



HM Revenue
& Customs

Strengthening Sanctions for Tax Avoidance - A Consultation on Detailed Proposals

Consultation document

Publication date: 22 July 2015

Closing date for comments: 14 October 2015

Subject of this consultation:	Following consultation in early 2015, a further consultation on measures for serial avoiders, serial promoters, and how to introduce specific penalties where the General Anti-Abuse Rule (GAAR) applies, which takes into account responses to the earlier consultation.
Scope of this consultation:	<p>This consultation builds on the responses to the earlier consultation. It details proposals on how each of the measures would work and asks for comments on those details.</p> <p>For serial avoiders, this detail includes how the regime should be structured and what the entry criteria should be; what extra reporting requirements should apply to serial avoiders; how a surcharge might work; restricting access to certain reliefs; and when it would be appropriate to name the most persistent serial avoiders.</p> <p>For the GAAR Penalty, this detail includes the circumstances in which a penalty will be charged; the penalty rate chargeable; and safeguards to ensure proportionality. The consultation also sets out some further areas for consideration under the GAAR.</p> <p>For Promoters of Tax Avoidance Schemes, this detail includes the new threshold criteria definitions, including the number of schemes to be considered over a specified period of time.</p>
Who should read this:	We would like to hear from businesses, individuals, tax advisers, professional bodies and any other interested parties.
Duration:	The consultation will run for twelve weeks from 22 July to 14 October 2015.
Lead official:	Ellen Roberts, Counter-Avoidance Directorate, HMRC
How to respond or enquire about this consultation:	<p>Written responses should be submitted by 14 October either by email to Ca.consultation@hmrc.gov.uk</p> <p>Or by post to</p> <p>Ellen Roberts, HM Revenue & Customs, Counter Avoidance, 3C/03, 100 Parliament Street, London, SW1A 2BQ</p>
Additional ways to be involved:	HMRC welcomes meetings with interested parties to discuss these proposals. Please contact us at the email address shown above.
After the consultation:	A response document will be published later in the year.
Getting to this stage:	At the 2015 Budget, the Government confirmed its intention to introduce a surcharge and special reporting requirements for serial avoiders and to consider further measures such as restricting access to certain reliefs. The Government also announced its intention to introduce a tax-gearred penalty for cases where the GAAR applies, and this consultation considers the detail for this.

**Previous
engagement:**

A prior consultation ran from 30 January to 12 March 2015. The Government's response to that consultation is included at Annex B. The responses to that consultation have been used to inform the proposals included in this consultation.

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1. Introduction

The Government is committed to ensuring there is an effective range of deterrents to those who engage in tax avoidance arrangements. These tools need to be effective in clamping down on the appetite for and supply of avoidance schemes. Effective outcomes should not only eliminate any benefits from engaging in avoidance but also ensure an appropriate downside for those who engage in it.

In the Budget of March this year, the Government announced that it would legislate to introduce a surcharge and new reporting requirement for serial avoiders. It also announced further work on proposals to restrict access to certain reliefs and to provide for the naming of serial avoiders.

The consultation *Strengthening Sanctions for Tax Avoidance* published in January of this year asked for views on some high-level proposals to change the behaviour of the most persistent tax avoiders who continue to attempt to circumvent making their fair contribution to society. It covered appropriate principles for introducing sanctions for serial avoiders, as well as penalties for those who engage in abusive tax avoidance that is caught by the General Anti-Abuse Rule (GAAR). This consultation builds on the principles established in this earlier consultation, outlining the detail of these measures to ensure that these changes are appropriately designed.

This consultation also considers further additional measures that are needed to strengthen the impact of the GAAR in tackling marketed avoidance schemes.

Strengthening Sanctions for Tax Avoidance included a proposal to introduce a new threshold condition to ensure that promoters would automatically fall within the scope of the Promoters of Tax Avoidance Scheme (POTAS) rules if a significant proportion of schemes they promoted are found to fail. The March Budget 2015 announced that a new POTAS threshold condition would be introduced to enable HMRC to consider whether a conduct notice should be issued in these circumstances. This consultation outlines the proposed new threshold criteria.

2. How the Serial Avoiders' Regime Would Work

The primary objective of these proposals for serial avoiders is to change the behaviour of those who repeatedly engage in tax avoidance and to discourage them from using avoidance schemes in the future. This chapter provides details on what a regime for serial avoiders would look like and the conditions for entering the regime. Chapter 3 then asks for views on how terms such as 'avoidance scheme' and 'defeated by HMRC' should be defined for this regime.

The Warning Period

The proposal is that the first defeat of an avoidance scheme should trigger a "warning period". The taxpayer would be issued with a warning notice which advised that certain additional consequences of entering into further avoidance schemes would apply for a period of, say, 5 years. This period should be long enough to give the avoider a real incentive to change their behaviour.

The warning notice would require the individual to certify annually whether they had entered into any avoidance scheme. This would apply throughout the whole 5-year period. If the avoider stayed out of avoidance for the warning period, the period would come to an end and any additional consequences would be avoided.

If the taxpayer did enter into further avoidance schemes during the warning period, they would be required to provide further information in the form of details of any schemes entered into and the reasons why they considered the schemes worked.

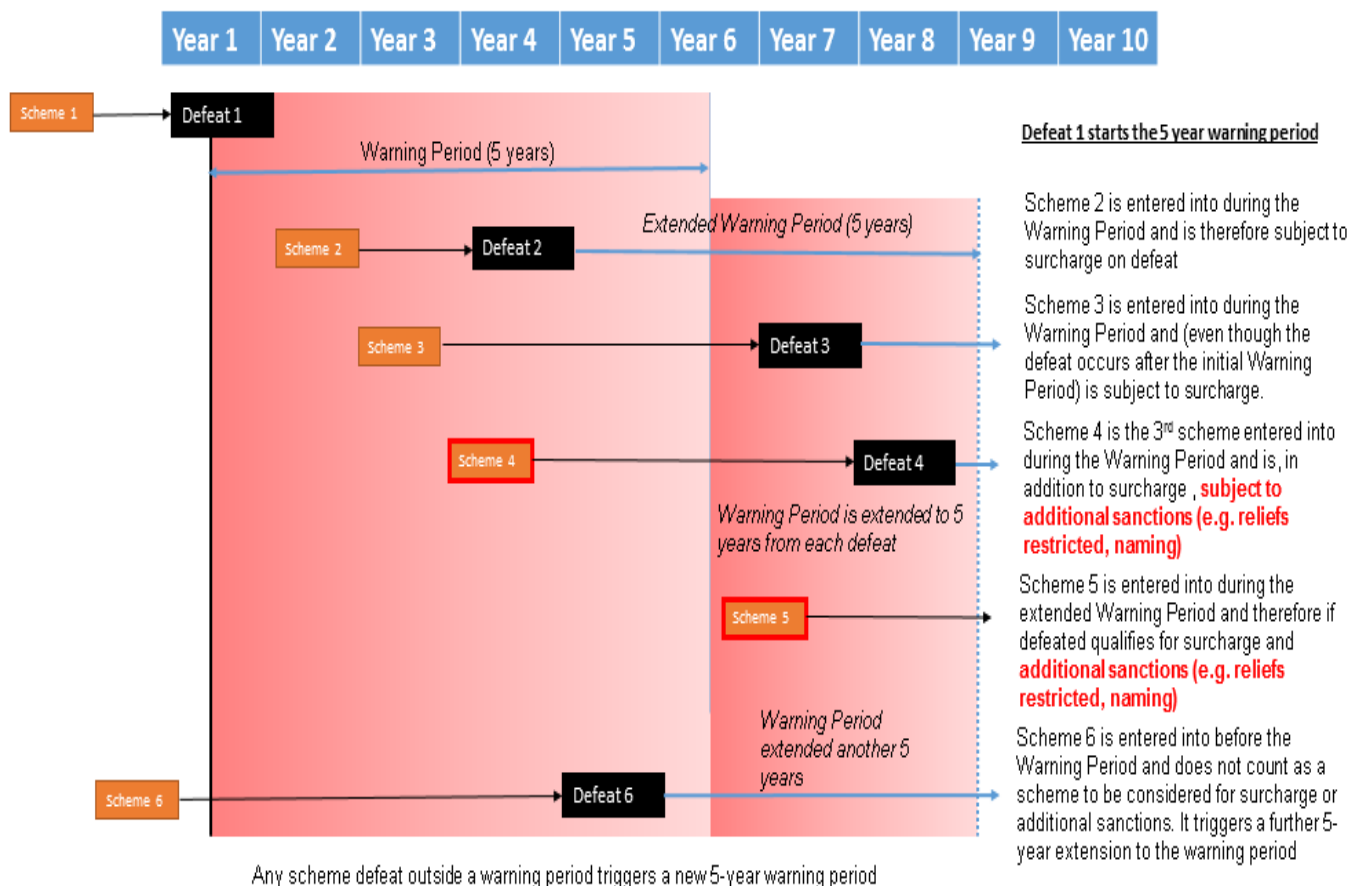
Any schemes entered into during the warning period that were defeated would be subject to a sanction at the point of defeat. This would apply whether the scheme was defeated within or after the warning period. Any defeat during an initial warning period would extend that warning period from the date of the fresh defeat. A defeat after the end of the warning period would trigger a new warning period for 5 years from the date of that defeat. Any further defeat during an initial warning period would further extend that warning period for 5 years from the date of this fresh defeat.

If the individual used avoidance schemes during the warning period, they would risk being named as a serial avoider. We propose that they would be named if three or more schemes entered into during the warning period were defeated. This would apply whether this was an initial or extended warning period.

A serial avoider warning notice would not in itself create any liability to tax or a penalty and therefore it would not be appropriate to allow appeals against a notice. However, all of the normal appeal rights against assessments and amendments to returns would be unaffected by this measure.

The following diagram provides an overview of how the regime would operate. Further detail is provided in the next chapter. Chapter 3 also outlines further detail on proposals to restrict access to reliefs where the individual seeks to avoid tax by

repeatedly misusing reliefs. We propose that this restriction would be triggered by the defeat of three avoidance schemes that sought a tax advantage through the use of a relief and that were entered into during the warning period. This would apply whether this was an initial or extended warning period.



Q1. Do you agree with a regime based on this model? If not, please outline the reasons for your view.

Q2. What do you consider would be a suitable length for a warning period?

3. Sanctions and Definitions

Additional reporting requirements

Serial avoiders represent a significant tax risk. Once issued with a warning notice, an avoider would be required to certify annually to HMRC that they have not used avoidance schemes, or, if they have used one or more avoidance schemes, to provide details of the schemes and why they believe the schemes work. This would emphasise to the taxpayer the possible consequences of employing tax avoidance arrangements. It would also provide HMRC with more information to make an accurate assessment of tax risk and of the taxpayer's compliance with the warning notice.

Q3. Would requiring serial avoiders to certify annually that they have not employed avoidance schemes, or to provide details of those they have used help discourage further avoidance?

The surcharge

The purpose of penalties and surcharges is to encourage people to comply with their obligations and to encourage compliant and co-operative behaviour. It is also to reassure those who do comply with their obligations that they will not be disadvantaged by those who do not.

Serial avoiders are taxpayers who engage in a sustained course of conduct that makes their tax affairs especially high risk. This marks them out for different treatment and requires HMRC to devote significant additional resource to tackling their behaviour and to uncover their true tax liability. Some avoiders make use of multiple tax avoidance schemes (either concurrently or repeatedly) as a tactic to obstruct the establishment of the true tax liability.

When a tax avoidance scheme is defeated, the tax returns, claims or other documents are inaccurate and penalties may be chargeable. For inaccurate documents, this depends in each case on establishing that the taxpayer failed to take reasonable care. However, existing law must look at each case in isolation, and cannot easily consider the evidence of a pattern of previous or parallel behaviour.

Introducing a surcharge based solely on objective criteria such as the repeated or concurrent use of tax avoidance schemes that are defeated would help deter serial avoiders from persisting with flawed schemes year after year. In all cases, taxpayers would already be on notice that a further defeated scheme which results in understated tax would lead to a surcharge and so would previously have had both opportunity and incentive to change their behaviour.

The publication "*HMRC Penalties: a discussion document*" published on 2 February 2015 set out the five principles that we consider should underpin our penalty regimes.

The penalty principles

- The penalty regime should be designed from the customer perspective, primarily to encourage compliance and prevent non-compliance. Penalties are not to be applied with the objective of raising revenues
- Penalties should be proportionate to the offence and may take into account past behaviour
- Penalties must be applied fairly, ensuring that compliant customers are (and are seen to be) in a better position than the non-compliant
- Penalties must provide a credible threat. If there is a penalty, we must have the operational capability and capacity to raise it accurately, and if we raise it, we must be able to collect it in a cost-efficient manner
- Customers should see a consistent and standardised approach. Variations will be those necessary to take into account customer behaviours and particular taxes.

We believe the surcharge should meet these five principles.

There are two possible approaches to setting a suitable level of surcharge for serial avoiders:

- A simple low level of charge, similar to current late-payment penalties. This approach would have the advantage of being simple and easy to engage with for both HMRC and taxpayers.
- A higher surcharge rate similar to that applied with Follower Notices, with the possibility for reductions in the rate to reflect co-operation or disclosure by the taxpayer during the tax enquiry. This approach would provide stronger incentives to change behaviour and to settle matters promptly, but would be more complex.

In either model, a serial avoider who during a period of warning continues to submit multiple returns that use avoidance schemes which HMRC defeats should face increasing rates of surcharge. This would be the case whenever the scheme is defeated, whether within or outside the warning period. This would underline the seriousness of the avoider's repeated use of schemes and increase the downside of continued avoidance.

Q4. Which of these approaches would best meet the five penalty principles?

Q5. If you believe the surcharge should be set at a high level, what should the taxpayer have to do to earn any reduction in the surcharge?

Q6. What other key features should form part of the surcharge to ensure it meets the five principles?

Appeals, reasonable excuse and reasonable care

As a financial sanction, there should be a right of appeal to a Tribunal against a surcharge.

However, tax avoiders sometimes look to exploit relevant safeguards in other parts of the tax system inappropriately. For example, taxpayers sometimes claim that they have received advice that the avoidance scheme works. In some circumstances the advice relied on is a general statement made to a scheme promoter that a scheme achieves its aim. This often pre-dates the taxpayer's involvement, and can take no account of their individual circumstances. In HMRC's opinion, an avoider cannot automatically be said to have a defence against a penalty or surcharge just because this sort of advice exists and has been followed indirectly.

To increase the behavioural impact of the proposed surcharge, we propose that the defence of reasonable excuse in an appeal against a surcharge should specifically exclude cases where the taxpayer has relied on advice that was given to a third party or that was not made by reference to his or her particular circumstances.

Our observation of generic or indirect advice is just one of the issues that we are concerned about in this context. We will therefore also consider ways to further delineate safeguards in the context of tax avoidance, for example by specifying further what may or may not constitute a reasonable excuse.

Q7. How should a reasonable excuse safeguard be structured to be fair to the taxpayer without undermining the effectiveness of the surcharge? Would excluding advice addressed to third parties, or not made by reference to the taxpayer's circumstances, achieve this aim?

Tax avoiders sometimes try to confound HMRC investigations by withholding basic information about a scheme. For example, when contesting that they have taken reasonable care, avoiders might be slow to produce supporting evidence, or submit incomplete information. In these cases, the legal onus is on HMRC to demonstrate that the taxpayer has not taken reasonable care, so there is little incentive for the avoider to submit relevant or timely information on the matter.

These tactics can lead to drawn out and more costly investigations, prolonging the resolution of avoidance disputes for all parties. For the new surcharge, we propose that if there is a defence of reasonable care the onus be put on the avoider to demonstrate that he or she took reasonable care in any appeal against a penalty for an inaccurate return.

Q8. If appealing against the surcharge on the grounds of having taken reasonable care, do you agree that putting the onus of proof on the taxpayer to demonstrate reasonable care would remove any incentive to engage in delaying tactics?

Naming Serial Avoiders

Attitudes to tax avoidance have hardened in recent years and there is significant public criticism of those engaged in avoidance. This means that being identified as a tax avoider can affect a person's or a business's reputation and public standing and so the prospect of being named would act as an incentive to change behaviour.

HMRC can publish information which identifies a taxpayer in certain circumstances. For instance, under Publishing Details of Deliberate Defaulters (PDDD), HMRC can publicise the names of those who have been charged a penalty for deliberate inaccuracies or failures, subject to certain conditions and safeguards. Similarly, under the 2014 Promoters of Tax Avoidance Schemes legislation HMRC may publish the fact that a person is a monitored promoter and require that monitored promoter to include that fact in their own published literature.

We propose that serial avoiders would only be considered for naming once objective tests were met—being placed on notice by the issue of a warning followed by a minimum number, say three, of further instances of understated tax due to use of avoidance schemes that are shown not to work. As with PDDD, serial avoiders would be named by having their details published on HMRC's website for a maximum period of time.

Q9. Do you agree that public naming of the most persistent users of tax avoidance schemes which HMRC defeats would be a fair and effective deterrent? How many schemes should be defeated before it is possible to name a serial avoider?

Safeguards

The prospect of naming would act as a deterrent because the effect of being publically named could affect an avoider's public standing. However, this would mean that there would have to be effective safeguards to ensure names are published only when appropriate.

Any serial avoider approaching a threshold to be named would have had several warnings about the possibility. They would have had an initial warning notice and, having received that, gone on to understate tax again through the use of schemes which are shown not to work. The avoiders would also be offered the opportunity to make representations that they should not be named, for example that it would result in a risk to their safety. There should be no right of appeal against a decision by HMRC to name a serial avoider, but the measure would not interfere with the person's ability to appeal against the assessments or other decisions underlying the failures. Once a taxpayer met the criteria to be named, naming could only be considered once all appeal rights relating to the understatements had been exhausted.

Q10. Do you agree that this would provide sufficient safeguards for naming serial avoiders? If not, what further safeguards do you suggest?

Restricting Reliefs

There are a great many tax reliefs and they have a wide variety of purposes and aims. Many tax avoidance schemes try to deliver their purported tax advantage by applying a relief in a way never intended by Parliament, for example in circumstances that were never envisaged when the relief was designed or by structuring activities in a way that inflates, or changes the timing of, a claim to the relief. This is not only unfair to the majority of taxpayers who play by the rules, but also can undermine the very purpose of the reliefs.

Therefore, when a taxpayer to whom a serial avoider warning notice has been issued uses further schemes which use a relief in a way not intended by Parliament as part of an avoidance scheme and that scheme is defeated by HMRC, it is a reasonable safeguard on the overall cost of the relief that the taxpayer should not have access to that relief again for a notified period of time.

The proposal is that as a minimum, once a warning notice has been issued, there should be three defeats of relief schemes which are entered into during a warning period. Relief could no longer be claimed for 5 years after the third defeat.

Where tax reliefs are intended to encourage a particular activity, it could be argued that, even where they are exploited, if the desired activity takes place they are still serving their original purpose – and that they should be excluded from any restrictions. However, abuse of reliefs involves actions such as attempting to access them with minimal additional investment in the desired activity, shifting the timing of benefitting from the relief or inflating claims. This represents poor value for money for taxpayers who are funding, rather than benefiting from, the relief.

There are two possible approaches to this.

Option 1, restricting access to the relief abused

Under this option, when a particular relief is abused three times as part of avoidance schemes defeated by HMRC in the circumstances described above, the taxpayer would be barred from making any further claims for that relief in the 5 years following the third defeat. The advantage of this option is that it would be clear for taxpayers to understand. However, this would allow serial avoiders to continue to seek to avoid tax by using a series of different reliefs.

Option 2, restricting access to categories of reliefs

This would operate in a similar way to Option 1, but under this option, the trigger of 3 defeats and barring access to reliefs would apply to broad categories of reliefs. These categories would need to be clearly defined or alternatively the reliefs within the categories would need to be specified. These categories might be based on differences in how reliefs are structured or on their purpose.

Q11. Which of these options would provide the best approach to restricting access to reliefs when they have been exploited by a serial avoider as part of a defeated avoidance scheme?

Q12. If you favour restricting the power to restrict reliefs to certain categories, how should those categories be defined?

Definitions

What is a scheme?

There is no universal definition of a tax avoidance scheme. The Disclosure of Tax Avoidance Schemes regulations (DOTAS) and the Disclosure of VAT Avoidance Schemes regime (VADR) both include expansive descriptions of the types of arrangement falling within their scope but not all avoidance being tackled by HMRC has necessarily been disclosed or is disclosable under DOTAS or VADR.

However, these regimes provide a useful and easily understood definition of avoidance schemes for this measure and so it is proposed that, as a minimum, only schemes notified or notifiable under DOTAS and VADR should come within the scope of the serial avoiders' regime.

Q13. Would focussing on a definition based on schemes notified or notifiable under DOTAS and VADR be sufficient to deter potential serial avoiders from entering into multiple schemes? If not, what other approach do you favour?

There are of course other markers of avoidance. The GAAR may apply to counteract avoidance arrangements which are not within DOTAS. Similarly, Follower Notices may be issued to those whose schemes are sufficiently similar to an avoidance scheme that has been finally defeated in court by another user's litigation. Such schemes are not limited to those notified under DOTAS.

Q14. Should arrangements to which Follower Notice or GAAR have been applied be included in the definition of a scheme for these purposes? If not, please explain why you do not think this would be appropriate.

When is a scheme defeated for the purposes of the serial avoiders' regime?

Some disputes between HMRC and taxpayers about avoidance matters are settled by agreement while others are settled by the Tribunals or courts in litigation. The proposal is that a scheme be regarded as 'defeated' when the taxpayer reaches agreement with HMRC about his or her case or makes no appeal against the assessment, amendment or determination made by HMRC, or if the taxpayer makes an appeal, when the litigation is finally settled in HMRC's favour if no agreement is otherwise reached. Litigation would be regarded as 'final' if the case is settled in the Supreme Court or, in a lower court, if no further appeal is made against the court's decision.

Schemes where a Follower Notice is issued or the GAAR is counteracted would be regarded as defeated when the taxpayer takes corrective action as a result of the Follower Notice, or does not appeal counteraction under the GAAR. If the taxpayer does not take corrective action on their return or accept the GAAR counteraction, the

scheme would be regarded as defeated when the litigation on their appeal is finally settled in HMRC's favour.

Q15. Should a scheme be viewed as 'defeated' once a dispute is settled in HMRC's favour, either by agreement with the taxpayer (or, as the case may be, acceptance of a Follower Notice or GAAR counteraction), or by final litigation being settled in HMRC's favour? If not, what criteria would you apply?

Transitional arrangements

The proposal is that schemes entered into before the effective date of the Serial Avoiders' Regime that were defeated after the effective date could trigger a warning notice (but would not be subject to any of the proposed sanctions). The Government would be interested in views on whether there should be a transitional period during which avoiders could withdraw from schemes (and pay tax accordingly) in order for them to avoid being a potential trigger.

Q16. How do you think a transitional provision should best work to encourage avoiders to withdraw from avoidance schemes they have already employed?

Related proposals

A consultation document on *Improving Large Business Tax Compliance* has been published alongside this document. That consultation considers measures intended to strengthen HMRC's approach to large businesses. The measures are intended to drive further behavioural change, embedding positive tax behaviour and equipping HMRC with additional tools to tackle the small number of large businesses who continue to engage in tax avoidance or aggressive tax planning, or who continue to resist full and open engagement with HMRC.

As the proposals in this document and the *Improving Large Business Tax Compliance* consultation document are developed we will consider how best to cater for the overlaps between the schemes.

4. Penalties for the GAAR

Background

The General Anti-Abuse Rule (GAAR) was introduced in July 2013 for tax and March 2014 for National Insurance Contributions. For the purposes of this document, any references to “tax” should also be taken to include National Insurance Contributions.

The GAAR’s objective is to deter taxpayers from entering into abusive arrangements, and to deter would-be promoters from promoting such arrangements.

If a taxpayer is undeterred, and goes ahead with an abusive arrangement, then the GAAR operates to counteract the abusive tax advantage which he or she is trying to achieve.

Throughout this paper, references to cases to which the GAAR ‘applies’ are to those arrangements which are abusive tax arrangements and which have been counteracted under section 209 of the Finance Act 2013.

Why Introduce a Penalty

With the introduction of the GAAR, the Government has drawn a ‘line in the sand’ for the worst cases of tax avoidance, clearly demarcating egregious arrangements as being a particularly unacceptable course of action to take.

Introducing penalties for cases to which the GAAR applies will reinforce this demarcation.

Without a GAAR Penalty, there is no additional disincentive from entering into egregious tax arrangements: a taxpayer can go ahead with an arrangement in full knowledge that it is likely to be challenged under the GAAR, without any specific sanction for this behaviour. Similarly, there is sometimes no real downside to delaying settlement of a dispute where the GAAR is at issue for as long as possible.

A GAAR penalty would ensure that cases to which the GAAR applies result in a financial consequence proportionate to the amount of tax counteracted under the GAAR, and help deter taxpayers from entering into abusive arrangements in the first place.

Scope of a GAAR Penalty

For a penalty to be chargeable the taxpayer must have committed a **failure** that gives rise to the offence being penalised. As outlined in the previous consultation on this issue, we propose that that failure would occur when the taxpayer submits their return, claim, or other document including a tax advantage arising from abusive tax arrangements coming within the GAAR.

An important element of a failure that gives rise to a penalty is that taxpayers understand the point at which they could become liable to a penalty as a result of that

failure. In the case of the GAAR penalty we propose that the failure should echo the terms of the GAAR itself. As such, the penalty would be triggered where a taxpayer submitted a return, claim or other document that included arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant provisions.

Whether returns have been submitted reflecting such arrangements would, as is already the case, be for the GAAR Advisory Panel to consider. The process for establishing that the GAAR applies to tax arrangements is outlined at Schedule 43 of the Finance Act 2013, and ensures that all GAAR cases are subject to the independent scrutiny of the GAAR Advisory Panel before HMRC can decide whether or not to counteract an advantage under the GAAR.

It will only be after the scrutiny of the GAAR Advisory Panel, at the point that HMRC has successfully counteracted abusive tax arrangements under section 209 of Finance Act 2013, that a penalty will be chargeable. A counteraction will be successful where there has been no appeal against the counteraction (whether realised through a closure notice, assessment etc.) or, if there has been, the appeal was not successful so that additional tax becomes due as a result of that counteraction.

This means that there will be certain circumstances where the GAAR could in theory be in play, but where no GAAR penalty will be charged:

- A taxpayer correctly self-assesses for the GAAR
- A taxpayer settles with HMRC in line with the Litigation and Settlement Strategy prior to a referral of the relevant arrangements to the GAAR Advisory Panel

Charging a penalty only when HMRC has successfully counteracted abusive tax arrangements is consistent with the 'line in the sand' drawn by the GAAR: taxpayers will have ample warning that they could come within the GAAR and therefore become chargeable to a penalty.

However, it is reasonable to provide an opportunity to the taxpayer to correct their tax position in line with the principle of counteraction under the GAAR. We propose that taxpayers would be able to correct their tax position up until the point that referral of their arrangements is made by HMRC to the GAAR Advisory Panel.

As outlined in the previous consultation, HMRC will retain responsibility for charging the GAAR Penalty. The GAAR Advisory Panel will retain its existing role and will not be involved in any part of the penalty decisions.

Q17. Do you agree that the proposed opportunity for taxpayers to correct their tax position is appropriate? Please explain your view.

5. GAAR Penalty Model and next steps

A GAAR Penalty should be proportionate, and, as noted above, consistent with HMRC's overarching approach to penalties. The publication "*HMRC Penalties: a discussion document*" published on 2 February 2015 set out the five principles that we consider should underpin our penalty regimes. These principles are outlined above in the chapter on Serial Avoiders.

The GAAR is distinct from other anti-avoidance provisions. It marks out egregious tax avoidance as a wholly unacceptable approach and the design of a GAAR Penalty should similarly reflect the seriousness of entering into abusive tax arrangements.

A GAAR Penalty should also reflect the binary nature of the GAAR: it applies where arrangements are found to be abusive, irrespective of the degree of abuse involved. It is proposed that a GAAR Penalty would apply in all cases where counteraction under the GAAR is successful, without any variation to the penalty according to some measure of the degree of the abuse, or the circumstances in which the abuse arises. This would maintain the simplicity of the penalty regime and make it clear that any failure to submit a return, claim or other document without taking the GAAR properly into consideration is eligible for a penalty.

Penalty Rates

The principal purpose of the GAAR Penalty is to increase the GAAR's deterrent effect, and discourage taxpayers from entering into abusive tax avoidance in the first place. Achieving this deterrent effect will require a relatively high rate of penalty in order to have a real impact. This is because taxpayers who are tempted into abusive tax avoidance have a strong appetite for risk, and the penalty rate needs to be sufficiently high to discourage them. Additionally, it is important that this penalty rate is set at a level that reflects the gravity of the behaviour displayed by taxpayers who enter into abusive tax arrangements.

As announced at Budget 2015, the GAAR Penalty will be proportionate to the amount of the tax advantage counteracted under the GAAR.

The penalty should reflect the fact that abusive tax arrangements under the GAAR will not usually come about as a result of behaviour similar to that exhibited in fraudulent activity. Under the existing penalty rules in Schedule 24 to the Finance Act 2007, a penalty of 70%-100% will usually be charged in cases where fraud has been proven. We do not consider that it would be appropriate to charge a GAAR Penalty at a similar rate to fraudulent cases.

On balance, we consider that a penalty of 60% of the tax counteracted under the GAAR would be an appropriate penalty, but would welcome respondents' views on this.

The existing penalty rules in Schedule 24 to the Finance Act 2007 will continue to apply in GAAR cases as they do to any other case. However, in situations where a

combination of a GAAR penalty and a Schedule 24 penalty in respect of the amount of tax counteracted by the GAAR exceeds the amount of that counteracted tax, it is proposed that the total penalty should be restricted to 100% of that tax, or for offshore matters up to the highest penalty available under Schedule 24.

Q18. Do you agree that the proposed rate for the GAAR Penalty is appropriate? If not, what penalty rate would you propose and why?

Q19. Do you agree that this penalty model will act as a fair and proportionate deterrent? Please explain your view.

Safeguards

It is important that a GAAR Penalty reflects the binary nature of the GAAR, ensures that the level of penalty is proportionate, and protects taxpayer rights. Although we cannot immediately foresee any disproportionate outcomes from this penalty, we think that a limited mitigation power (such as that which currently exists at Section 102 Taxes Management Act 1970) for exceptional cases would ensure that no such disproportionate outcomes could arise. This mitigation power would allow HMRC to stay or agree a compromise regarding a GAAR penalty in circumstances where charging such a penalty produced a response that is contrary to the policy intention of this penalty.

Although it is not possible to produce a comprehensive list as to when such a power might be used, one such example might be if a taxpayer's ill health prevented them from correcting their tax affairs prior to their case going to the GAAR Advisory Panel.

Q20. Do you agree that this safeguard would be appropriate for the GAAR Penalty?

GAAR: Next Steps

Following this consultation, we intend to publish draft legislation for the GAAR Penalty at Autumn Statement 2015.

Alongside the development of the GAAR Penalty, we are also considering whether additional measures are needed to strengthen the impact of the GAAR in tackling marketed avoidance schemes. These could include:

- Allowing a GAAR Advisory Panel opinion to enable counteraction of the same arrangements by other users.
- Aligning GAAR procedures with the overarching enquiry framework. In enquiry cases where assessing time limits are due to expire, HMRC is usually able to issue a "protective" assessment to protect HMRC interests and ensure that tax can be collected. The GAAR procedure does not currently allow us to protect tax without relinquishing a GAAR argument. We are therefore exploring whether a measure could be introduced to prevent this potential loss of tax whilst maintaining the taxpayer's right for the GAAR procedure to be completed

before counteraction became final. This could involve introducing a “provisional” counteraction under the GAAR, and/or amendments to the overarching time limits to accommodate the GAAR procedure.

Q21. Do you have any views on the development of these measures?

6. New POTAS threshold condition for promoters whose schemes are regularly defeated

The Promoters of Tax Avoidance Schemes (POTAS) legislation was introduced in Finance Act 2014. The objectives of the regime are to change the behaviour of a small and persistent minority of promoters of avoidance schemes who exhibit certain behaviours, and to aim to deter the development and use of avoidance schemes by influencing the behaviour of promoters, their intermediaries and clients.

The POTAS legislation relies on a number of criteria known as threshold conditions to identify promoters as high-risk. Promoters who cross the threshold must either change their behaviour or face sanctions.

To further strengthen POTAS, *Strengthening Sanctions for Tax Avoidance* proposed a new threshold condition for promoters who have marketed multiple tax avoidance schemes that are defeated.

The Chancellor announced at the March Budget 2015 that the Government intended to introduce such a threshold condition. The intention is to change the behaviours of promoters who repeatedly devise schemes that HMRC defeat. By encouraging a change in promoters' behaviour it would also help protect potential users from being sold schemes that do not work.

This part of the consultation sets out the elements of the new threshold and seeks views on them.

Definition of a Promoter

The new threshold condition would fit within the existing POTAS framework and use the existing definition of a promoter. This definition of promoter includes (but is not restricted to):

- Being responsible to any extent for the design of the arrangements;
- Making a firm approach to another person to make the arrangements available to another person; or
- Being responsible for the organisation or management of the arrangements.

What is a “scheme” in the context of the new threshold?

When this policy was first consulted upon in January it was suggested that a scheme in this context would be a scheme covered by the Disclosure of Tax Avoidance Schemes (DOTAS). This would provide a definition that was already readily

understood. However, as for the serial avoiders' regime discussed in Chapter 3, there are avoidance schemes which are covered by other provisions. For the purposes of the new threshold condition, we propose that schemes would be included if they are:

- Notified or notifiable under DOTAS;
- Notified or notifiable under VADR;
- Defeated under the GAAR;
- Defeated following the issue of a follower notice; or
- Defeated under a TAAR.

Q22. Would including the definitions listed above as triggering this threshold condition be sufficient? If not, what other approach do you favour?

When would a scheme be regarded as defeated for this threshold condition?

As is proposed in Chapter 3 for the serial avoiders' regime, a defeated scheme would essentially be a scheme which was shown not to work. So the proposal is that a scheme would be treated as defeated for this purpose where:

- The user of the scheme reaches agreement with HMRC about their case or makes no appeal against an assessment or, where the GAAR applies, a GAAR counteraction;
- The user of the scheme corrects their return on receipt of a Follower Notice; or
- Litigation on the scheme is finally settled in HMRC's favour.

Marketed schemes (where replicated schemes are made available to multiple users) could provide a potential range of responses from taxpayers, e.g. where one taxpayer does not appeal HMRC's conclusions and agrees the scheme defeat, but another scheme participant launches an appeal.

There could be a variety of ways of defining when that scheme was defeated: for example, when a certain proportion of scheme users has accepted that the scheme is defeated; when any appeal by one user is finally decided in the Courts or at some other point.

Q23. What are your views on the options for the trigger for the threshold condition? Please explain your reasoning.

Q24. At what point should a scheme that has high numbers of users count as having been defeated?

What does "regularly defeated" mean in the context of the new threshold?

In everyday meaning, "regularly" means repeatedly, frequently, or often. To ensure that a sustained course of behaviour has been established, we propose that one option for the trigger is if within a defined period three of a promoter's schemes are defeated.

A requirement could also be included that a set proportion of the promoter's schemes must have been defeated.

Q25. What are your views on the proposed methods of counting defeated schemes that will trigger this threshold condition? Do you think that a rule regarding proportions of cases defeated would be appropriate?

Time periods for considering regularly defeated schemes under the new threshold condition

Currently the look-back period under the POTAS rules for determining whether a threshold condition has been met is three years, but the new threshold condition requires a pattern of behaviour to be established, which may not be evident over a three-year period.

The proposal is that HMRC will, as is the practice elsewhere with POTAS, use the three year look-back period. If, over that period, there have been three scheme defeats the threshold condition will have been met. If there was at least one defeat in that period, then the promoter would be put on notice that the promoter would meet the threshold condition if the total number of scheme defeats during the period starting three years before the notice and ending six years after the notice were three or more over that period. This would allow a promoter's pattern of behaviour to be properly established over a nine-year period.

For instance, HMRC reviews the last 3 years in relation to Promoter A in Jan 2018. During that period, one scheme is identified as having been defeated - in May 2017. HMRC would then put Promoter A on notice that two further defeats over the next six years would see it considered for a conduct notice. Two further defeats occur in June 2020 and another in November 2023. All three defeats would be taken into account to determine whether the threshold condition is met and Promoter A would be considered for a conduct notice.

Q26. Do you agree that a period of up to 9 years provides sufficient time to accurately establish regularity of behaviour for this threshold condition? What are your views on the furthest date in the past the authorised officer should consider?

Q27. What provisions should be made for cases that are already in the courts but have not yet concluded?

Safeguards

As this new threshold condition would fit into the current POTAS legislation, the existing safeguards would apply, including the "significance" test required of the authorised officer before a conduct notice can be issued. HMRC are required to engage with the promoter prior to a conduct notice being issued (through the

“precursor” letter), in order to discuss ways in which behavioural improvements could be made through the conditions proposed for the notice.

Once issued, the conditions in the conduct notice can apply for up to two years. If there is no breach of the conditions in the conduct notice during this period, no further action is taken, and the conduct notice ceases to apply.

If the conditions in the conduct notice are breached, the authorised officer may apply to the First Tier Tribunal in order to issue a monitoring notice on a promoter; the promoter may appeal against the issue of the monitoring notice. If the decision on issuing the monitoring notice is in favour of the promoter, a monitoring notice cannot be issued, or if it has been issued, the authorised officer must withdraw it.

7. Summary of Impacts

Exchequer impact (£m)	2014-15	2015-16	2016-17	2017-18	2018-19
	nil	nil	nil	nil	nil
The final costing will be subject to scrutiny by the Office for Budget Responsibility, and will be set out at Autumn Statement 2015.					
Economic impact	The measure is not expected to have any significant economic impacts.				
Impact on individuals and households	<p>The measure will mainly impact on taxpayers who engage in or promote tax avoidance.</p> <p>Individuals who use avoidance schemes will generally be higher rate taxpayers.</p>				
Equalities impacts	These measures will affect individuals who are likely to share protected characteristics with others of above average means. It is anticipated that equality groups represented in lower income groups are less likely to be affected.				
Impact on businesses and Civil Society Organisations	These measures will not affect compliant businesses. These measures are expected to have a negligible impact on non-compliant businesses.				
Impact on HMRC or other public sector delivery organisations	The operational costs to HMRC of these measures will be established once the details emerging from this consultation have been resolved.				
Other impacts	<u>Small and Micro Business Assessment:</u> These measures will not affect compliant businesses. These measures are expected to have negligible impact on non-compliant small and micro businesses.				

8. Summary of Consultation Questions

Q1. Do you agree with a regime based on this model? If not, please outline the reasons for your view.

Q2. What do you consider would be a suitable length for a warning period?

Q3. Would requiring serial avoiders to certify annually that they have not employed avoidance schemes, or to provide details of those they have used help discourage further avoidance?

Q4. Which of these approaches would best meet the five penalty principles?

Q5. If you believe the surcharge should be set at a high level, what should the taxpayer have to do to earn any reduction in the surcharge?

Q6. What other key features should form part of the surcharge to ensure it meets the five principles?

Q7. How should a reasonable excuse safeguard be structured to be fair to the taxpayer without undermining the effectiveness of the surcharge? Would excluding advice addressed to third parties, or not made by reference to the taxpayer's circumstances, achieve this aim?

Q8. If appealing against the surcharge on the grounds of having taken reasonable care, do you agree that putting the onus of proof on the taxpayer to demonstrate reasonable care would remove any incentive to engage in delaying tactics?

Q9. Do you agree that public naming of the most persistent users of tax avoidance schemes which HMRC defeats would be a fair and effective deterrent? How many schemes should be defeated before it is possible to name a serial avoider?

Q10. Do you agree that this would provide sufficient safeguards for naming serial avoiders? If not, what further safeguards do you suggest?

Q11. Which of these options would provide the best approach to restricting access to reliefs when they have been exploited by a serial avoider as part of a defeated avoidance scheme?

Q12. If you favour restricting the power to restrict reliefs to certain categories, how should those categories be defined?

Q13. Would focussing on a definition based on schemes notified or notifiable under DOTAS and VADR be sufficient to deter potential serial avoiders from entering into multiple schemes? If not, what other approach do you favour?

Q14. Should arrangements to which Follower Notice or GAAR have been applied be included in the definition of a scheme for these purposes? If not, please explain why you do not think this would be appropriate.

Q15. Should a scheme be viewed as 'defeated' once a dispute is settled in HMRC's favour, either by agreement with the taxpayer (or, as the case may be, acceptance of a Follower Notice or GAAR counteraction), or by final litigation being settled in HMRC's favour? If not, what criteria would you apply?

Q16. How do you think a transitional provision should best work to encourage avoiders to withdraw from avoidance schemes they have already employed?

Q17. Do you agree that the proposed opportunity for taxpayers to correct their tax position is appropriate? Please explain your view.

Q18. Do you agree that the proposed rate for the GAAR Penalty is appropriate? If not, what penalty rate would you propose and why?

Q19. Do you agree that this penalty model will act as a fair and proportionate deterrent? Please explain your view.

Q20. Do you agree that this safeguard would be appropriate for the GAAR Penalty?

Q21. Do you have any views on the development of these measures?

Q22. Would including the definitions listed above as triggering this threshold condition be sufficient? If not, what other approach do you favour?

Q23. What are your views on the options for the trigger for the threshold condition? Please explain your reasoning.

Q24. At what point should a scheme that has high numbers of users count as having been defeated?

Q25. What are your views on the proposed methods of counting defeated schemes that will trigger this threshold condition? Do you think that a rule regarding proportions of cases defeated would be appropriate?

Q26. Do you agree that a period of up to 9 years provides sufficient time to accurately establish regularity of behaviour for this threshold condition? What are your views on the furthest date in the past the authorised officer should consider?

Q27. What provisions should be made for cases that are already in the courts but have not yet concluded?

9. The Consultation Process

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

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

This consultation is taking place during stage 2 of the process. The purpose of the consultation is to seek views on the detailed policy design and a framework for implementation of a specific proposal, rather than to seek views on alternative proposals.

How to respond

A summary of the questions in this consultation is included at chapter 7.

Responses should be sent by 14 October 2015, by e-mail to Ca.consultation@hmrc.gov.uk or by post to: Ellen Roberts, Counter Avoidance Directorate, 3C/03 100 Parliament Street, SW1A 2BQ.

Telephone enquiries can be made to 03000 594918 (from a text phone prefix this number with 18001)

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

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

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public

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

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Principles

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

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

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

Oliver Toop, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: hmrc-consultation.co-ordinator@hmrc.gov.uk

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

Annex A: Relevant (current) Legislation

Schedule 43 to the Finance Act 2013: General anti-abuse rule: procedural requirements

1(1) in this Part “the GAAR Advisory Panel” means the panel of persons established by the Commissioners for the purposes of the general anti-abuse rule.

(2) In this Schedule “the Chair” means any member of the GAAR Advisory Panel appointed by the Commissioners to chair it.

Meaning of “designated HMRC officer”

2) In this Schedule a “designated HMRC officer” means an officer of Revenue and Customs who has been designated by the Commissioners for the purposes of the general anti-abuse rule...

Notice to taxpayer of proposed counteraction of tax advantage

3(1) if a designated HMRC officer considers—

(a) that a tax advantage has arisen to a person (“the taxpayer”) from tax arrangements that are abusive, and,

(b) that the advantage ought to be counteracted under section 209, the officer must give the taxpayer a written notice to that effect.

(2) The notice must—

(a) specify the arrangements and the tax advantage,

(b) explain why the officer considers that a tax advantage has arisen to the taxpayer from tax arrangements that are abusive,

(c) set out the counteraction that the officer considers ought to be taken,

(d) inform the taxpayer of the period under paragraph 4 for making representations, and,

(e) explain the effect of paragraphs 5 and 6...

(3) The notice may set out steps that the taxpayer may take to avoid the proposed counteraction...

4(1) if a notice is given to the taxpayer under paragraph 3, the taxpayer has 45 days beginning with the day on which the notice is given to send written representations in response to the notice to the designated HMRC officer...

(2) The designated officer may, on a written request made by the taxpayer, extend the period during which representations may be made..

Referral to GAAR Advisory Panel

5 If no representations are made in accordance with paragraph 4, a designated HMRC officer must refer the matter to the GAAR Advisory Panel...

6(1) If representations are made in accordance with paragraph 4, a designated HMRC officer must consider them..

(2) If, after considering them, the designated HMRC officer considers that the tax advantage ought to be counteracted under section 209, the officer must refer the matter to the GAAR Advisory Panel..

7 If the matter is referred to the GAAR Advisory Panel, the designated HMRC officer must at the same time provide it with—.

- (a) a copy of the notice given to the taxpayer under paragraph 3,.
- (b) a copy of any representations made in accordance with paragraph 4 and any comments that the officer has on those representations, and.
- (c) a copy of the notice given to the taxpayer under paragraph 8..

8 If the matter is referred to the GAAR Advisory Panel, the designated HMRC officer must at the same time give the taxpayer a notice which—.

- (a) specifies that the matter is being referred,.
- (b) is accompanied by a copy of any comments provided to the GAAR Advisory Panel under paragraph 7(b), and.
- (c) informs the taxpayer of the period under paragraph 9 for making representations, and of the requirement under that paragraph to send any representations to the officer.

9(1) The taxpayer has 21 days beginning with the day on which a notice is given under paragraph 8 to send the GAAR Advisory Panel written representations about—.

- (a) the notice given to the taxpayer under paragraph 3, or.
 - (b) any comments provided under paragraph 7(b).
- (2) The GAAR Advisory Panel may, on a written request made by the taxpayer, extend the period during which representations may be made.
- (3) The taxpayer must send a copy of any representations to the designated HMRC officer at the same time as the representations are sent to the GAAR Advisory Panel.
- (4) If no representations were made in accordance with paragraph 4, the designated HMRC officer—.
- (a) may provide the GAAR Advisory Panel with comments on any representations made under this paragraph, and.
 - (b) if comments are provided, must at the same time send a copy of them to the taxpayer.

Decision of GAAR Advisory Panel and opinion notices

10(1) If the matter is referred to the GAAR Advisory Panel, the Chair must arrange for a sub-panel consisting of 3 members of the GAAR Advisory Panel (one of whom may be the Chair) to consider it.

- (2) The sub-panel may invite the taxpayer or the designated HMRC officer (or both) to supply the sub-panel with further information within a period specified in the invitation.
- (3) Invitations must explain the effect of sub-paragraph (4) or (5) (as appropriate).
- (4) If the taxpayer supplies information to the sub-panel under this paragraph, the taxpayer must at the same time send a copy of the information to the designated HMRC officer.
- (5) If the designated HMRC officer supplies information to the sub-panel under this paragraph, the officer must at the same time send a copy of the information to the taxpayer.

11(1) Where the matter is referred to the GAAR Advisory Panel, the sub-panel must produce—.

- (a) one opinion notice stating the joint opinion of all the members of the sub-panel, or.
 - (b) two or three opinion notices which taken together state the opinions of all the members.
- (2) The sub-panel must give a copy of the opinion notice or notices to—.
- (a) the designated HMRC officer, and.
 - (b) the taxpayer.

- (3) An opinion notice is a notice which states that in the opinion of the members of the sub-panel, or one or more of those members—
- (a) the entering into and carrying out of the tax arrangements is a reasonable course of action in relation to the relevant tax provisions—
 - (i) having regard to all the circumstances (including the matters mentioned in subsections (2)(a) to (c) and (3) of section 207), and.
 - (ii) taking account of subsections (4) to (6) of that section, or.
 - (b) the entering into or carrying out of the tax arrangements is not a reasonable course of action in relation to the relevant tax provisions having regard to those circumstances and taking account of those subsections, or.
 - (c) it is not possible, on the information available, to reach a view on that matter, and the reasons for that opinion.
- (4) For the purposes of the giving of an opinion under this paragraph, the arrangements are to be assumed to be tax arrangements.
- (5) In this Part, a reference to any opinion of the GAAR Advisory Panel about any tax arrangements is a reference to the contents of any opinion notice about the arrangements.

Notice of final decision after considering opinion of GAAR Advisory Panel

- 12(1) A designated HMRC officer who has received a notice or notices under paragraph 11 must, having considered any opinion of the GAAR Advisory Panel about the tax arrangements, give the taxpayer a written notice setting out whether the tax advantage arising from the arrangements is to be counteracted under the general anti-abuse rule..
- (2) If the notice states that a tax advantage is to be counteracted, it must also set out—
- (a) the adjustments required to give effect to the counteraction, and.
 - (b) if relevant, any steps that the taxpayer is required to take to give effect to it.

Notices may be given on assumption that tax advantage does arise

- 13(1) A designated HMRC officer may give a notice, or do anything else, under this Schedule where the officer considers that a tax advantage might have arisen to the taxpayer.
- (2) Accordingly, any notice given by a designated HMRC officer under this Schedule may be expressed to be given on the assumption that the tax advantage does arise (without agreeing that it does).

Promoters of Tax Avoidance schemes Legislation

Finance Act 2014 – Promoters of Tax Avoidance schemes – part 5, Schedules 30 to 36

<http://www.legislation.gov.uk/ukpga/2014/26/contents>

amended by schedule 19 of Finance Act 2015

<http://www.legislation.gov.uk/ukpga/2015/11/contents/enacted>

SI2004/1865 The Tax Avoidance Schemes (Promoters and Prescribed circumstances) Regulations (last amended by SI 2015/945)

SI2015/130 The Promoters of Tax Avoidance Schemes (Prescribed Circumstances under section 235) regulations

SI2015/131 The Finance Act 2014 (schedule 34 Prescribed Matters) Regulations

SI2015/549 The Finance Act 2014 (High Risk Promoters Prescribed Information) Regulations

Annex B:

Strengthening Sanctions for Tax Avoidance

Summary of Responses

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1. Introduction

Background

- 1.1** On 30 January 2015, the Government published the consultation document *Strengthening Sanctions for Tax Avoidance*, which discussed a series of measures to change the behaviour of those who persist in engaging in tax avoidance.
- 1.2** The paper outlined options to sanction serial users of tax avoidance schemes, and asked for views on a possible penalty for specific cases where the General Anti-Abuse Rule (GAAR) applies. It also considered whether to widen the scope of the Promoters of Tax Avoidance Schemes (POTAS) regime, to include promoters of avoidance schemes that HMRC defeats in court.

Overview of responses

- 1.3** HMRC received 33 responses to the consultation, including written responses and comments made in meetings. A breakdown of the representative capacities in which respondents made comments is below:
- 11 from representative bodies
 - 4 from consultants
 - 9 from accountancy firms
 - 5 from individuals
 - 2 from other businesses
 - 2 from law firms
- 1.4** A list of the respondents to the consultation, excluding individuals, is in chapter 4.
- 1.5** HMRC is grateful for the responses to the consultation document. We appreciate the opportunity to discuss these measures at an early stage in the development of these policies.

2. Responses – New Measures for Serial Avoiders

Government response in outline

2.1 The Government believes there is still a need to legislate for measures to deal with serial avoiders and those who repeatedly promote tax avoidance schemes. Further consultation is needed to add detail to the high-level proposals and this is published with this response document. Chapters 2 and 3 of *Strengthening Sanctions for Tax Avoidance — A Consultation on Detailed Proposals* deal with serial avoiders and Chapter 6 deals with promoters whose schemes are regularly defeated.

Q1. What should be the starting point for identifying those who should be the subject of new legislative measures? Should it, for example, be based on the number of schemes used over a certain period or in any one period or are there other criteria that could be used?

Q2. To what extent would a surcharge be a deterrent to taxpayers who repeatedly use tax avoidance schemes that are shown not to work?

Q3. Use of how many tax avoidance schemes, over what period, should trigger the surcharge?

Q4. What level of financial sanction would best deter the types of negative behaviour described here?

2.2 Some respondents were of the view that existing penalty regimes and new measures such as Accelerated Payments are sufficient to act as a disincentive to repeat avoidance, and a minority felt that HMRC already had sufficient powers to impose sanctions.

2.3 While a number of respondents considered that the level of surcharge should be low, in the region of 5% of understated tax, others took the view that, in order to change entrenched patterns of behaviour, a surcharge should be large enough to make a serious economic impact and should thus be set high.

2.4 Most respondents who expressed a view felt that the qualifying period of time should be between three and five years.

Government response

2.5 The Government is grateful for these views. Any sanction must be effective and proportionate to the offence and provided with sufficient safeguards. The Government has given further consideration to these points and the detail is set out in Chapters 2 and 3 of this document.

Q5. Could subjecting a serial avoider to special measures, such as additional reporting requirements, conduct notices, or restricting access to reliefs be an effective and proportionate approach to encouraging less risky behaviour?

Q6. What sort of special measures would best positively influence the behaviour of serial avoiders?

Q7. What threshold conditions should trigger entry into special measures?

Q8. What consequences should follow from failure to comply with special measures?

Q9. In particular, would the prospect of publicly naming serial avoiders be an effective and proportionate approach to encouraging behaviour change?

Q10. Should special measures be imposed for a set period of time or lifted only when the avoider has demonstrated objectively a change in behaviour?

2.6 Few respondents believed that a special reporting requirement would have any impact on the behaviour of avoiders. A small number of respondents suggested extending enquiry windows and adding further monetary disincentives to influence behaviours. Most respondents considered that special measures should be set for a stated period of time.

2.7 There was little consensus in responses to Q8, with a small number believing a surcharge should result from failing to comply with a special measure.

2.8 Mixed views were expressed about naming serial avoiders, with some respondents considering it inappropriate to name a taxpayer who has acted on advice. Others replied that naming would have a significant deterrent effect.

Government response

2.9 The Government notes these views but believes further reporting requirements; a surcharge and potential naming of serial avoiders will provide HMRC with valuable tools to counter serial avoidance. The application of appropriate safeguards will ensure that the impact of any surcharge is focussed on those who do not take proper precautions to ensure their tax affairs are in order.

2.10 The Government believes that the application of special measures should be time-limited, as this would provide the simplest and clearest signal to taxpayers that any additional requirements would end if their tax avoidance behaviour changed over a specified period.

Q11. What safeguards do you think would be necessary and proportionate to ensure the fair application of each of the proposed measures?

2.11 Most respondents stated that there should be a full right of appeal against any surcharge and some stated that appeal rights should be available against every proposal. A small number of respondents called for HMRC to set operational safeguards, such as an oversight board or allowing only senior members of the department, not involved with the case, to determine if taxpayers should be included in the regime.

Government response

2.12 The Government notes these views. Any safeguards must provide an appropriate level of protection for the taxpayer while allowing HMRC to administer the regime effectively to achieve its objectives.

Serial Promoters

2.13 As part of its package of measures to tackle serial avoiders, the Government proposed to add a new threshold condition to ensure that promoters fall within the POTAS rules if a significant number of their schemes are defeated.

Q12. The Government would welcome views on whether and how such a threshold condition might work, and in particular what proportion and/or how many adverse decisions should trigger the threshold condition.

2.14 There were 13 responses to this question, expressing a wide range of views. These varied from agreement with the proposal, to questioning why the legislation needed changing when it had only been in place for eight months. Some respondents questioned how this threshold condition would work in practice.

Government response

2.15 The Government notes these views and has published further details on this proposal in Chapter 6 of this document.

3. Responses – Penalties for the GAAR

Background

3.1 The consultation made a number of proposals concerning the introduction of a penalty for GAAR cases. Specifically, it considered:

- Whether a penalty for GAAR cases would increase the GAAR's deterrent effect
- Whether to charge a penalty in all cases in which the GAAR is counteracted
- That a penalty ought to apply only in cases where the GAAR is successfully counteracted
- The framework for a GAAR Penalty – and whether it should be based upon existing penalty legislation or not
- The basis for calculating any penalty

General responses on the proposals for Penalties for the GAAR

3.2 Some respondents queried whether any further anti-avoidance legislation was needed at all, saying that there had been no time to evaluate the effectiveness of the measures introduced in Finance Act 2014. Many also expressed the view that there had not been sufficient time to evaluate the impact of the GAAR, and therefore whether a GAAR penalty was needed. Responses to the consultation largely confirmed that the GAAR is seen as an important tool in HMRC's armoury in tackling tax avoidance.

Government response

3.3 The Government believes there is still a need to legislate for a measure to increase the deterrent effect of the GAAR by introducing a penalty for GAAR cases. Further consultation is needed to add detail to the high-level proposals and this is published with this summary.

Q13. To what extent would a GAAR penalty act as an effective deterrent?

Q14. Do you think an alternative sanction such as a surcharge might act as a more appropriate deterrent? What form might such a sanction take?

3.4 While respondents largely agreed that a penalty would increase the GAAR's deterrent effect, several considered that this might be disproportionate. Some respondents took the view that HMRC should focus on using the existing penalty rules at Schedule 24 to the Finance Act 2007.

3.5 Most respondents considered that an alternative sanction such as a surcharge would not significantly differ from a penalty in terms of effecting a change in taxpayer behaviour.

Government response

3.6 The Government is grateful for these views. For the reasons outlined in the previous consultation document, the Government is concerned that the existing penalty rules at Schedule 24 to the Finance Act 2007 do not specifically address participation in egregious tax arrangements. A GAAR-specific penalty will enable HMRC to effectively discourage participation in these forms of tax avoidance.

Q15. Do you agree that it would not be appropriate to charge a penalty when a taxpayer has correctly included a GAAR adjustment on their return?

3.7 All the respondents agreed that charging a penalty on a GAAR adjustment that has been correctly included on a taxpayer's return would not be appropriate.

Government response

3.8 The Government agrees with these views and does not propose to charge a GAAR penalty in such circumstances.

Q16. Should a GAAR-specific penalty apply when the GAAR applies, without exception?

3.9 Views here varied considerably. A number of respondents commented that a penalty should only be charged in GAAR cases where the transaction is identical to one of the examples in the GAAR guidance. Others considered that the GAAR Penalty should apply not only in GAAR cases but also where the GAAR definitions are met but the scheme fails for some other reason.

Government response

3.10 The Government notes these responses, and considers that the GAAR penalty should apply in all cases where the tax advantage is successfully counteracted using the GAAR, without a distinction as to how this has arisen.

Q17. Do you agree that submission of the taxpayer's return ought to be the trigger point for a specific GAAR penalty to become chargeable?

Q18. Are there any other points at which you think a GAAR penalty or other sanction could become chargeable?

3.11 A small number of respondents offered a view here. Proposals included a trigger point based upon the GAAR Advisory Panel's decision, or the outcome of a Tribunal hearing.

3.12 A small number of respondents suggested that a GAAR penalty could not be charged in any circumstances other than a successful counteraction under the GAAR. Some raised the question of whether a GAAR penalty should only be charged when the GAAR Advisory Panel is unanimous in its opinion.

Government response

3.13 The Government is grateful for these views but remains of the view that the return should act as the trigger point for a GAAR penalty to become chargeable. This approach maintains consistency with existing penalty rules, and would ensure that taxpayers for whom the GAAR might apply would consider this point when filing their return. Only once the tax advantage is successfully counteracted using the GAAR would a penalty be charged.

Q19. Should a GAAR-specific penalty be tax-geared? If so, what do you consider would be an appropriate rate of penalty?

Q20. If you consider that a fixed penalty would be more appropriate, why do you think this is? How much would you consider to be an appropriate fixed penalty?

Q21. Should the normal penalty mitigation rules apply? Should it be possible to levy higher penalties according to taxpayer behaviour?

Q22. Should it be possible to charge a GAAR penalty in addition to a penalty under Schedule 24 to the Finance Act 2007?

Q23. Do you agree that existing rights of appeal would be appropriate for a GAAR penalty?

3.15 The majority of respondents considered that a tax-geared GAAR penalty was the most proportionate approach for GAAR cases, although a number of respondents did not express a view on the penalty rate. Amongst those that did propose a penalty rate, this varied from 10% to 100% of the tax advantage counteracted under the GAAR. Almost all respondents considered that a fixed amount penalty would not be an appropriate penalty for the GAAR, due to the difficulty in setting it at an appropriate level for all taxpayers.

3.16 Most respondents felt that a degree of mitigation ought to be possible for the GAAR penalty in order to encourage taxpayer cooperation.

3.17 Respondents' views on Q22 were mixed, with some disagreeing in principle with the application of two penalties to the same tax liability, whilst others considered that a maximum cap for the two penalties ought to apply.

3.18 Respondents agreed that existing rights of appeal would be appropriate safeguards for a GAAR penalty.

Government response

3.19 The Government is grateful for these views. A tax-geared penalty would ensure that the GAAR penalty acts as an effective deterrent whilst also being a proportionate response. The penalty rate chargeable is considered in further depth in Chapter 5 of the current consultation. The Government considers that it would be helpful to consult further on the detail of the interaction between a GAAR penalty and the existing penalty rules to better understand stakeholders' views on this point.

3.20 The Government considers that the GAAR penalty ought to reflect the binary nature of the GAAR itself and apply equally in all cases where a taxpayer has engaged in abusive tax avoidance.

3.21 The Government will ensure that appeal rights are included as part of the GAAR penalty.

Q24. Do you think either of these measures would impact disproportionately on those with protected characteristics (as defined under the Equality Act 2010)?

3.22 The majority of responses considered that both of these measures would not impact disproportionately on those with protected characteristics as defined under the Equality Act 2010.

Government response

3.23 The Government thanks respondents for their views.

4: List of stakeholders consulted

HMRC does not normally identify the names of any individuals who contribute to a consultation. Where there has been any uncertainty over whether a consultation response represented personal views or those of an organisation, we have assumed that it was made in a personal capacity. Please note that whether a response is deemed to be made by an individual or organisation will have a bearing only on whether the name of the stakeholder is published below.

AAT
ACCA
AFME
Alliance for HMRC Accountability
AVN Venus Tax LLP
Baker Tilly
BBA
BDO
CBI
CIOT
Deloitte
EDF Tax Ltd
Ernst & Young LLP
Freshfields
GAAR Advisory Panel
Grant Thornton
Harcourt Capital LLP
ICAEW
ICAS
IFA
Kazaz & Company
KPMG
The Law Society of Scotland
Pinsent Masons
PwC
Rebus
Russell & Russell
Tax Justice Network
Tax Law Committee of The Law Society of England and Wales

5: Consultation process and statistics

HMRC received 33 responses to the consultation document published by the Financial Secretary, David Gauke, on 30 January 2015.

These came from a range of businesses, representative bodies, trade associations, professional bodies, firms and individuals.

In addition to receiving written responses, HMRC held a number of meetings to discuss the proposals with businesses, representative bodies and professional firms.

Question	No of responses
Q1. What should be the starting point for identifying those who should be the subject of new legislative measures? Should it, for example, be based on the number of schemes used over a certain period or in any one period or are there other criteria that could be used?	15
Q2. To what extent would a surcharge be a deterrent to taxpayers who repeatedly use tax avoidance schemes that are shown not to work?	13
Q3. Use of how many tax avoidance schemes, over what period, should trigger the surcharge?	11
Q4. What level of financial sanction would best deter the sorts of negative behaviour described here?	12
Q5. Could subjecting a serial avoider to special measures, such as additional reporting requirements, conduct notices, or restricting access to reliefs be an effective and proportionate approach to encouraging less risky behaviour?	14
Q6. What sort of special measures would best positively influence the behaviour of serial avoiders?	14
Q7. What threshold conditions should trigger entry into special measures?	12
Q8. What consequences should follow from failure to comply with special measures?	10
Q9. In particular, would the prospect of publicly naming serial avoiders be an effective and proportionate approach to encouraging behaviour change?	14
Q10. Should special measures be imposed for a set period of time or lifted only when the avoider has demonstrated objectively a change in behaviour?	10
Q11. What safeguards do you think would be necessary and proportionate to ensure the fair application of each of the proposed measures?	13
Q12. The Government would welcome views on whether and how such a threshold condition might work, and in particular what proportion and/or how many adverse decisions should trigger the threshold condition.	13
Q13. To what extent would a GAAR penalty act as an effective deterrent?	15
Q14. Do you think an alternative sanction such as a surcharge might act as a more appropriate deterrent? What form might such a sanction take?	14
Q15. Do you agree that it would not be appropriate to charge a penalty when a taxpayer has correctly included a GAAR adjustment on their return?	16
Q16. Should a GAAR-specific penalty apply when the GAAR applies, without exception?	15
Q17. Do you agree that submission of the taxpayer's return ought to be the trigger point for a specific GAAR penalty to become chargeable?	13
Q18. Are there any other points at which you think a GAAR penalty or other sanction could become chargeable?	12
Q19. Should a GAAR-specific penalty be tax-geared? If so, what do you consider would be an appropriate rate of penalty?	13
Q20. If you consider that a fixed penalty would be more appropriate, why do you think this is? How much would you consider to be an appropriate fixed penalty?	12
Q21. Should the normal penalty mitigation rules apply? Should it be possible to levy higher penalties according to taxpayer behaviour?	13
Q22. Should it be possible to charge a GAAR penalty in addition to a penalty under Schedule 24 to the Finance Act 2007?	15
Q23. Do you agree that existing rights of appeal would be appropriate for a GAAR penalty?	14
Q24. Do you think either of these measures would impact disproportionately on those with protected characteristics (as defined under the Equality Act 2010)?	6