

LIFTING THE LID ON TAX AVOIDANCE SCHEMES

CONSULTATION DOCUMENT

PUBLICATION DATE: 23 JULY 2012

CLOSING DATE FOR COMMENTS: 15 OCTOBER 2012

Subject of this consultation:

Measures to improve the information available to HM Revenue & Customs and customers about tax avoidance schemes and the risks of using them, including proposals to revise and extend the Disclosure of Tax Avoidance Schemes (DOTAS) regime, which requires promoters and users of tax avoidance schemes to provide information to HMRC.

Scope of this consultation:

HMRC seeks views on a programme of work for improving public information about tax avoidance arrangements and the risks associated with using them. It also seeks views as to whether options for:

- ◆ extending the DOTAS information to be reported to HMRC, and
- ◆ ensuring that persons required to disclose a scheme do so at the right time;

would be feasible ways of meeting the described objectives

HMRC also seeks views as to whether proposals to revise and extend the DOTAS 'hallmarks' (the descriptions of schemes required to be disclosed for income tax, capital gains tax and corporation tax purposes) are too widely or narrowly drawn, and on their impacts upon compliance costs and administrative burdens.

Who should read this:

We would like to hear views from representative bodies, tax agents and scheme promoters, as well as businesses and individuals who may receive marketing and advice about tax avoidance schemes.

Duration:

This is a 12 week consultation from 23 July to 15 October 2012

Lead official:

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How to respond or enquire about this consultation:

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Additional ways to be involved:

HMRC intends to meet with representative bodies and other interested parties.

After the consultation:

A summary of responses will be published after the consultation. If the hallmark proposals move to the next stage, draft legislation will be published.

Getting to this stage/previous engagement:

A formal consultation that included extending the DOTAS hallmarks took place in 2009/10. This was followed up by an informal consultation in the summer of 2011 with specialist interests.

1. Executive Summary

This consultation document describes a significant new programme of work the Government is developing to improve the information available to HM Revenue and Customs ('HMRC') and customers about tax avoidance schemes and the risks of using them.

Firstly, it describes a range of options to improve the provision of information about tax avoidance - to ensure that where tax avoidance schemes are identified, the public knows about the risks of using them. That is key to the Government's strategy of ensuring that everyone pays their fair share of tax and in making it clear that tax avoidance is unacceptable.

Secondly, it considers some detailed options to improve the information available to HMRC about tax avoidance through the Disclosure of Tax Avoidance Schemes ('DOTAS') regime, in order to make this an even more effective tool. In particular, it proposes changes to the descriptions of schemes required to be disclosed to HMRC. Any changes, insofar as they affect income tax, will be extended to the DOTAS National Insurance contributions regime at the same time as the tax changes come into force.

Chapter 2 is introductory. It describes HMRC's anti-avoidance strategy, changes in the tax avoidance environment and the need for the elements of the strategy, including DOTAS, to respond effectively to them.

Chapter 3 describes a range of options to improve the provision of public information about tax avoidance and the risks of using tax avoidance schemes.

Chapter 4 describes options intended to enable DOTAS to ensure that HMRC has sufficient information and documents to understand how a scheme works and who is intended to use it, and to ensure that the rules are complied with.

Headline options include:

- ◆ Extending the information disclosed to HMRC about discloseable avoidance schemes;
- ◆ Extending the information reported to HMRC about users and other parties involved in a discloseable avoidance scheme;
- ◆ Raising the threshold of 'reasonable excuse' for a promoter who fails to notify a discloseable scheme;
- ◆ Imposing additional reporting obligations on a promoter who incurs a penalty for failure to disclose a scheme; and

- ◆ Imposing a personal responsibility on an individual, to sit alongside the firm's obligations, to comply with a promoter's DOTAS obligations.

Chapter 5 describes proposed revisions and extensions to the existing 'hallmarks', the descriptions of schemes required to be disclosed under the 'main regime' of income tax, capital gains tax and corporation tax.

The proposed revisions to existing hallmarks are:

- ◆ Amending the 'confidentiality where promoter involved' hallmark to remove inconsistencies in the interpretations being applied by promoters to the hallmark;
- ◆ Amending the 'confidentiality where no promoter involved' hallmark to cover instances where the firm designing the scheme for use in-house is also a promoter who is capable of selling the scheme to clients; and
- ◆ Amending the 'loss scheme' hallmark to ensure that marketed loss schemes are discloseable, and extending the hallmark (currently limited to schemes intended for individuals) to schemes for corporate users.

Chapter 5 also proposes adding two new hallmarks:

- ◆ A hallmark that targets schemes seeking to circumvent the disguised remuneration rules concerning **employment income provided via intermediaries**; and
- ◆ A hallmark targeting schemes that rely upon certain **financial products**.

Chapter 6 is a summary of impacts in table form.

Chapter 7 is a summary of the consultation questions

2. Introduction

Tax avoidance

2.1 Tax avoidance represents nearly 14% of the UK tax gap. It involves using the tax law to gain an advantage that Parliament never intended and frequently involves contrived, artificial transactions that serve little or no purpose other than to reduce tax liability. And it enables some taxpayers to gain an unfair advantage, undermining confidence in the tax system.

2.2 In March 2011, the Government introduced a new HMRC anti-avoidance strategy in the document *Tackling tax avoidance*.¹ The strategy focuses on three core strands:

- ◆ preventing avoidance at the outset where possible;
- ◆ detecting it early where it persists; and
- ◆ countering it effectively through challenge by HMRC.

2.3 The Government has taken robust measures to tackle tax avoidance; e.g. announcing legislation that, in effect, has closed schemes down with immediate (and in one exceptional case, retrospective) effect. The Government is currently consulting on a General Anti-Abuse Rule ('GAAR') that is targeted at artificial and abusive tax avoidance schemes. The GAAR is expected to act as a deterrent to those engaging in such schemes in the first place; and where avoidance persists it will provide an additional tool to enable HMRC to challenge and defeat these.

2.4 More robust legislation has led to both a reduction in the quantity and 'quality' of avoidance schemes being marketed. Fewer schemes are now being sold and more are being challenged operationally, rather than through a change in the law, because it is clear that they do not work and simply do not deliver the tax advantages advertised by those who promote them.

2.5 In this changed environment, it is increasingly important for HMRC to prevent avoidance by communicating with promoters, tax agents, businesses and the public about the risks of entering into avoidance schemes. Chapter 3 of this consultation document suggests a range of options for building upon existing communications.

2.6 The Disclosure of Tax Avoidance Schemes ('DOTAS') regime is a key component of the detection strand of the strategy, and it also plays an important role in deterring avoidance, and hence in preventing it at the outset. A summary of the DOTAS objectives and how it works is at **Annex C**.

2.7 The initial focus of DOTAS was upon gaining information about avoidance schemes, particularly new and innovative schemes, to identify loopholes in the law that were being exploited and inform legislation to close them down. DOTAS has performed this role well and has informed over 60 measures in Finance Acts since 2004.

2.8 DOTAS also needs to adapt to keep in step with the changed avoidance environment described in paragraph 2.4. In particular, it is increasingly important for DOTAS to identify avoidance schemes, regardless of whether or not they are new and innovative, to enable communication with users and inform counteraction by operational challenge. Chapter 4 describes options for ensuring that HMRC receives sufficient information to understand how a disclosed avoidance scheme is intended to work and who is intended to use it. It also describes options for ensuring that persons required to disclose a scheme do so, and at the proper time. Chapter 5 describes proposals for revising and extending the hallmarks to ensure that avoidance schemes, whether or not they are new and innovative, are discloseable. These Chapter 5 proposals build upon previous consultation.

2.9 Regulations extending the descriptions of Stamp Duty Land Tax (SDLT) schemes required to be disclosed have been published on HMRC's website for comment² with a view to implementation in September. This is separate from the consultation exercise covered by this document. However, the main objective (to ensure that HMRC receives disclosures of SDLT avoidance schemes incorporating sub-sale relief) reflects the changed avoidance environment described in paragraph 2.4.

3. Improving public information about tax avoidance

3.1 The Government wants to increase and improve the information available to the public about tax avoidance arrangements and the risks associated with using them by building an environment where responsible tax agents, businesses, individuals and HMRC work together to combat tax avoidance.

3.2 To that end, the Government is developing a programme of measures for improving information about avoidance arrangements and the risks associated with using them. The Government wants to do this co-operatively with representative bodies and reputable tax agents and businesses (the vast majority), many of whom have publicly and strongly condemned artificial and abusive schemes. The Government has already begun

discussing practical options with interested parties and wants to open up that discussion to wider views and approaches.

3.3 The following paragraphs describe suggested options for improving communications about tax avoidance schemes that HMRC will be exploring with interested parties. However, the Government is open to suggestions and is willing to explore other options that may be suggested.

3.4 HMRC will be exploring what further information (subject to its legal duties of confidentiality) it could publish about avoidance schemes and the risks and consequences attached to those schemes. For example, it will be exploring what further information it could publish about schemes that are proved not to work, about the promoters of those schemes, and the consequences for the users of those schemes. It will also be exploring the ways and means of communicating information about avoidance scheme. For example, HMRC is looking at ways of improving the content and raising the profile of the 'Spotlights' section on its website, which provides a 'buyer beware' warning to potential users of certain schemes or schemes that incorporate certain features. HMRC is also looking at ways of making more effective use of new social networking media.

3.5 HMRC will also be exploring ways in which it could communicate more directly with users of tax avoidance schemes where it considers the schemes to be ineffective, and, in particular, warning of the risks of using those schemes which rely upon some degree of misrepresentation or concealment of the facts in order to deliver the purported tax advantage. Misrepresentation, and concealment are indicators of fraud and evasion and they can result in prosecution or tax penalties.

3.6 One suggestion put forward from outside government is to build on the financial services mis-selling rules as a response to the promoters of schemes that patently do not deliver the advertised tax advantages. The Government believes this is an interesting suggestion that it would like to explore further with interested parties.

3.7 HMRC is also considering ways in which it can share (non-confidential) information about tax avoidance with professional bodies and engage further with them about the advice that should be given to clients who may be invited by third parties to enter into avoidance schemes.

3.8 The Government wants to encourage representative bodies, tax agents, businesses and individuals to share information about tax avoidance schemes with HMRC. If it transpires that confidentiality conditions imposed by promoters put persons who share information with HMRC at risk of being sued, the Government is prepared to consider introducing a statutory override to such conditions.

Q.1 Do you have any comments on this proposed programme of work?

Q.2 Do you have any suggestions for improving the communication of information about tax avoidance?

4. Enhancing DOTAS

4.1 The Government has identified certain objectives that it wishes DOTAS to achieve. This section sets out options and suggestions for achieving those objectives and invites

comments as to their feasibility. If the consultation indicates that these, or other, options are feasible, they will be worked up into detailed proposals.

4.2 The Government's first objective is to ensure that HMRC is either supplied with, or is able to call upon, sufficient information and documents to:

- ◆ understand fully how a discloseable tax avoidance scheme works;
- ◆ identify all the parties involved in the marketing and implementation of the arrangements and what role they play; and
- ◆ in particular, identify the end user of the scheme, i.e. the person or persons intended to obtain the expected tax advantage.

4.3 The information that a promoter is currently required to disclose to HMRC is an explanation of each element of the scheme, including the structure, from which the expected tax advantage arises. In other words, it is a high-level description of how the scheme works. But it is often impossible for HMRC to decide, absent more detailed information about the facts, whether or not the scheme works and whether the appropriate response should be legislative or operational.

4.4 In practice HMRC often asks promoters for such further information about the detail of a scheme and many provide it voluntarily. Others do not. One option is to impose more detailed reporting obligations on promoters. Another option is to provide HMRC with additional powers to require further information and/or documents in relation to certain schemes. A third option is a mix of the two. Currently the power to call for further information is restricted to cases where the promoter has failed to provide the information already required by the legislation.

4.5 Client lists have fulfilled their original, and limited, objective which was to provide information about the number and type of persons using a scheme so that HMRC could risk assess the scheme and choose the appropriate response. Where the response is operational challenge, early knowledge of the numbers of users enables HMRC to ensure that resources are in the right place at the right time.

4.6 The information that promoters are required to provide on client lists is not sufficient, where the scheme is mass-marketed to individuals, for HMRC to readily match the data to specific customers.

4.7 Moreover, the client may be merely an intermediary, not the end user who is intended to obtain the expected tax advantage. There is no onward reporting obligation on intermediaries, so in such cases client lists will not inform HMRC who the end user is. For example, HMRC has had disclosures of employment income schemes where the client is an offshore umbrella company. Further, since it is offshore, it cannot be compelled to pass on the scheme reference number to those parties (UK companies and individuals) who intend to obtain income tax and NICs advantages. So, at present it is inherently difficult for HMRC to identify the end users of such schemes.

4.8 The Government wants to ensure that HMRC obtains sufficient information to be able to cut through the chain of introducers and intermediaries in such cases and identify who the end users are. One option is to impose additional 'client list' reporting obligations on promoters and intermediaries. Another option is to provide HMRC with additional

powers to require persons involved in marketing a scheme to identify the other parties in the scheme and what their role is. A third option is a mix of the two.

4.9 The Government's second objective is to ensure that those persons, primarily promoters, who are required to disclose a tax avoidance scheme meet their obligations and at the correct time.

4.10 Finance Act 2010 provided for a tribunal to impose higher maximum penalties, up to £1 million, for a promoter who fails to disclose a scheme. Higher penalties and increased powers have been helpful in securing compliance from certain promoters. But others do not disclose and HMRC then becomes involved in a protracted enquiry in order to establish that the scheme was discloseable.

4.11 If the promoter eventually agrees that the scheme is discloseable, they will generally rely upon the fact they have legal opinion that the scheme was not discloseable as providing 'reasonable excuse' for non-disclosure. Where reasonable excuse applies, the effect is that there is no failure to comply with the rules. HMRC's view, as described in its published guidance, is that whether or not the obtaining of legal advice provides reasonable excuse is contextual and not absolute. However, it acknowledges that not all promoters agree with that view.

4.12 The Government recognises that there is a difficult balance to be struck in ensuring compliance. Disclosure is 'self-assessing' and a promoter has to interpret the law as to whether or not any particular scheme is discloseable. On the one hand, it would be wrong to penalise a promoter who has relied upon a reasonable interpretation of law and fact. It would also be wrong to force a promoter to disclose a scheme in order to prove it is not discloseable. On the other hand, the later a disclosure is made, the less its value to HMRC and the more that promoter has gained an unfair advantage over those competitors who have disclosed a similar scheme.

4.13 The Government considers that, in the particular circumstances of DOTAS, there is a case for raising the hurdle for a reasonable excuse as extinguishing a prima facie breach of the rules (e.g. to where the promoter relied upon a reasonable interpretation of both fact and law).

4.14 The Government also considers that where a promoter incurs a penalty for a serious failure to comply with DOTAS, there is a case for imposing additional reporting obligations on it. Those could extend to providing information about all of the promoter's marketed schemes and clients, not just the schemes it has disclosed or the scheme that was the subject of the penalty.

4.15 Finally, the Government considers that there is case for imposing a personal obligation upon an individual, alongside the obligation on the firm, to ensure that a promoter's DOTAS obligations are complied with. This would be of particular significance where the firm is dissolved, moves offshore, or the individual moves from firm to firm. The Government does not want to impose any additional obligation on the vast majority of accountants, solicitors etc who do not engage in avoidance schemes and are in practice never promoters for DOTAS purposes.

4.16 In summary, the options being considered are:

- ◆ Enhanced information about the detail of avoidance schemes (paragraphs 4.3 and 4.4);
- ◆ Enhanced information about the parties involved in a scheme (paragraphs 4.5 to 4.8);
- ◆ A higher hurdle for 'reasonable excuse' in cases of failure by a promoter to disclose a scheme (paragraphs 4.10 to 4.13);
- ◆ Imposing additional reporting obligations on persons who fail to disclose a scheme (paragraph 4.14); and
- ◆ Imposing a personal obligation upon an individual, alongside that on the firm, to ensure that DOTAS obligations are complied with (paragraph 4.15).

Q.3 Do you agree that the options suggested would be feasible ways of achieving the described objectives?

Q.4 Can you suggest alternative options for achieving the same objectives?

5. Changes to the DOTAS hallmarks

Abbreviations used in this Chapter

CIS is collective investment scheme

CTA is the Corporation Tax Act 2010

FSA is the Financial Services Authority

ITEPA is the Income Tax (Earnings and Pensions) Act 2003

Part 7 is Part 7 of the Finance Act 2004

Part 7A is Part 7A of ITEPA

SAAC is the Special Annual Allowance Charge

SRN is the scheme reference number issued by HMRC to a disclosed scheme

UCIS is unregulated collective investment scheme

Introduction

5.1 The main regime was initially restricted to two known high risk areas, schemes that sought to avoid income tax on employment income and schemes that involved the use of certain financial products.

5.2 The hallmarks were introduced in August 2006 and there are currently seven. Four of these are 'generic' hallmarks. They describe generic features that are indicative of avoidance. The other three hallmarks are 'specific' hallmarks. These are more narrowly focussed descriptions that target specific high-risk areas: leasing arrangements, loss schemes and pensions. The pensions hallmark is effectively now redundant (see paragraph 5.35).

5.3 HMRC has identified a number of avoidance schemes which have not been disclosed because they are outside the existing hallmarks, or at least the matter is not free from doubt. In order for the regime to be effective, DOTAS depends upon a scheme being

disclosed at the correct time. A disclosure made belatedly following a protracted dispute is of limited value to HMRC.

5.4 Moreover, as described in paragraph 2.4, avoidance schemes increasingly do not work (i.e. they do not provide the tax advantages advertised by the promoter). HMRC wants to know about such schemes so that it can challenge the users operationally.

5.5 Consequently, the Government proposes to revise and extend the existing hallmarks to put beyond doubt that certain types of avoidance scheme should be disclosed to HMRC. However, HMRC is equally concerned to ensure that the changes are narrowly focussed on avoidance and do not impose unnecessary administration burdens and compliance costs on promoters, other businesses or individuals.

Previous steps

5.6 In 2009/10 there was a formal consultation on five measures concerning DOTAS, one of which was a proposal to revise and extend the hallmarks. This led to some minor revisions to the hallmarks that came into force on 1 January 2011 (the other four measures were implemented in Finance Act 2010 and subsequent regulations).

5.7 More substantial changes to the hallmarks were deferred for two reasons. Firstly, responses to the consultation had identified that a number of the proposed new hallmarks were too wide in scope and would catch a significant amount of ordinary tax planning. HMRC expressed an intention to continue discussions with interested parties and develop the hallmarks in an iterative process.

5.8 Secondly, the Government initiated a number of measures which directly concerned tax law targeted by avoidance schemes. For example, employment income schemes involving the provision of employment income through third parties were the subject of legislation in Finance Act 2011. It was sensible to await the outcome of these changes and consider their implications for DOTAS.

5.9 An informal consultation in the summer of 2011 was intended to identify options for further changes to the hallmarks. HMRC issued a briefing paper, which invited comments, to all parties who had previously contributed to a DOTAS consultation, and followed that up with discussions with interested parties. Some parties said they would not comment until more formal proposals were put forward.

Proposed revisions to existing hallmarks

Hallmark 1: Confidentiality where promoter involved

5.10 There are two parts to this hallmark which can be expressed as two tests. If either test is met, the scheme is discloseable:

- ◆ The first test asks the promoter of a scheme whether *any* promoter of such a scheme would wish to keep any element of the scheme, which gives rise to the expected tax advantage, confidential (at any time after a 'material date') from any other promoter;
- ◆ The second test asks the promoter of a scheme whether *they* would wish to keep any element of the scheme, which gives rise to the expected tax advantage, confidential

from HMRC (at any time after a 'material date') in order to facilitate repeated or continued use of the same element.

In both tests:

- ◆ 'Any element' of the scheme includes the way that the scheme is structured; and
- ◆ The 'material date' is the date of the event that triggers the disclosure; e.g. the date the scheme is first made available for implementation.

5.11 The assumption implicit in the first test is that a promoter would be concerned that if another promoter had access to that information, they would develop their own version of the scheme and take away potential clients.

5.12 The assumption implicit in the second test is that the promoter would be concerned that if HMRC had access to that information, it would take action to prevent further or repeated use of the scheme.

5.13 HMRC has seen a number of schemes that it would have expected to have been disclosed under this hallmark, in particular under the second test, which have not been disclosed (e.g. schemes that purport to circumvent the Disguised Remuneration legislation in Part 7A of ITEPA). These non-disclosures include schemes which are aggressive and contain a number of features that suggest the promoter either expects, or considers there to be a high risk, that HMRC will challenge them operationally.

5.14 HMRC has discussed this hallmark with promoters as part of the informal consultation and in regular liaison meetings and it is clear that there is a divergence of views as to how the second test is to be interpreted. Some promoters take the view that the test can be met only if either:

- ◆ The promoter attaches some specific condition upon third parties, or takes specific steps, to keep the scheme confidential from HMRC; or
- ◆ The scheme is new and innovative. A promoter may consider this applies where, for example, they have evidence that certain other promoters are already promoting a scheme that is substantially the same as their own.

5.15 Other promoters take the view that the test applies to any scheme that HMRC would be likely to take action to counter (legislatively or operationally) if it knew about it. This would apply, for example, to a scheme that does not incorporate particularly new or innovative features, but is being used to circumvent a new piece of legislation in a way that is clearly unintended.

5.16 The Government proposes to amend the hallmark to put beyond doubt that the second test applies in the way described in paragraph 5.15. HMRC suggests the way to do this is to align it with the first test so that it applies where *it might be reasonably expected that a promoter* (as opposed to *the promoter*) would wish to keep any element of the scheme (or the scheme itself) confidential from HMRC in order to facilitate repeated or continued use of the same scheme.

5.17 The Government also proposes to make explicit that a scheme will fall within the second test if the promoter imposes specific conditions of confidentiality on the client, which will include instances where the promotion or implementation of the scheme is

conducted with a degree of secrecy such that the client is not given or allowed to keep the promotional material, plans, legal, tax or financial analysis and opinions or commentaries from advisers, counterparties or promoters.

5.18 Finally, the Government proposes that a scheme will fall automatically within the second test if it includes certain features that are indicative that it is a scheme that the promoter considers HMRC is likely to challenge. These features might include:

- ◆ A 'fighting fund' to fund litigation in the event of HMRC challenge;
- ◆ A commitment by the promoter to fund litigation in the event of HMRC challenge;
- ◆ Fees that will be earned if HMRC challenges the scheme and it is eventually settled or decided in the client's favour;
- ◆ The promoter indemnifies users' costs in the event that the scheme fails to achieve any tax advantage.

Q.5 Would the proposed changes to Hallmark 1 (paragraphs 5.16 to 5.18) be proportionate and effective?

Hallmark 2: Confidentiality where no promoter involved

5.19 This hallmark applies to schemes developed 'in house' and applies only where the person who is expected to obtain the tax advantage is other than a small or medium-sized enterprise. It is similar to the second test in Hallmark 1. It asks the firm designing the scheme for use in-house whether *they* wish to keep any element of the scheme (where that element gives rise to the expected tax advantage) confidential from HMRC at any time after the 'material date' in order to:

- ◆ facilitate the repeated or continued use of the same, or substantially the same, element;
- ◆ reduce the risk of HMRC opening an enquiry into the return, etc. affected; or
- ◆ reduce the risk of HMRC withholding a claim for repayment.

5.20 HMRC has seen in-house schemes of the type which it would wish to take action to counter where the person disclosing has said that they do not believe the scheme is actually discloseable, but they are doing so on a 'voluntary' or 'protective' basis. The Government wants to make it absolutely clear that such schemes are discloseable and ensure that a disclosure leads to the usual obligations regarding SRNs, etc.

5.21 Most such schemes are developed and used in-house by firms who also promote schemes, e.g. banks and financial institutions. These products have the capability of being promoted subsequently to clients.

5.22 The Government proposes to amend the test in line with Hallmark 1 (paragraph 5.16) where the person who has developed the scheme is a 'relevant business' as defined in section 307 of Part 7, which provides the meaning of 'promoter' for DOTAS. The test would ask the firm whether *it might reasonably be expected that a promoter* would wish to keep any element of the scheme (or the scheme itself) confidential from HMRC in order to facilitate repeated or continued use of the same scheme.

5.23 A 'relevant business' is a trade profession or vocation which;

- ◆ involves the provision to other persons of services relating to taxation; or is
- ◆ a bank or securities house as defined within CTA (sections 1120 and 1009(3) respectively).

The proposed change is limited to such businesses because of their role as both promoters and in-house developers and users of schemes. Other businesses develop schemes only for use in-house and it would not be reasonable or relevant to ask them whether a scheme is capable of promotion.

Q.6 Would the proposed changes to Hallmark 2 (paragraph 5.22) be proportionate and effective?

Hallmark 6: Losses

5.24 This hallmark targets schemes that seek to create tax losses for individuals to set off against their personal income or gains. It applies where a promoter expects more than one individual to use the same, or substantially the same, scheme. The test is broadly that an informed observer might conclude that *the main benefit* that some or all of those individuals could expect to receive is a tax loss which they would offset against their personal income or gains.

5.25 HMRC receives disclosures of avoidance schemes under this hallmark, but a significant proportion of loss schemes have not been disclosed. HMRC is concerned that the existing benefit test provides too much margin for dispute and uncertainty as to whether, on the facts of the scheme, the main benefit to the individuals is short-term tax losses or potential future profits (since even the most contrived schemes purport to provide investors with profits over the longer term).

5.26 The Government wants to remove any doubt that all schemes that seek to create losses for tax avoidance purposes are discloseable.

5.27 Previous consultations suggested changing the benefit test from *the main benefit* to *one of the main benefits*. However, respondents were concerned that (given the wide definition of 'arrangements' and 'tax advantage' in Part 7) this would catch ordinary business start-ups where early-year losses might occur. In response to those concerns, the Government proposes to substitute *the main benefit* test with a *one of the main benefits* test, but only where the scheme is a UCIS for the purposes of the Financial Services and Markets Act 2000.

5.28 A CIS, sometimes referred to as a 'pooled investment' is broadly a fund that several people contribute to. A funds manager will invest the pooled money in one or more types of asset, such as stocks, bonds or property. A *regulated* CIS is one that the FSA has either 'authorised' (UK CIS) or 'recognised' (non-UK CIS). An unregulated CIS is a CIS that has not been authorised or recognised by the FSA.³

5.29 A UCIS can be based outside the UK and dedicate money to a range of different enterprises, including less common investment products and activities like film production, forest plantations and foreign property. These unregulated schemes cannot be promoted to the general public in the UK, but can be proposed to certain limited categories of investors including:

- ◆ certified high-net-worth investors;

- ◆ sophisticated investors;
- ◆ self-certified sophisticated investors; and
- ◆ existing investors in UCIS.

5.30 Despite these rules, the FSA has seen evidence that ordinary members of the public are being sold UCIS, with some customers being advised to invest their self- invested personal pension (SIPP) into a UCIS.⁴ Most tax avoidance schemes that create income tax losses are UCIS.

Q.7 Would the proposed safeguard (paragraph 5.27) address concerns about catching ordinary business start-ups?

5.31 A further concern is that the types of loss scheme marketed to individuals are now being marketed to companies. For example, HMRC has received disclosures of arrangements that involve a UK company (UKCO) participating in an LLP carrying on a loss-making trade. The arrangements are structured with the expectation of UKCO being able to claim trading losses greater than its capital contributions.

5.32 Respondents to the earlier consultation expressed concerns that a corporate loss hallmark might catch:

- ◆ benign tax planning;
- ◆ arrangements conducted for commercial reasons;
- ◆ arrangements intended to put a company in the best position to utilise losses in the future as the company returns to profitability; and
- ◆ arrangements that respondents described as routine intra-group planning.

5.33 HMRC broadly accepts these concerns. However, HMRC is aware of arrangements involving groups or consortia that go beyond what could reasonably be described as benign planning; for example:

- ◆ arrangements involving the acquisition by a group of a trading company with carried-forward losses, followed by the transfer of the trade to another company in the group after which the trade undergoes a major change in its nature and conduct. The middle step is inserted to avoid the losses being cancelled under Part 14 of CTA2010; and
- ◆ arrangements that involve the creation of a consortium wholly for the purpose of sharing losses, in either direction, between the consortium members and the consortium companies.

5.34 The proposal is to amend this hallmark (in addition to the change proposed in paragraph 5.27) so that:

- ◆ it applies where the expected participants are persons (legal or natural) rather than solely individuals;
- ◆ corporation tax is added to the taxes whose liability participants would be expected reduce by the tax losses generated by the scheme; and

- ◆ for CT losses, it also applies where the scheme is designed 'in-house' and there is no promoter.

CT losses' would include:

- ◆ trading losses;
- ◆ unrelieved non-trading loan relationship deficits; and
- ◆ unused capital allowances.

Q.8 What types of benign tax planning around corporation tax losses might the proposed change (paragraph 5.34) catch inadvertently?

Hallmark 8: Pensions

5.35 The hallmark requires disclosure of schemes seeking to circumvent the SAAC legislation in Finance Act 2009. The SAAC legislation ceased to have any effect from 6 April 2012, so the hallmark is now effectively redundant and will be removed.

5.36 Finance Act 2011 restricts pensions tax relief for individuals by reducing the annual allowance from £255,000 to £50,000 and the lifetime allowance from £1.8 million to £1.5 million. For defined benefit schemes, accrued benefits are equally capped at those levels, above which income tax charges apply. The annual and lifetime allowances apply to registered pension schemes and to equivalent non-UK pension schemes to the extent they receive UK tax relief. In addition, Part 7A of ITEPA (see paragraph 5.42) contains provisions to prevent third party arrangements being used (instead of, or in addition to, registered pension schemes) to provide retirement or death benefits to employees above the annual and lifetime allowances, thereby avoiding restrictions on pensions tax relief.

5.37 Where an employer provides an employee with retirement or death benefits through a third party pension scheme, the value of which is not subject to the annual or lifetime allowances, the provision is potentially within the scope of Part 7A. The new hallmark proposed in respect of employment income via intermediaries (see paragraphs 5.44 to 5.46) would therefore include avoidance schemes using such pension arrangements. For this reason, a specific hallmark for pensions is not currently necessary.

5.38 HMRC is monitoring developments in the use of tax-advantaged pension provision and will keep the need for a pensions hallmark under review. In particular, the Government announced at Budget 2012⁵ that it will continue to monitor the use of unfunded workplace pension arrangements and remains ready to act if necessary to prevent new and extensive use of these arrangements from creating a significant fiscal risk and undermining its objective of a more affordable pensions regime.

New hallmarks

Employment Income via Intermediaries

5.39 In 2004, DOTAS applied to two scheme descriptions, one of which was 'arrangements connected with employment'. It consisted of three elements:

- a. arrangements involving securities and associated rights;
- b. arrangements involving payments to trustees and intermediaries; and
- c. arrangements involving loans.

Confidentiality and premium fee 'filters' restricted the scope narrowly to avoidance. This description triggered 198 disclosures before it was replaced by the 'generic' hallmarks in August 2006.

5.40 Schemes that involved payments or loans to employees via Employee Benefit Trusts or similar intermediaries continued to be heavily used for avoidance, despite operational challenge to those schemes. The schemes sought to reward employees by payments, loans, the transfers of assets, etc. via intermediaries with the aim being for tax and NICs to be due (if at all) only on the use of the money or assets during the employee's employment and not on their full value. Some of these schemes were disclosed under the 'generic' hallmarks; others were not as they fell outside those tests.

5.41 Schedule 2 to the Finance Act 2011 inserted a new Part 7A (Employment income provided through third parties - often referred to as the 'Disguised Remuneration legislation') into ITEPA 2003 with effect from 6 April 2011⁶ to counter these schemes and other long-term tax deferral arrangements (see paragraph 5.36 in relation to pensions).

5.42 Part 7A operates as follows:

- ◆ Chapter 1 sets out the circumstances where an employment income charge applies under Part 7A. This is broadly where:
 - there is an arrangement (a 'relevant arrangement') under which an employer seeks to provide value to a current, prospective or former employee, which is in substance reward or recognition, or a loan, in connection with that person's employment, via a third party, and
 - a 'relevant step' (e.g. the earmarking or payment of a sum of money, the transfer of an asset etc.) is taken by a 'relevant third person' (e.g. the trustee of an Employee Benefit Trust);
- ◆ There are a number of specific exclusions from the relevant steps (e.g. a relevant step under a registered pension scheme or an approved share incentive plan). Chapter 2 provides that the value of the relevant step is to count as employment income of the employee;
- ◆ Chapter 3 sets out some extra rules which provide for amounts to count as employment income when an undertaking is given to pay a contribution to a third-party non-registered pension scheme in respect of an employee and the employer earmarks property or otherwise provides security with a view to that contribution being paid.

5.43 Although it is confident that the legislation is effective, HMRC is aware that schemes purporting to circumvent Part 7A are being marketed and has had some disclosures of such schemes. The Government wishes to ensure that all such avoidance schemes are detected early, so that the risks to income tax and NICs can be assessed and the appropriate counteraction (which may be legislative, operational or both) taken early and effectively.

5.44 The Government proposes to introduce an hallmark for employment income via intermediaries that targets avoidance schemes that have the following characteristics:

- ◆ The arrangements involve an employee ("A") and their employer ("B");
- ◆ B provides, or arranges either directly or indirectly or together with A for the provision of, money or assets to a third party C (and this provision might happen either before, at the same time or after any provision of value or benefits to A);
- ◆ The scheme is predicated on an assumption that the arrangements are a means of B providing A with benefits via C as reward or recognition, or a loan, in connection with A's employment, without A incurring an income tax charge under Chapter 2 of Part 7A. Such schemes will also usually be predicated on the assumption that B will avoid a charge to NICs.

A may be an actual, former or prospective employee of B, who may be located in the UK or offshore. A may work directly to B or may be seconded to D, or sub-seconded to E, etc.

5.45 The scope of the hallmark would include schemes that seek to circumvent a Chapter 2 Part 7A charge on the basis that either:

- ◆ the arrangements do not involve the intermediary, C, taking a 'relevant step' as defined in section 554A(2) ITEPA (for example, because the arrangements are structured so that in the first instance B takes the step); or
- ◆ the arrangements trigger a Chapter 2 charge, but are structured so that the amount of the charge is nil or very modest in comparison to the value received.

5.46 Schemes that contain a 'relevant step' that is excluded by virtue of sections 554E to 554X ITEPA, or by regulations made under section 554Y, would not be within the scope of the hallmark unless at least one of the following circumstances applies:

- ◆ the exclusion is conditional and the arrangements would be expected to result in a fallback charge; or
- ◆ the aim of the scheme is to secure the application of one or more of the exclusions in circumstances where the substance of the transaction would not, without a degree of contrivance, satisfy the terms of the exclusion.

Q.9 Would a hallmark based upon the characteristics described above (paragraphs 5.44 to 5.46) be workable?

Financial products

5.47 The second DOTAS description in 2004 was schemes that involved the use of certain financial products (excluding ISAs, PEPs and finance leases) where those products might be expected to contribute to 'a significant degree' to the gaining of the tax advantage. Again, confidentiality and premium fee 'filters' cut down the scope. This description triggered 465 disclosures before it was replaced by the hallmarks in August 2006.

5.48 HMRC has continued to receive disclosures, primarily under the two confidentiality hallmarks (hallmarks 1 and 2) and the premium fee hallmark (hallmark 3) of schemes that use structured financial products to reduce CT liability.

5.49 Disclosures of these schemes are frequently accompanied by a statement from the person disclosing that they do not consider the arrangements disclosable, but they are disclosing them on a protective basis. HMRC treats these as normal disclosures as the legislation does not contemplate 'voluntary disclosure' or a person providing information (protectively) absent a statutory obligation - it requires information relating to 'notifiable arrangements' to be provided to HMRC, which triggers a series of other obligations (mainly relating to SRNs) by reference to their being 'notifiable arrangements.'

5.50 Such schemes pose a very significant risk to the Exchequer. The Government wants to make it absolutely clear that such schemes are discloseable, and ensure that a disclosure leads to the usual obligations regarding SRNs etc.

5.51 The Government proposes to create a financial products hallmark, similar to the 2004 description in that it applies to arrangements that contain one or more specified financial products. Broadly these would be:

- ◆ a loan;
- ◆ a derivative contract;
- ◆ an agreement for the sale and repurchase of securities;
- ◆ a stock lending arrangement;
- ◆ a share;
- ◆ any arrangement which produces for any person a return that is economically equivalent to interest;
- ◆ a contract, not being one of the above, which alone or in combination amounts to a loan or the advance or deposit of money;
- ◆ CIS and alternative investment funds; and
- ◆ insurance products included in section 473 of the Income Tax (Trading and other Income) Act 2005 (ITTOIA).

5.52 This hallmark would not include employment income schemes, which are primarily intended to provide an income tax and/or NICs advantage in relation to employment income (and may contain a secondary CT advantage). It would apply to other types of income tax advantage (e.g. in relation to investment products).

5.53 HMRC intends only schemes where there is a direct link between the financial product and the gaining of the expected tax advantage to be within the scope of the hallmark. Put another way, the hallmark would apply only where the financial product is an active ingredient of an avoidance scheme and not merely incidental to it.

5.54 The 2004 regulations used the 'significant degree' test for this purpose (see paragraph 5.47). But that test was described by the Special Commissioners as not easy to interpret. HMRC's view is that such a test would be too narrow as it can be interpreted as suggesting that the financial product must be the proximate cause of the gaining of the tax advantage. The test should be that the tax advantage could not arise 'but for' the inclusion of the financial product. For example, in a typical income tax loss scheme containing a limited recourse loan, the loan is not the proximate cause of the gaining of

the tax advantage, but the tax advantage could not be obtained but for the inclusion of the loan (because the loan is the means of providing a tax loss in form greater than economic substance).

Q.10 Would a 'but for' test (paragraph 5.54) be reasonable for determining whether a financial product is an active ingredient of an avoidance scheme or merely incidental to it?

5.55 HMRC also wants to incorporate a filter (or filters) to restrict the hallmark to instances where there is a significant avoidance risk. It is not the intention to target benign tax planning. That filter could not be confidentiality or premium fee because the objective is to obtain disclosures of avoidance schemes that do not fall within the confidentiality and premium fee hallmarks.

5.56 One option is to exclude 'standard products' from the hallmark. But since avoidance schemes often incorporate and build upon relatively standard products, such an exclusion might undermine the hallmark. Another option is for a filter based upon the amount of the tax advantage a user would expect to receive as a result of using the scheme.

Q.11 Would filters based upon standard products or the amount of the tax advantage (paragraph 5.56) be workable? If not, what are the alternatives?

Offshore schemes

5.57 Previous consultation has included discussion about a hallmark intended to identify tax avoidance schemes that rely upon structures and transactions in offshore territories.

5.58 Respondents were generally concerned to ensure that any such hallmark made clear that the use of the gaining of the expected tax advantage was directly attributable to the use of the offshore territory. They were concerned that the hallmark should not capture arrangements where an offshore territory was used solely for reasons other than tax avoidance.

5.59 Since then, there has been continued progress in improving international co-operation on tax transparency, both through bi-lateral agreements and internationally through the Global Forum on Transparency and Exchange of Information, which now includes over one hundred jurisdictions, including all OECD and G20 members.

5.60 Notwithstanding this progress, HMRC is aware of a number of avoidance arrangements that rely directly upon complex offshore structures, often involving bespoke chains of trusts and companies, to create a purported tax advantage (whilst also creating opacity as to what has been done). Typically, the beneficiaries are affluent individuals, but companies may also use offshore structures for tax avoidance.

5.61 This is a complex issue and it is not currently clear to what extent a DOTAS hallmark would be practicable. Consequently, the Government does not propose to include a hallmark in the current exercise. HMRC will continue to discuss the issues involved with interested parties.

6. Table of Impacts

Table of Impacts

Exchequer impact (£m)	2012-13	2013-14	2014-15	2015-16
	0	0	0	0
	Indicative estimates of the impact of the extensions to DOTAS described in Chapter 5. The DOTAS regime is an information device and its main impact is to protect revenue by reducing the need for tax and operational interventions. As the programme of work in Chapters 3 and 4 represents a range of options, there are still a range of options, the impact of these is not included.			
Economic impact	Chapter 5 measures are not expected to have significant economic impacts. Chapter 6 measures are subject to early consultation and the impact of these is not included.			
Impact on individuals and households	The measure will only impact those individuals and households who use tax avoidance schemes that create tax losses. Those individuals would be required to report the use of the scheme, normally by completing a box on the ITSA return.			
Equalities impact	Analysis of persons reporting SRNs indicates that the individuals affected will be those with income in excess of £100,000. It is not expected that the policy would adversely or disproportionately affect any other equality groups.			
Impact on Businesses and civil society organisations	<p>Most avoidance schemes are developed by a relatively small number of promoters (including various niche promoters).</p> <p>The extension of DOTAS is intended to increase transparency in the marketing and use of schemes that provide an income tax, capital gains tax or corporation tax advantage.</p> <p>The measure is not expected to impose a significant increase in admin burden, provided it is targeted on avoidance.</p> <p>Businesses of any size, develop, market and use avoidance schemes. HMRC does not expect to have a significant effect on small businesses either in absolute terms or proportionately.</p>			
Operational impact	Dealing with additional scheme disclosures and reporting of reference numbers will require additional resources for HMRC			
Other impacts	Any policy change will also be tested against the list of possible impacts used in the impact assessment. An initial assessment suggests no significant 'other impacts'.			

Q.12 Do you have any comments or suggestions on the Tax Impact Assessment as set out above?

7. Summary of Consultation Questions

Q.1 Do you have any comments on programme of work suggested in Chapter 3 for improving public information about tax avoidance arrangements and the risks associated with using them ?

Q.2 Do you have any suggestions for improving the communication of information about tax avoidance?

Q.3 Do you agree that the options suggested in Chapter 4 for widening DOTAS would be feasible ways of achieving the described objectives?

Q.4 Can you suggest alternative options for achieving the same objectives?

Q.5 Would the proposed changes to Hallmark 1 (paragraphs 5.16 to 5.18) be proportionate and effective?

Q.6 Would the proposed changes to Hallmark 2 (paragraph 5.22) be proportionate and effective?

Q.7 Would the proposed safeguard in Hallmark 6 (paragraph 5.27) address concerns about catching ordinary business start ups?

Q.8 What types of benign tax planning around corporation tax losses might the proposed change to Hallmark 6 (paragraph 5.34) catch inadvertently?

Q.9 Would an employment income via intermediaries hallmark based upon the characteristics described in paragraphs 5.44 to 5.46 be workable?

Q.10 Would a 'but for' test (paragraph 5.54) be reasonable for determining whether a financial product is an active ingredient of an avoidance scheme or merely incidental to it?

Q.11 Would filters based upon standard products or the amount of the tax advantage (paragraph 5.56) be workable? If not, what are the alternatives?

Q.12 Do you have any comments or suggestions on the Tax Impact Assessment?

8. 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 options.

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 1 of the process for the measures described in Chapters 3 and 4, and during stage 2 for those described in Chapter 5. The purpose of the Chapter 5 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 15 October 2012 by e-mail to Philippa.staples@hmrc.gsi.gov.uk or by post to:

Philippa Staples

HMRC

CTIAA AAG

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100 Parliament Street

London

SW1A 2BQ

Telephone enquiries 0207 147 2444/2418 (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 the HMRC Internet site at <http://www.hmrc.gov.uk/consultations/index.htm>. 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.

The Consultation Code of Practice

This consultation is being conducted in accordance with the Code of Practice on Consultation. A copy of the Code of Practice criteria and a contact for any comments on the consultation process can be found in Annex A.

ANNEX A : THE CODE OF PRACTICE ON CONSULTATION

About the consultation process

This consultation is being conducted in accordance with the Code of Practice on Consultation.

The consultation criteria

1. When to consult - Formal consultation should take place at a stage when there is scope to influence the policy outcome.
2. Duration of consultation exercises - Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Clarity of scope and impact - Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Accessibility of consultation exercise - Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. The burden of consultation - Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Responsiveness of consultation exercises - Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Capacity to consult - Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

If you feel that this consultation does not satisfy these criteria, or if you have any complaints or comments about the process, please contact:

Amy Burgess, Consultation Coordinator, Budget & Finance Bill Co-ordination Group, HM Revenue & Customs, 100 Parliament Street, London, SWA 2BQ

e-mail hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

ANNEX B : LIST OF STAKEHOLDERS CONSULTED

An informal consultation was held in 2011 on extending the DOTAS hallmarks in the course of which a briefing paper was issued to the following stakeholders:

PWC*

Ernst & Young*

KPMG*

Deloitte*

Slaughter & May*

Linklaters*

Allen & Overy*
Freshfields*
Clifford Chance*
BDO Stoy Hayward*
Tenon
Grant Thornton
Baker Tilly
Confederation of British Industry
Institute of Directors
Law Society of England & Wales
Chartered Institute of Taxation
Institute of Chartered Accountants of England & Wales
Institute of Chartered Accountants of Scotland
British Bankers Association
Association for Financial Markets in Europe
Follow up discussions were held with the stakeholders asterisked.

ANNEX C : DOTAS

DOTAS - policy objectives

The policy objectives of DOTAS are:

- ◆ to provide early information to HMRC about tax avoidance schemes to allow the risk they pose to be assessed, and to inform legislation to close loopholes;
- ◆ to identify the users of those schemes to inform HMRC's compliance work; and
- ◆ to reduce the supply of avoidance schemes by altering the economics of avoidance, reducing the returns to promoters and users as schemes are closed down more quickly.

DOTAS was introduced in 2004. It was an innovative approach to countering tax avoidance and so was initially limited to schemes that concern one or more of income tax, capital gains tax (CGT) or corporation tax (CT). A separate, but similar, disclosure system was introduced for VAT at the same time.

DOTAS has informed a wide range of anti-avoidance measures since its introduction. There is also evidence that DOTAS has changed the economics of avoidance.

Since 2004 DOTAS has been extended to stamp duty land tax (SDLT), to National Insurance contributions (NICs) and to Inheritance Tax (IHT). Various other extensions and improvements have been made to the system.

How DOTAS works

DOTAS requires certain persons, normally promoters of schemes, to provide HMRC with information about 'arrangements' and 'proposals for arrangements' (i.e. schemes) where:

- ◆ the scheme might be expected to provide any person with a tax advantage in relation to income tax, CGT, CT, SDLT or IHT;
- ◆ the tax advantage might be expected to be the main benefit, or one of the main benefits, of using the scheme; and
- ◆ the scheme falls within certain descriptions (contained in regulations). For income tax, CT and CGT the descriptions are commonly referred to as hallmarks.

If a scheme is discloseable, the promoter must explain how the scheme is intended to work and must normally do so within five days of marketing the scheme or making it available to clients for implementation. In practice, promoters are accountants, solicitors, banks and financial institutions and small firms of specialist promoters known as 'tax boutiques'.

A scheme reference number (SRN) system enables HMRC to identify the users of schemes. When a scheme is disclosed, HMRC allocates a SRN and notifies it to the promoter. The promoter passes the SRN to those clients who it becomes aware have implemented the scheme. A client who uses a disclosed scheme must report the SRN and other information to HMRC, normally on the tax return affected by using the scheme.

Since 1 January 2011, promoters have also been required to provide HMRC with quarterly returns providing name and address information about clients to whom they have become required to issue a SRN. These are commonly known as 'client lists'.

There are information powers enabling HMRC to investigate cases of suspected non-compliance. There are also penalties for failing to disclose a scheme and for failing to pass on or report a SRN, or provide a client list.

ANNEX D : RELEVANT (CURRENT) GOVERNMENT LEGISLATION

DOTAS Legislation

The primary legislation for DOTAS is primarily contained in **Part 7 of the Finance Act 2004 ('Part 7')** (as amended) consisting of sections 306 to 318. The main sections of relevance to this consultation are:

- ◆ section 306 - defines 'notifiable arrangements' and 'notifiable proposals' and also provides for Treasury regulations to prescribe descriptions of arrangements required to be disclosed;
- ◆ section 307 - defines 'promoter';
- ◆ section 308 sets out the duties of a promoter to provide prescribed information;
- ◆ section 309 concerns the situation where a promoter is outside the UK (in which case if the promoter does not provide prescribed information, the obligation passes to the client who uses the arrangements);

- ◆ by virtue of section 310 the obligation to provide prescribed information also passes to the scheme user if no person is obliged to provide information under either of sections 309 or 310. In practice this applies where either,
 - the arrangements are designed by an 'in-house' tax department' or
 - the promoter is a lawyer who cannot make a full disclosure without providing legally privileged information

The primary legislation for penalties for a failure to comply with a DOTAS obligation is contained in **section 98C of The Taxes Management Act 1970** and the level of certain penalties provided for in **The Tax Avoidance Schemes (Penalty) Regulations 2007, SI 2007/3104**.

The descriptions of schemes prescribed under section 306 in relation to the main regime (i.e. the hallmarks) are contained in **The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006, SI 2006/1543** (as amended) (*the Descriptions Regulations*).

The descriptions are contained in Part 3 of the Descriptions Regulations. There are currently seven:

- ◆ Description 1: Confidentiality where promoter involved;
- ◆ Description 2: Confidentiality where no promoter involved;
- ◆ Description 3: Premium fee;
- ◆ Description 5⁷: Standardised tax products;
- ◆ Description 6: Loss Schemes;
- ◆ Description 7: Leasing arrangements;
- ◆ Description 8: Pensions.

The Tax Avoidance Schemes (Information) Regulations SI 2004/1864 (as amended) ('the *Information Regulations*') prescribe the information to be provided under DOTAS and the time limits for providing it. Consolidated Information Regulations were laid before Parliament on 13 July 2012 - **The Tax Avoidance Schemes (Information) Regulations 2012, SI 2012/1836** - and will come into force on 1 September 2012, at which point the 2004 regulations will be revoked.

The Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations SI 2004/1865 (as amended) ('the *Promoters Regulations*') prescribe circumstances in which persons are not to be treated as promoters.

The **Social Security Administration Act 1992** provides that H M Treasury may make regulations applying (with or without modification) to National Insurance contributions those provisions of DOTAS (both primary and secondary legislation) that apply to income tax.

The regulations that apply DOTAS to NICs are the **National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 SI 2007/785** (as amended) ('the *NICs Regulations*'). Consolidated NICs Regulations were laid before Parliament on 17 July 2012 - **The National Insurance Contributions (Application of**

Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868 - and will come into force on 1 September 2012, at which point the 2007 regulations will be revoked.

Other legislation referred to

Corporation Tax Act 2010

Part 7A Income (Earnings and Pensions) Act 2003

Financial Services and Markets Act 2000