introduces the amendments to the 2006 Regulations.

Regulation 3 amends regulation 2 of the 2006 Regulations.

Regulation 4 amends regulation 5 of the 2006 Regulations to extend the scope of the confidentiality and premium fee hallmarks to arrangements involving inheritance tax.

Regulation 5 updates a reference to the Income Tax Act 2007 to reflect that it has been defined in regulation 2 as the ITA 2007.

Regulation 6 substitutes a new description of standardised tax products hallmark in the 2006 Regulations. The amendment changes how the hallmark works by requiring the informed observer to consider all aspects of the test, rather than the previous position where the observer was required only to consider the purpose of the arrangements.

Regulation 7 removes the grandfathering provision from regulation 11 of the 2006 Regulations, updates statutory references and makes arrangements prescribed under regulation 10 subject to the exception in regulation 21.

(**17**) 2006 c.46.

(**18**) S.I. 1998/1870; relevant amending instruments are regulation 3 of S.I. 2002/1974, regulations 5 and 6 of S.I. 2007/2119, regulation 4 of S.I. 2009/1994, regulation 3 of S.I. 2010/2957, regulations 4 and 5 of S.I. 2011/782, regulation 7 of S.I. 2011/1780, paragraph 22 of Schedule 2 to S.I. 2013/472, regulation 5 of S.I. 2014/1450 and regulation 5 of S.I. 2015/869.

(**19**) 2014 c.26.

(**20**) The Code is available at https://www.gov.uk/government/publications/code-of-practice-on-taxation-for-banks. For those without computer access, a copy of the code can be obtained without charge by writing to: FAO Banking Code Team, Large Business Financial, Floor 6 & 7, Bush House, S.W. Wing, The Strand, London, WC2B 4RD.

Regulation 8 substitutes a new description of the Loss Scheme hallmark in the 2006 Regulations. The amendment refines the targeting of the hallmark by requiring the informed observer to consider whether the provision of losses is a main benefit, rather than the main benefit, and to consider whether the arrangements or their structure contain elements which are unlikely to have been entered were it not for the provision of those losses.

Regulation 9 inserts new regulations 19, 20 and 21 into the 2006 Regulations. New regulation 19 prescribes arrangements, for the purposes of section 306 of the Finance Act 2004, where certain conditions are met. Condition 1 is that one or more of the financial products specified by new regulation 20 has been used as part of the arrangements. Conditions 2 to 4 relate to particular circumstances which may exist in respect of such arrangements. New regulation 21 sets out arrangements that are excepted from new regulation 19.

A Tax Information and Impact Note covering this instrument was published on the 10th December 2014 alongside the Autumn Statement 2014 and is available on the HMRC website at https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins. It remains an accurate summary of the impacts that apply to this instrument.

Annex B: List of stakeholders consulted

5 Stone Buildings
Allen & Overy LLP
Association of British Insurers
Association for Financial Markets in Europe
Association of International Life Offices
BDO LLP
Boodle Hatfield LLP
British Bankers Association
British Property Federation
Canada Life
Chartered Institute of Taxation
Citigroup
EY
Grant Thornton LLP
Haines Watts LLP
Insurance Ireland
Isle of Man Assurance Ltd.
King & Wood Mallesons LLP
KPMG LLP
The Law Society
Manx Insurance Association
Mills & Reeve LLP
Octopus Investments
PricewaterhouseCoopers LLP
Simmons & Simmons LLP
Smith & Williamson
Society of Trust and Estate Practitioners
Technical Connection Ltd.
T&G Legal Solutions
Way Investment Services Ltd.
Wilsons Solicitors LLP
UBS
UHY Hacker Young