



Response from ICAS

Tackling Promoters of Tax Avoidance

15 September 2020

About ICAS

1. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants. We represent over 22,000 members working across the UK and internationally. Our members work in the public and not for profit sectors, business and private practice. Approximately 10,000 of our members are based in Scotland and 10,000 in England.
2. The ICAS Tax Board, with its five technical Committees, is responsible for putting forward the views of the ICAS tax community; it does this with the active input and support of over 60 board and committee members.
3. ICAS has a public interest remit, a duty to act not solely for its members but for the wider good. From a public interest perspective, our role is to share insights from ICAS members into the many complex issues and decisions involved in tax and regulatory system design, and to point out operational practicalities.

General comments

4. ICAS welcomes the opportunity to respond to the consultation, Tackling Promoters of Tax Avoidance, issued by HMRC on 21 July 2020.
5. We appreciated the opportunity to discuss the consultation with HMRC in a call (which also included the Law Society of Scotland) on 9 September 2020.
6. We welcome the recognition in paragraph 1.4 of the consultation that promoters of tax avoidance schemes are rarely members of professional bodies and that many tax advisers adhere to high professional standards and are a very useful source of advice and support to taxpayers. We support the government commitment (paragraph 2.6) to ensure HMRC can reduce the scope for promoters to market avoidance schemes whilst enabling tax advisers who adhere to high professional standards to go about their business unhindered.
7. ICAS broadly supports the changes proposed in the consultation and the intention to target them at promoters of abusive tax avoidance schemes who often do not hold themselves out to be tax advisers. We have not therefore attempted to respond to all the detailed questions. However, we set out below some concerns and suggestions.

Publishing details of avoidance schemes and promoters and raising awareness

8. The proposed changes to DOTAS and POTAS include changes designed to enhance HMRC's ability to publish details of avoidance schemes and promoters – and to do so at an earlier stage.
9. We have commented before (for example, in our response to the Powers and Safeguards Review) that it would be helpful for HMRC to impose monitoring notices on promoters under the POTAS regime (where they do not change their behaviour). It is clear from the consultation document that this has not been possible to date due to promoters sidestepping the regime, so we broadly welcome the attempt to improve the operation of POTAS.
10. Imposition of a monitoring notice would allow information about the promoter to be published by HMRC and would require the promoter to tell clients that it is a monitored promoter. This would act as a clear warning to compliant taxpayers and to agents – which would be welcomed by many.
11. In the case of agents and advisers who belong to one of the main professional bodies (and who must therefore comply with Professional Conduct in Relation to Taxation), POTAS is specifically referred to in the PCRT Help Sheet on Tax Advice:
*"FAQ 5. I am considering introducing my client to another adviser's planning arrangement. What should I consider?
Before considering the other adviser's tax planning you need to ascertain whether the promoter is subject to a monitoring notice within the POTAS regime. If they are it is difficult to envisage any circumstance in which it would be appropriate for you to introduce their arrangement to your client."*
12. HMRC's guidance on POTAS indicates that HMRC will publish details of monitored promoters on its website "with due prominence" and will "take into account the need to make sure that clients and potential clients are able to find out about the promoter's status". Information will include name,

business name and address and if HMRC publishes information about the nature of a monitored promoter's business "it will typically consist of summary information about the types of avoidance schemes that the promoter has been known to promote".

13. We believe that it will be important for HMRC to publish as much information as possible about monitored promoters and the types of avoidance schemes they promote – and to make it as easy as possible for agents and taxpayers to locate the details. A 'landing page' which could be linked to from other sites (and therefore publicised) would be helpful, in view of the poor navigation and search functionality available in GOV.UK.
14. Question 3 in the consultation asks how useful it would be to publish information about schemes, at an early stage, without the name of the promoter. The intention would be to help potential purchasers of the scheme understand the risks of using it – and the published information would include details of how the scheme purports to operate and why HMRC believes it fails.
15. We would welcome the publication of as much information as possible about schemes as early as possible – including HMRC's analysis of why the schemes fail and a clear statement that HMRC will challenge users of the schemes. This would assist agents and advisers in explaining the true position to clients/prospective clients who have been approached by promoters of schemes (often with misleading information). HMRC already publishes information in Spotlights but currently these can take a long time to be issued – the longer the delay the more users are likely to have signed up to the schemes in the meantime.
16. Whilst agents and advisers belonging to the main professional bodies will generally be aware of Spotlights (and Spotlights are referenced in PCRT) we are concerned that awareness amongst taxpayers in general is very low. HMRC could consider use of social media and mainstream media for campaigns which would make information about schemes more accessible.
17. Development of more targeted approaches by HMRC should also be considered, to counter information provided by promoters. Many scheme users (particularly those who only talk to the promoters and do not have access to independent professional advice) have little understanding that the scheme they have been sold is unlikely to work and will be challenged by HMRC. In the context of disguised remuneration schemes, anecdotal evidence from members indicates that higher earning employees no longer tend to enter into these schemes and that lower earning employees who might be tempted or pushed into the schemes are unlikely to have an independent adviser.
18. The loan charge review noted ongoing promotion of loan schemes (with approximately 3,000 first time users in the first half of the 2019-20 tax year) and one of its recommendations was for HMRC to consider direct communication with taxpayers where it suspects they may be engaging in tax avoidance:
"the strategy for communicating what is considered tax avoidance must be improved to reflect the 'mass market' nature of loan schemes. In particular, HMRC should continue enhancing its usage of Pay As You Earn (PAYE) Real Time Information to communicate with taxpayers who they suspect may be engaging in tax avoidance, and proactively put taxpayers directly on notice of its view."
19. We agree that more direct communication from HMRC would be useful. We are aware that HMRC is looking into the development of an avoidance advisory service which would allow taxpayers to seek a view from HMRC on whether the employment arrangements they are considering using are likely to involve avoidance. A small number of letters have recently been issued to individuals HMRC thought were likely to be using employment schemes, offering access to HMRC advice, as part of a pilot. This is a promising development which (subject to the outcome of the pilot) we hope can be expanded in future.
20. Having RTI data makes it easier for HMRC to identify possible users of employment related schemes in order to make direct contact. However, HMRC could consider other sources of data which would also allow direct communication about other types of schemes; for example, in the context of SDLT and LBTT we understand that house purchasers are being contacted by firms (who obtain their details from the Land Registry/Registers of Scotland) telling them they have paid too much tax – HMRC could counter this by providing information about SDLT/LBTT avoidance schemes.
21. As the introduction to the consultation notes, promoters *"are often deliberately silent in their marketing to taxpayers about the risks of successful challenge by HMRC"*. Some advertising by promoters is also actively misleading. HMRC has had some success in tackling this by referring cases to the

Advertising Standards Authority. It obtained rulings in three cases (involving disguised remuneration schemes and SDLT) – and subsequent adverts have tended to avoid, for example, claiming HMRC endorsement for schemes. We welcome the fact that HMRC is now working with the ASA to develop a joint enforcement notice covering the advertising of tax avoidance schemes.

22. Our response to the call for evidence “[Raising standards in the tax advice market](#)” noted that the coronavirus epidemic had prompted closer and stronger collaboration between HMRC and the main professional bodies in developing and implementing the support schemes. We believe this was beneficial and hope that it will continue. In the context of avoidance schemes and raising standards generally, mechanisms could be put in place for HMRC to report to the professional bodies:
- emerging schemes that cause concern, which HMRC is, or will be, challenging; and/or
 - emerging poor practice/trends.
23. The professional bodies could put in place a process to cascade such messages to their members, for example, through CPD, member communications, and Practice Review teams – where they broadly agree that the schemes or practices highlighted by HMRC are unacceptable. Members would be expected to take note and act accordingly. If a two-way process could be introduced HMRC could also share information with its staff about areas of concern raised by professional bodies, including avoidance schemes members are encountering.

Proposed changes to DOTAS

24. Question 1 asks whether 30 days would give a reasonable amount of time to furnish HMRC with information on the schemes that promoters or enablers have been promoting or enabling. Paragraph 3.14 notes that HMRC would require all documents and information relating to the scheme, so a response to the notice could take some time to prepare. Given that HMRC’s postal arrangements mean that letters could take almost half the 30 days to arrive – and that it will take time for the response to be received by HMRC – we suggest that a longer period of time might be required.
25. The new proposal will not be restricted to promoters as defined under DOTAS – but will extend to any party that HMRC believes to be in the supply chain for the scheme. Whilst we understand the reasons behind this, we have some concerns that the real promoters will continue to be obstructive (and may be offshore) – but that an adviser with a very limited role (who may be unaware that an avoidance scheme is involved) could find it hard to convince HMRC that they do not hold the information HMRC wants and are not part of the supply chain. Paragraph 3.23 notes that HMRC will apply strong internal governance to ensure the process is properly overseen and its use authorised at the appropriate levels – it will be important that this is properly resourced and works effectively.

Proposed changes to POTAS

26. We are concerned about the proposal (in the draft legislation rather than the consultation) to amend FA 2014 Schedule 34A (defeated arrangements) so that Condition C (paragraph 13(1)(a)) would include DAC 6 arrangements as well as DOTAS arrangements.
27. We do not believe that the addition of DAC 6 arrangements is appropriate. There are significant differences between DAC 6 and DOTAS – and also between DAC 6 and the provisions referenced in the other conditions, for example the GAAR (Condition A). Due to the very broad nature of some of the DAC 6 Hallmarks (some of which also do not include a ‘main benefit’ test) they will catch some commercial transactions and other arrangements where there is no tax avoidance intention (but there is some tax benefit). This is not the case with DOTAS or the GAAR.
28. “Counteracted” in Condition C is defined as “if adjustments are made in respect of the taxpayer’s tax position on the basis that the whole or part of that tax advantage does not arise.” However, several DAC 6 Hallmarks relate to complex areas where there is considerable scope for technical disagreement, for example, transfer pricing. A technical adjustment could be agreed which would apparently mean that Condition C would be met.
29. We believe that the inclusion of DAC 6 arrangements in this threshold condition should be reconsidered.

Proposed changes to the enablers’ penalties

30. Paragraph 6.8 of the consultation notes that HMRC has encountered issues with suspected enablers claiming “that client confidentiality prevented them from voluntarily providing client information without

an information notice". Whilst we understand the difficulties, it is important that HMRC appreciate that client confidentiality is a fundamental principle in professional standards and should not be discounted. We accept that it is not HMRC's intention to 'get round' client confidentiality rules but a recent case reported to us demonstrated that some HMRC officers do not respect the importance of client confidentiality. A robust approach from HMRC, to monitoring implementation of the revised powers, will be required.

31. The proposed changes would also allow HMRC to request information from one enabler about other enablers involved in the same scheme. We can see that this would make sense where HMRC targets the promoter of a scheme (as in example 6.2). However, depending on their position in the chain other enablers might not have this information – for example, the IFA and the solicitor in example 6.2 might not be aware of each other. We understand that HMRC's intention is primarily to target promoters but that in some cases this may not be sufficient, for example, offshore promoters may use entities in the UK to facilitate – the ability to issue notices to any potential enabler therefore makes sense.
32. Question 31 asks what factors the government should consider in determining whether it would be appropriate to apply these measures from the introduction of the penalty regime in 2017. As a broad policy principle, we do not agree with retrospection. We believe that the changes should take effect from Royal Assent, as currently proposed.

Proposed changes to the General Anti Abuse Rule

33. We have no comments on this section of the consultation.