

(With effect from 4 November 2013)

# GUIDANCE

## DISCLOSURE OF TAX AVOIDANCE SCHEMES

Income Tax, Corporation Tax, Capital Gains Tax,  
National Insurance Contributions, Stamp Duty Land Tax, Annual  
Tax on Enveloped Dwellings and Inheritance Tax

**HM Revenue & Customs**

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## 1. Introduction

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### 1.1 What is this guidance about?

This guidance is about what to do if you promote or use arrangements (including any scheme, transaction or series of transactions) that will or are intended to provide the user with a tax and/or National Insurance contribution advantage when compared to adopting a different course of action. It is divided into **sections** (e.g. 1, 2, 3) and **paragraphs** (e.g. 1.5, 1.5.1, 1.5.2) and includes advice on:

- deciding if arrangements relating to income tax, corporation tax, capital gains tax, National Insurance contributions, stamp duty land tax, annual tax on enveloped dwellings and inheritance tax should be disclosed to HMRC;
- how to make a disclosure (section 15);
- the systems we expect users of tax arrangements to have in place to monitor for arrangements that they, rather than the promoter, may need to disclose to HMRC (see paragraphs 3.9 to 3.10 and 14.4 to 14.6); and
- how to notify HMRC that you are using a disclosed arrangement (sections 17, 18 and 19).

It does not include advice on revoked, repealed or superseded legislation.

Guidance on the rules for disclosing arrangements relating to VAT can be found in VAT Notice 700/8 Disclosure of VAT avoidance schemes available on HMRC's internet site at: <http://www.hmrc.gov.uk/aiu/guidance.htm>.

### 1.2 The status of this guidance

The parts of this guidance (detailed in paragraph 1.5.3 below) that specify the form and manner for providing specified information have the force of law.

The remainder of this guidance is not a substitute for the relevant legislation. Whilst you can rely on this guidance as an accurate explanation of how HMRC will apply the legislation, it does not cover every possible issue that may arise.

### 1.3 Effective date and superseded guidance

This guidance replaces and supersedes all previous guidance with effect from 4 November 2013 including:

- The Disclosure of Tax Avoidance Schemes Income Tax, Corporation Tax, Capital Gains Tax, National Insurance Contributions, Stamp duty Land Tax and Inheritance Tax, effective from 1 November 2012 and published 23 October 2012.

- The Disclosure of Tax Avoidance Schemes Income Tax, Corporation Tax, Capital Gains Tax, National Insurance Contributions, Stamp Duty Land Tax and Inheritance Tax, effective from 6 April 2011 and published February 2012.
- The Disclosure of Tax Avoidance Schemes Income Tax, Corporation Tax, Capital Gains Tax, National Insurance Contributions, Stamp Duty Land Tax and Inheritance Tax, effective 6 April 2011 and published in August 2011.
- The Disclosure of Inheritance Tax Avoidance Schemes – sections 9A, 9B and 13A published in March 2011 and effective from 6<sup>th</sup> April 2011 (now consolidated as sections 10, 11 and 17 respectively).
- The Disclosure of Tax Avoidance Schemes, Income Tax, Corporation Tax, Capital Gains Tax, National Insurance contributions and Stamp Duty Land Tax – sections 3, 7 10, 11A, 14 and 15 of the guidance effective from 1 January 2011 (now consolidated as sections 3, 7, 12, 14, 18 and 19).
- The Disclosure of Tax Avoidance Schemes, Income Tax, Corporation Tax and Capital Gains Tax, National Insurance contributions and Stamp Duty Land dated February 2010 and effective from 1st April 2010.
- Disclosure of Tax Avoidance Schemes, Income Tax, Corporation Tax, Capital Gains Tax, National Insurance Contributions and Stamp Duty Land Tax effective from February 2010.

#### **1.4 What's changed?**

This guidance has been updated to reflect legislative changes in relation to information HMRC collects about users of notifiable tax avoidance schemes, new and revised hallmarks (descriptions of schemes to be disclosed) and the extension to include the new Annual Tax on Enveloped Dwellings. These changes come into force on 4 November 2013. This guidance was reissued on 16/05/2014 to correct a number of minor formatting errors and to make it clear that the employment income hallmark applies to all sizes of business.

The main changes are detailed below:

- Paras 17.2 – the requirement for the user to give the promoter their NINO and UTR
- Paras 21 – a new information power to enquire into client lists
- Paras 7.11 – the employment hallmark;
- Paras 7.3,7.4 - revised confidentiality hallmark;
- Pensions hallmark – revoked
- Section 10,11 – Determining and ATED scheme;

- Section 20 what do to if you receive a scheme reference number relating to Annual Tax on Enveloped Dwellings.

## **1.5 What law does this guidance cover?**

The main legislation covered by this guidance is detailed below.

### **1.5.1 Primary legislation**

- The Finance Act 2004, Part 7 (s.306 to s.319) (as amended by FA2007, s.108, FA2008, s.116 and Sch.38 and FA2010 s.56 and Schedule 17, FA2012, s.215, FA2013 s.223));
- The Social Security Administration Act 1992, s.132A; and
- The Taxes Management Act 1970, s.98C (inserted by s.315 and s.319 of FA2004 and amended by FA2009 s.108(9) and FA 2010 s.56, Sch 17)

### **1.5.2 Secondary legislation**

- The Tax Avoidance Schemes (Information) Regulations 2012 (SI 2012/1836 as amended by SI 2013/2592)
- The Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004 (SI 2004/1865, as amended by SI 2004/2613);
- The Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868, as amended by SI 2010/407 and SI 2012/2395);
- The Stamp Duty Land Tax (Avoidance Schemes) (Specified Proposals or Arrangements) Regulations 2012 (SI 2012/2396);
- The Annual Tax on Enveloped Dwellings Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2013 (SI 2013/2571);
- The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543 (reg 17A, pensions, revoked), as amended by SI 2007/2484, SI 2009/2033 (revoked), SI 2010/2834 and SI 2013/2595);
- The Inheritance Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2011 (SI 2011/170);
- The National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012 (SI 2012/1868, as amended by SI 2013/2600)
- The Tax Avoidance Schemes (Penalty) Regulations 2007 (SI 2007/3104 as amended by SI 2010/2743).

### **1.5.3 Tertiary legislation (FA 2004, s.316; and SI 2012/1868, reg.21)**

The Commissioners for Her Majesty's Revenue and Customs hereby specify that the information required under the provisions described below (including, for National Insurance purposes, the appropriate corresponding provision (see paragraph 1.6) must be provided in the following form and manner:

- Finance Act 2004, section 308(1) and (3) – on forms AAG 1 and AAG 5
- Finance Act 2004, section 309(1) – on forms AAG 2 and AAG 5
- Finance Act 2004, section 310 – on forms AAG 3 and AAG 5
- Finance Act 2004, section 312(2) – on form AAG 6, AAG 6 (IHT), AAG 6 (SDLT) or AAG 6 (ATED).
- Finance Act 2004, section 312A(2) – on form AAG 6, AAG 6 (IHT), AAG 6 (SDLT) or AAG 6 (ATED).
- Finance Act 2004, section 313(1) and (3)(a) – in the boxes provided for this purpose on the return.
- Finance Act 2004, section 313(1) and (3)(b) – on forms AAG 4, AAG 4 (SDLT), AAG 4 (IHT) or AAG 4 (ATED).
- Finance Act 2004, section 313ZA(3) – on the client list form supplied by the Counter-Avoidance Directorate.

The address for, and means of, delivering forms AAG 1 to AAG 3 and AAG 5 is that detailed at paragraph 15.2.

The address for, and means of, delivering form AAG 4 is that detailed at paragraph **Error! Reference source not found..**

The address for, and means of, delivering form AAG 4 (SDLT) is that detailed at paragraph 18.6.

The address for, and means of, delivering form AAG 4 (ATED) is that detailed at paragraph 11A.5.12

The address for, and means of, delivering form AAG 4 (IHT) is that detailed at paragraph 19.6

The address for, and means of, delivering the client list form is that detailed at paragraph 16.2.4

The prescribed electronic means for the submission of forms in accordance with Regulation 4 of the Information Regulations (SI 2012/1836) (as modified in the case of NICs by Regulation 26(3) (SI 2012/1868)) is as follows.

- Forms AAG 1, AAG 2, AAG 3 AAG 4, AAG 4(SDLT), AAG 4 (ATED) and AAG 4(IHT) are submitted by means of the link provided on the avoidance pages of the HMRC website. Form AAG 5 is not needed for forms submitted electronically.
- Forms AAG 6, (SDLT), AAG 6 (ATED) and AAG 6 (IHT) (client list forms) are not sent to HMRC and therefore there is no prescribed electronic format. Client list forms are submitted electronically using the Shared Workspace Software supplied on request by the Counter Avoidance Directorate of HMRC as detailed at paragraph 18.6

**Warning:** The above specified form and manner for providing required information has the force of law and there are penalties for not complying with this – see section 22.

## 1.6 Use of legal references

Selected legal references and extracts from the legislation are provided in the headings to, and reproduced in the text of, this guidance to act as a quick reference and to aid understanding.

The National Insurance related provisions are, in the main, not referred to or reproduced as they are intended to mirror, with some minor differences explained at the relevant paragraphs of this guidance, those found in the Finance Act 2004 and other legislation. The table below, however, details the main corresponding or modifying provisions:

<b>Tax provision</b>	<b>Corresponding or modifying provision</b>
TMA 1970, section 98C	SI 2012/1868, regulations 22 and 24
FA 2004, section 306	SI 2012/1868, regulation 5
FA 2004, section 306A	SI 2012/1868, regulation 6
FA 2004, section 307	SI 2012/1868, regulation 7
FA 2004, section 308	SI 2012/1868, regulation 8
FA 2004, section 308A	SI 2012/1868, regulation 9
FA 2004, section 309	SI 2012/1868, regulation 10
FA 2004, section 310	SI 2012/1868, regulation 11
FA 2004, section 311	SI 2012/1868, regulation 12
FA 2004, section 312	SI 2012/1868, regulation 13
FA 2004, section 312A	SI 2012/1868, regulation 14
FA 2004, section 312B	SI 2012/1868, regulation [14A]
FA 2004, section 313	SI 2012/1868, regulation 15
FA 2004, section 313ZA	SI 2012/1868, regulation 16
FA 2004, section 313ZB	SI 2012/1868, regulation [16 <sup>o</sup> ]
FA 2004, section 313A	SI 2012/1868, regulation 17
FA 2004, section 313B	SI 2012/1868, regulation 18
FA 2004, section 313C	SI 2012/1868, regulation 19
FA 2004, section 314	SSA 1992, section 132A(6)
FA 2004, section 314A	SI 2012/1868, regulation 20
FA 2004, section 316	SI 2012/1868, regulation 21
SI 2012/1836	SI 2012/1868, regulation 26



SI 2004/1865

SI 2006/1543

SI 2007/3104

SI 2012/1868, regulation 27

SI 2012/1868, regulation 25

SI 2012/1868, regulation 28

## **1.7 Help and advice**

If you are concerned about any arrangement being marketed to you, or you would like to discuss any aspect of these guidance notes, you can contact us by post at the following address:

Counter Avoidance Directorate (Intelligence)  
HM Revenue & Customs  
CA Intelligence S0528  
PO Box 194  
Bootle  
L69 9AA

Alternatively you can:

- telephone us on (+44) (0)3000 588993, or
- email us at [aag@hmrc.gov.uk](mailto:aag@hmrc.gov.uk)

## **2. An overview of the disclosure rules**

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### **2.1 Objectives**

The objectives of the disclosure rules are to obtain:

- early information about tax arrangements and how they work; and
- information about who has used them.

### **2.2 The effect of disclosure**

On its own the disclosure of a tax arrangement has no effect on the tax position of any person who uses it. However, a disclosed tax arrangement may be rendered ineffective by Parliament, possibly with retrospective effect.

### **2.3 Scope and summary of the disclosure rules**

#### **2.3.1 Scope**

Currently, disclosure covers certain tax arrangements relating to:

- **income tax, corporation tax and capital gains tax** – the detailed rules are in sections 4, 6 and 7; Corporation tax is defined in s.318 of FA 2004 as including any amount which, by virtue of any of the provisions mentioned in paragraph 1 of Schedule 18 to the Finance Act 1998 (c. 36) (company tax returns, assessments and related matters) is assessable and chargeable as if it were corporation tax. Bank levy was added to paragraph 1 of Schedule 18 FA 1998 by virtue of paragraph 61 of Schedule 19 to Finance Act 2011 and so is within the scope of these rules.
- **National Insurance contributions** – the detailed rules are in sections 5 to 7;
- **stamp duty land tax** – the detailed rules are in sections 8 and 9;
- **annual tax on enveloped dwellings** – the detailed rules are in sections 7 and 11.
- **inheritance tax** – the detailed rules are in sections 12 and 13.

#### **2.3.2 Summary: Income tax, corporation tax and capital gains tax**

Under the rules, a tax arrangement may need to be disclosed even if HMRC is already aware of it or it is not considered to be avoidance. A tax arrangement should be disclosed where:

- it will, or might be expected to, enable any person to obtain a tax advantage (see paragraph 6.2);
- that tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement (see paragraph 6.3); and

- it is a hallmarked scheme by being a tax arrangement that falls within any description (the “hallmarks”) prescribed in the relevant regulations – see section 7.

In most situations where disclosure is required it must be made by the scheme “promoter” within 5 days of one of three trigger events (see paragraph 14.3 for more detail on the events that trigger a disclosure). However, the scheme user may need to make the disclosure where:

- the promoter is based outside the UK;
- the promoter is a lawyer and legal professional privilege prevents him from providing all or part of the prescribed information to HMRC; or
- there is no promoter, such as when a person designs and implements their own scheme. (In such cases disclosure must be made within 30 days of the scheme being implemented – see paragraph 14.6.)

There is more guidance on who discloses in section 3 and the time limits for doing so in section 14.

Once a scheme has been disclosed, HMRC will normally issue the person who has made the disclosure and any co-promoters with a scheme reference number. This number must then be sent on to clients and, if appropriate, on again to further clients until the final user of the scheme has received it. The scheme user must report their use of the scheme to HMRC by including the number on their tax return or on form AAG 4. There is more on this in section 17, including what to do when a promoter’s client is not the person expected to obtain an advantage from the scheme.

A promoter must also provide HMRC with periodic lists of persons to whom they become liable to issue a scheme reference number (see section 16).

### **2.3.3 Summary: National Insurance contributions**

The rules for disclosing hallmarked NI contribution schemes mirror those that apply to income tax hallmarked schemes with some minor differences explained at the relevant paragraphs of this guidance. Where there is both an NI contribution advantage and a tax advantage only one disclosure need be made but it must identify both advantages.

### **2.3.4 Summary: Stamp duty land tax**

From 1 November 2012 the descriptions of stamp duty land tax arrangements required to be disclosed were extended so that they now cover schemes intended to be used for non-residential and/or residential property of any value, subject to the following exceptions.

- Arrangements that were first made available for implementation before 1 April 2010 unless those arrangements fall within certain descriptions (paragraph

9.7.2);

- Arrangements falling within a “white list”, which includes the single use of a number of statutory reliefs (paragraphs 9.7-9.10).

The SRN system has applied to SDLT schemes since 1 April 2010.

With effect from 1 November 2012, the normal rule that a promoter has to disclose a scheme once only (unless it changes substantially) is overridden where:

- The scheme falls within certain descriptions (paragraph 14.2.4); and
- It was disclosed before 1 April 2010;

so as to require one further disclosure if the promoter continues to sell the scheme. The purpose of this change is to enable the scheme to be issued with a SRN so that its users are identified (paragraph 14.2.4).

### **2.3.5 Summary: Annual Tax on Enveloped Dwellings**

The regime was extended, with effect from 4 November 2013 to require the disclosure of certain arrangements where the aim was to reduce or avoid the Annual Tax on Enveloped Dwellings.

### **2.3.6 Summary: Inheritance tax**

The regime was extended, with effect from 6th April 2011, to require the disclosure of certain inheritance tax (‘IHT’) arrangements where the aim of those arrangements is to seek to avoid or reduce the IHT entry charge when transferring property into trust.

The main difference compared to the disclosure regime for income tax, corporation tax, and capital gains tax is that in order for an inheritance tax scheme to be disclosable:

- the arrangements must result in property becoming “relevant property” as defined under s.58(1) of the Inheritance Tax Act 1984;
- the main benefit of the arrangements is the reduction, deferral or avoidance of the IHT entry charge.

Disclosure is only required for schemes that are new or innovative. Schemes which are the same or substantially the same as arrangements made available before 6th April 2011 are exempted from disclosure.

### 3. Who discloses?

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#### 3.1 General

The duty to disclose normally falls on the scheme promoter, however special rules apply when:

- a non-UK based promoter does not disclose a scheme – here the client of the promoter is required to disclose the scheme (see paragraph 3.9).
- the promoter is a lawyer and legal professional privilege prevents him from providing all or part of the prescribed information to HMRC – here the lawyer's client must disclose the scheme (see paragraph 3.10).
- there is no promoter (i.e. the scheme is devised 'in-house' for use within that entity or a corporate group to which it belongs) – here the scheme is disclosed by the scheme user (see paragraph 3.11).

**Warning:** Penalties can apply if a scheme is not disclosed accurately and at the right time (see section 22).

The Counter-Avoidance Directorate in HMRC works closely with compliance teams to ensure that schemes have been disclosed properly. Anyone likely to have a liability to disclose a scheme should ensure that effective identification and reporting arrangements exist.

#### 3.2 Who is a promoter? (FA 2004, s.307)

You may be a promoter if, in the course of providing services relating to taxation (or, where applicable, National Insurance contributions), or if you are a bank or securities house, you:

- are to any extent responsible for the design of a scheme;
- make a firm approach to another person with a view to making a scheme available for implementation by that person or others;
- make a scheme available for implementation by others; or
- organise or manage the implementation of a scheme.

Both UK and non-UK based promoters are subject to the disclosure rules but they only apply to the extent that the scheme enables or is expected to enable a UK tax advantage to be obtained.

### **3.3 Who is an introducer? (FA 2004, s.307)**

FA 2010 included a new category of person for information power purposes, an 'introducer,' to describe persons who advertise notifiable schemes on behalf of a promoter but whose role does not extend to that of a promoter (see paragraph 3.2 above). 'Introducer' is defined in s.307(1A) FA 2004 as a person who 'makes a marketing contact' in relation to a notifiable scheme. You will find guidance on making a marketing contact in paragraph 3.6.1.

In the remainder of this paragraph we use the term "introducer" to refer to a person who is purely an introducer and not a promoter. Such an introducer will not have been involved in the design of the scheme and may not know how the scheme is intended to work. Their role is simply to market the scheme to potential users and put them in touch with the promoter. Introducers will often, but not always, be IFAs.

The disclosure rules do not impose any automatic reporting obligations on an introducer. However an introducer can be required to provide HMRC with information in response to an information notice from HMRC under s.313C FA 2004 (see paragraph 21.4.3).

### **3.4 Scheme designers**

A person who is only involved in the design of a scheme, and does not make the scheme available for implementation by others or organise or manage it, is not a promoter if any one of three tests is passed. These are:

- the benign test (see paragraph 3.4.1);
- the non-advisor test (see paragraph 3.4.2); and
- the ignorance test (see paragraph 3.4.3).

#### **3.4.1 The benign test (SI 2004/1865, reg. 4(1) and (2))**

The benign test applies where, in the course of providing tax (or National Insurance contributions) advice, the person is not responsible for the design of any element of the arrangement or proposal (including the way in which it is structured). For example, a promoter marketing or designing a scheme may consult a second firm to provide advice in relation to a particular element of it. This second firm will not be a promoter, despite being involved in the design of the overall scheme, so long as any tax (or National Insurance contributions) advice does not contribute to the tax (or National Insurance contributions) advantage element of it.

For example, a promoter may seek advice from an accounting or law firm on whether two companies are "connected" for any purpose of the Taxes Acts. Provided the advice goes no further than explaining the interpretation of words used in tax legislation, it would be benign; as would advice on general compliance requirements and so on.

On the other hand, if the advice given seeks to highlight opportunities to exploit the relevant provisions then it is not benign advice.

Where the advice recommends some alteration to “a taxpayer’s affairs”, then whether the advice is benign will depend on the expected tax outcomes of any transactions entered into as a result of the advice.

### **3.4.2 The non-adviser test (SI 2004/1865, reg. 4(1) and (3))**

The non-adviser test applies where a person who, although involved in the design of a scheme, does not contribute any tax advice. This test does not apply to a bank or securities house.

This might typically happen where:

- a promoter consults a law firm (which has a business that includes giving tax advice) in relation to company law. The law firm will not become a promoter as long as it provides no tax advice (other than benign advice) in the course of carrying out its responsibilities; or
- a promoter consults an accounting firm in relation to accounting aspects of a scheme. The firm is not a promoter so long as it provides no tax advice in the course of carrying out its responsibilities.

### **3.4.3 The ignorance test (SI 2004/1865, reg. 4(1) and (4))**

The ignorance test applies when a person could not reasonably be expected to have either:

- sufficient information to enable them to know whether or not the arrangements are disclosable schemes; or
- sufficient information so as to enable that person to comply.

This test might apply where, for example, a person has insufficient knowledge of the overall arrangements to know whether the “benign” or “non-adviser” tests are failed; or has only a partial understanding of the scheme so that they would be unable to comply with the disclosure requirements.

Where having the relevant “information” depends not merely upon factual knowledge, but upon the application of some particular expertise, persons will not normally be expected to have such an expertise if it falls outside their own area of professional expertise (unless the matters in question can reasonably be said to be common knowledge amongst business and professional persons generally).

## **3.5 Who makes a scheme available for implementation by others?**

A person makes a scheme available for implementation if and when:

- the scheme is fully designed;

- it is capable of implementation in practice; and
- he/she communicates information about the scheme to potential clients suggesting that they consider entering into transactions forming part of the scheme.

The design of a scheme will typically consist of a number of elements (e.g. a partnership, a loan, partner's contributions, the purchase of assets, etc) structured to deliver the expected tax advantage. The scheme will be capable of implementation in practice only when the elements of the design have been put into place 'on the ground'. So, for example, if the design includes a loan, it will be capable of implementation only if and when an actual loan provider is in place and funds made available.

A scheme can be made available by more than one person such as by the scheme designer or those who provide the scheme under a licensing agreement with the designer. Each such person may be a promoter for disclosure purposes and have obligations as described in this guidance. Paragraph 14.2.2 describes when a co-promoter is exempt from making disclosure. However, co-promoters are not exempt from other obligations, such as providing their client with the relevant scheme reference number (see paragraph 17.2).

A person who acts solely as an intermediary between a scheme provider and a potential scheme user (i.e. they seek clients for the provider, not themselves) is not a promoter.

For stamp duty land tax schemes, a person providing the typical services of a conveyancer, and nothing more, will not be a scheme promoter.

Paragraph 14.3 provides information on when a scheme is 'made available for implementation by others'.

### **3.6 Who makes a firm approach to another person with a view to making a scheme available for implementation by that person or others?**

This leg of the definition of 'promoter' was inserted by FA 2010. The change, combined with an addition to the list of events that trigger a disclosure (see paragraph 14.3), is intended to ensure that HMRC gets early information about marketed schemes. The change ensures that a disclosure is triggered as soon as a person takes steps to market the scheme, whether or not it is or could be made available for implementation at the same time or later. **The legislation and associated guidance should be read in accordance with that policy intent.**

The legislation contains three key tests to determine whether or not a person (P) is a promoter under this leg of the 'promoter' definition. The three tests are:

- P 'makes a marketing contact' with another person (C) in relation to the scheme;
- At the time of the marketing contact, the scheme is 'substantially designed'; and



- P makes the marketing contact with a view to P making the scheme available for implementation by C or any other person.

### **3.6.1 The first test – P makes a marketing contact with C**

P makes a marketing contact with C if P:

- communicates information about the scheme to another person, C;
- the communication is made with a view to C (or any other person) entering into transactions forming part of the arrangements; and
- the information communicated includes an explanation of any tax advantage that a person might be expected to obtain from using the arrangements.

For a marketing contact to be made it is sufficient for the information communicated about the scheme to indicate the nature of the tax advantages persons using the scheme might expect to obtain. In order for there to be a marketing contact, it is not necessary for the information communicated to explain how the scheme works.

A person who makes a marketing contact may be either a promoter of the scheme or merely an introducer. And C may be the potential user, an introducer, or a co-promoter.

A person who makes a marketing contact will be a promoter if all of the three of the tests described in paragraph 3.6 are met.

A person who makes a marketing contact with a view to introducing clients to another person (the promoter) who will make the scheme available to them is a scheme introducer only. That person will not be a promoter because they will not meet the third test described below at paragraph 3.6.3. An introducer may be required to provide information to HMRC leading to the identification of the promoter (see paragraphs 3.3 & 21.4.3).

### **3.6.2 The second test – the scheme is substantially designed**

The statutory test is that a scheme is substantially designed at any time if, at that time, the nature of the transactions to form part of the scheme has been sufficiently developed that it would be reasonable to believe that a person who wishes to obtain the tax advantage communicated might enter into either:

- transactions of the nature developed at the time; or
- transactions not substantially different from those developed at the time.

This test must be read in conjunction with the first test. If the first test is met a person will have communicated information to third parties about a scheme, including information about an expected tax advantage, with a view to persons entering into the scheme. This second test asks whether the design is worked up to the point that it would be reasonable to conclude that the combination of transactions envisaged in the design would be used to deliver the advantage to anyone wishing to secure the advantage communicated, without the design requiring further, substantial, amendment. In practice, this point will normally coincide with the point where a promoter has sufficient confidence in the tax analysis of the scheme to market it.

It does not matter whether:

- the detailed design is communicated to potential clients (the test is that the design is in place at the time information is communicated to third parties);
- the scheme is eventually implemented in that form (the test is that it is reasonable to believe that it might be implemented in that form or substantially the same form);
- potential clients choose not to enter the scheme for reasons unconnected with the design. The test focuses on design of the scheme not the mind of potential clients. It asks a promoter to assume that a person will want to obtain the tax advantage offered, and then whether it is reasonable to believe the design the client would use would be this one (or would the design have to change substantially before the scheme could be implemented); or
- the scheme is capable of being implemented in practice (see paragraph 3.5) at this time. For example, the design of the scheme may include a loan. It does not matter whether or not an actual loan provider is in place at this point.

### **3.6.3 The third test – does P intend to make the scheme available himself for implementation by clients?**

The test is that a person makes a marketing contact with a view to making the scheme available **himself** (i.e. he is making a marketing contact with a view to obtaining clients who will buy the scheme from him).

A person who is simply an introducer will not meet this test and will not be a promoter because an introducer solicits clients for another person (the promoter) not himself.

### **3.7 Scheme organisers and managers (SI 2004/1865, reg. 5)**

A person who organises or manages a scheme that they did not design or make available for implementation is not regarded as a promoter if he is unconnected with a person who has marketed or designed it or similar schemes.

If the person who organises or manages the scheme is connected with a person who has designed or made it or similar schemes available for implementation, the need for both persons to make a disclosure will not arise when the co-promoter rule applies (see paragraph 14.2.2).

Sections 993 of ITA 2007 and 1122 of CTA 2010 apply to determine whether a person is connected with another.

### **3.8 Corporate groups (SI 2004/1865, reg. 2)**

A group company that provides tax services to other companies within the same group is not a promoter. This ensures that disclosable schemes devised within a group for its own use are disclosed in the same way as those devised by a single company “in-house” for its own use – see paragraph 3.11

For the purpose of these rules a company is a group company where it is a member of a group under any of the existing provisions of the Taxes Acts, for example group relief and/or capital gains, but as modified by SI 2004/1865, reg. 2.

### **3.9 Schemes marketed by offshore promoters (FA 2004, s.309)**

The obligations on promoters to disclose schemes they market and/or design apply to both UK and non-UK based promoters. Where a non-UK based promoter fails to disclose a scheme when required to do so, the client must make the disclosure. The time limits are described at paragraph 14.4.

A non-UK based promoter who has disclosed a scheme will be able to provide his or her clients with the 8-digit reference number issued by the Counter-Avoidance Directorate in HMRC.

If you are a user of such a scheme please contact the Counter-Avoidance Directorate for advice if you are unsure whether these rules apply to you – see paragraph 1.7.

### **3.10 Schemes promoted by lawyers (FA 2004, s.310 and SI 2004/1865, reg. 6)**

Schemes promoted by lawyers are within the scope of the disclosure rules in the same way as for other promoters.

However, where an adviser who would ordinarily be a promoter is prevented by reason of legal professional privilege from providing any of the information needed to make a full disclosure, that adviser has no obligation to make a disclosure. Unless there is another promoter who has an obligation to disclose the scheme, it must be disclosed by any person in the UK who enters into any transaction forming part of it. But the client of the lawyer has the option of waiving any right to legal privilege. If legal privilege is waived the lawyer is required to disclose.

The following important points should be noted in relation to waiver of legal privilege:

- any waiver must be made within sufficient time to enable the lawyer to disclose within 5 days of the scheme being made available (see paragraph 14.2.1), otherwise the client must make the disclosure within 5 or 30 days, as applicable, of the first transaction (see paragraph 14.5); and
- any waiver can be limited by the client so as to apply only to the extent necessary to enable the lawyer to comply with the disclosure obligation and to have no relevance for any other purpose.

Your lawyer or tax adviser will be able to help you but you can also contact the Counter-Avoidance Directorate in HMRC if you are in doubt – see paragraph 1.7.

Where a lawyer is “marketing” a scheme, as described at paragraph 14.3, the lawyer cannot assert legal privilege. This means that such marketing is subject to the disclosure obligation and the lawyer should disclose the scheme (providing the other conditions are met) to the Counter-Avoidance Directorate in the normal way.

### **3.11 Schemes with no promoter, including “in-house” schemes (FA 2004, s.310)**

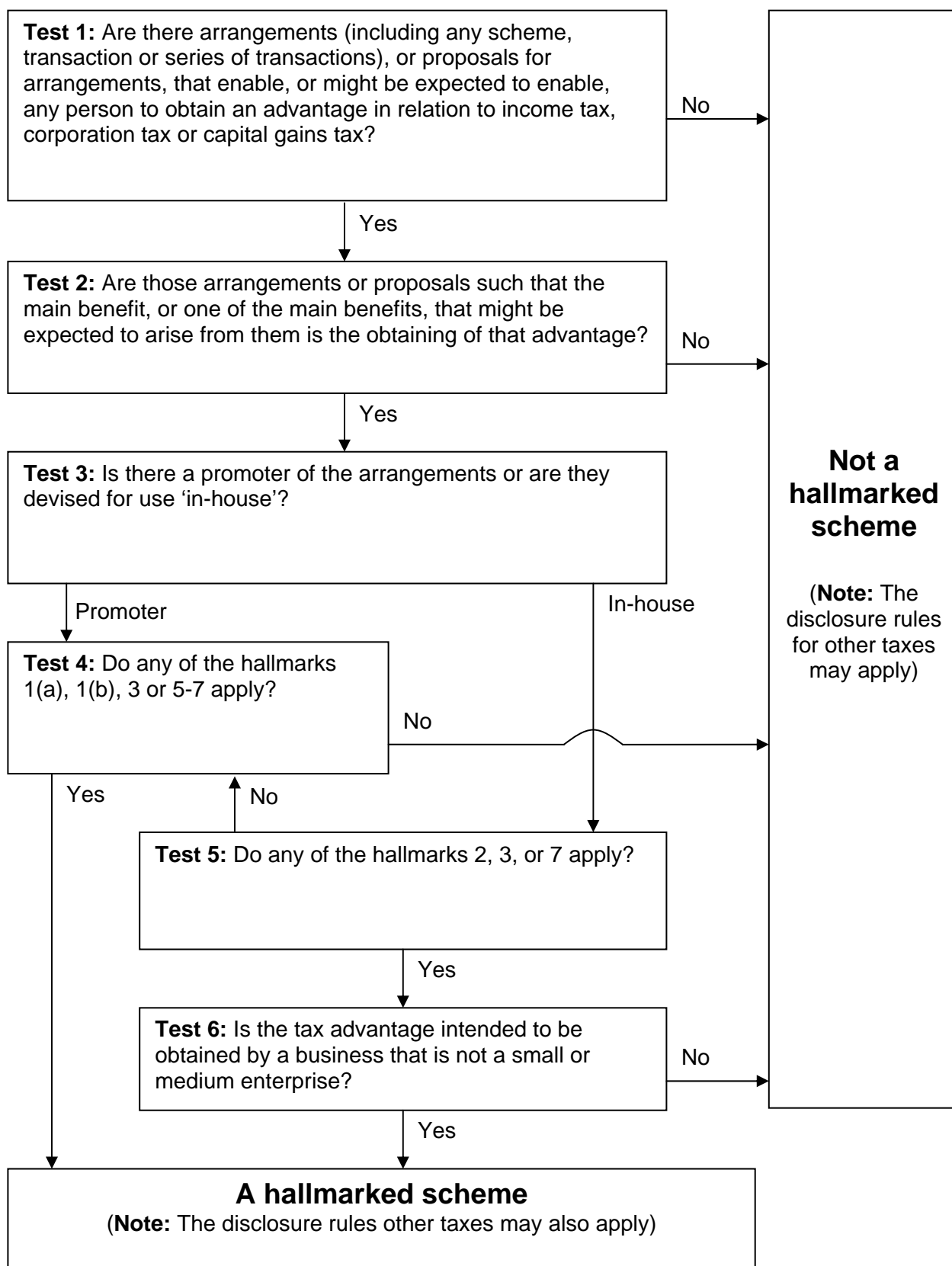
Where there is no person who is a “promoter” in respect of a scheme, it must be disclosed by any person in the UK who enters into any transaction forming part of it. Whilst these rules can apply to an individual, partnership, trust or company, we expect them to be of most relevance to those companies with their own in-house tax departments.

Hallmarked schemes and hallmarked NI contribution schemes with no promoter are generally only required to be disclosed where the advantage is intended to be obtained by a business that is not a small or medium enterprise (see paragraph 6.6).

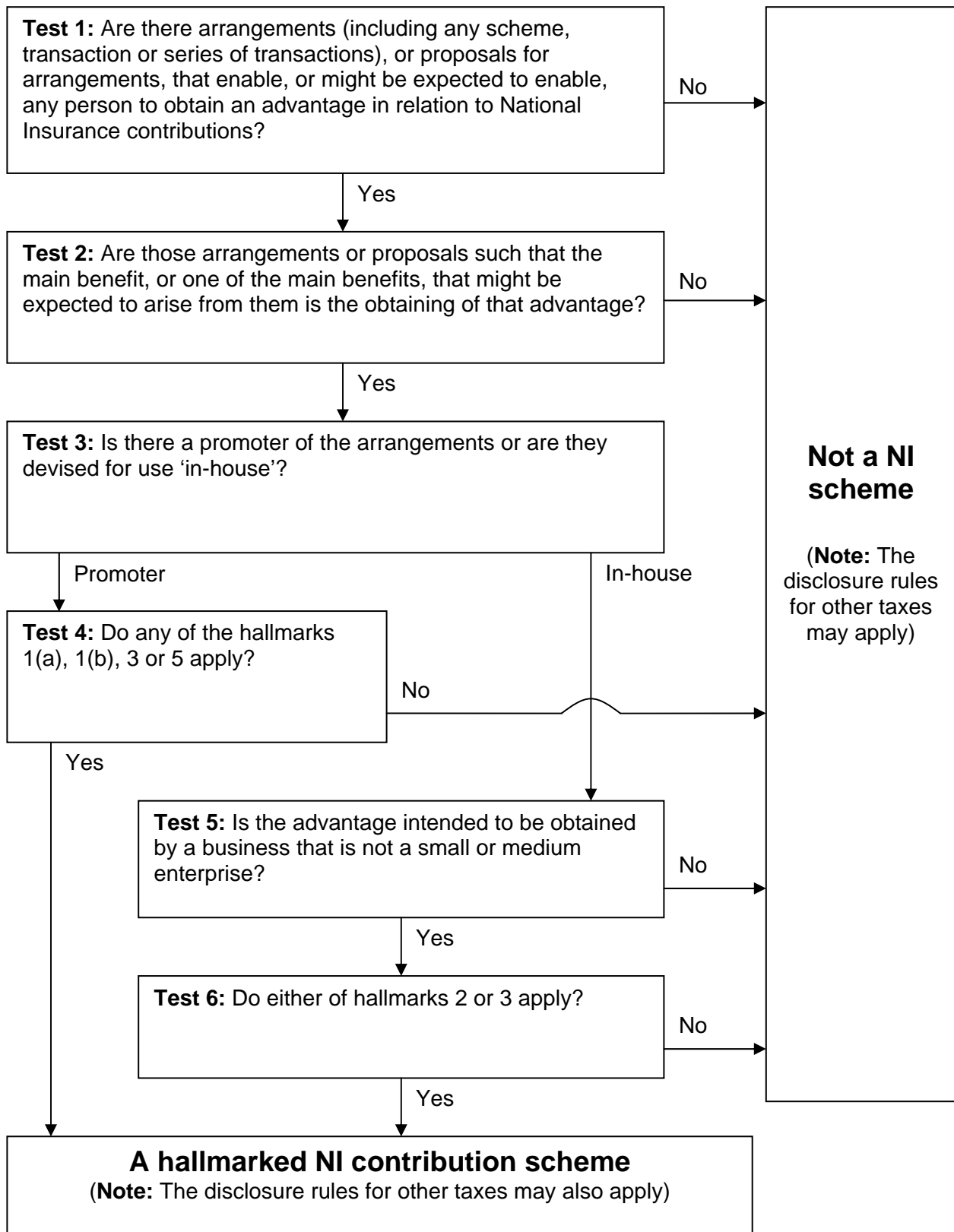
For stamp duty land tax schemes and Inheritance tax schemes, any in-house user has to disclose (see sections 8, 9, 12 and 13).

In both cases, disclosure only applies to schemes that have been implemented; there is no requirement to disclose mere plans and ideas.

#### 4. Determining a hallmarked scheme – Flow chart



## 5. Determining a hallmarked NI contribution scheme – Flow chart



## **6. Determining a hallmarked, or hallmarked NI contribution, scheme – The tests**

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### **6.1 Application of this section to National Insurance contributions arrangements**

For the purposes of determining a hallmarked NI contribution scheme, any references in this section to tax should be construed as a reference to National Insurance contributions.

The table at paragraph 1.6 details the main corresponding or modifying legislative provisions.

### **6.2 Test 1: Are there arrangements that enable an IT, CT or CGT tax advantage be obtained? (FA 2004, s.306(1)(a) and (b))**

#### **6.2.1 Meaning of “arrangements” (FA 2004, s.318)**

The meaning of “arrangements” is not exhaustively defined in the primary legislation but includes any scheme, transaction or series of transactions.

#### **6.2.2 Meaning of “tax advantage” (FA 2004, s.318)**

The definition of “tax advantage” is drawn from the definition of tax advantage in ITA 2007 s687 and CTA 2010 s732 (formerly s709 ICTA 1988). Unlike ss687 and 732 the definition makes specific reference to the deferral of tax and the avoidance of an obligation to deduct tax (for example under PAYE). It should not be inferred from this that ss687 and 732 do not extend to deferral or avoiding an obligation to deduct tax.

In the context of ss682 ITA 2007 and s731 CTA 2010 the Courts have considered ss687 and 732 on a number of occasions. We expect the existing body of case law to apply equally for disclosure purposes. From these cases some general points can be made:

- The definition of tax advantage in ss687 ITA 2007 and 732 CTA 2010 is very widely drawn and consequently we expect that FA 2004, s.318 will also be construed widely. It includes the avoidance or reduction of a charge to tax, a relief from tax, repayment of tax and as mentioned the deferral of tax or the avoidance of an obligation to deduct tax.
- Where the scheme is expected to result in tax being avoided or reduced then the long-standing Judgment of Lord Wilberforce in CIR v Parker (1966 AC 141) applies and the existence of a tax advantage is tested on a comparative basis.
- In a more recent case Sema Group Pension Fund (2003 STC 95) Lord Justice Parker said that “what the draftsman was manifestly trying to do when defining ‘tax advantage’ in s709(1) was to cover every situation in which the position of the taxpayer vis-à-vis the Revenue is improved in consequence of the particular transaction or transactions”. This has been regarded by some outside commentators as widening the definition still further. However, in our view Sema is consistent with earlier cases.

- A relief or exemption from tax, substantial shareholdings, loss relief, group relief, etc will give rise to a tax advantage as defined.

In deciding whether the necessary comparison can be made it should be noted that the very wide range of possible ways in which tax arrangements might be structured made it impossible to outline in regulations the range of schemes likely to come within the disclosure rules. Such schemes may involve for example, income being received in capital form or rewards for remuneration being structured to fall outside the provisions of ITEPA or an imbalance between the economic cost of the tax advantage and the value of that advantage to the taxpayer.

For National Insurance contributions purposes, the definition potentially applies to all classes of National Insurance.

### **6.3 Test 2: Is the advantage a main benefit of the arrangements? (FA 2004, s.306(1)(c))**

The following general points can be made as to when a tax advantage will be regarded as one of the main benefits:

- In our experience those who plan tax arrangements fully understand the tax advantage such schemes are intended to achieve. Therefore we expect it will be obvious (with or without detailed explanation) to any potential client what the relationship is between the tax advantage and any other financial benefits of the product they are buying.
- The test is objective and considers the value of the expected tax advantage compared to the value of any other benefits likely to be enjoyed.

### **6.4 Test 3: Is there a promoter of the arrangements? (FA2004 s.307, s309, s310 SI 2004/1865)**

The purpose of this test is to distinguish between arrangements that are promoted and those that are designed 'in-house' for use by the business that devised it. The distinction is important for two reasons:

- different hallmarks apply to promoted and 'in-house' schemes; and
- 'in-house' schemes are only required to be disclosed when the tax advantage is intended to be obtained by a business that is not a small or medium enterprise.

A scheme is a promoted scheme even where the user is required to disclose the details of it to HMRC as a result of the promoter being either:

- offshore and failing to disclose the scheme to HMRC – see paragraph 3.9; or
- a lawyer who is prevented by legal and professional privilege from providing all of the prescribed information to HMRC – see paragraph 3.10.

### **6.5 Test 4: The hallmarks for arrangements where there is a promoter**

When there is a promoter of the arrangement, it is a hallmarked scheme when any one of the following hallmarks applies:

- Hallmark 1(a): Confidentiality from other promoters – see paragraph 7.3.2



- Hallmark 1(b): Confidentiality from HMRC – see paragraphs 7.3.3 to 7.3.6
- Hallmark 3: Premium fee – see paragraph 7.5
- Hallmark 4: [omitted - off market terms hallmark omitted by SI 2010/2834]
- Hallmark 5: Standardised tax products – see paragraph 7.7
- Hallmark 6: Loss schemes – see paragraph 7.8
- Hallmark 7: Leasing arrangements – see paragraph 7.9
- Hallmark 8: [omitted – pensions hallmark ceased to have effect on 6/4/11]
- Hallmark 9: Employment Income – see paragraph 7.11

Hallmarks 6 and 7 do not apply when determining a hallmarked NI contribution scheme.

#### **6.6 Test 5: The hallmarks for ‘in-house’ arrangements**

When the arrangement is designed ‘in-house’, it is a hallmarked scheme when any one of the following hallmarks applies. The first three hallmarks below only apply when the person receiving the tax advantage is not a small or medium enterprise (see paragraph 6.7 below):

- Hallmark 1(b): Confidentiality from HMRC – see paragraphs 7.3.3 to 7.3.6
- Hallmark 3: Premium fee – see paragraph 7.5
- Hallmark 7: Leasing arrangements – see paragraph 7.9
- Hallmark 9: Employment Income – see paragraph 7.11

Hallmark 7 does not apply when determining a hallmarked NI contribution scheme.

#### **6.7 Test 6: Is the person intended to obtain the advantage a large business? (SI 2006/1543, regs. 3 and 4)**

If you devise a tax arrangement for use ‘in-house’, you need only consider if it is a hallmarked scheme (and disclose it to HMRC) if the person intended to obtain the tax advantage is a business that is not a small or medium enterprise.

“Businesses” are:

- companies;
- partnerships; and
- any other person whose profits are charged to income tax as trading or property income.

Guidance on whether a business is a small or medium enterprise for the purposes of the 2003 EC Recommendation tests is at CIRD91400. See in particular the flow chart at CIRD92850.

## **7. The hallmarks (not applicable to stamp duty land tax, Annual Tax on Enveloped Dwellings or Inheritance Tax)**

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### **7.1 About the hallmarks**

The legislation sets out a number of descriptions of arrangements that are referred to as 'hallmarks' in this guidance.

Some of these are designed to capture new and innovative arrangements. Others are designed to capture areas of specific concern. These may include schemes that are well known or commonly used.

The hallmarks are not mutually exclusive – an arrangement may be a hallmarked scheme, or hallmarked NI contribution scheme, by virtue of one or more of the hallmarks.

It is expected that the range of hallmarks will change over time, such as to test perceived changes in the avoidance market place or the effectiveness of an Counter-Avoidance measure.

The absence of a hallmark should not be regarded as an indicator that arrangements not caught constitute practices that are acceptable to HMRC.

Similarly, we do not regard all arrangements that include or meet a hallmark description as practices that are unacceptable to us – whilst we have tried to keep burdens to a minimum, you may have to tell us about schemes that may not be considered to be avoidance.

### **7.2 Application of this section to National Insurance contribution schemes**

For the purposes of determining a hallmarked NI contribution scheme, any references in this section to tax should be construed as a reference to National Insurance contributions. The table at paragraph 1.6 details the main corresponding or modifying legislative provisions.

Hallmarks 6 (loss schemes) and 7 (leasing arrangements) and the annual tax on enveloped dwellings hallmarks do not apply when determining a hallmarked NI contribution scheme.

### **7.3 Hallmarks 1(a) and (b): Confidentiality where promoter involved**

#### **7.3.1 The legislation**

Hallmarks 1(a) and (b) are prescribed by regulation 6 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543) as amended by the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) (Amendment) Regulations 2013 (2013 No. 2595).

#### **Commencement**

The 2013 regulations came into force on 4 November 2013 and do not have effect where:

- The relevant date under section 308 (1) for the promoter to provide the prescribed information in respect of a notifiable proposal is before 4 November 2013, or
- The date under section 308 (3) on which the promoter first becomes aware of any transaction that is part of notifiable arrangements is before 4 November 2013.

This guidance therefore applies where the promoter has a duty to provide prescribed information on a notifiable proposal or becomes aware of a transaction forming part of notifiable arrangements on or after 4 November 2013.

**Description 1: Confidentiality where promoter involved**

6(1) Arrangements are prescribed if

- (a) any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements; and
- (b) it might reasonably be expected that a promoter would wish the way in which that element of those arrangements secures, or might secure, a tax advantage to be kept confidential from any other promoter at any time following the material date.

6(2) Arrangements are prescribed if it might reasonably be expected that a promoter would, but for the requirements of these Regulations, wish to keep the way in which any element of those arrangements (including the way in which the arrangements are structured) secures, or might secure, the tax advantage confidential from HMRC at any time following the material date, and a reason for doing so is to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

6 (2A) Cases where arrangements will be prescribed under paragraph (2) include, but are not limited to, where –

- (a) a promoter does not provide to the user of the arrangements (“the user”), or prevents or discourages the user of the arrangements from retaining any promotional materials, data or written professional advice relating to those arrangements; and
- (b) it might reasonably be expected that the reason for doing so is to keep the arrangements confidential from HMRC in order to facilitate repeated or continued use of any element of those arrangements..

6(3) In a case where—

- (a) by virtue of regulation 6 of the Promoters Regulations, no person is to be treated as the promoter in relation to the arrangements; or
- (b) by virtue of section 309(1) of FA 2004 (duty of person dealing with promoter outside United Kingdom), a user of the arrangement has a duty to provide prescribed information,

for paragraph (2) substitute –

“6(2) Arrangements are prescribed if it might reasonably be expected that the user of the arrangements would, but for the requirements of these regulations, wish to keep the way in which any element of those arrangements (including the way in which the arrangements are structured) that secures the tax advantage confidential from HMRC at any time following the material date.”

**Definition of “the material date” (Regulation 2(2) SI 2006/1543)**

*“the material date” means whichever of the following is applicable –*  
*(a) for a proposal notifiable under section 308(1) of FA 2004, the relevant date (as defined in section 308(2) of FA 2004);*  
*(b) for arrangements notifiable under section 308(3) of FA 2004, the date the promoter first becomes aware of any transaction forming part of the notifiable arrangements; or*  
*(c) for arrangements notifiable under section 309 or 310 of FA 2004, the date the person enters into any transaction forming part of the notifiable arrangements.”*

**7.3.2 Hallmark 1(a): Confidentiality from competitors**

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4).

The test requires the person with a prima facie duty to disclose the arrangements to ask themselves the hypothetical question:

“Might it reasonably be expected that any promoter of the arrangements would wish the way in which any element of those arrangements (including the way in which they are structured) gives rise to and secures, or might secure, the expected tax advantage to be kept confidential from any other promoter,

... at any time following the material date?” (see paragraph 7.3.5)

The test would be answered in the affirmative if an element of the scheme were sufficiently new and innovative that a promoter would want the details to remain secret in order to maintain their competitive advantage and ability to earn fees.

When applying the test the promoter should first consider its own position and if it concludes that it would want to keep the arrangement confidential from another promoter then the arrangement is within the hallmark. If the promoter concludes that it does not want to keep the arrangement confidential from another promoter then it needs to consider if it might reasonably be expected that another promoter would wish to keep the arrangement confidential.

When considering if another promoter would wish to keep the arrangement confidential the promoter should only attribute to the hypothetical promoter the knowledge and information that the promoter itself holds and should not attribute to the hypothetical promoter any other knowledge or information. In addition the promoter should assume that the hypothetical promoter takes a reasonable view of its obligations to disclose proposals and arrangements under DOTAS and does not take an extreme view.

The test is unrelated to:

- any general rule or agreement by a client that they keep advice confidential; or
- whether any fees charged would be at a premium level.

The use of an explicit confidentiality agreement before revealing full details of the scheme to a client by advisers who do not normally use such agreements may indicate that the test is met.

However, even if certain sectors promoting the scheme would routinely insist on an explicit confidentiality agreement from their clients, HMRC would accept the test is not met if the scheme is reasonably well known in the tax community. This can be evidenced from, for example, articles in the tax press, textbooks or case law.

### **7.3.3 Hallmark 1(b): Confidentiality from HMRC**

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4).

The amendments made by the 2013 Regulations put beyond doubt that this test requires the same approach as regulation 6(1), as described in paragraph 7.3.2 above.

The test requires the person with a prima facie duty to disclose the arrangements to ask themselves the hypothetical question:

- “Might it reasonably be expected that any promoter of the arrangements would wish the way in which any element of those arrangements (including the way in which they are structured) gives rise to and secures, or might secure, the expected tax advantage to be kept confidential from HMRC,
- ... at any time following the material date?” (see paragraph 7.3.5), and
- “Is a reason for doing so to facilitate the repeated or continued use of that element, or substantially the same element, in the future?” (This may be, for example, in order to secure fee income in the future. There is more on “repeated and continued use” at paragraph 7.3.6.).

When applying the test the promoter should only attribute to the hypothetical promoter the knowledge and information that the promoter itself holds and should not attribute to the hypothetical promoter any other knowledge or information. In addition the promoter should assume that the hypothetical promoter takes a reasonable view of their obligations to disclose proposals and arrangements under DOTAS and does not take an extreme view.

The test would be answered in the affirmative if an element of the scheme were sufficiently new and innovative that a promoter (including the promoter applying the test) would want the details to remain secret in order to facilitate repeated or continued use of any element of the arrangement.

The test applies to any scheme that HMRC would be likely to take action to counter (legislatively or operationally) if it knew about it.

However, where the person with a duty to disclose the arrangements is the scheme user, he must consider:

- “Do I wish to keep confidential from HMRC the way any element of the arrangements (including the way they are structured) gives rise to and secures, or might secure, the expected tax advantage ... (see paragraph 7.3.4);
- ... at any time following the material date?” (see paragraph 7.3.5).

In either case the relevant question(s) must be consciously answered at the time the relevant trigger for disclosure arises. (See also paragraph 7.3.5.)

Promoters will answer the relevant questions in one of the following ways:

- “I or any other promoter would wish to keep an element of the scheme confidential from HMRC in order to facilitate repeated or continued use of that element, or substantially the same element, in future”; or
- “I or any other promoter would not wish to keep any element of the scheme confidential from HMRC in order to facilitate repeated or continued use of that element, or substantially the same element, in the future but, and disregarding any obligation of confidentiality, I nevertheless wish to keep it confidential from HMRC for other reasons”; or
- “I or any other promoter would not wish to keep any element of the scheme confidential from HMRC”.

A promoter is not required to make disclosure under this hallmark where the answer falls within the second or third bullet.

The user will answer the relevant question in one of two ways:

- “I wish to keep an element of the scheme confidential from HMRC.”
- “I do not wish to keep any element of the scheme confidential from HMRC.”

The user is not required to make disclosure under this hallmark where the answer falls within the second bullet.

HMRC will expect promoters and users to answer the test fairly and act in accordance with the decision they make.

The 2013 Regulations put it beyond doubt that there does not need to be an explicit confidentiality agreement between the promoter and user about the arrangement before the test is met.

Regulation 6(2A) provides that arrangements will be prescribed under regulation 6(2) if the promoter does not provide, allow or discourages the user from retaining any promotional materials, data or written professional advice for those arrangements and it might reasonably be expected that the reason for doing so is to keep the arrangements confidential from HMRC so to facilitate repeated or continued use of the any element of the arrangements.

There may be circumstances where a promoter does not routinely provide to a client some information for reasons other than keeping the arrangement confidential from HMRC, for example detailed legal advice which the promoter does not share with the user in order to protect its legal privilege.

The regulation is not limited to these circumstances and will apply if it might reasonably be expected that other means would be used to keep the arrangement confidential from HMRC in order to facilitate the repeated or continued use of an element.

HMRC will not:

- assume that because a scheme was not disclosed that the promoter wanted to keep it confidential from HMRC (likewise, a promoter is not required to disclose everything just to prove there was nothing to disclose); or
- carry out “fishing expeditions” to determine what schemes have not been disclosed under this hallmark.

If HMRC discover a scheme that has not been disclosed we will, when considering whether the test has been applied correctly, examine all the evidence and form a balanced view as to why it was not disclosed. Indicative factors include:

- How new, innovative and aggressive the scheme is. Schemes that promoters know to be known to HMRC are not caught by the hallmark. These can be evidenced from, for example, technical guidance notes, case law, or past correspondence with a case officer in HMRC or between HMRC and a professional body where the detail of how the scheme works has been made clear.
- Whether a promoter imposes an obligation upon potential clients, whether in writing or verbally, to keep the details of the scheme confidential from third parties including HMRC. This factor would not be considered if the agreement is a general agreement.
- Whether a promoter does not provide to, or otherwise prevents or discourages the user from, retaining promotional materials, data or written professional advice so that such information cannot be provided by the user to HMRC.
- Whether confidentiality agreements, general or specific, between a promoter and client allow the client to disclose information to HMRC without referral to the promoter.
- The use of explicit warnings in marketing material or other communications to a client to the effect that the scheme may have a limited “shelf life” because Parliament may act to close it once it became known.
- The degree of co-operation to requests for information from HMRC concerning a specific scheme and the reasons for not providing information.



#### **7.3.4 Hallmark 1(b): “Any element” of the arrangements**

The hallmark asks whether the promoter or scheme user (as applicable) wants to keep any element of the arrangements confidential from HMRC. This could include part of a bespoke arrangement where the totality of the scheme will not be repeated.

#### **7.3.5 Hallmark 1(b): Confidential “at any time”**

The hallmark asks whether the promoter or scheme user (as applicable) wants to keep an element of the scheme (including the way it is structured) confidential from HMRC at any point in time after the requirement to disclose the arrangements has been triggered. It is not relevant if it is wished that the scheme be kept confidential before this time.

#### **7.3.6 Hallmark 1(b): Repeated and continued use of the element**

The hallmark asks, where applicable, whether the promoter wants to keep an element of the scheme (including the way it is structured) confidential from HMRC in order to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

“Repeated use” – the test examines whether the key element that achieves the tax advantage is being kept confidential in order to insert it into further schemes used by either other clients or the same client. It could apply, for example, where the totality of the scheme is expected to be repeatable in its generic form time and again, or where the key element was conceived as part of a bespoke scheme and then recorded on a register for use in other schemes in the future.

“Continued use” – the test examines whether the element that seeks to achieve the tax advantage is being kept confidential in order to allow the tax advantage to accrue over time or the scheme to run its course.

### **7.4 Hallmark 2: Confidentiality where no promoter involved**

#### **7.4.1 The legislation**

Hallmark 2 is prescribed by regulation 7 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

#### ***Regulation 7***

*(1) Arrangements are prescribed if—*

*(a) no person is a promoter in relation to them;*

*(b) the intended user of the arrangements is a business which is not a small or medium-sized enterprise;*

*(c) any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements;*

*(d) it might reasonably be expected that a user would, but for the requirements of these Regulations, wish to keep the way in which that element secures the advantage confidential from HMRC at any time following the material date; and*

*(e) a reason for the user's wishing to keep the element confidential from HMRC is—*

*(i) to facilitate repeated or continued use of the same element, or substantially the same element, in the future; or*

*(ii) to reduce the risk of HMRC using that information to open an enquiry into any return or account which a person is required by or under any enactment to deliver to HMRC; or*

*(iii) to reduce the risk of HMRC using that information to withhold payment of all or part of an amount claimed separately from a return under—*

*(aa) section 261B of the Taxation of Chargeable Gains Act 1992 (treating trade loss etc as CGT loss); or*

*(bb) Part 4 of the Income Tax Act 2007 (loss relief).*

*(2) Arrangements are also prescribed if –*

*(a) paragraphs (1) (a) to (c) are met; and*

*(b) if there had been a promoter in relation to the arrangements it might reasonably have been expected that they would, but for the requirements of these Regulations, wish to have kept the way in which any element of the arrangements (including the way in which the arrangements were structured) that secured the advantage confidential from HMRC at any time following the material date, and a reason for doing so would be to facilitate repeated or continued use of the same element, or substantially the same element, in the future.*

#### **7.4.2 Confidentiality from HMRC**

This hallmark only applies to schemes devised for use 'in-house'. It does not apply where the person intended to obtain the tax advantage is a small or medium enterprise.

Regulation 7(1) requires that the in-house person has to consider whether or not a user would reasonably be expected to wish to keep the arrangements confidential from HMRC. The user may be the in-house user itself or a hypothetical user. If the in-house user would wish to keep any element of the arrangements confidential from HMRC then that is sufficient to meet the test. If not then the in-house user has to consider if any other user would wish to keep the arrangements confidential from HMRC.

When applying the test the in-house user should only attribute to the hypothetical user the knowledge and information that the in-house user itself holds and should not attribute to the hypothetical user any other knowledge or information. In addition the in-house user should assume that the hypothetical user takes a reasonable view of their obligations to disclose proposals and arrangements under DOTAS and does not take an extreme view.

So the test under 7(1) for a person using an in-house scheme is, having entered into a transaction forming part of the arrangements:

- “Do I wish to keep confidential from HMRC, or
- Would any user wish to keep confidential from HMRC
- the way any element of the arrangements (including the way they are structured) gives rise to and secures the expected tax advantage ... (see paragraph 7.3.4);
- ... at any time following the material date?” (see paragraph 7.3.5);
- “Is a reason for doing so to:
  - facilitate the repeated or continued use of that element, in the future?” (The guidance on “repeated and continued use” at paragraph 7.3.6, when read in the context of a scheme user, applies to this hallmark in the same way as it applies to hallmark 1(b)), or
  - reduce the risk that HMRC might open an enquiry into any return or account that I am required to make? or
  - reduce the risk that HMRC might withhold some or all of a repayment sought in a claim outside a return in respect of relief for losses under s261B Taxation of Chargeable Gains Act 1992 (trade loss treated as capital loss) or Part 4 Income Tax Act 2007 (loss relief)?

Again the test is not circular in that it does not mean that all undisclosed schemes are, by default, schemes that a taxpayer wishes to keep confidential and so should have been disclosed. The guidance on this at paragraph 7.3.3 applies equally here.

As for hallmark 1(b), if HMRC discover a scheme that has not been disclosed we will, when considering whether the test has been applied correctly, examine all the evidence and form a balanced view as to why it was not disclosed. Indicative factors include:

- How innovative or aggressive the scheme is. Schemes that taxpayers are aware to be known to HMRC are not caught by the hallmark;
- The degree of co-operation with requests for information from HMRC concerning a specific scheme and the reasons for not providing that information;
- Whether a taxpayer imposes an obligation upon other parties to the scheme, whether in writing or verbally, to keep the details of the scheme confidential from HMRC.

The 2013 Regulations introduced a new paragraph 7(2) for users of in house schemes. Again, it does not apply where the person intended to obtain the tax advantage is a small or medium enterprise. This applies alongside the test under paragraph 7(1).

The test under paragraph 7(2) requires the user of the in house scheme to consider, hypothetically, whether or not a promoter would disclose the arrangements in question. They must consider:

- “If there were a promoter for these arrangements, would it reasonably be expected that any promoter of the arrangements would wish the way in which any element of those arrangements (including the way in which they are structured) that secures the tax advantage to be kept confidential from HMRC, and a reason for doing so would be to facilitate repeated or continued use of the same element, or substantially the same element, in the future,
- ... at any time following the material date?” (see paragraph 7.3.5).

The test requires the in-house user to put themselves in the position of a promoter who would want to exploit the arrangement commercially. At the time of applying the test the in-house user may not have any intention of making the arrangement available to anyone else but they must apply the test nevertheless. The test, if answered in the affirmative, will provide HMRC with early information on in-house arrangements that could be made available to other users. To apply the test the in-house user needs to ask themselves –

- “If I were a promoter would I want to keep this arrangement confidential from HMRC so that I can re-use or continue to use any element of the arrangement?”

The relevant question(s) must be consciously answered at the time the relevant trigger for disclosure arises; failure to do this prima facie constitutes a breach of the disclosure obligation. Considering both paragraphs 7(1) and 7(2) together, the user of the in house scheme will answer the relevant questions in one of the following ways:

- “I do, or the hypothetical user or promoter would, wish to keep an element of the scheme confidential from HMRC”; or
- “I do not, and the hypothetical user or promoter would not, wish to keep any element of the scheme confidential from HMRC.”

The user of the in house scheme will not be required to make disclosure under this hallmark where the answer falls within the second bullet.

HMRC will expect users to answer the test fairly and act in accordance with the decision they make.

### **7.4.3 The timing rule**

The timing rule is by reference to the date on which the arrangements are implemented. The issue is whether there is a wish to keep the details confidential at any point after this time. It is also irrelevant whether the details would be disclosed on a return.

## **7.5 Hallmark 3: Premium fee**

### **7.5.1 The legislation**

Hallmark 3 is prescribed by regulation 8 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

## **Regulation 8**

*(1) Arrangements are prescribed if they are such that it might reasonably be expected that a promoter or person connected with a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements of these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.*

*But arrangements are not prescribed by this regulation if—*

- (a) no person is a promoter in relation to them; and*
- (b) the tax advantage as a matter of law which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.*

*(2) For the purposes of paragraph (1), and in relation to any arrangements, a “premium fee” is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises; and which is—*

- (a) to a significant extent attributable to that tax advantage, or*
- (b) to any extent contingent upon the obtaining of that tax advantage.*

### **7.5.2 Applying the hallmark**

This hallmark applies to both promoted and ‘in-house’ arrangements. For ‘in-house’ arrangements, it does not apply where the person intended to obtain the tax advantage is a small or medium enterprise.

The hallmark contains a hypothetical test that does not depend on a premium fee actually being received and considers whether in the absence of the Disclosure of Tax Avoidance Schemes regime a premium fee could be obtained. The question is whether it might reasonably be expected that a promoter could charge a premium fee if he wished to do so. That a promoter does not charge a premium fee is not conclusive, though the hallmark would be met if he does. “Fees” for these purposes are drawn very widely and include amounts paid directly or indirectly to the promoter.

The test should be applied from the perspective of a client who is experienced in receiving tax advice or other services of the type being provided. Our assumption is that where a client regards the advice as valuable and not generally available he would be prepared to pay a premium for it. Equally, by contrast, if similar advice was available elsewhere the client would be unwilling to pay more than a normal fee for it.

We know that the size of fee charged is not the only reason why a client may choose a particular accounting or law firm. So the hallmark is no more than a broad attempt to identify tax advice that is innovative and valuable and which the promoter can use to obtain premium fees from a client who is experienced in receiving services of the type being provided.

### **7.5.3 Is the fee significantly attributable to, or contingent on, the advantage?**

It is recognised that almost any fee obtained in relation to tax planning can to some extent be said to be attributable to obtaining a tax advantage. So a “premium fee” for this purpose is a fee that is to a significant extent attributable to the tax advantage or is contingent upon a tax advantage **as a matter of law** being obtained.

“As a matter of law” was inserted with effect from 1 January 2011 in order to limit the hallmark to situations where the fee is contingent upon the scheme delivering the expected tax advantage in the sense that the tax analysis underpinning the scheme is correct.

The hallmark will no longer apply to situations where the fee is contingent wholly on factors other than the tax analysis being correct. So, for example, it will not apply to salary sacrifice schemes where the fee is contingent upon the number of employees entering into the scheme.

In other words the hallmark works on the assumption that where a promoter is able to market a tax arrangement that is innovative then not all promoters will be in a similar position and potential users will be prepared to pay more to the promoter for that scheme.

When applying the hallmark you need to consider whether a fee could be charged in respect of any element of the tax arrangement such that it would to a significant extent be attributable to, or contingent upon, the expected tax advantage. So a fee is not a premium fee solely on account of factors such as:

- The adviser’s location – e.g. fees could be expected to be higher in London.
- The urgency of the advice – a fee that is higher due to the adviser having to give the advice urgently is not a premium fee for that reason alone.
- The size of the transaction – if a large amount is at stake on a deal, the tax adviser may wish to increase his fee to reflect the greater level of exposure.
- The skill or reputation of the adviser – some advisers normally charge more for advice than others to reflect the perceived higher quality of advice they offer.
- The scarcity of appropriately skilled staff – some areas of tax advice are more complex and fees may be higher to reflect this.
- The number of users who sign up for a scheme – in some schemes, for example certain salary sacrifice schemes, the size of the fee depends upon the number of employees who take up the scheme (see above).

### **7.6 [Hallmark 4: Off market terms – omitted]**

This hallmark was abolished with effect from 1 January 2011. If you wish to refer to the previous guidance on this hallmark you can access the February 2010 version which is available on the HMRC website here <http://www.hmrc.gov.uk/aiu/guidance.htm>.

## **7.7 Hallmark 5: Standardised tax products**

### **7.7.1 The legislation**

Hallmark 5 is prescribed by regulations 10 and 11 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI2006/1543):

#### ***Regulation 10***

*(1) Arrangements are prescribed if the arrangements are a standardised tax product.*

*But arrangements are excepted from being prescribed under this regulation if they are specified in regulation 11.*

*(2) For the purposes of paragraph (1) arrangements are a product if—*

*(a) the arrangements have standardised, or substantially standardised, documentation -*

*(i) the purpose of which is to enable the implementation, by the client, of the arrangements; and*

*(ii) the form of which is determined by the promoter, and not tailored, to any material extent, to reflect the circumstances of the client;*

*(b) a client must enter into a specific transaction or series of transactions, and*

*(c) that transaction or that series of transactions are standardised, or substantially standardised in form.*

*(3) For the purpose of paragraph (1) arrangements are a tax product if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage.*

*(4) For the purpose of paragraph (1) arrangements are standardised if a promoter makes the arrangements available for implementation by more than one other person.*

#### ***Regulation 11: Arrangements excepted from [hallmark] 5***

*(1) The arrangements specified in this regulation are—*

*(a) those described in paragraph (2); and*

*(b) those which are of the same, or substantially the same, description as arrangements which were first made available for implementation before 1st August 2006.*

*(2) The arrangements referred to in paragraph (1)(a) are—*

- (a) *arrangements which consist solely of one or more plant or machinery leases (see regulation 14);*
- (b) *an enterprise investment scheme (Chapter 3 of Part 7 of ICTA 1988 and Schedules 5B and 5BA to TCGA 1992); [Now Part 5 ITA 2007]*
- (c) *arrangements using a venture capital trust (see section 842AA of, and Schedule 15B to, ICTA 1988 and Schedule 5C to TCGA 1992); [Now Part 6 ITA 2007]*
- (d) *arrangements qualifying under the corporate venturing scheme (see Schedule 15 to the Finance Act 2000);*
- (e) *arrangements qualifying for community investment tax relief (see Schedules 16 and 17 to the Finance Act 2002); [Now Part 7 ITA 2007 and Part 7 CTA 2010]*
- (f) *an account which satisfies the conditions in the Individual Savings Account Regulations 1998;*
- (g) *an approved share incentive plan (see Chapter 6 of Part 7 of, and Schedule 2 to, ITEPA 2003);*
- (h) *an approved share option scheme (see Chapter 7 of Part 7 of, and Schedule 3 to, ITEPA 2003);*
- (i) *an approved CSOP scheme (see Chapter 8 of Part 7 of, and Schedule 4 to, ITEPA 2003);*
- (j) *the grant of one or more qualifying options which meet the requirements of Schedule 5 to ITEPA 2003 (enterprise management incentives)—*
  - (i) *together only with such other steps as are reasonably necessary in all the circumstances for the purposes of facilitating it, or*
  - (ii) *which fall to be notified to the Board in accordance with Part 7 of that Schedule;*
- (k) *a registered pension scheme (see section 150(2) of FA 2004);*
- (l) *an overseas pension scheme in respect of which tax relief is granted in the United Kingdom under section 615 of ICTA 1988 (exemption from tax for superannuation payments in respect of persons not resident in the United Kingdom or in respect of trades carried on wholly or partly outside the United Kingdom);*
- (m) *a pension scheme which is a relevant non-UK pension scheme within the meaning given by paragraph 1(5) of Schedule 34 to FA 2004;*
- (n) *a scheme to which section 731 of ITTOIA 2005 applies (periodical payments of personal injury damages).*



### **7.7.2 About the hallmark**

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4) and, other than some exceptions, is intended to capture what are often referred to as “mass marketed schemes”.

The fundamental characteristic of such schemes is their ease of replication rather than the volume of take-up or how they are made available – the number of clients, or potential clients, can vary enormously; as can the way in which they are “marketed”. Schemes with this replication characteristic have variously been described to us as “shrink-wrapped” or “plug and play” schemes. Essentially, all the client purchases is a prepared tax product that requires little, if any, modification to suit his circumstances. To adopt it would not require him to receive significant additional professional advice or services.

The hallmark is met when the five tests below are met and the product does not fall within one of the exceptions.

### **7.7.3 Test 1 – Are the arrangements a product?**

This test is intended to limit disclosure to those arrangements that are offered to potential clients as a finished “product”, rather than a package of proposed arrangements and additional services.

To be a “product” the arrangements will have standardised, or substantially standardised, documentation the form of which has been determined by the promoter, do not require tailoring to the client’s circumstances to any material extent, and which enable the client to implement the arrangements. As a minimum this will mean that standardised contracts, agreements or other written understandings between the parties to the arrangements are provided to the client. Instructions on how to implement the scheme might, typically, also be included, as may a copy of Counsel’s Opinion.

To be a “product” the arrangements will also commit the client to enter either a specific standardised (or substantially standardised) transaction, or more usually a number of specific standardised (or substantially standardised) transactions, comprising the scheme. For example, a client who enters into the scheme may be required to join a specific partnership, take out a specific loan from a specific provider, buy a specific financial instrument etc.

### **7.7.4 Test 2 – Is the product a tax product?**

This test is intended to limit disclosure to those arrangements that are tax driven – i.e. absent the tax advantage, it is highly unlikely that the product would exist, or if it did that any client would buy it.

The test asks whether it would be reasonable for an informed observer to conclude, having studied the arrangements, that **the**, not a, main purpose of the product is to enable the person entering into it to obtain a tax advantage. An informed observer is a person who is independent and has knowledge of the Taxes Act, such as the Tribunal. He need not necessarily be a tax practitioner.

#### **7.7.5 Test 3 – Is the tax product made available generally?**

As mentioned earlier, the manner in which schemes caught by this hallmark are promoted can vary enormously. At one end of the spectrum the scheme promoter could enter into a proactive campaign or aggressive marketing strategy. At the other (especially for established schemes) he could simply react to a casual enquiry for “ideas” from a potential client or offer him a product having identified a potential need, such as whilst carrying out consultancy work. Consequently, this test is not based on how or why a scheme is promoted but how available it is to potential users – i.e. whether or not it is bespoke.

Subject to the other tests and exceptions, the hallmark will apply to any “tax product” that a promoter makes available for implementation to two or more potential clients.

#### **7.7.6 Test 4 – Was the tax arrangement first made available on or after 1<sup>st</sup> August 2006?**

If the arrangements, or substantially the same arrangements (see paragraph 14.2.3 for guidance on “substantially the same”), forming the tax product were made available before 1st August 2006 (“grandfathered”), then they are not disclosable by virtue of this hallmark. It is irrelevant whether a given legal entity made them available prior to 1st August 2006; what is important is whether any person made them available prior to this date.

It is a matter of fact whether an arrangement is “grandfathered”. Evidence would include, for example, the existence and substance of the arrangement being clearly described in tax manuals or publications; or a practitioner’s own record as to when they made, or learnt that competitors were making, it available.

#### **7.7.7 Test 5 – Is the tax product not within an exception?**

There are a number of tax products that are excepted from disclosure. The list of exceptions is found at regulation 11 to the relevant legislation – reproduced at paragraph 7.7.1 above.

#### **7.7.8 Packaged solutions**

Accountants and other promoters of tax arrangements often maintain a “solutions register” that enables them to offer the same or similar solution to more than one client. The ‘solution’ will often require transactions of a specific nature to be carried out, possibly in a pre-ordained sequence; clauses to be inserted into contracts; etc. It will be a matter of scale and degree as to whether schemes on these registers fall within this hallmark.

In general, we would not expect such schemes to be caught where, before they can be implemented, the relevant transactions and/or documentation require significant tailoring to suit the client’s circumstances; or there are other circumstances where the input from a professional goes substantially beyond rudimentary oversight and checking.

## **7.8 Hallmark 6: Loss schemes**

### **7.8.1 The legislation**

Hallmark 6 is prescribed by regulation 12 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

#### **Regulation 12**

Arrangements are prescribed if—

- (a) the promoter expects more than one individual to implement the same, or substantially the same, arrangements; and
- (b) the arrangements are such that an informed observer (having studied them) could reasonably conclude—
  - (i) that the main benefit of those arrangements which could be expected to accrue to some or all of the individuals participating in them is the provision of losses, and
  - (ii) that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax.

### **7.8.2 About the hallmark**

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4) and is intended to capture various loss creation schemes that are typically used by wealthy individuals.

The schemes vary considerably in detail but are normally designed so that they generate trading losses for wealthy individuals that can then be offset against income tax and capital gains tax liabilities or generate a repayment.

The hallmark is met when the two tests below are met.

#### **7.8.3 Test 1 – Is more than one individual expected to implement the tax arrangements?**

This test is met if the promoter expects that there will be more than one individual client for each set of arrangements having the same, or substantially the same, form.

#### **7.8.4 Test 2 – Is the main benefit of the arrangements an expected loss for use against IT or CGT liabilities?**

The test is whether an informed observer would reasonably conclude, having studied the details, that the, not a, main benefit of the arrangements is to provide all or some of the individual participants with losses that will be used to reduce their income tax or capital gains tax liabilities or generate a repayment. An informed observer is a person who is independent and has knowledge of the Taxes Act, such as the Tribunal. He need not necessarily be a tax practitioner.

This will normally be the case where it would be reasonable to expect that the tax relief expected by the “investors” is greater than the total amount of the investment which represents real personal risk. For example, the amount an individual invests in the scheme may be geared up by a non-recourse loan or limited recourse loan from sources connected with the scheme and the arrangements such that however little income the scheme generates the tax relief will be greater than the amount the individual has, in economic substance, contributed.

This test does not catch genuine business start-ups where any losses are an unintended, albeit possibly predictable, consequence.

## **7.9 Hallmark 7: Leasing arrangements**

### **7.9.1 The legislation**

Hallmark 7 is prescribed by regulations 13 to 17 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

#### ***Regulation 13***

- (1) *Arrangements are prescribed if—*
  - (a) *the arrangements include a plant or machinery lease;*
  - (b) *one of the additional conditions is met (see regulation 15);*
  - (c) *the relevant value condition is met (see regulation 16); and*
  - (d) *the lease is not a short-term lease (see regulation 17).*
- (2) *But arrangements are not prescribed by this regulation if—*
  - (a) *no person is a promoter in relation to them; and*
  - (b) *the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.*

#### ***Regulation 15: The additional conditions***

- (1) *The first additional condition is that the arrangements are designed in such a way that one or more of the plant or machinery leases, comprised in the arrangements, are or would be entered into by—*
  - (a) *one party who has or would have a right or entitlement to claim capital allowances under Part 2 of CAA 2001 (plant and machinery allowances) in respect of the expenditure incurred on the plant or machinery, and*
  - (b) *another party who is not, or would not be, within the charge to corporation tax.*

(2) *A lease satisfies this condition if sub-paragraphs (a) and (b) of paragraph (1) are met, regardless of whether there are or would be (in addition to the parties mentioned in those sub-paragraphs) other parties to the lease who satisfy neither of those conditions.*

(3) *A party who acts merely as a guarantor under the lease is to be disregarded for the purposes of paragraph (1)(b).*

(4) *The second additional condition is that the arrangements include provision designed to—*

(a) *remove from the lessor the whole, or the greater part, of any risk, which would otherwise fall directly or indirectly upon the lessor, of sustaining a loss if payments due under the lease are not made in accordance with its terms, and*

(b) *do so by the provision of money or a money debt.*

*For the purposes of this paragraph “money” and “money debt” have the same meanings as they have in section 702(6) of ITEPA 2003.*

(5) *The third additional condition is that the arrangements are designed to consist of, or include—*

(a) *a sale and finance leaseback arrangement (within the meaning of section 221 of CAA 2001), or*

(b) *a lease and finance leaseback (within the meaning of section 228A(2)) of CAA 2001).*

*The third additional condition is subject to the following paragraphs of this regulation.*

(6) *In a case falling within paragraph (5)(a) the third additional condition does not apply if the arrangements are designed in such a way that—*

(a) *the assets leased or to be leased under the sale and finance leaseback are or will be unused and not second-hand at the time when the assets are acquired or created; and*

(b) *the interval between the acquisition or creation of the asset and the sale of the asset under the sale and finance leaseback arrangement is not more than four months.*

(7) *The third additional condition does not apply if plant or machinery which is, or which the promoter expects to become, a fixture, is leased with relevant land, unless the plant or machinery is used for storage or production.*

*Here “used for storage or production” means used for the purposes of—*

(a) *storing, moving or displaying goods to be sold in the course of a trade;*

(b) *manufacturing goods or materials;*

(c) *subjecting goods or materials to a process;*

- (d) *storing goods or materials—*
- (i) *which are to be used in the manufacture of other goods or materials;*
  - (ii) *which are to be subjected to a process in the course of a trade;*
  - (iii) *which having been subjected in the course of a trade to process, manufactured or produced, have not yet been delivered to a purchaser; or*
  - (iv) *upon their arrival in the United Kingdom from a place outside it.*
- (8) *But paragraph (7) does not apply (so that, accordingly, the third additional condition is met) if the arrangements are designed in such a way that—*
- (a) *the qualifying expenditure incurred on the fixture referred to in paragraph (7) amounts or will amount to more than 50% of the aggregate value of the assets subject to the lease, and*
  - (b) *the rent payable under the lease is directly or indirectly dependent on the availability of capital allowances under Part 2 of CAA 2001 in respect of expenditure on any plant or machinery comprised in the lease.*
- (9) *In determining the value of the assets comprised in the lease the following rules apply.*

#### **Rule 1**

*The value of the land subject to the lease is the market value of the lessor's interest.*

#### **Rule 2**

*The value of the plant or machinery subject to the lease is to be determined in the same manner as for the purposes of regulation 16(1).*

- (10) *In this regulation—*

*“fixture” has the meaning given by section 173(1) of CAA 2001;*

*“relevant land” has the meaning given by section 173(2) of CAA 2001.*

#### **Regulation 16: The relevant value condition**

- (1) *The relevant value condition is met if—*
- (a) *the lower of the cost to the lessor, or the market value, of any one asset forming part of the plant and machinery leased or to be leased under the arrangements is at least £10,000,000; or*
  - (b) *the aggregate of the lower of the costs to the lessor, or the market values, of all of the assets forming part of the plant and machinery leased or to be leased under the arrangements is at least £25,000,000.*

(2) *For the purposes of paragraph (1) the market value of plant or machinery leased or to be leased under arrangements is to be determined on the assumption of a disposal—*

- (a) *by an absolute owner;*
- (b) *free from all encumbrances; and*
- (c) *in the open market.*

(3) *“Absolute owner” in the application of paragraph (2)(a) to Scotland, means the owner.*

**Regulation 17: Short-term leases**

(1) For the purposes of regulation 13(1)(d) a lease whose term is 2 years or less is a short-term lease.

*But a lease is not a short-term lease if any of the following Conditions apply.*

*In those Conditions “L” is the lessee.*

(2) Condition A is that the lease contains an option exercisable by L to extend the term so that the total term exceeds 2 years.

(3) Condition B is that at the time of the inception of the lease, other arrangements have been entered into which contemplate the extension of the lease to L which, if carried out, would extend the term of the lease so that it exceeds 2 years.

(4) Condition C is that—

(a) a person leases an asset to L under a lease that would, apart from this paragraph, be a short-term lease,

(b) the inception of that lease is on or after the date on which these Regulations come into force,

(c) at or about the time of the inception of that lease, arrangements are entered into for the asset to be leased to one or more other persons under one or more other leases, and

(d) in the aggregate, the term of the lease to L and the terms of the leases to such of those other persons as are connected with L exceed 2 years.

(5) In this regulation “inception” has the meaning given by section 70YI CAA 2001.

**7.9.2 About the hallmark**

This hallmark applies both to promoted and ‘in-house’ arrangements, but for in-house arrangements it does not apply where the person intended to obtain the tax advantage is a small or medium enterprise. It is met when both:

- all of tests 1 to 3 described below are met; and
- any one of the three additional conditions is met.

**7.9.3 Test 1 – Does the arrangement include a plant or machinery lease?**

The hallmark only applies if the arrangement includes a plant or machinery lease. In brief, this is:

- any agreement or arrangement under which a person grants to another person the right to use plant or machinery for a period and which in accordance with generally accepted accounting practice falls, or would fall, to be treated as a lease;



- any other agreement or arrangement to the extent that, in accordance with generally accepted accounting practice falls (or would fall) to be treated as a lease, the agreement conveys (or falls or would fall to be regarded as conveying) the right to use an asset, and the asset is plant or machinery; or
- the finance lease where plant or machinery is the subject of a sale and finance leaseback as defined in section 221 of the Capital Allowances Act 2001.

#### **7.9.4 Test 2 – Is the lease of high value?**

The hallmark only applies to high value plant or machinery leases. It is a high value lease when, of the assets forming part of the plant and machinery leased or to be leased under it,

- the cost to the lessor of any one asset or its market value (whichever is lower) is at least £10m, or
- the cost to the lessor of all the assets or their market value (whichever is lower) is at least £25m.

Facilities to lease assets with an individual value of £10m or to the aggregate value of at least £25m are caught by this test even if there is no guarantee that the £25m threshold will be reached and should be disclosed when the facilities are made available.

Where a succession of leases are made to the same parties, or persons connected with them, and they are negotiated at the same time or as part of the same series of negotiations (that is, as part of the “arrangements”), the value of the plant or machinery to be leased under all the leases should be aggregated.

The acquisition of assets with an aggregate value of more than £25m (and no individual asset is at least £10m) does not have to be disclosed if the assets are to be leased to a variety of clients and no individual lease meets the £10m or £25m threshold, as appropriate.

#### **7.9.5 Test 3 – Is the lease a long lease?**

The hallmark only applies where the lease is not a short-term lease.

The meaning of “short-term lease” is different from that of “short lease” in section 70I of CAA 2001. A short-term lease is one whose term is 2 years or less but does not include leases that:

- contain an option allowing the lessee to extend the lease beyond 2 years;
- at the time of inception, other arrangements have been entered into that contemplate an extension beyond 2 years; or
- are inceptioned on or after 1st August 2006 with the intention that the assets be leased under it to one or more other persons such that the aggregate term exceeds 2 years.

#### **7.9.6 Additional condition 1 – Does the lease involve a party outside the charge to corporation tax?**

This additional condition applies where the arrangement includes one or more plant or machinery lease entered, or to be entered, into by:

- a party who is entitled to claim capital allowances (on plant and machinery) in relation to the leased asset; and
- a party who is not, or would not be, within the charge to corporation tax.

It does not matter how many parties there are to the lease. Where there are more than two parties involved the arrangement is a hallmarked scheme if there are, or would be, parties to the lease meeting each of the above bullets.

A manufacturer may, of course, be a lessor and so a party to the lease. But a manufacturer of leased equipment is not a party to the lease merely by virtue of being a supplier to the lessor.

A party that acts solely as a guarantor is not taken into account in considering whether this condition is met. However you need to consider whether the guarantee provided is such that the second additional condition is met.

#### **7.9.7 Additional condition 2 – Does the arrangement involve the removal of risk from the lessor?**

This additional condition applies where the arrangement includes provision that:

- removes the whole, or the greater part, of the risk that would otherwise fall directly or indirectly upon the lessor if payments due under the lease were not made in accordance with its terms; and
- does so by the provision of money or a money debt.

“Money” includes money expressed in a currency other than sterling.

“Money debt” means any obligation that falls to be, or may be, settled by the payment of money, or the transfer of a right to settlement under an obligation which is itself a money debt. It covers all trade debts, as well as other money debts, such as debentures.

#### **7.9.8 Additional condition 3 – Does the arrangement involve a finance leaseback?**

This additional condition applies where the arrangements consist of, or include:

- a sale and finance leaseback arrangement, or
- a lease and finance leaseback.

However, there are two exceptions to this general rule.

First, this additional condition does not apply where the arrangements consist of, or include a sale and finance leaseback arrangement and, at the time the sale and finance leaseback is entered into, the assets leased, or to be leased, are new. By this it is meant that the assets:

- at the time they are acquired or created by the seller, are unused and not second-hand; and
- were acquired or created by the seller not more than 4 months before the sale part of the sale and finance leaseback arrangement.

Second, it is recognised that many property transactions consist of sale or lease and finance leaseback; and most property includes plant or machinery such as central heating and air conditioning. It is not intended that the simple sale and leaseback of plant or machinery within a typical building such as an office block fall within this additional condition.

The hallmark does not attempt to define the type of plant or machinery that is excluded when leased with land. Instead it takes the approach that the arrangements do not need to be disclosed where—

- the plant or machinery is, or is expected to become, a fixture that is part of the leased land,
- the plant or machinery does not exceed half the value of the leased assets, and
- the rent payable under the lease is not directly or indirectly dependent on the availability of capital allowances.

However, leases involving plant and machinery used for storage or production do not fall within this exemption – see the definition at regulation 15(7) reproduced at paragraph 7.9.1 above.

So, for example, if a factory is sold and leased back where the production line plant in the factory has a value of over £25m (or contains equipment with an individual value of over £10m) it will need to be disclosed.

But the sale and leaseback of an office block costing £100m with £35m of plant or machinery that does not meet the definition of “plant used for storage or production” will not need to be disclosed under this condition.

## **7.10 Hallmark 8: Pensions [revoked]**

This hallmark concerned the special annual allowance charge which ceased to have effect from 6<sup>th</sup> April 2011. If you wish to refer to the previous guidance on this hallmark you can refer to the February 2010 version which is available on the HMRC website here <http://www.hmrc.gov.uk/aiu/guidance.htm>.

## **7.11 Hallmark 9: Employment Income**

### **7.11.1 The Legislation**

Hallmark 8 is prescribed by regulation 18 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543).

#### *Regulation 18*

- (1) *Arrangements are prescribed if—*
- (a) *Conditions 1 and 2 are met and Condition 3 is not met; or*

- (b) *Conditions 1, 2 and 3 are met and at least one of Conditions 4 and 5 is met.*
- (2) *Condition 1 is met if the arrangements involve at least one of the following—*
- (a) *a relevant third person taking a relevant step under section 554B;*
  - (b) *any person taking a relevant step under section 554C or 554D; or*
  - (c) *B taking a step under section 554Z18 or 554Z19.*
- (3) *Condition 2 is met if the main benefit, or one of the main benefits, of the arrangements is that an amount that would otherwise count as employment income under section 554Z2(1) is reduced or eliminated.*
- (4) *Condition 3 is met if, by reason of at least one of sections 554E to 554X or regulations made under section 554Y, Chapter 2 of Part 7A does not apply.*
- (5) *Condition 4 is met if the arrangements involve one or more contrived or abnormal steps without which the main benefit in paragraph (3) would not be obtained.*
- (6) *Condition 5 is met if the arrangements involve—*
- (a) *a relevant step being treated as taking place; and*
  - (b) *Chapter 2 of Part 7A applying as a consequence of sub-paragraph (a).*
- (7) *In this regulation—*
- (a) *references to sections or Parts are to those in ITEPA unless otherwise stated;*
  - (b) *“B” has the meaning given for Part 7A by sections 554A(1)(a) and 554Z17(7) read together;*
  - (c) *“contrived or abnormal” has the same meaning as in section 207 of the Finance Act 2013; and*
  - (d) *“relevant third person” has the same meaning as in section 554A(7).*

### **7.11.2 About the Hallmark**

The new employment income hallmark came into force on 4 November 2013 and will not have effect where:

- The relevant date under section 308(1) of the Finance Act 2004 for the promoter to provide the prescribed information in respect of a notifiable proposal is before 4 November 2013, or
- The date under section 308(3) of that Act on which the promoter first becomes aware of any transaction that is part of notifiable arrangements is before 4 November 2013.

The guidance on the new employment income hallmark therefore applies where the person has a duty to provide prescribed information on a notifiable proposal or becomes aware of a transaction forming part of notifiable arrangements on or after 4 November 2013. The hallmark applies to both promoters and those designing notifiable arrangements for use “in house”. Unlike other hallmarks for “in house” notifiable arrangements this hallmark applies to all sizes of business.

### **7.11.3 National Insurance Contributions**

Arrangements designed to circumvent Part 7A are normally intended to obtain not only a tax advantage but also a NIC advantage. The NIC DOTAS regulations – the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012 (SI 2012/1868) – attract the prescribed descriptions in the tax DOTAS regulations. See regulation 25 of SI 2012/1868. Therefore, the employment income hallmark will apply for the purposes of both income tax and NIC.

#### **7.11.4 The two scenarios**

Regulation 18(1) sets out two scenarios within the new prescribed description. These scenarios are defined in terms of Conditions 1 to 5, which are defined in regulation 18(2) to (6).

Regulation 18(1)(a) defines the first scenario in which arrangements are notifiable if the statutory conditions are met. In summary, it is that:

- the arrangements are intended to circumvent Part 7A; and
- none of the Part 7A exclusions is in point.

The first scenario will apply if, but only if, Conditions 1 and 2 are met and Condition 3 is not met. Conditions 1 to 3 are discussed in sections 7.11.4 to 7.11.12.

The second scenario will apply if, but only if, Conditions 1, 2 and 3 are met and at least one of Conditions 4 and 5 is met. Conditions 4 and 5 are discussed in sections 7.11.13 and 7.11.14.

#### **7.11.5 Condition 1 the “step” condition**

Regulation 18(2) defines Condition 1, the “step” condition. It specifies three possible ‘steps’, using the terminology of Part 7A. If none of these steps is taken, value does not emerge to benefit “A” (broadly speaking, the employee) and the arrangement does not satisfy Condition 1.

If “B” (broadly speaking, the employer) earmarks a sum of money or asset, that will not, as such, satisfy Condition 1 unless B is taking a step under section 554Z18. Condition 1 will also be met if the employer provides security within section 554Z19.

But, if B takes a relevant step under section 554C or 554D, that will satisfy Condition 1 even though Chapter 2 of Part 7A will not apply by reason of this step.

For the purposes of Condition 1, it does not make any difference when the relevant step is to be taken.

#### **7.11.6 Condition 2 the “main benefit” condition**

Condition 1 is very broad. But it is a necessary condition, not a sufficient condition. Therefore, the hallmark will not apply to arrangements merely because they meet Condition 1. Arrangements also need to meet Condition 2, which is much narrower.

Regulation 18(3) defines Condition 2, the “main benefit” condition. It states that Condition 2 is met if the main benefit, or one of the main benefits, of the arrangements is that an amount that would otherwise count as employment income under section 554Z2(1) is reduced or eliminated. If Part 7A bites, there is an amount counting as employment income under section 554Z2(1). Therefore, if arrangements do not have the benefit of reducing or eliminating such income, they will not satisfy Condition 2.

Furthermore, if arrangements have the benefit of reducing or eliminating Part 7A income, but this benefit is peripheral and the main benefit (or main benefits) of the arrangements do not include either a tax advantage or a NIC advantage, the arrangements will not satisfy Condition 2.

But if arrangements have more than one main benefit, and one of the main benefits is that an amount counting as employment income under section 554Z2(1) is reduced or eliminated, Condition 2 is met – no matter what the other main benefit or benefits may be.

One way to decide whether Condition 2 is met is to ask: what are the parties to the arrangement really trying to achieve? The examples in the following sections illustrate this.

#### **7.11.7 Condition 2: example: relevant step by employer**

If an employer makes a normal salary payment to an employee, this will be a relevant step under section 554C and will thus meet Condition 1.

However, an employer is not (except in certain unusual circumstances) a relevant third person, and so the salary payment will not trigger Part 7A.

This is a consequence of the arrangements. But reduction or elimination of Part 7A income is not the main benefit, or one of the main benefits, of the arrangements. Therefore Condition 2 is not met.

#### **7.11.8 Condition 2: example: sale of shares at market value**

An employee benefit trust (EBT) sells shares in the sponsoring employer to an employee for market value. Because this meets the conditions of section 554Z8, there will be no Part 7A income.

But this will not be the main benefit, or one of the main benefits, of the transaction; it will be, at most, only a peripheral benefit. The main benefit of the transaction will be obtaining an asset with the hope of gaining investment return which is not reflected in its market value.

#### **7.11.9 Condition 2: example: “two-step” employee share offers**

Arrangements will not meet Condition 2 merely because they are complicated.

The sponsoring employer of an EBT approaches the EBT trustees with a recommendation that the trustees sell a number of shares to employees at market value. The recommendation is made in such a way that, if the trustees agree that they will make such a sale, they do not thereby take any relevant steps under section 554B.

Some time later, after the administrative and HR aspects of the arrangements have been completed, the employer asks the trustees to transfer specified parcels of shares to identified employees for immediate completion of the sale. The share transfers are relevant steps under section 554C. The trustees earmark shares to be transferred, but, because the arrangements are such that they do not earmark the shares with a view to a later relevant step, they do not take any relevant steps under section 554B.

Condition 1 is met, because the trustees take relevant steps under section 554C.

One of the benefits of the arrangements is that the Part 7A income arising on the section 554C step is, in each case, reduced under section 554Z8 by the consideration paid for the shares.

However, it does not follow that Condition 2 is met. If one considers the benefits, the “two-step” arrangements are a more complex version of the example in section 7.11.7. The main benefit of the transaction will be obtaining an asset with the hope of gaining investment return which is not reflected in its market value, not the reduction or elimination of Part 7A income.

**7.11.10** Condition 2: example: new employee share scheme set up to reduce earmarking charge

Arrangements will not meet Condition 2 merely because they include a new arrangement which takes account of Part 7A.

The owner of a private company wants to sell some shares to an employee at market value. Although the employee is not able to pay for the shares now, the parties expect that the employee will be able to pay for them in the not too distant future.

The parties foresee the following Part 7A consequences. On earmarking shares to sell to the employee at the expected future date, the shareholder will take a relevant step under section 554B. And, on selling the shares, the shareholder will also take a relevant step, under section 554C. Under section 554Z5, the value of the section 554B step would reduce the value of the section 554C step – but that would be nil anyway, as the employee would have paid market value for the shares.

Accordingly, the parties set up a new employee share scheme, under which the shareholder grants a share option to the employee, the exercise price being equal to the market value of the shares at the time of the grant of the option. The arrangement is such that all the conditions of section 554Z7(1) are satisfied; in particular, there is no connection (direct or indirect) between the shareholder’s earmarking of the shares and a tax avoidance arrangement (cf. section 554Z). Consequently, as provided by section 554Z7, the value of the section 554B step is reduced to nil by the exercise price. This is one of the benefits of the arrangements.

The employee exercises the option as planned and pays for the shares, being taxed on any increase in value of the shares above the exercise price by the normal share option tax rules in Chapter 5 of Part 7. See ERS110000.

Condition 2 is not met. As in the examples in section 7.11.7 and 7.11.8, the main benefit of the transaction will be obtaining an asset with the hope of gaining investment return which is not reflected in its market value, not the reduction or elimination of Part 7A income.

#### **7.11.11 Condition 2: example: unfunded EFRBS**

An employer and an employee are considering the provision of retirement benefits by means of an employer-financed retirement benefit scheme (EFRBS). They realise that a funded EFRBS, whereby defined contributions are paid to a trust and immediately earmarked for the employee's benefit, would trigger Chapter 2 of Part 7A.

They therefore set up an unfunded EFRBS, whereby:

- the employer makes a contractual promise that it will, itself, pay retirement benefits to the employee based on the value of specified sums or assets whether or not actually held by employer; and
- never pays contributions to a third party to fund that third party to pay those benefits instead.

Condition 1 is met, because the payment of retirement benefits will be a relevant step under section 554C.

These arrangements escape Part 7A, because no relevant third person is involved.

In the circumstances under review, the reduction or elimination of Part 7A income is not a peripheral benefit. Funded EFRBS are among the arrangements which Part 7A is intended to catch. In the circumstances under review, the parties set up an unfunded EFRBS in order to sidestep Part 7A. The reduction or elimination of Part 7A income is therefore a main benefit, or one of the main benefits, of the arrangements. Condition 2 is therefore met.

Because the arrangements are to pay retirement benefits, the Part 7A exclusions covering deferred remuneration and share and share option schemes cannot apply to them.

Because the arrangements are to pay retirement benefits based on the value of specified sums or assets, they are "money purchase" defined contribution arrangements. They are thus different both from deferred remuneration and share and share option schemes and from defined benefit arrangements.

This example considers an EFRBS. A scheme that is restricted to providing pensions cannot be an EFRBS as defined in section 393A. However, the Part 7A rules specific to EFRBS modify the definition where appropriate to include schemes which would be EFRBS except that they are restricted to providing pensions. Therefore, the employment income hallmark applies to such schemes in the same way that it applies to EFRBS as defined in section 393A.

HMRC continues to monitor the risks that increasing use of unfunded EFRBS presents to the Government's objective of creating a more affordable pensions tax regime through restricting the tax reliefs for pension savings. The new employment income hallmark supports this activity.



#### **7.11.12 Condition 3: the “exclusion” condition**

Regulation 18(4) defines Condition 3, the “exclusion” condition. Condition 3 is, in summary, that one of the Part 7A exclusions applies.

Arrangements designed to avoid Part 7A will normally satisfy Conditions 1 and 2 but not Condition 3. They will then come within regulation 18(1)(a) and be “prescribed”.

Conversely, the Part 7A exclusions prevent Part 7A income arising in certain circumstances envisaged and defined by Parliament. For example, section 554F is an exclusion for certain commercial transactions, and section 554G is an exclusion for certain transactions under employee benefit packages. Tax planning to take advantage of the Part 7A exclusions in the way intended by Parliament may satisfy Conditions 1 and 2, but it will also satisfy Condition 3. It will thus be outside regulation 18(1)(a).

However, arrangements may involve taking advantage of a Part 7A exclusion in a way not intended by Parliament. Such arrangements will satisfy Conditions 1, 2 and 3 and be outside regulation 18(1)(a). Regulation 18(1)(b) is directed against such arrangements. It sets out a second scenario in which arrangements are disclosable if the statutory conditions are met. It will apply if Conditions 1, 2 and 3 are met and at least one of Conditions 4 and 5 is met.

#### **7.11.13 Condition 3: example: exclusion for pension income chargeable under Part 9**

A UK resident individual receives employment-related pension income from a non-UK pension scheme. This income is chargeable to income tax under Part 9. Although the pension payment is a relevant step under section 554C, it comes within the exclusion in section 554S. Condition 3 is therefore met.

The arrangements are therefore outside the first scenario (regulation 18(1)(a)) – whether or not Condition 2 is met.

#### **7.11.14 Condition 4: the “contrived or abnormal step” condition**

Regulation 18(5) defines Condition 4, the “contrived or abnormal step” condition. It states that Condition 4 is met if the arrangements involve one or more contrived or abnormal steps without which the main benefit in regulation 18(3) would not be obtained. In Condition 4, “contrived” and “abnormal” have the same meaning as in section 207 of Finance Act 2013 (general anti-abuse rule: definition of “abusive” tax arrangements).

HMRC’s guidance on the general anti-abuse rule (GAAR) is currently available at <http://www.hmrc.gov.uk/avoidance/gaar.htm>.

In Condition 4, “the main benefit in paragraph (3)” means the main benefit mentioned above. It does not imply that Condition 4 can only be met if there is only one main benefit.

Part 7A is complex legislation, and taxpayers may therefore enter into complex arrangements in order to comply with Part 7A. In particular, the provisions of the share-related earmarking exclusions at sections 554J to 554M are very detailed and will involve careful design of plans or schemes to ensure those provisions are satisfied. In that context, the detail and complexity of particular arrangements will not, in themselves, mean that such arrangements are regarded as contrived or abnormal.

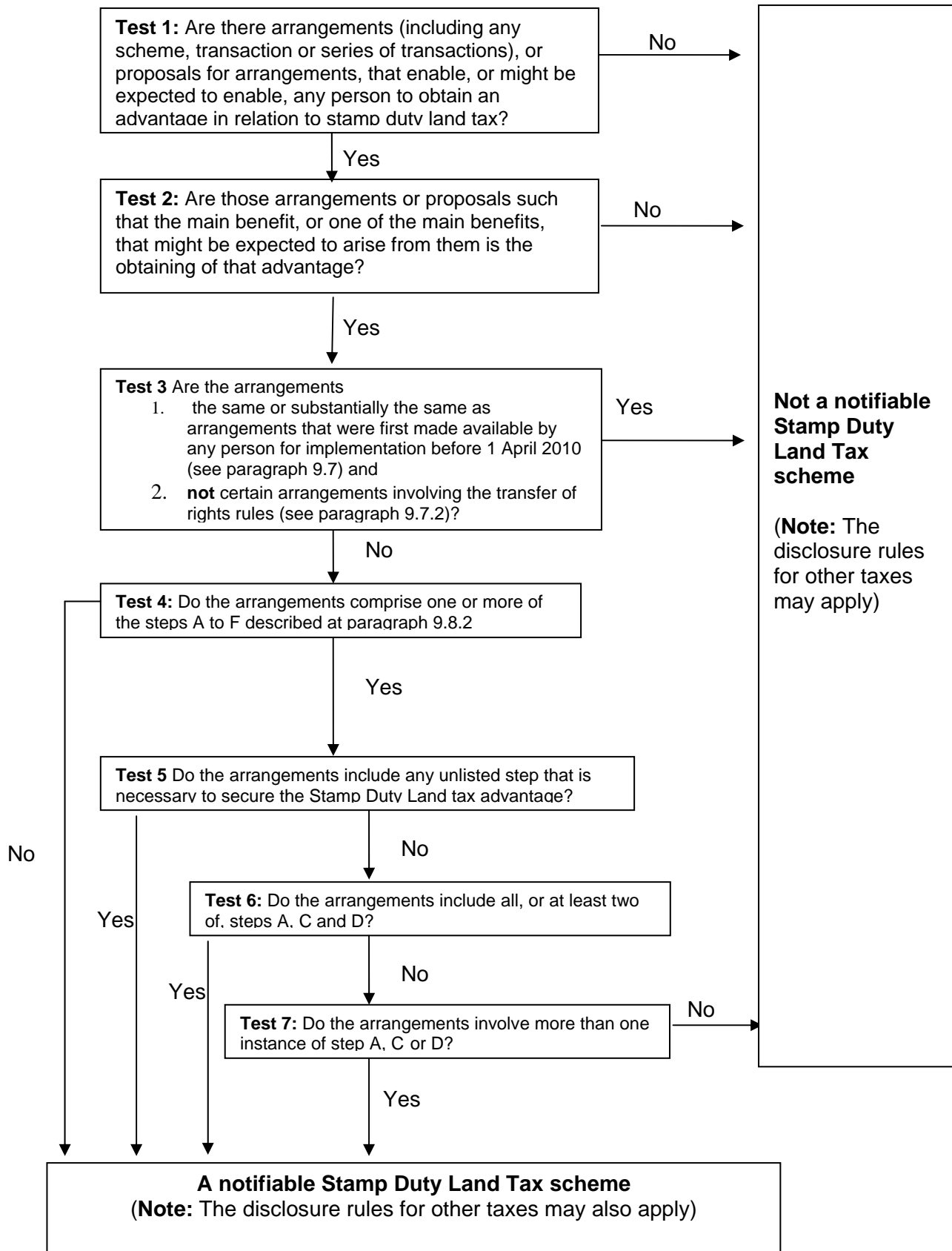
#### **7.11.15 Condition 5: the “deliberate fall-back charge” condition**

Regulation 18(6) defines Condition 5, the “deliberate fall-back charge” condition. It states that Condition 5 is met if the arrangements involve –

- (a) a relevant step being treated as taking place; and
- (b) Chapter 2 of Part 7A applying as a consequence.

Some of the exclusions in Chapter 1 of Part 7A are safeguarded by what is commonly known as a “fall-back” charge. If an arrangement at first comes within the exclusion, but later on fails to meet the statutory conditions, then Part 7A bites. However, the relevant step which, because of the exclusion, did not give rise to Part 7A income still does not give rise to Part 7A income; the past is left undisturbed. Instead, there is a deemed relevant step at the time when the statutory conditions are breached, giving rise to a “fall-back” charge. See, for example, section 554O, especially section 554O(3) and (4). These contingent fall-back charges are safeguards, rather than primary charging provisions. Condition 5 catches arrangements which seek to defer tax by excluding an upfront charge for the price of a later fall-back charge.

## 8. Determining a Stamp Duty Land Tax Scheme – Flow Chart



## **9. Determining a stamp duty land tax scheme – The tests**

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### **9.1 General**

The hallmarks at section 7, including the “confidentiality” and “premium fee” hallmarks, do not apply to this section.

### **9.2 Test 1: Are there arrangements that enable an SDLT advantage to be obtained? (FA 2004, s.306(1)(a) and (b) and s.318)**

The guidance at paragraph 6.2 applies to this section in the same way as it does for section 6.

**Note:** The definition of “arrangements” used for disclosure purposes is wider than the concept of “linked transactions” used for stamp duty land tax purposes (FA 2003, s.108).

### **9.3 Test 2: Is the advantage a main benefit of the arrangements? (FA 2004, s.306(1)(c))**

The guidance at paragraph 6.3 applies to this section in the same way as it does for section 6.

### **9.4 [Omitted]**

### **9.5 [Omitted]**

### **9.6 [Omitted]**

### **9.7 Test 3: Grandfathering**

Certain schemes are exempted from disclosure (or “grandfathered”). Schemes are exempt if they are the same or substantially the same as arrangements made available by any person before 1<sup>st</sup> April 2010. **But** some schemes involving the transfer of rights rules do not benefit from this grandfathering (see paragraph 9.7.2 below).

See paragraph 14.2.3 below for the meaning of “substantially the same”. It is irrelevant whether a given legal entity made the arrangements available prior to 1st April 2010; what is important is whether any person made them available prior to this date.

It is a matter of fact whether an arrangement is “grandfathered”. Evidence of grandfathering would include:

- the existence and substance of the arrangement being clearly described in tax manuals or publications;
- a practitioner’s own record as to when they made, or learnt that competitors were making, an arrangement available.

“Makes available for implementation” takes the meaning at s.308(2) Finance Act 2004 and detailed guidance as to its meaning is given at paragraph 14.3.2 below.

The fact that any particular scheme is exempted from disclosure by the application of test 3 should not be taken as an indication that HMRC either finds the scheme acceptable, or that we accept that it works under current law.

Satisfying tests 4 to 7 (paragraphs 9.8-9.10) will also remove the need to notify HMRC of arrangements.

#### **9.7.1 [Omitted]**

#### **9.7.2 Exceptions to grandfathering**

The grandfathering rule does not apply to certain arrangements involving the transfer of rights rules. Arrangements are not exempt under the grandfathering rules where:

- (a) a chargeable interest is acquired under a contract, the substantial performance or completion of which falls to be disregarded under section 45(3) of the Finance Act 2003, and
- (b) the secondary contract referred to in section 45(3) of the Finance Act 2003 applies to a transaction with one or more of these features—
  - (i) a distribution in specie (i.e. a distribution of an asset in physical form without selling it and distributing the cash);
  - (ii) an acquisition by a partnership;
  - (iii) an acquisition by a settlement;
  - (iv) an element of gift or transfer at an undervalue ;
  - (v) the grant of an option;
  - (vi) an assignment or novation.

### **9.8 Tests 4 to 7: Introduction to steps A to F**

#### **9.8.1 General**

To further restrict disclosed schemes , you are not required to notify schemes that comprise one or more of six “steps” A to F (test 4). However, this is subject to:

- an overarching rule that any arrangement that contains an unlisted step – where that unlisted step is necessary for securing the stamp duty land tax advantage – is not exempted from disclosure (test 5); and
- certain restrictions on using combinations of steps or multiples of the same step (tests 6 and 7 – see paragraph 9.10 below).

This is in addition to the grandfathering rule at Test 3 and paragraph 9.7 above.

The steps A to F have been described to us as “existing toolkit”. We believe a better term would be “existing building blocks”. For stamp duty land tax purposes, we are not interested in the existing building blocks in themselves. But we are interested in the ways in which the building blocks are put together to form more complex products. Hence the limits on the ways in which steps A to F can be used in combination.

The fact that any particular scheme is exempted from disclosure by the application of tests 4 to 7 should not be taken as an indication that HMRC either finds the scheme acceptable, or that we accept that it works under current law.

### **9.8.2 The six steps – A summary**

The six listed steps are:

- Step A – The acquisition of a chargeable interest in land by a special purpose vehicle (SPV);
- Step B – Claims to certain reliefs (see paragraph 9.8.3 below);
- Step C – The sale of shares in a SPV which holds chargeable interests in land, to a person who is not connected to either the SPV or the vendor;
- Step D – Not electing to waive the exemption from VAT (i.e. not “opting to tax”);
- Step E – Structuring a transaction as the transfer of a going concern for VAT purposes; and
- Step F – The creation of a partnership to which a property subject to a land transaction is to be transferred.

### **9.8.3 The six steps – The legislation**

The six steps are listed in the Schedule to The Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868): The steps are as follows:

#### **Step A: Acquisition of a chargeable interest by special purpose vehicle**

The acquisition of a chargeable interest in land by a company created for that purpose (“a special purpose vehicle”).

#### **Step B: Claims to relief**

Making—

(a) a single claim to relief under any of the following provisions of the Finance Act 2003—

- (i) section 57A (sale and leaseback arrangements);
- (ii) section 58B (relief for new zero-carbon homes);
- (iii) section 58C (relief for new zero-carbon homes: supplemental);
- (iv) section 60 (compulsory purchase facilitating development);

- (v) section 61 (compliance with planning obligation);
  - (vi) section 63 (demutualisation of insurance company);
  - (vii) section 64 (demutualisation of building society);
  - (viii) section 65 (incorporation of limited liability partnership);
  - (ix) section 66 (transfers involving public bodies);
  - (x) section 67 (transfer in consequence of reorganisation of parliamentary constituencies);
  - (xi) section 69 (acquisition by bodies for national purposes);
  - (xii) section 71 (certain acquisitions by registered social landlords);
  - (xiii) section 74 (collective enfranchisement by leaseholders);
  - (xiv) section 75 (crofting community right to buy);
  - (xv) Schedule 6 (disadvantaged areas relief);
  - (xvi) Schedule 6A (relief for certain acquisitions of residential property);
  - (xvii) Schedule 6B (transfers involving multiple dwellings);
  - (xviii) Schedule 7 (group relief and reconstruction acquisition relief);
  - (xix) Schedule 8 (charities relief);
  - (xx) Schedule 9 (right to buy, shared ownership leases etc); or
  - (aa) a single claim to relief under Schedule 61 to Finance Act 2009 (alternative finance investment bonds); or
- (b) one or more claims to relief under any one of the following provisions of the Finance Act 2003—
- i) section 71A (alternative property finance: land sold to financial institution and leased to individual);
  - ii) section 72 (alternative property finance in Scotland: land sold to financial institution and leased to individual);
  - iii) section 72A (alternative property finance in Scotland: land sold to financial institution and individual in common); or
  - iv) section 73 (alternative property finance: land sold to financial institution and resold to individual).

### **Step C: Sale of shares in special purpose vehicle**

The sale of shares in a special purpose vehicle, which holds a chargeable interest in land, to a person with whom neither the special purpose vehicle, nor the vendor, is connected.

### **Step D: Not exercising election to waive exemption from VAT**

No election is made to waive exemption from value added tax contained in paragraph 2 of Schedule 10 to the Value Added Tax Act (treatment of buildings and land for value added tax purposes).

### **Step E: Transfer of a business as a going concern**

Arranging the transfer of a business, connected with the land which is the subject of the arrangements, in such a way that it is treated for the purposes of value added tax as the transfer of a going concern.

### **Step F: Undertaking a joint venture**

The creation of a partnership (within the meaning of paragraph 1 of Schedule 15 to the Finance Act 2003) to which the property subject to a land transaction is to be transferred.

## 9.9 Approach to tests 4 to 7

The way to approach the steps is as follows:

- Identify all the single listed steps comprised in the arrangement. Paragraph 9.9.1 provides guidance on what constitutes a single step B;
- Identify any unlisted steps in the arrangement that are necessary to secure the expected stamp duty land tax advantage (if there are any such steps, the scheme is not exempted from disclosure – see paragraph 9.8.1 above);
- If the arrangement involves a combination of steps, or more than one instance of the same step, refer to tests 6 to 7 (paragraph 9.10 below) to see if that combination or multiple falls within the arrangements exempted from disclosure.

### 9.9.1 Single step B

A single instance of step B consists of either:

- a single claim to one of the reliefs listed under step B(a)(i) to (a)(xx) and step B(aa) in the Schedule (see paragraph 9.8.3); or
- one or more claims to one the reliefs listed under step B(b)(i) to (b)(iv) in the Schedule (see paragraph 9.8.3).

**Note:** For this purpose a claim can still be a ‘single claim’ even if it is one of a number of identical claims being made in respect of separate and distinct properties. So, for example, where two properties are transferred from group company A to group company B, each of the two claims to group relief is a ‘single claim’ for this purpose.

Examples of single step B:

- a single claim to charities relief is one step B (single use of a relief in group (a)); and
- two claims to alternative property finance: land sold to a financial institution and leased to an individual constitutes one step B (multiple use of a relief in group (b)).

We will accept that a single step B(a)(xviii) (group relief and reconstruction acquisition reliefs) includes actions taken or not taken with the intention of ensuring that, within the context of the withdrawal of group, reconstruction or acquisition relief:

- the purchaser ceases to a member of the same group as the vendor; or
- control of the acquiring company changes; or
- arrangements for either of the above events are entered into

on or after the end of the period of three years beginning with the effective date of the relief, rather than before the end of that period.



A "single claim" to a relief means step B does not include any arrangement that comprises more than one claim to the same listed relief within groups (a) and (aa) of the Schedule. Nor do such schemes constitute multiples of step B. They are not within step B at all. For example:

- two claims to group relief fall outside step B (two claims to the same listed relief); and
- a claim to group relief and a claim to reconstruction relief also fall outside step B (two claims to the same listed relief – although these are separate reliefs, they are listed together in group (a)(xviii)).

Any such arrangement is not excepted from disclosure.

An arrangement that comprises the use of two or more different listed reliefs will amount to two or more separate instances of step B. For example:

- a claim to charities relief and a claim to group relief constitute two separate steps B (use of two separately listed reliefs);
- a claim to group relief and a claim to alternative property finance: land sold to financial institution and leased to individual constitute two separate steps B (use of two separately listed reliefs).

In such cases, you should refer to paragraph 9.10 to see whether the combination is excepted from disclosure.

## **9.10 Tests 6 and 7: Combination steps**

Rules 1 and 2 of the schedule to The Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868) specify which combinations of steps, or multiples of the same step, can be used as part of the excepted arrangements. These two rules are separate (i.e. they are not two legs of a single rule in which Rule 2 is merely an extension of Rule 1). It is necessary to consider Rule 2 even where Rule 1 is not in point.

### **9.10.1 SI 2005/1868: Rule 1 to the schedule**

This rule merely confirms that arrangements exempted from disclosure can include any combination of steps B, D, E and F, including multiple uses of the same step.

### **9.10.2 Tests 6 and 7 (SI 2005/1868, Rule 2 to the schedule)**

These tests provide that arrangements are not excluded from disclosure if they:

- include any combination of steps A, C and D; or
- involve a multiple use of any of steps A, C or D.

### **9.10.3 Examples of arrangements exempted from disclosure**

Examples of arrangements exempted from disclosure include schemes that consist of:

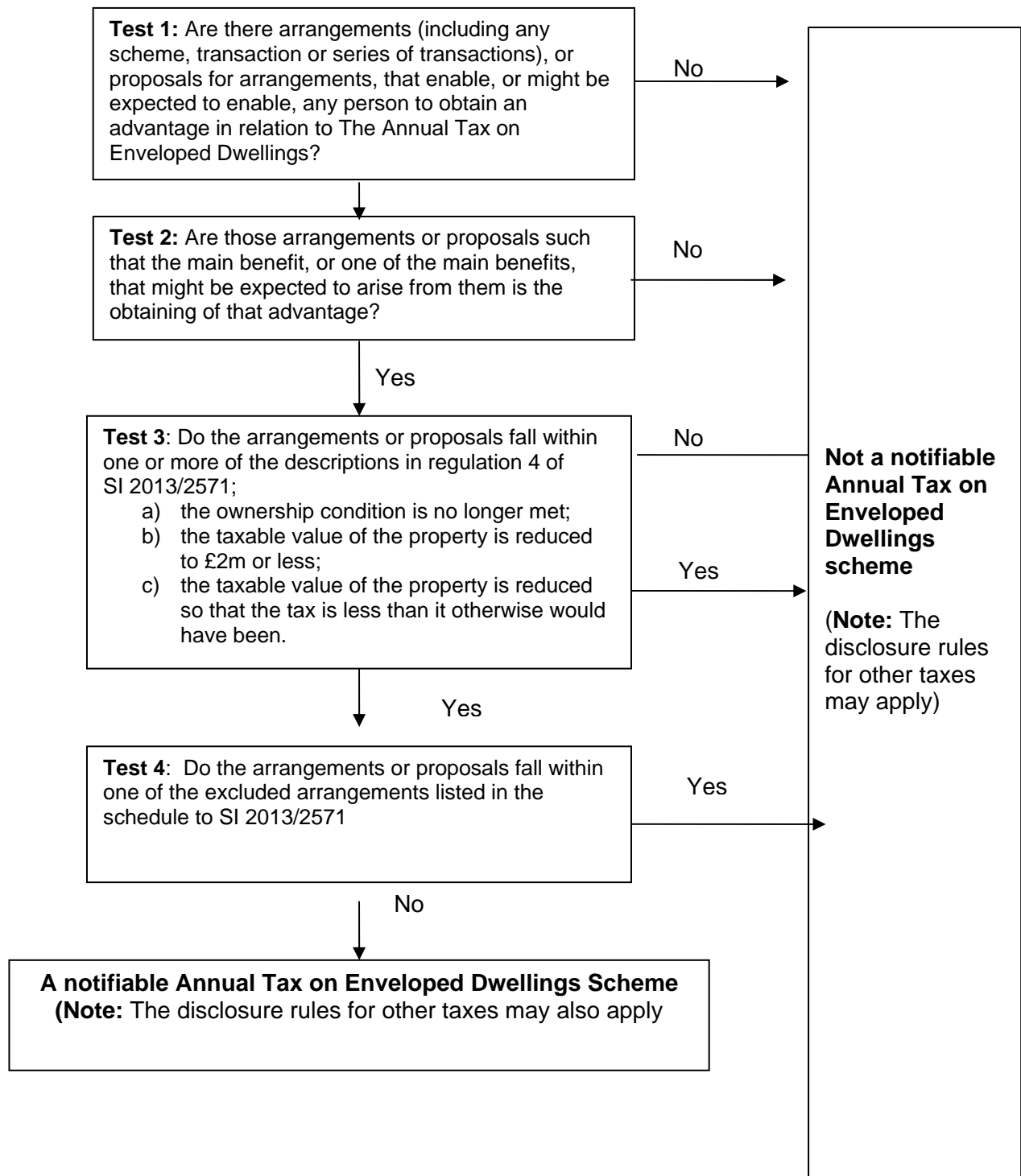
- two steps B;
- two steps B and a single step A; and
- two Steps B and two steps F.

### **9.10.4 Examples of arrangements not exempted from disclosure**

Examples of arrangements that are not exempted from disclosure include schemes that consist of:

- two claims to group relief (double use of the same relief does not fall within step B at all – see paragraph 9.8.1 above);
- two steps A only;
- two steps B and single steps A and D; and
- two steps B and two steps A.

## 10. Determining an Annual Tax on Enveloped Dwellings Scheme – Flow Chart



## **11. Determining an Annual Tax on Enveloped Dwellings Scheme – The tests**

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### **11.1 General**

The hallmarks at Section 7, including the confidentiality and premium fee hallmarks do not apply to ATED. However, the disclosure rules for other taxes may apply to the arrangement.

### **11.2 Test 1: Are there arrangements that enable an ATED advantage to be obtained? (FA 2004, s.306(1)(a) and (b) and s.318)**

The meaning of “arrangements” is not exhaustively defined in the primary legislation but includes any scheme, transaction or series of transactions. The guidance at paragraph 6.2 applies to this section in the same way as it does for section 6.

### **11.3 Test 2: Is the tax advantage a main benefit of the arrangements (FA2004, s.306(1)(c))**

The definition of ‘tax advantage’ is widely drawn and construed. It involves the avoidance or reduction of a charge to tax, a relief or an increased relief and the deferral of tax.

The guidance at paragraph 6.3 applies to this section in the same way as it does for section 6.

### **11.4 Test 3: Does the arrangement fall within one of the prescribed descriptions (SI 2013/2571 Reg 4)**

The ATED descriptions are initially drawn very widely. However, disclosure is not required if the arrangement falls within one or more of the exclusions outlined in paragraph 11.5 below.

## **The Legislation**

### *Prescribed description of arrangements in relation to annual tax on enveloped dwellings*

*1.—(1) For the purposes of Part 7 of the Finance Act 2004 (disclosure of tax avoidance schemes) the arrangements specified in paragraph (2) are prescribed in relation to annual tax on enveloped dwellings.*

*(2) Arrangements are prescribed if they are not excluded arrangements under the Schedule and as a result of any element of the arrangements—*

- (a) a company, partnership or collective investment scheme ceases to meet the ownership condition in respect of the chargeable interest;*
- (b) the taxable value of the chargeable interest is reduced to £2 million or less;*  
*or*
- (c) the taxable value of the chargeable interest is reduced with the consequence that a lower annual chargeable amount applies than that which otherwise would have applied.*

*(3) In this regulation—*

- (a) *reference to a lower annual chargeable amount applying is to be read in accordance with the table at section 99(4) of the Finance Act 2013; and*
- (b) *reference to “taxable value” is to be read in accordance with section 102 of the Finance Act 2013.*

The ownership condition is met where a single dwelling interest is held by a company, a partnership with a company member or a collective investment scheme. Where arrangements are put in place to transfer the ownership of a dwelling to an entity which is not among those listed as ‘excluded’ then a disclosure will be required.

Where the value of a dwelling is reduced so that the charge to ATED falls or the dwelling is taken out of the charge completely and this has been achieved other than by a transaction which could reasonably be considered as made at arms length, a disclosure will be required.

### **11.5 Does the arrangement or proposal fall within one of the excluded arrangements? (SI 2013/2571)**

The excluded arrangements are listed in the Schedule to The Annual Tax on Enveloped Dwellings Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2013 (SI 2013/2571).

### **11.6 The Legislation**

#### *Excluded Arrangements*

*Arrangements are excluded arrangements if they comprise a transfer of the chargeable interest from a company, partnership or collective investment scheme (a “transferor”) to a transferee where one or more of the following applies.*

- 1. The transfer is on such terms as would reasonably be expected to be agreed between unconnected persons.*
- 2. The transferor and the transferee are members of the same group of companies and the transferee meets the ownership condition.*
- 3. The transfer constitutes a distribution out of the assets of the transferor, and the transferee is an individual, a corporation sole, a trustee or a person who meets the ownership condition.*
- 4. The transfer constitutes a settlement.*

*In paragraph 1 reference to being “unconnected persons” is to be read in accordance with section 1122 of the Corporation Tax Act 2010.*

*In paragraph 2 reference to companies being “members of the same group of companies” is to be read in accordance with section 152 of the Corporation Tax Act 2010.*

*In paragraph 4 “settlement” has the meaning given by section 43 of the Inheritance Tax Act 1984.*

Schemes are exempted from disclosure where they fall within one of these exclusions. The fact that a scheme is exempted from disclosure does not necessarily indicate that HMRC finds it acceptable or accepts that the scheme works. If an arrangement satisfies one or more of these tests then there is no requirement to notify the scheme to HMRC.

Where a dwelling is disposed of to an unconnected person then this will be outside DOTAS. However, HMRC acknowledge that de-enveloping may be achieved by the disposing of a dwelling to a connected person, either an individual connected with the corporate wrapper or a fellow group member. Where such transactions are carried out on the same terms as they would for an unconnected person transaction then there is no requirement to notify HMRC of the disposal.

De-enveloping may also be achieved by the liquidation of a company giving rise to a distribution of the company assets to shareholders. Such transactions are outside the scope of DOTAS.

For ATED purposes, 'entitled' means beneficially entitled and this excludes entitlement in the capacity of a trustee or personal representative or entitlement as a beneficiary under a settlement. Where a dwelling is transferred to the shareholders of the company who are trustees of a settlement then this will be regarded as a settlement under Paragraph 4.

**11.7 Exclusion 1 - The transfer is on such terms as would reasonably be expected to be agreed between unconnected persons.**

A dwelling has been transferred using the open market value.

For example, an individual owns a company which in turn owns a chargeable interest within the scope of ATED. The company transfers the dwelling to the individual at market value and thus takes the dwelling outside ATED. Although the individual is a connected person because the market value of the dwelling has been used, there is no requirement to notify HMRC of the transfer.

**11.8 Exclusion 2 - The transferor and the transferee are members of the same group of companies and the transferee meets the ownership condition.**

A dwelling has been transferred to a fellow group member. For example, a company owns a dwelling within the charge to ATED. The company transfers the dwelling to a fellow group company where it will also be within the charge to ATED. There is no requirement to notify HMRC of the transfer.

**11.9 Exclusion 3 - The transfer constitutes a distribution out of the assets of the transferor, and the transferee is an individual, a corporation sole, a trustee or a person who meets the ownership condition.**

A company owns a dwelling within the charge to ATED and goes into liquidation.

For example, a company decides to de-envelope by winding the company up and makes a distribution of the company assets to the shareholder, who is an individual. This transaction would be outside DOTAS.

#### **11.10 Exclusion 4 - The transfer constitutes a settlement.**

A company owns a dwelling within the charge to ATED and transfers the dwelling to trustees.

For example, a company owns a dwelling within the charge to ATED and the shareholders of the company are trustees of a settlement. The company decides to de-envelope by distributing the assets of the company to the trustees. There is no requirement to notify HMRC of the transfer.

There are a number of statutory exemptions within ATED, including Charitable Companies, Public Bodies, Bodies established for National Purposes and Dwellings Conditionally Exempt from Inheritance Tax. Where transactions relate to any of these exempt entities, there is no requirement to notify HMRC under the current ATED Regulations.

#### **11.11 Commencement and transitional provisions**

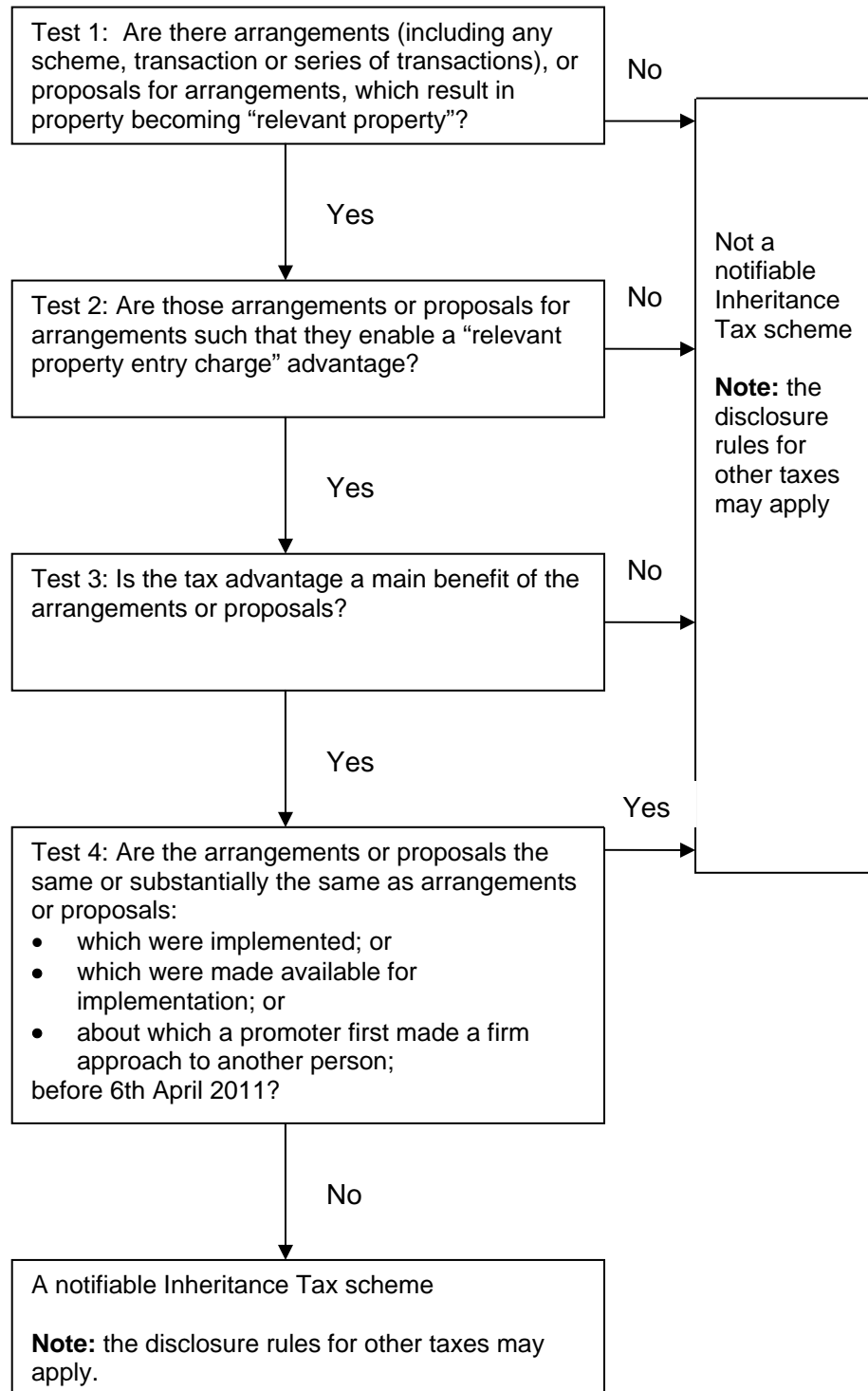
Apart from specific transitional provisions described below, generally a proposal or arrangement for ATED is disclosable where:

- For the purposes of section 308(1), the relevant date is on or after the date that the regulations come into effect on 4 November 2013, or
- For the purposes of section 308(3), the date on which the promoter first becomes aware of any transaction forming part of the notifiable arrangements is on or after the date the regulations come into effect on 4 November 2013.

Specific transitional provisions are needed for the ATED regulations because they also apply to proposals or arrangements where the relevant date under section 308(1) or 308(3) falls within the period beginning 31 January 2013 and ending on the day before the regulations come into effect. If this is the case then the date by which the information on the arrangement or proposal need to be supplied is 17th January 2014 rather than the usual five day period.

## 12. Determining an Inheritance Tax Scheme – Flow Chart

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## **13. Determining an Inheritance Tax scheme – The tests**

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### **13.1 General**

All section references are to the Inheritance Tax Act 1984 unless otherwise stated.

Any reference to “the Regulations” means the Inheritance Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2011 (SI 2011/170), as does a reference to a specific regulation.

The hallmarks at section 7, including the “confidentiality” and “premium fee” hallmarks, do not apply to this section.

### **13.2 Definitions**

The terms used in this guidance shall have the same meaning as those contained in the Inheritance Tax Act 1984 and the Regulations, where appropriate.

### **13.3 Test 1: Are there arrangements or proposals for arrangements which result in property becoming “relevant property”?**

#### **13.3.1 Meaning of “arrangements” (FA 2004, s.318)**

The meaning of “arrangements” is not exhaustively defined in the primary legislation but includes any scheme, transaction or series of transactions.

#### **13.3.2 Property becoming relevant property**

In order for an Inheritance Tax scheme to be disclosable the arrangements must result in property becoming relevant property. Relevant property is defined under s.58(1) and does not include, for example, property held on charitable trusts, a qualifying interest in possession (s.59) or a disabled person’s interest (s.89B).

Where, arrangements do not, at any stage, lead to property becoming relevant property then the scheme will not require disclosure under the Regulations.

It is important to remember that the requirement of the Regulations is merely that property becomes relevant property. It does not matter whether or not property becomes relevant property straight away or whether it remains relevant property; a scheme will require disclosure if at any point in the arrangements or proposed arrangements property becomes relevant property.

### **13.4 Test 2: Are those arrangements or proposals for arrangements such that they enable a “relevant property entry charge” advantage?**

#### **13.4.1 Meaning of “advantage” (FA 2004 s.318)**

The definition of “tax advantage” is very widely drawn and is construed widely. It includes the avoidance or reduction of a charge to tax, a relief or increased relief from tax and the deferral of tax.

Where the scheme is expected to result in tax being avoided or reduced then the long-standing judgement of Lord Wilberforce in CIR v Parker (1966 AC 141) applies and the existence of a tax advantage is tested on a comparative basis.

A relief or exemption from tax will give rise to a tax advantage, as defined (but see paragraph 11.6 below).

It is important to note that under the Regulations a scheme is only disclosable if there is a tax advantage in respect of the “relevant property entry charge” (see paragraph 11.4.2 below). Where a scheme provides a tax advantage but that advantage is not in respect of the “relevant property entry charge” then disclosure will not be required under the Regulations. However, consideration will need to be given as to whether the scheme falls to be disclosed under any other part of the Disclosure of tax avoidance regime.

#### **13.4.2 Meaning of “relevant property entry charge”**

“Relevant property entry charge” means the charge to inheritance tax which arises on a transfer of value made by an individual during that individual’s life as a result of which property becomes relevant property (Regulation 2(3)).

The definition of “transfer of value” can be found at s3(1) and the definition of “relevant property” can be found at s.58(1).

#### **13.4.3 Meaning of advantage in respect of the relevant property entry charge**

As indicated at paragraph 13.4.1, “advantage” is construed widely and in the context of the relevant property entry charge would mean the avoidance, reduction, relief from or deferral of, the relevant property entry charge.

Where there is no transfer of value and no wider arrangements then no advantage can be obtained in respect of a transaction which results in property becoming relevant property.

Where there are:

- arrangements which result in property becoming relevant property;
- there is no transfer of value; but,
- in the absence of other intervening steps in the arrangements there would have been a transfer of value;

disclosure may be required. This is because the arrangements have, by definition, resulted in an advantage in respect of the relevant property entry charge. Whether disclosure is required will depend on the grandfathering rules (see paragraph 13.6 below).

Where due to the arrangements the value of the property which becomes relevant property is greater than the loss to the individual’s estate then disclosure may be required. This is because an advantage may have been obtained in respect of the relevant property entry charge. This will be subject to the grandfathering provisions (see paragraph 11.6 below).

The claiming of a relief or increased relief is included within the definition of advantage. This means that where the relevant property entry charge is relieved then disclosure may be required. However, where there are no wider arrangements other than a single step claim to relief/exemption or use of the Inheritance Tax nil rate band then arrangements would not be disclosable.

### **13.5 Test 3: Is the tax advantage a main benefit of the arrangements? (FA 2004, s306(1)(c))**

The following general points can be made as to when a tax advantage will be regarded as one of the main benefits:

- In our experience those who plan tax arrangements fully understand the tax advantage such schemes are intended to achieve. Therefore we expect it will be obvious (with or without detailed explanation) to any potential client what the relationship is between the tax advantage and any other benefits of the product they are buying/the arrangements they are entering into.
- The test is objective and considers the value of the expected tax advantage compared to the value of any other benefits likely to be enjoyed.

### **13.6 Test 4: Grandfathering**

One of the aims of the extension of the disclosure rules to Inheritance Tax is to restrict disclosure to those schemes which are new or innovative. This is achieved by exempting from disclosure those schemes which are the same or substantially the same as arrangements made available before 6<sup>th</sup> April 2011. This is known as 'grandfathering'.

Regulation 3 provides for the exempting from disclosure of arrangements which are the same or substantially the same description as arrangements:

- which were first made available for implementation before 6<sup>th</sup> April 2011;
- in relation to which the date of any transaction forming part of the arrangements falls before 6<sup>th</sup> April 2011; or,
- in relation to which a promoter first made a firm approach to another person before 6<sup>th</sup> April 2011.

See paragraph 14.2.3 below for the meaning of 'substantially the same'.

'Makes available for implementation' takes the meaning at s.308 Finance Act 2004 and detailed guidance as to its meaning is given at paragraph 14.3 below.

S.307(4A) FA 2004 defines the circumstances in which a person makes a firm approach to another person for the purposes of Part 7 of that Act.

It is a matter of fact whether an arrangement is grandfathered. Evidence of grandfathering would include:

- the existence and substance of the arrangement being clearly described in tax manuals or publications;

- the production of an affidavit where evidence that the grandfathering rule applies is subject to legal professional privilege;
- a practitioner's own record as to when they made, or learnt that competitors were making, an arrangement available.

### **13.7 List of grandfathered schemes & schemes that are not within the Regulations**

A list of schemes which HMRC regards as being 'grandfathered' may be found below. This list is purely illustrative and should not be regarded as being exhaustive. If there is any doubt as to whether a scheme ought to be disclosed then a disclosure should be made.

To be as extensive as possible, the list includes arrangements which do not fall within the regulations because, for example, property does not become relevant property.

The fact that any particular scheme is exempted from disclosure should not be taken as an indication that HMRC either finds the scheme acceptable, or that we accept that it has the intended tax effect under current law. It merely signifies that we are already aware of it or that it does not fall within the Regulations.

It is important to remember where schemes are included on the list of grandfathered schemes it is because HMRC are already aware of them. Where a new scheme is implemented that fails the grandfathering provisions then it will require disclosure.

A scheme may be required to be disclosed even though it is included on the following list if it is part of wider arrangements, not themselves grandfathered, which result in property becoming relevant property and an advantage is obtained in respect of the relevant property entry charge.

A scheme may also need to be disclosed where it is included on the list but the scheme itself is not the same or substantially the same as those already in existence.

#### **A: Arrangements where property does not become relevant property**

If arrangements do not result in any property becoming relevant property at any stage then the arrangements are not disclosable as the Regulations will not apply.

#### **B: Arrangements that qualify for relief/exemptions**

- (a) A single step that qualifies for a relief or exemption (where there are no other steps in order to gain an advantage) will not require disclosure.
- (b) Where the arrangements lead to qualification for:
  - multiple reliefs or exemptions;
  - more than one application of the same relief or exemption;

- a single relief or exemption where there are further steps in order to gain an advantage;

then disclosure will not be required where the arrangements can be shown to be covered by the grandfathering rule.

When considering whether arrangements which qualify for a relief or exemption require disclosure, it is important to remember that the arrangements must result in property becoming relevant property for the Regulations to apply.

**C: The purchase of business assets with a view to transferring the assets into a relevant property trust after two years.**

The purchase of business assets (whether or not they are insurance backed) with a view to holding them for two years prior to transferring them into a trust (and therefore qualifying for relief under s.105) is not disclosable provided that there are no further steps in the arrangements as the grandfathering rules will apply.

**D: The purchase of agricultural assets with a view to transferring the assets into a relevant property trust after the appropriate period.**

The purchase of agricultural assets (whether or not they are insurance backed) with a view to holding them for two years prior to transferring them into a trust (and therefore qualifying for relief under s.117(a)) or seven years prior to transferring them into trust (and therefore qualifying for relief under s.117(b)) is not disclosable provided that there are no further steps in the arrangements as the grandfathering rules will apply.

**E: Pilot Settlements**

The establishment of pilot settlements with a nominal sum (regardless of the number of settlements and whether they are created on successive days) would not require disclosure where there is no advantage obtained in relation to the relevant property entry charge. An advantage in respect of the ten year anniversary and exit charges is not disclosable under the Regulations.

**F: Discounted Gift Trusts/Schemes**

Discounted gift schemes/trusts where the residual trust is a bare trust would not require disclosure as there is no property becoming relevant property.

Where, in relation to a discounted gift trust/scheme, property becomes relevant property then disclosure will not be required where the grandfathering provisions apply.

**G: Excluded property trusts; disabled trusts; employee benefit trusts which satisfy s. 86 and a qualifying interest in possession trust**

Property which is transferred into the above trusts does not become relevant property and is therefore not disclosable under the Regulations unless, as a further element of the arrangements, property does become relevant property and an advantage is obtained in respect of the relevant property entry charge. This will be subject to the grandfathering rules applying.

## **H: Transfers on death into relevant property trusts**

A transfer into a relevant property trust made under the terms of a person's Will or paid into a relevant property trust on a person's death will not require disclosure.

## **I: Changes in distribution of deceased's estates**

S.17 prevents there from being a transfer of value where there is:

- (i) a variation or disclaimer to which s.142(1) applies;
- (ii) a transfer to which s.143 applies;
- (iii) an election by a surviving spouse or civil partner under s. 47A of the Administration of Estates Act 1925;
- (iv) the renunciation of a claim to legitim or rights under s. 131 of the Civil Partnership Act 2004 within the period mentioned in s. 147(6)

Where property becomes relevant property but s.17 applies to the transaction then disclosure will not be required.

In addition, where distributions are made from property settled by Will to which s.144 applies then disclosure will not be required.

## **J: Transfers of the Nil Rate Band every seven years**

The transfer of the settlor's nil rate band into a relevant property trust every seven years (provided there is no other step or steps to the arrangements which enable an advantage to be obtained in respect of the relevant property entry charge) will not be disclosable as the grandfathering provisions will apply.

## **K: Loan into trust**

A transfer into a relevant property trust by way of loan where, other than the establishment of the trust, it is a single step transaction, will not be disclosable as the grandfathering provisions will apply.

## **L: Insurance Policy trusts**

A transfer of the rights to the benefits payable on death into a relevant property trust will not be disclosable even where other benefits, for example, critical illness benefits are payable to the settlor as the grandfathering provisions will apply.

The payment of premiums on a policy settled into a relevant property trust paid by the settlor or other person will not be disclosable as the grandfathering provisions will apply. .

**M: Making a chargeable transfer followed by a potentially exempt transfer**

Where a settlor makes a chargeable transfer prior to a potentially exempt transfer so as to ensure that their full nil rate band is available for the chargeable transfer, the arrangements are not disclosable unless there are further arrangements so as to allow an advantage to be obtained in respect of the relevant property entry charge as the grandfathering provisions will apply.

**N: Deferred shares**

The transfer of deferred shares into a relevant property trust in itself is not disclosable. However, where the transfer is part of arrangements which enable an advantage to be obtained in respect of the relevant property entry charge then disclosure may be required. This will depend on whether it can be shown that the grandfathering provisions will apply.

**O: Items of national importance**

Where a transfer of value is exempt under the following provisions then the transfer does not result in property becoming relevant property:

- (i) s.27 (Maintenance funds for historic buildings etc.);
- (ii) s.30 (Conditionally exempt transfers);
- (iii) s.57A (Relief where property enters maintenance fund).

Where property does not become relevant property then the Regulations will not apply.

**P: Pension death benefits**

The transfer of pension scheme death benefits into a relevant property trust where the scheme member retains the retirement benefits will not in itself require disclosure. However, where the transfer is part of arrangements which enable an advantage to be obtained in respect of the relevant property entry charge then disclosure may be required. This will depend on whether it can be shown that the arrangements are within the exceptions to disclosure outlined in Regulation 3.

**Q: Reversionary Interests**

Where property is transferred into a relevant property trust and the settlor retains a reversionary interest then the transfer will not require disclosure as long as it can be shown that the grandfathering rule applies.

**R: Transfers of value**

A disposition is not disclosable where

- it is not a transfer of value, and
- it does not form part of wider arrangements, of which one of the main purposes is to avoid an entry charge.

This would include dispositions which are not transfers of value under the following sections:

- (i) s.10 (dispositions not intended to confer gratuitous benefit);
- (ii) s.11 (dispositions for maintenance of family);
- (iii) s.12 (dispositions allowable for income tax or conferring benefits under a pension scheme);
- (iv) s.13 (dispositions by close companies for the benefit of employees);
- (v) s.14 (waiver of remuneration);
- (vi) s.15 (waiver of dividends);
- (vii) s.16 (Grant of tenancies of agricultural property).

Where there are:

- arrangements which result in property becoming relevant property;
- there is no transfer of value; but,
- in the absence of other intervening steps in the arrangements there would have been a transfer of value;

disclosure will be required unless it can be shown that the grandfathering rules will apply.

## **S: Gifts to Companies**

Gifts to companies whilst being chargeable transfers do not result in property becoming relevant property and so will not require disclosure under the Regulations.

### **13.8 Examples of arrangements not exempted from disclosure**

Examples of arrangements which would not be excluded from disclosure include arrangements where property becomes relevant property and an advantage is obtained in respect of the relevant property entry charge:

- where the claim that there is no transfer of value relies on a series of transactions where, in the absence of all other intervening steps, there would have been a transfer of value and a relevant property entry charge;
- where reliefs and exemptions are used in such a way that the arrangements are not covered by the grandfathering rule (Regulation 3);
- where an individual makes a potentially exempt transfer to another person and the arrangements are such that the subject matter of the transfer becomes relevant property then, unless the arrangements are covered by the grandfathering rule, disclosure will be required.



## 14. When to disclose a notifiable scheme

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### 14.1 General

Section 3 explains who is required to disclose a notifiable scheme. In general, it is the scheme promoter who has to disclose. However, the user may have to disclose where an offshore promoter or lawyer markets the scheme, or it is devised for use 'in house'.

When new hallmarks are introduced or existing hallmarks are revised then arrangements which have already been marketed or made available may need to be disclosed. In such cases the scheme should be disclosed once one of the tests described in paragraph 14.2.1 is triggered, on or after the date the scheme becomes notifiable.

### 14.2 Schemes where the promoter must disclose

#### 14.2.1 Time limits (FA 2004, s.308(1) and (3), and SI 2012/1836, reg. 5(4), (5) and 2(3))

Where a promoter is required to disclose he must do so within 5 days beginning with the day after he:

- **makes a firm approach** to another person with a view to making the scheme available for implementation by that person or others (see paragraph 14.3.1); or
- **makes a scheme available for implementation** by another person (see paragraph 14.3.2); or
- **becomes aware of a transaction** forming part of the scheme (see paragraph 14.3.3).

Which of the above tests triggers a disclosure will in practice depend upon how the scheme is provided to users and the promoter's precise role. For example, disclosure of a marketed scheme will normally be triggered by the "makes a firm approach" test.

Weekends, Bank Holidays, Good Friday and Christmas Day are not counted in calculating the 5 days.

#### 14.2.2 Exemption for co-promoters (FA2004, s308.(4) to (4C))

Where two or more persons are promoters in respect of the same, or substantially the same, scheme, whether or not it is made available to the same person, the following rules can be used to enable only a single disclosure to be made, rather than a disclosure by each promoter. Use of these exemption rules is optional with the normal rules applying to those promoters who choose not, or are unable, to follow them.

The first rule ((a) below) is intended to apply when there is a co-promoter at the time of disclosure, whereas the second ((b)) is intended to apply when a person becomes a co-promoter some time afterwards.

- (a) A promoter (P2) is exempt from making a disclosure when:
- another promoter (P1) discloses the scheme information described at paragraph 13.3; and
  - P2 holds that information (normally, we would expect P1 to pass a copy of his disclosure to P2); and
  - P1 has provided the identity and address of P2 to HMRC (normally, this would happen at the time P1 makes his disclosure of the scheme, but in any case the information must be provided before P2's duty to disclose arises (see also paragraph 13.4)).
- (b) A promoter (P2) is exempt from making a disclosure when:
- another promoter (P1) has made a disclosure of the scheme information described at paragraph 13.3 to HMRC and been provided by HMRC with a scheme reference number; and
  - P2 holds that information and the scheme reference number (normally, we would expect P1 to pass a copy of his disclosure along with the scheme reference number allocated by HMRC to P2).

In applying the above rules to National Insurance contributions, the promoter P2 is exempt from disclosing the National Insurance contribution element of a scheme if the information provided to him is only in respect of any income tax advantage element. However, the promoter P1 continues to have a duty to disclose both elements.

In the first rule, if, as a result of promoter P1's disclosure, a scheme reference number is allocated, HMRC will issue this to P2 as well as P1.

There is more on scheme reference numbers, and what you should do if you are provided with one, in Section 15.

#### **14.2.3 Exemption for substantially the same scheme (FA 2004, s.308(5))**

A promoter is required to disclose the same scheme only once (except for certain stamp duty land tax schemes (see paragraph 14.2.4). Minor changes, for example to suit the requirements of different clients, need not be separately disclosed providing the revised proposal remains substantially the same.

What constitutes a change in a scheme or arrangement so that it is no longer substantially the same is a matter which will need to be considered on each occasion.

In our view a scheme is no longer substantially the same if the effect of any change would be to make any previous disclosure misleading in relation to the second (or subsequent) client.

In general provided the tax analysis is substantially the same we will regard schemes as "substantially the same" where the only change is a different client including a different company in the same group.

We will not regard schemes as substantially the same where there are changes to deal with changes in the law or accounting treatment, changes in the tax attributes e.g. schemes creating income losses instead of capital losses or other legal and commercial issues.

However, special care must be taken where an existing tax product is used as part of an otherwise bespoke scheme. This has been described to us as “the use of existing toolkit”.

Where a piece of “existing toolkit” is used as part of a separate scheme for the same or different client then it may be that the resulting scheme is so different from the earlier planning idea that the disclosure position needs to be considered afresh. In some situations this might involve the client being given two or more numbers, for example where the scheme involves a combination of ideas that were themselves disclosed and allocated a number.

#### **14.2.4 Disclosing stamp duty land tax schemes twice**

Before April 2010, Scheme Reference Numbers (SRNs) were not issued to SDLT disclosures. This meant that whilst HMRC obtained early warning of the arrangements disclosed it did not enable users of the arrangements to be identified. From April 2010 SRNs were issued in respect of discloseable SDLT arrangements but this only applied to new schemes. As many SDLT arrangements are exempted from disclosure, or “grandfathered”, because they are the same as schemes HMRC is already aware of (see paragraph 9.7), new users of these arrangements could not be easily identified. To enable users of certain arrangements to be identified the disclosure rules have been amended to enable SRNs to be issued in respect of these schemes. This will bring these arrangements within both the client list rules (section 14) and the rules requiring users to notify HMRC of their use of the arrangements on form AAG4 (SDLT) (paragraph 16.4).

In general, schemes that have been disclosed once are exempted from being disclosed again (paragraph 14.2.3). However, with effect from 1 November 2012, certain SDLT schemes (broadly those involving sub-sale arrangements) that were disclosed before April 2010 will have to be disclosed one further time.

Schemes will be disclosable one further time if:

- a promoter disclosed the scheme before April 2010; and
- on or after 1 November 2012, the promoter is a promoter in relation to the scheme; and
- the scheme falls within conditions A and B.

Condition A is that a chargeable interest is acquired under a contract, the substantial performance or completion of which falls to be disregarded by virtue of section 45(3) of the Finance Act 2003.

Condition B is that the secondary contract referred to in section 45(3) of the Finance Act 2003 applies to a transaction with one or more of these features—

- (i) a distribution in specie (i.e. a distribution of an asset in physical form without selling it and distributing the cash);
- (ii) an acquisition by a partnership;
- (iii) an acquisition by a settlement;
- (iv) an element of gift or transfer at an undervalue;
- (v) the grant of an option;
- (vi) an assignment or novation.

Following a second disclosure of the arrangements promoters are reminded of their obligations to include users on a client list (section 14) and to pass the SRN on to those to whom the scheme is marketed (para 15.2 and 15.3) so that users ultimately complete and return form AAG 4(SDLT) (paragraph 16.4).

### **14.3 The tests that trigger a disclosure**

#### **14.3.1 The “makes a firm approach” test**

This test was inserted by FA 2010, thereby creating a new trigger event, which has to be considered before the “makes a scheme available for implementation” test.

The “makes a scheme available for implementation” test was intended to trigger disclosure of a marketed scheme early in the marketing process. However, it became apparent that some promoters were taking steps to delay having to make a disclosure under the letter of the law in order to maximise potential avoidance opportunities before HMRC was able to react to any disclosure. HMRC had examples of promoters taking steps to ensure that a disclosure was not triggered until virtually the point where it was implemented. As a result the application of the provision in practice was not consistent with the policy objective.

Consequently, the “makes a firm approach” test was introduced to ensure that disclosure of a marketed scheme is triggered as soon as a promoter takes steps to market the scheme to potential clients, as originally intended. There is more detail concerning the point at which this takes place in the definition of a promoter at paragraphs 3.6 and 3.6.1 in particular. It is the time when the promoter communicates information about the scheme, which is “substantially designed” (see paragraph 3.6.2), to a third party (who may be a potential client or a scheme introducer) with a view to obtaining clients for the scheme.

#### **14.3.2 The “makes a scheme available for implementation” test**

As described in paragraph 14.3.1, this test did not have the effect originally intended. The test is retained to cover the circumstances where a promoter makes a scheme available for implementation by clients without previously having come within the firm approach test (i.e. without marketing the scheme).

For example, a promoter may offer a client a “packaged solution”. By “packaged solution” we refer to the situation where a promoter does not actively market a scheme, but has a ready developed planning solution (i.e. a scheme) on a solutions database or similar system which is rolled out, with or without modification, to a specific client in response to an approach from that client.

In our view a scheme is made available for implementation at the point when all the elements necessary for implementation of the scheme are in place and a communication is made to a client suggesting the client might consider entering into transactions forming part of the scheme, but it does not matter whether full details of the scheme are communicated at that time.

In practice, it is likely that even arrangements that have to be heavily modified to meet the circumstances of the particular client will reach a point where the design is complete, the scheme is capable of implementation, and the client is then invited to enter into arrangements forming part of the scheme. At that point the scheme is made available for implementation. The promoter might consider such arrangements to be bespoke. But the promoter should focus on whether or not the scheme is made available for implementation, not on to what degree it is bespoke.

#### **14.3.3 The “becomes aware of a transaction” test**

The trigger for disclosure under this test is that a promoter becomes aware that the client has entered into any transaction forming part of the scheme.

In practice it is likely that a disclosure will normally be triggered by one of the other two tests, before this third test arises.

This third test may be the only test to arise where a scheme is wholly bespoke. By a wholly bespoke scheme we mean a tax arrangement designed by an interactive process in response to a client’s specific tax management issue, where it may be that at no point can the scheme be said to be made available for implementation. The trigger for disclosure will then be the implementation itself.

#### **14.4 Schemes marketed by offshore promoters (FA 2004, s.309 and SI 2012/1836, reg. 5(6) and 2(3))**

Where a non-UK based promoter fails to comply with any disclosure obligation, the user must disclose (see paragraph 3.9). He must do so within 5 days of entering into the first transaction forming part of the scheme (see paragraph 14.8). Weekends, Bank Holidays, Good Friday and Christmas Day are ignored for the purposes of determining the due date.

Where disclosure has been made by the promoter, the scheme reference number allocated to it by the Counter-Avoidance Directorate in HMRC should be provided to the user. The Counter-Avoidance Directorate can confirm whether a genuine reference number has been provided. Contact details are at paragraph 1.7.

#### **14.5 Schemes marketed by lawyers (FA 2004, s.310 and SI 2012/1836, regs. 5(7) and 2(3))**

Where a promoter is a lawyer and legal professional privilege prevents him from providing all or part of the prescribed information to HMRC the user must disclose (see paragraph 3.10). Disclosure must normally be made within 5 days of entering into the first transaction forming part of the scheme (see paragraph 14.8). Weekends, bank holidays, Good Friday and Christmas Day are ignored for the purposes of determining the due date.

#### **14.6 Schemes with no promoter, including “in-house” schemes (FA 2004, s.310 and SI 2012/1836, reg. 5(8) and 2(3))**

Where there is no promoter (other than in the case described in paragraph 14.5) the user must disclose (see paragraphs 3.8 and 3.10). He must do so within 30 days of entering into the first transaction forming part of the scheme (see paragraph 14.8 below). Weekends, bank holidays, Good Friday and Christmas day are included for the purposes of determining the due date.

#### **14.7 Exemption for substantially the same scheme (FA 2004, s.308(5) and SI 2012/1836, reg 4(4))**

The exemption described in paragraph 14.2.3 above also applies to the circumstances described in paragraphs 14.4 to 14.6. The effect of this is that a user is only required to disclose the same scheme once.

#### **14.8 The “first transaction” test**

The due date for making a disclosure, where the user is required to make the disclosure, is by reference to the first transaction forming part of the scheme.

In the majority of cases where disclosure is required, it is likely that the tax department or individual is fully aware that the scheme is to be implemented and can monitor when the first transaction takes place.

In other cases, especially in larger organisations, systems should be put in place to identify and report disclosable schemes within the relevant time limit. What those systems are depends on individual circumstances. However they should be reasonable and proportionate to the risk.

In general, we expect the adopted system to involve the people who have the ability and authority to purchase, design or implement the sorts of schemes that are disclosable. These will normally be people within the tax department itself. Such people should be identified and be made sufficiently aware of the adopted system in order that disclosure can be made on time. The system should be reviewed periodically, at least once a year.

It is, however, accepted that there may be unusual circumstances that are either unforeseeable or beyond your control where a disclosable scheme is not captured by the adopted system in sufficient time for the disclosure to be made within the relevant time limit. In some cases the scheme may not be discovered until the end of year audit and tax computation. Concerns have arisen, in particular, over a UK tax advantage arising as a main benefit following:

- a controlled foreign company entering into local tax planning arrangements;

- unusual accountancy treatment;
- commercial transactions being carried out by non-tax specialists without the knowledge of the tax department; or
- the size of the tax benefit being too small for the tax department to be aware of it.

You should make disclosure of the scheme as soon as you are aware that it is late with an explanation as to why. If you have a reasonable excuse for not disclosing earlier you will not be liable to a penalty (see section 19).

#### **14.9 A transaction forming part of the scheme**

A transaction which forms part of a scheme is one that will, either in isolation or in conjunction with other transactions, deliver the tax advantage expected from using the scheme (see paragraph 15.3.4).

The concept of a transaction is not limited to the performance of a contract or the making of a payment under it – the entering into a contract is itself part of the transaction.

Whether an engagement letter is a transaction forming part of a scheme depends upon the nature of the engagement letter. An engagement letter is unlikely to amount to a transaction forming part of a scheme where the promoter is not counterparty to any of the scheme transactions as defined above.

However, if the promoter, or a body controlled by the promoter such as an investment vehicle, is counterparty to a scheme transaction, and the engagement letter amounts to a contract to enter into such a transaction, then the engagement letter may be a scheme transaction. This is to be distinguished from the case where the engagement letter merely amounts to an agreement by a client to pay for, and by the promoter to provide, details of a scheme. Indeed, in some cases a client may buy a scheme but not enter into any transaction which forms part of the scheme.

#### **14.10 Arrangements that provide an advantage in respect of more than one head of duty**

Where a single arrangement provides an advantage in respect of more than one head of duty, each advantage is subject to its own disclosure considerations.

Where more than one advantage requires disclosure the timing rules will always require them to be disclosed at the same time. For administrative ease, combined disclosures can be made. This is explained further at paragraph 15.5.

## **15. How to make a disclosure**

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### **15.1 The forms to complete (FA 2004, s.316)**

There are four different forms available for use in the following circumstances:

- AAG 1 – Notification of scheme by promoter;
- AAG 2 – Notification by scheme user where offshore promoter does not notify;
- AAG 3 – Notification by scheme user where no promoter, or promoted by lawyer unable to make full notification;
- AAG 5 – Continuation sheet

Use of these forms is a legal requirement (see paragraphs 1.2 and 1.5.3).

### **15.2 How to obtain and submit the forms**

You can make an online disclosure by clicking the relevant links on the Counter-Avoidance Directorate website at <http://www.hmrc.gov.uk/aiu/index.htm>. This enables you to use a structured form to send HMRC the prescribed information by secure e-mail.

You can obtain PDF version of the forms for printing out by clicking the relevant links on the same web page, or by contacting the Counter-Avoidance Directorate (Intelligence) within HMRC at the address shown at paragraph 1.7. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should then be sent by either post or e-mail to the Counter-Avoidance Directorate (Intelligence) at the address shown at paragraph 1.7. Word versions of the above forms were withdrawn with effect from 1<sup>st</sup> July 2011.

### **15.3 The information to be provided**

#### **15.3.1 General (SI 2012/, reg. 4)**

Briefly, the regulations prescribe that the following information must be provided:

- Your name and address if you are a promoter making the disclosure, a client making a disclosure where the promoter is a lawyer, or making an 'in-house' disclosure where there is no promoter.
- Your and the promoter's name and address if you are disclosing as the client of an off-shore promoter.
- Details of the provision, in the Prescribed Descriptions of Arrangements Regulations that makes the scheme disclosable – see paragraph 15.3.3.
- A summary of the proposal/arrangements and the name by which it/they are known – see paragraph 15.3.4.



- Information explaining the elements and how the expected tax advantage arises – see paragraph 15.3.4.
- The statutory provisions on which that tax advantage is based – see paragraph 15.3.4.

### **15.3.2 Legal advice (FA 2004, s.314)**

Legal professional privilege may apply to certain advice given by lawyers to their clients. Such information need not be disclosed.

### **15.3.3 The prescribed arrangement(s)**

The relevant forms have a list of the relevant provisions.

For hallmarked schemes, the relevant hallmark (see section 7) should be indicated. For some schemes, more than one hallmark may apply. Here you need only indicate one hallmark. However, in order to allow HMRC to monitor the value of the hallmarks, we would prefer you to indicate the main applicable hallmark.

For stamp duty land tax schemes there are four options; first to indicate disclosure of a scheme in relation to the acquisition of a chargeable interest and then the type of property for which the arrangement is to be used.

For inheritance tax schemes there is only one box to be ticked.

See paragraph 15.5 below for situations where an advantage is obtained in respect of more than one head of duty.

### **15.3.4 Explaining the scheme**

Sufficient information must be provided such that an Officer of the Board of HMRC is able to understand how the expected tax advantage is intended to arise. The explanation should be in straightforward terms and should identify the steps involved and the relevant UK tax law. Common technical or legal terms and concepts need not be explained in depth.

If the scheme is complex then copies of any prospectus or scheme diagrams will help us understand what is proposed. But even where you send such documents you must still use form AAG 1, AAG 2 or AAG 3 as appropriate. Where such documents are supplied there is no objection to these documents excluding information that would identify a client.

### **15.4 Notification of co-promoters (FA 2004, s.308(4A)(a) and (4C)(a))**

When you make your disclosure, you may also provide HMRC with details of any other promoter (a co-promoter) of the same or substantially the same scheme. You are not required to provide their details to HMRC but if you do so and provide the co-promoter with the information at paragraph 13.3 above he will be exempt from making his own disclosure of the scheme (see paragraph 14.2.2).

The details to be provided are the co-promoter's name and address. Where the co-promoter is a company, it is the company's name and address that is to be provided not that of an individual.

The details should be sent to the mail, or email, address at paragraph 1.7 and accompany the disclosure.

If you have already made a disclosure of the scheme and hold the scheme reference number allocated by HMRC, and your co-promoter seeks exemption from making his own disclosure, his details need not be provided to HMRC if rule (b) at paragraph 14.2.2 is followed.

### **15.5 Arrangements that provide an advantage in respect of more than one head of duty**

A single arrangement may provide an advantage in respect of more than one head of duty each of which is subject to its own disclosure considerations. For example both a NI contribution advantage and an income tax advantage or both an Inheritance Tax advantage and a Capital Gains Tax advantage.

Where more than one advantage requires disclosure, the arrangements need only be disclosed on one form. However, the scheme description must make it clear that there is an advantage in respect of more than one head of duty and explain how each of those advantages arises.

The effect of the above on scheme reference numbers is explained at paragraph 17.8.

## 16. Client Lists

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### 16.1 General (FA 2004, s.312B, 313ZA, 312ZB and SI 2010/2928, SI 2013/2592)

From 1 January 2011 promoters are required to provide quarterly lists to HMRC of clients to whom they have become obliged to issue a scheme reference number during that calendar quarter.

The lists apply to schemes disclosed at any time. If a scheme was disclosed before 1 January 2011 a promoter will have to provide a client list in respect of any clients to whom he is required to issue a scheme reference number on or after that date. He will not have to provide a client list in respect of any clients to whom he was required to issue a scheme reference number before 1 January 2011 (even if he actually issues them with a scheme reference number on or after that date). See the examples in paragraph 16.3 below.

HMRC uses the information from client lists to assess and monitor the level of risk posed by disclosed arrangements.

**Warning:** Failure to provide details of a client in accordance with the rules described in this section may result in a penalty (see paragraph 22).

### 16.2 Duty of promoter to provide details of client

#### 16.2.1 The duty

The duty applies to a promoter who is providing, or has provided, services to any person ("the client") in connection with a notifiable proposal or arrangements and who is obliged to pass the scheme reference number to the client (under s.312(2) - see paragraph 16.2.2 below and section 15). The duty applies to co-promoters whether or not they made a separate disclosure (see paragraphs 3.4, 14.2.2, 13.4 & 15.2). To ensure equality of treatment, for penalty purposes, it also applies where a promoter would have been obliged to pass on a scheme reference number but for a failure by the promoter to notify the proposal or arrangements under s308(1) or (3) (see section 12).

Under the duty the promoter is required to provide prescribed information (see paragraph 16.2.3 below) to HMRC within a prescribed period (30 days) of the end of a relevant period (calendar quarter). There is an extended deadline in certain circumstances for provision of the client's unique tax reference number (UTR) and national insurance number (NINO). See the examples in paragraph 14.4 below. This is irrespective of weekends, Bank Holidays, Good Friday and Christmas Day. So for example the client list for the quarter ended 31<sup>st</sup> March 2012 will be due on or before 30<sup>th</sup> April 2012 regardless of the holidays that fell on 6<sup>th</sup> and 9<sup>th</sup> April.

### **16.2.2 When to provide a client's details**

The trigger for a promoter to provide a client's details for any quarter is the promoter coming under the s.312 (2) obligation to notify the scheme reference number in relation to that client (see paragraph 15.2). This obligation arises when the later of two events occurs: the promoter being provided with the scheme reference number, or becoming aware of any transaction that forms part of the scheme (see paragraph 14.9 on what constitutes "*a transaction forming part of the scheme*")

In most cases this is likely to mean that the promoter will provide the client's details in the quarter in which the promoter first becomes aware of a transaction forming part of the scheme. In any other case it will be the quarter in which the promoter receives the scheme reference number.

A client may take the first step and enter into an arrangement, but later withdraw from, or unwind, it so that no tax advantage is obtained. Even where this occurs within the same calendar quarter, the promoter is still obliged to include the client on the client list. This is because the trigger for inclusion on the client list is the same as for the scheme reference number notification obligation.

However, the client may not be obliged to report the scheme reference number on a return because the trigger for a client to report the scheme reference number on a return or AAG4 is different (see paragraph 17.5). Promoters may therefore wish to advise Counter Avoidance Directorate of clients who have subsequently decided not to proceed with arrangements when they submit their client list to avoid any unnecessary enquiries in the future.

Promoters are not required to make nil returns for any quarter in which they have no clients to whom they have to pass the scheme reference number.

There is an extended deadline for provision of the client's UTR and NINO in certain circumstances. The client has to provide the promoter with their UTR and NINO within 10 days of the later of the client receiving the scheme reference number or the date that the client first enters into a transaction forming part of the notifiable arrangements. If these events are at or near the end of the quarter then the promoter may not have the UTR and NINO to provide to HMRC or be able to inform HMRC that the client does not have a UTR and NINO.

In which case the promoter is obliged to confirm to HMRC, within the usual 30 day prescribed period, that either one of three scenarios applies:

- That the client has notified the promoter that they do not have a UTR or NINO, or
- That the client has not complied with their obligation to inform the promoter of their UTR and NINO, or
- On the 16<sup>th</sup> day after the relevant period that the time limit for the client to provide their NINO and UTR has not expired.

Where the time limit for the client to provide the information has not expired (the third bullet point above) then the prescribed period is extended to 60 days. The extended period only applies to the following prescribed information.

- The client's UTR and NINO, or
- Confirmation that the client does not have a UTR and NINO, or
- Confirmation that the client has not complied with their obligation to provide the UTR and NINO.

#### **16.2.3 The information to be provided within the 30 day prescribed period**

- The promoter's full name and address;
- The scheme reference number issued by HMRC in connection with the proposal or arrangement;
- The client's full name and address. The address is the one to which the promoter sends the scheme reference number;
- The client's unique taxpayer reference number and/or National insurance Number, or
- Confirmation that the client does not have a UTR or NINO, or
- Confirmation that the client has failed to provide their UTR and NINO, or
- That on the 16<sup>th</sup> day after the end of the calendar quarter, the time limit for the client to provide their UTR and NINO has not expired, and
- The end date of the calendar quarter for which the information is being supplied.

#### **16.2.4 How to submit client lists**

You must send the client list to Counter Avoidance Directorate at the address in paragraph 1.7, using a client list form that will consist of 2 parts. The first part will contain the promoter's details. The second part will contain both the prescribed information relating to the client(s).

If you submit the client list online you must use the Shared Workspace (SWS) software. SWS provides an environment for the secure transmission of data to HMRC. Promoters of existing schemes have been sent instructions on how to register for SWS. When HMRC acknowledges receipt of new disclosures it also sends details on how to register for this service. A promoter has to register for SWS only once, so a promoter already registered for other purposes will not have to re-register but will have to contact Counter Avoidance Directorate at the address detailed at paragraph 1.7 to be given access to the clients' room. These contact details should also be used for any other queries regarding SWS or if you would prefer to send us your client list manually.

### **16.3 Examples**

In these examples "*implemented the scheme*" refers to entering into a transaction forming part of the scheme (see paragraphs 14.8 and 16.2.2).

#### **Example 1**

Promoter P discloses a scheme in November 2010 and HMRC issues a scheme reference number. P's normal practice is to issue a scheme reference number to clients as soon as he makes a scheme available to them.

The first relevant period will be 1 January to 31 March 2011. During that period P:

- Issues the scheme reference number to clients X and Y;
- Becomes aware that X has implemented the scheme;
- Also becomes aware that client Z, to whom P issued the scheme reference number in December 2010, has implemented the scheme.

P is required to provide information about clients X and Z in the client list due by 30 April 2011.

During the period 1 April 2011 to 30 June 2011 P:

- Does not issue this scheme reference number to any further clients;
- Becomes aware that Y has implemented the scheme.

P is required to provide information about client Y on the client list due by 30 July 2011.

### Example 2

Promoter P discloses a scheme in January 2011 and HMRC issues a scheme reference number. On 17 February 2011 P becomes aware that client X has implemented the scheme. He issues X with the scheme reference number 30 days later. On 31 March 2011 P becomes aware that client Y has implemented the scheme. He issues Y with the scheme reference number 30 days later on 30 April 2011.

P is required to provide information about clients X and Y in the client list for the period 1 January to 31 March 2011, due by 30 April 2011.

### Example 3

Promoter P discloses a scheme on 22 March 2011. On 29 March 2011 he becomes aware that client X has implemented the scheme. P receives a scheme reference number from HMRC on 2 April 2011. The "relevant date" for the purposes of s.312 FA 2004 is 2 April 2011.

P is required to provide information about client X in the client list for the quarter ended 30 June 2011, due by 30 July 2011.

### Example 4

Promoter P has disclosed two schemes (A and B) each of which has been issued with a scheme reference number. In the period to 31 March 2011, he becomes aware that:

- clients X and Y have implemented scheme A; and
- clients Y and Z have implemented scheme B.

P will be required to submit 2 forms by 30 April 2011, one for scheme A (containing information about clients X and Y), one for scheme B (containing information about clients Y and Z).

## **17. What to do if you receive a scheme reference number relating to an income tax, corporation tax, capital gains tax or NI contribution scheme**

### **17.1 Outline of the scheme reference number system**

The scheme reference number system is a means of identifying the users of disclosed schemes, allowing HMRC to prioritise and co-ordinate enquiries into users' returns.

It works by scheme users reporting an 8-digit scheme reference number to HMRC. This is normally done on the relevant tax return, but in some circumstances it has to be reported separately on a specified HMRC form.

This reference number is allocated by HMRC at the time the scheme is disclosed and is given to the person who disclosed the scheme and, from 1 November 2008, any co-promoters notified in the disclosure. They then in turn pass it to the scheme user, sometimes via a third party client, in accordance with the rules explained below. Where a scheme user is the person required to disclose the scheme, HMRC will provide the number directly to him, who nevertheless must report the number on his return or the specified form.

The allocation or notification of a scheme reference number does not indicate that HMRC accept that the scheme achieves or is capable of achieving any purported tax advantage nor that the disclosure is complete.

**Warning:** You may incur a penalty if you fail to comply with the rules outlined in this section (see section 22).

### **17.2 Promoters must provide scheme reference number to clients (FA 2004, s.312 and SI 2012/1836, reg. 6)**

As a promoter you may have been provided with a reference number by HMRC because you disclosed a hallmarked scheme, or because you were named as a co-promoter by another promoter at the time they disclosed the scheme (see paragraph 14.2.2 at (a)). Alternatively, you may have been provided with a scheme reference number by another promoter as a result of becoming a co-promoter some time after the main promoter made their disclosure (see paragraph 14.2.2 at (b)).

However you come to be in receipt of a scheme reference number you **must**:

- provide it to any other person (your "client") to whom you provide, or have provided, services in connection with the disclosed scheme or any scheme that is substantially the same. Your client may be the person who is intended to obtain the tax advantage or he may be a third party (i.e. a person who does not himself enter into the scheme and/or expect to obtain a tax advantage);
- do so using form AAG 6 available by clicking the relevant links on the HMRC website at <http://www.hmrc.gov.uk/aiu/index.htm>; and
- do so within 30 days of either being provided with the scheme reference number or becoming aware of any transaction that forms part of the scheme, whichever is later.

- include the client on a client list – see chapter 14.

While there is no obligation to do so, you may find it more convenient to provide the number to a client when you make the scheme available rather than wait until it has been implemented. If, but only if, you do so using the form AAG 6, you need not re-notify the number to your client when you become aware of a transaction forming part of the scheme.

If you have been provided with more than one scheme reference number in relation to any given scheme, you only need provide one of those numbers to your client.

### **17.3 Clients must provide scheme reference number to parties to the scheme (FA 2004, s.312A and SI 2012/1836, regs. 6 to 8)**

As explained at paragraph 17.2 above, if a promoter provides, or has provided, you with services in connection with a disclosable scheme, he may also provide you with a scheme reference number. From 1 November 2008 this should be given to you on an HMRC form AAG 6 containing guidance about when and how to report the reference number to HMRC or provide it to other parties. Prior to then it will have been passed to you in some other way.

When you have been provided with a scheme reference number, by whatever route, you **must**:

- provide it to any other person who you might reasonably expect to be a party to, and whom might reasonably be expected to gain a tax advantage from, the scheme;
- do so using form AAG 6 available by clicking the relevant links on the HMRC website at <http://www.hmrc.gov.uk/aiu/index.htm>; and
- do so within 30 days of either being provided with the scheme reference number by the promoter or becoming aware of any transaction that forms part of the scheme, whichever is the later.

If you are an employer and your employee receives or expects to receive an income or capital gains tax advantage or NI contributions advantage as a result of the scheme, there is no requirement to pass the number to him.

#### **17.3.1 Reasonable expectation**

Your obligation, as the client of a promoter, to pass a scheme reference number to third parties only applies when you have sufficient commercial connection with that party to have a reasonable expectation that they will gain a tax advantage from the scheme. As examples:

- You are a company which is not subject to UK corporation tax but seek to reduce costs on equipment. You buy a disclosable leasing scheme from a promoter (thereby becoming their 'client') that involves you purchasing equipment and then entering into a sale and leaseback arrangement with a UK finance house – the finance house not you, obtains the tax advantage, as defined, but you seek to share in the capital allowances the finance house can claim. The promoter is required to provide you with the scheme



reference number. As you can reasonably be expected to know that the finance house is a party to, and expects to gain a tax advantage from, the scheme, you must provide them with the scheme reference number.

- You are a parent company which purchases a scheme and makes it available for subsidiary companies to use but without yourself becoming a party to the arrangements that make up the scheme. You must provide the scheme reference number to those subsidiaries that are expected to gain a tax advantage from the scheme.

You are not required to provide a number to a person simply because, for example, you learn about their use of a scheme through hearsay, reading about it in the press or a Special Commissioners' decision, etc.

#### **17.4 On receipt of scheme reference number clients must provide their NINO and UTR to the promoter (FA2004 s.312B and SI 2013/2592)**

Within ten days from the later of the date that the client receives a scheme reference number or the date that the client first enters into a transaction forming part of the arrangements the client has to notify the promoter of their:

- National insurance number
- Unique taxpayer reference
- Or if they have neither of these, confirmation that they do not hold a national insurance number or a unique taxpayer reference.

The promoter will then provide this information to HMRC in accordance with chapter 16 above.

#### **17.5 Parties to a scheme must include the scheme reference number on a return, etc. (FA 2004, s.313)**

As explained at paragraphs 17.2 and 17.3, if you are a party to a scheme, the promoter or his client may provide you with a scheme reference number. Since 1 November 2008 this should be provided to you on form AAG 6. In some cases you may receive the number direct from HMRC as a result of disclosing the scheme yourself (see paragraphs 3.9 to 3.11).

If you expect to obtain a tax advantage as a result of being a party to the scheme; or are an employer of an employee, by reason of whose employment a tax or NI contribution advantage is expected to arise to any person as a result of the scheme; you **must**:

- include the scheme reference number on your tax return in the specific boxes provided or on form AAG 4 – see paragraph 17.5.1; and
- state the last day of the year of assessment, tax year, accounting period or earnings period (as the case may be) in which, or the date on which, you expect the advantage to be obtained – see paragraph 17.5.4.

If you are a partnership which expects a tax or NI contributions advantage to arise in respect of a partner's share of partnership profits or gains, the information is to be entered on both your partnership return and the relevant individual, company, or trust & estate return (as the case may be) for the partner in question.

**Warning:** You may incur penalties if you fail to notify prescribed information within the prescribed time limits (see section 22).

#### **17.5.1** When to enter information on tax return or form AAG 4

Subject to the following the information (at paragraph 17.4) must be entered on the return (in the specific boxes) that relates to the year of assessment, tax year, accounting period or earnings period (as the case may be) in which you first enter into a transaction forming part of the scheme. If any one of the following applied the information must not be entered onto a return, instead you must use form AAG 4:

- you are an employer of an employee, by reason of whose employment a tax or NI contribution advantage is expected to arise;
- you expect to obtain a tax or NI contribution advantage but do not have a return on which you would otherwise be required to enter the information. (If you are a partnership which expects a tax or NI contributions advantage to arise in respect of a partner's share of partnership profits or gains, and do not have either or both the partnership return and the return for the partner in question, form AAG 4 must be completed for each return that you do not have.);
- you are late submitting the return for the relevant period such that it will not be submitted to HMRC before the statutory filing date;
- you have submitted the return for the relevant period but have not included the information at paragraph 17.3 in it;
- you need to notify more scheme reference numbers than there are spaces on the return (you should use form AAG 4 to notify only those numbers that will not fit on the return); or
- the scheme gives rise to a claim to relief made separately from your return under section 261B of TCGA1992 (treating trade loss etc as CGT loss) or any of the various loss relief provisions within Part 4 of ITA2007. In these circumstances you must also notify the SRN on your Income Tax or Corporation Tax Return affected by the use of the scheme.

You must continue to do this for every subsequent year or period until the advantage ceases to apply. For example, if losses created by a scheme are expected to be used in a future year, you should enter the information at paragraph 15.4 in the year you first enter into a transaction forming part of the scheme and each subsequent year, including those where the losses are not used, until the losses have been used up. The information must be included in the scheme reference boxes on the return or on the form AAG4 as described above.

Where you use a scheme that involves an in-year claim not covered by the last bullet above, for example a coding adjustment, reduction in any payment on account or quarterly payment, there is no statutory requirement to disclose the scheme reference number as part of the claim. However, it will be helpful if you show the number on any such claims and you must include it in your return or on form AAG 4 as appropriate.

#### **17.5.2 Where to send form AAG 4**

Other than for in-year claims (see below), form AAG 4 must be sent to

Counter-Avoidance Directorate (Intelligence)  
HM Revenue & Customs  
CTIAA Intelligence S0528  
PO Box 194  
Bootle  
L69 9AA

in sufficient time for it to be received by the date appropriate to the entity receiving the tax advantage as detailed at paragraph 17.5.4 below.

#### **17.5.3 Date for submission of form AAG 4 to Counter-Avoidance Group (Intelligence).**

- For partnerships, or partners in respect of whom the partnership expects the tax or NI contributions advantage to arise the form must reach Counter Avoidance Directorate by 31st October following the end of the year of assessment, tax year, accounting period or earnings period in which the tax advantage arises.
- If you are an individual, or trustee the form must reach Counter Avoidance Directorate by 31st January following the end of the year of assessment, tax year, accounting period or earnings period in which the tax advantage arises.
- If you are a corporate body the form must reach Counter Avoidance Directorate within 12 months of the end of the accounting period in which the tax advantage arises unless one of the following applies –
  - where a PAYE tax advantage is expected to arise (note: the scheme reference number is reported by the employer rather than individual employees – see paragraph 17.8) there are two potential dates by which the scheme reference number should be reported.
    - If you are an employer making returns of PAYE using real time information (RTI) then the date is 14 days after the final tax period in the tax year (i.e. if the final tax period runs to the 5<sup>th</sup> of April then by the 19<sup>th</sup> of April)
    - If you are not making returns of RTI then the date to report the scheme reference number is by the 19<sup>th</sup> May following the relevant tax year;
    - where a NI contribution advantage is expected to arise there are two potential dates by which the scheme reference

number should be reported (except for class 1A national insurance contributions – see below).

- If you are an employer making returns of national insurance contributions using real time information (RTI) then the date is 14 days after the final tax period in the tax year (i.e. if the final tax period runs to the 5<sup>th</sup> of April then by the 19<sup>th</sup> of April)
  - If you are not making returns of RTI then the date to report the scheme reference number is by the 19<sup>th</sup> May following the relevant tax year;
- where a NI contribution advantage is expected to arise and it only relates to Class 1A contributions and it does not give rise to a tax advantage by 6th July following the relevant tax year.

For in-year claims, form AAG 4 must be sent to your HMRC office with the claim and not to Counter-Avoidance Directorate (Intelligence).

#### **17.5.4 Expectation of obtaining a tax advantage**

You are required to state the last day of the year of assessment, tax year, accounting period or earnings period (as the case may be) in which, or the date on which, you expect the advantage to be obtained. You must continue to do this for every subsequent year or period until the advantage ceases to apply.

In the majority of cases the date will be the same as the period in which you first enter into a transaction forming part of the scheme. However, this is not always the case. For example, where the implementation of a scheme spans the end of a period, with the advantage expected to arise in a subsequent period, you should quote the subsequent period in respect of which the advantage is expected to arise.

For loss schemes, if you use the loss or part of the loss in the period for which a return is being, or would otherwise be, completed, you should quote the last day of that period. If you do not use any of the loss in that period you should quote the last day of the next period in respect of which you expect it to be used.

#### **17.6 How to obtain and submit form AAG 4**

You can obtain and submit form AAG 4 online by clicking the relevant links on the HMRC website at <http://www.hmrc.gov.uk/aiu/index.htm>

You can obtain PDF version of the forms for printing out by clicking the relevant links on the same web page, or by contacting the Counter-Avoidance Directorate (Intelligence) within HMRC at the address shown at paragraph 1.7. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should then be sent by either post or e-mail to the Counter-Avoidance (Intelligence) at the address shown at paragraph 1.7. Word versions of the above forms are no longer available.

### **17.7 Is an individual or a small and medium enterprise (SME) exempt from notifying reference numbers?**

No, the available exemption for individuals who are not in business and SMEs is from the requirement to determine (and disclose) if they use in-house hallmarked schemes (see paragraph 6.7).

However, they are required to declare on their tax return or form AAG 4 any scheme reference numbers issued or provided to them that relate to schemes they use.

### **17.8 Employers using schemes**

This paragraph applies where a scheme is expected to result in a PAYE tax advantage and involves one or more directors or employees or persons connected to directors or employees or the employer.

Where a promoter has disclosed the scheme to HMRC it will be given a reference number and the promoter is obliged to notify this number to the client in the usual way.

The employer must notify the use of the arrangement on form AAG 4 directly to HMRC.

For employers HMRC has introduced a new way of reporting PAYE called Real Time Information (RTI). This means that the vast majority of employers will be required to report PAYE in real time. You can read about the new RTI rules on HMRC's website at <http://www.hmrc.gov.uk/payerti/index.htm>.

Employers must submit form AAG 4 to HMRC:-

- For Real time Information employers - 14 days after the final tax period for a tax year (reg 12 3(b) of SI 2012/1836).

#### **RTI Example**

An RTI employer runs his payroll monthly, paying his employees on the last working day of each month – Friday 28 March.

For 2013/14 the employer's last RTI return for the year will be due for the final tax period to 5 April 2014 and should be submitted by 19 April 2014.

The employer must also send form AAG4 to HMRC 14 days after the final tax period for the tax year, which is by 19 April 2014.

- For non-Real Time Information employers - 19th May following the end of the tax year (reg 12 (3)(a) of SI 2012/1836);

However, the employer is not required to pass the scheme reference number to his employees, who in turn are not required to include a number on their returns.

Employers do not need to include the reference number on their personal SA return or CTSA return (where the employer is a company).

### **17.9 Arrangements that provide both a NI contribution advantage and an income tax advantage**

A single arrangement may provide both a NI contribution advantage and an income tax advantage, each of which is subject to its own disclosure considerations.

Where both advantages are required to be disclosed, HMRC will issue a single scheme reference number that will apply to both advantages. You need only make one entry on your return or form AAG 4.

### **17.10 Withdrawal of scheme reference numbers**

HMRC has discretion to withdraw scheme reference numbers – i.e. specify that with effect from a given date the scheme reference number:

- need no longer be passed from a promoter to their client (paragraph 17.2), or from their clients to parties to the scheme (paragraph 17.3); or
- reported to HMRC by the parties to the scheme.

The withdrawal of a scheme reference number will be notified to the person who originally made the disclosure and any co-promoters whose details had been provided to HMRC by the person who made the original disclosure. Details of withdrawn numbers and the effective date from when they have been withdrawn will also be posted on the HMRC website at <http://www.hmrc.gov.uk/aiu/index.htm>.

The withdrawal of a scheme reference number does not relieve any obligation that may have existed prior to the date of withdrawal.

If, after a notice of withdrawal is made, a party to a scheme reports a withdrawn number, it will have no impact on HMRC's interventions.

## **18. What to do if you receive a scheme reference number relating to a stamp duty land tax scheme**

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### **18.1 Outline of the scheme reference number system**

The scheme reference number system is a means of identifying the users of disclosed schemes, allowing HMRC to prioritise and co-ordinate enquiries into users' returns. The scheme reference number system applies to stamp duty land tax schemes and arrangements which became notifiable on or after 1 April 2010 (including schemes that became notifiable for a second time after 1 November 2012 – see sections 8 and 9). Prior to 1 April 2010 numbers relating to notifiable schemes and arrangements were given to promoters etc but these were not Scheme Reference Numbers within the meaning of the legislation and there was no obligation either to pass the number to users etc or for the users to notify the number to HMRC. The remainder of the guidance in section 16 relates solely to stamp duty land tax schemes and arrangements which became notifiable on or after 1 April 2010. If you are in doubt as to whether a reference number you have received should be passed on or notified to HMRC you should contact Counter-Avoidance Directorate using the contact details at paragraph 1.7.

The scheme reference number system works by scheme users reporting an 8-digit scheme reference number to HMRC. For stamp duty land tax schemes the scheme reference number has to be reported on form AAG 4 (SDLT).

This reference number is allocated by HMRC at the time the scheme is disclosed and is given to the person or persons who disclosed the scheme. They then in turn pass it to the scheme user, sometimes via a third party client, in accordance with the rules explained below. Where a scheme user is the person required to disclose the scheme (see section 3), HMRC will provide the number directly to them, who must nevertheless report the number on the form AAG4 (SDLT).

The allocation or notification of a scheme reference number does not indicate that HMRC accept that the scheme achieves or is capable of achieving any purported tax advantage.

**Warning:** You may incur a penalty if you fail to comply with the rules outlined in this section (see section 22).

### **18.2 Promoters must provide scheme reference number to clients**

As the promoter of a stamp duty land tax you will have been provided with a reference number by HMRC because you disclosed a stamp duty land tax scheme. You **must**:

- provide it to any other person (your “client”) to whom you provide, or have provided, services in connection with the disclosed scheme or any scheme that is substantially the same. Your client may be the person who is intended to obtain the tax advantage or he may be a third party (i.e. a person who does not himself enter into the scheme and/or expect to obtain a tax advantage);

- do so using form AAG 6(SDLT) available by clicking the relevant links on the Counter-Avoidance Directorate website at <http://www.hmrc.gov.uk/aiu/index.htm>; and
- do so within 30 days of either being provided with the scheme reference number or becoming aware of any transaction that forms part of the scheme, whichever is later.
- include the client on a client list – see chapter 14.

While there is no obligation to do so, you may find it more convenient to provide the number to a client when you make the scheme available rather than wait until it has been implemented. If, but only if, you do so using the form AAG 6(SDLT), you need not re-notify the number to your client when you become aware of a transaction forming part of the scheme.

If you have been provided with more than one scheme reference number in relation to any given scheme, you only need provide one of those numbers to your client.

### **18.3 On receipt of scheme reference number clients must provide certain information to the promoter (FA2004 s.312B and SI 2013/2592)**

Within ten days from the later of the date that the client receives a scheme reference number or the date that the client first enters into a transaction forming part of the arrangements the client has to notify the promoter of their:

- National insurance number
- Unique taxpayer reference
- Or if they have neither of these, confirmation that they do not hold a national insurance number or a unique taxpayer reference.

The promoter will then provide this information to HMRC in accordance with chapter 16 above.

### **18.4 Clients must provide scheme reference number to parties to the scheme**

As explained at paragraph 16.2 above, if a promoter provides, or has provided, you with services in connection with a disclosable scheme, he may also provide you with a scheme reference number. This should be given to you on an HMRC form AAG6 (SDLT) which contains guidance about when and how to report the reference number to HMRC or provide it to other parties.

When you have been provided with a scheme reference number, by whatever route, you must:

- provide it to any other person who you might reasonably expect to be a party to, and whom might reasonably be expected to gain a tax advantage from, the scheme;
- do so using form AAG 6 (SDLT) available by clicking the relevant links on the Counter-Avoidance Directorate website at <http://www.hmrc.gov.uk/aiu/index.htm>; and



- do so within 30 days of either being provided with the scheme reference number by the promoter or becoming aware of any transaction that forms part of the scheme, whichever is the later.

#### **18.4.1 Reasonable expectation**

Your obligation, as the client of a promoter, to pass a scheme reference number to third parties only applies when you have sufficient commercial connection with that party to have a reasonable expectation that they will gain a tax advantage from the scheme. As examples:

- You are a parent company which purchases a scheme and makes it available for subsidiary companies to use but without yourself becoming a party to the arrangements that make up the scheme. You must provide the scheme reference number to those subsidiaries that are expected to gain a tax advantage from the scheme.
- You are a property developer which purchases a scheme and makes it available to property purchasers but without yourself becoming a party to the arrangements that make up the scheme. You must provide the scheme reference number to those purchasers that are expected to gain a tax advantage from the scheme.

You are not required to provide a number to a person simply because, for example, you learn about their use of a scheme through hearsay, reading about it in the press or a Tribunal decision, etc.

#### **18.5 Purchaser receiving a stamp duty land tax advantage must include the scheme reference number and other information on form AAG 4 (SDLT)**

As explained at paragraphs 18.2 and 18.3, if you expect to obtain a tax advantage from a tax avoidance scheme, the promoter of the scheme or his client may provide you with a scheme reference number. This should be provided to you on an HMRC form AAG6 (SDLT), which contains guidance about when and how to report the reference number to HMRC. In some cases you may receive the number directly from HMRC as a result of disclosing the scheme yourself (see paragraphs 3.9 to 3.11).

The scheme reference number and additional information specified at paragraph 18.5.2 must be entered on form AAG 4 (SDLT). This is the only means by which HMRC may be notified of a stamp duty land tax scheme. The scheme reference number for stamp duty land tax schemes should never be entered on either an SDLT 1 return or the user's tax return. Such an entry will not discharge a scheme user's obligations under DOTAS.

If you are a purchaser for stamp duty land tax purposes (see [SDLT M07200](#) for definition) and expect to receive a stamp duty land tax advantage you must within the time limit detailed at paragraph 18.5.1:

- include the number on form AAG 4 (SDLT) and
- provide the information specified in paragraph 18.5.2

The purchaser is limited to a person who is either a party to the transaction or has provided consideration for that transaction. The term purchaser is defined as the person who acquires the subject matter of a land transaction and includes a tenant if the interest in land is a grant of a lease (S43 Finance Act 2003).

When stamp duty land tax group relief is withdrawn, group relief may be recovered from a person other than the purchaser (Schedule 7, Para 5, Finance Act 2003, [SDLTM 23100](#)). The obligation to disclose a Scheme Reference Number falls only on the purchaser. Any other person from whom Group Relief may be recovered whilst they may be in receipt of a stamp duty land tax advantage, they are not obliged to be passed a Scheme Reference Number nor to disclose that to HMRC.

#### **18.5.1 When to enter information on form AAG 4 (SDLT)**

The information detailed at paragraph 18.5.2 must be entered on form AAG 4(SDLT) when you receive the number or you enter into the first land transaction in connection with the arrangements, whichever is later.

You must continue to do this for each subsequent transaction in which you expect to obtain a stamp duty land tax advantage from the scheme.

Form AAG 4 (SDLT) should be sent to the Counter-Avoidance Directorate (Intelligence) within HMRC (the address can be found at paragraph 1.7) in sufficient time for it to be received within 30 days of the later of the following two events:

- receiving a scheme reference number from the promoter or another party to the scheme;
- the effective date of the first land transaction which forms part of the scheme

The effective date takes its normal meaning for stamp duty land tax purposes (S119 Finance Act 2003). The general rule is when the land transaction is completed but there are exceptions and further guidance may be found in the Stamp Duty Land Tax Manual at SDLTM7600.

#### **18.5.2 What to enter on form AAG 4 (SDLT)**

- the scheme reference number;
- the name and address of the person providing the scheme reference number (the person who is expecting to obtain a stamp duty land tax advantage);
- the address of the property forming the subject of the arrangements (see paragraph 18.5.3);
- the title number (or numbers) of the property (see paragraph 18.5.4);
- the unique transaction reference number which is found, for a paper return, in the 'Reference' box attached to the payslip on the Land Transaction Return

(Form SDLT 1) or, for an electronic return, on the electronic SDLT submission receipt.

- the market value of the property (see paragraph 18.5.5);
- the effective date (see paragraph 18.5.1) of the first land transaction which forms part of the arrangement;
- the name of the person providing the declaration as to the accuracy and completeness of the notification (see paragraph 18.5.6); and
- the capacity in which that person is acting (for example purchaser, company secretary etc). Regardless of who has provided the information the signatory should be that of the purchaser.

#### **18.5.3 Address of property**

Give the full address including the postcode if there is one. If the property does not have a postcode or a building number then you must provide sufficient information of the nature and location of the property to enable it to be accurately identified;

#### **18.5.4 Title number**

If the property or properties that is/are the subject(s) of the arrangements is/are registered give the title number for the property. If no title number has been allocated then this information need not be provided.

#### **18.5.5 Market Value**

The figure to be entered for the market value is the Open Market Value of all the property on which a stamp duty land tax advantage is to be obtained assuming it has been purchased without the benefit of the stamp duty land tax arrangements. Market value takes the statutory definition for stamp duty land tax purposes at S118 Finance Act 2003. This in turn is tied to Sections 272 to 274 of the Taxation of Capital Gains Tax Act 1992.

The market value of an asset is the price which that asset might reasonably be expected to fetch on a sale in the open market. In a normal land transaction such a value will normally have been arrived at by an independent valuer before the transaction has been entered into and so should be readily available.

If, exceptionally, such a value has not been obtained then a reasoned estimate is acceptable bearing in mind that HMRC requires the information in order to assess the likely tax at risk. Submission of the AAG4 (SDLT) should not be held up because a valuation has not been obtained nor should the market value be omitted. Either of these courses of action could render the user liable to a penalty.

#### **18.5.6 Declaration as to accuracy and completeness.**

The person obtaining the stamp duty land tax advantage from the arrangements should sign the declaration. This will usually be the purchaser. Whilst in the majority of cases the return is likely to be drafted and submitted by a solicitor, licensed conveyancer, legal executive or accountant, it is the responsibility of the person obtaining the advantage to ensure that the information given on the AAG 4 (SDLT) is complete and correct and sign the declaration accordingly.

#### **18.5.7 Expectation of obtaining a tax advantage**

If you are a party to a scheme, have been provided with a scheme reference number, but do not expect to obtain a tax advantage (for example, because the advantage is expected to be obtained by another person or you have not yet decided to implement the scheme), you need not include the number on form AAG 4 (SDLT) unless and until such time as your expectation changes.

#### **18.5.8 Partnerships Finance Act 2003, Schedule 15, Part3**

Where the arrangements involve a partnership all of the partners have joint and several liability for any stamp duty land tax subject to special provisions. Further guidance may be found at <http://www.hmrc.gov.uk/so/pftmanual.htm>

Whilst more than one partner might therefore be expected to receive a stamp duty land tax advantage, HMRC will accept a single joint notification, signed by the representative partner on behalf of all of the liable partners, rather than each making their own notification.

#### **18.6 How to obtain and submit form AAG 4 (SDLT)**

You can obtain and submit form AAG 4(SDLT) online by clicking the relevant links on the Counter-Avoidance Directorate website at <http://www.hmrc.gov.uk/aiu/index.htm>

You can obtain PDF version of the forms for printing out by clicking the relevant links on the same web page, or by contacting the Counter-Avoidance Directorate (Intelligence) within HMRC at the address shown at paragraph 1.7. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should then be sent by either post or e-mail to the Counter-Avoidance Directorate (Intelligence) at the address shown at paragraph 1.7. Word versions of the above forms are no longer available.

## **19. What to do if you receive a scheme reference number relating to an inheritance tax scheme**

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### **19.1.1 Outline of the scheme reference number system**

The scheme reference number system is a means of identifying the users of disclosed schemes, allowing HMRC to prioritise and co-ordinate enquiries into users' returns. The scheme reference number system applies to inheritance tax schemes and arrangements which became notifiable on or after 6 April 2011.

The remainder of the guidance in section 17 relates solely to inheritance tax schemes and arrangements which became notifiable on or after 6 April 2011. If you are in doubt as to whether a reference number you have received should be passed on or notified to HMRC you should contact Counter-Avoidance Directorate using the contact details at paragraph 1.7.

The scheme reference number system works by scheme users reporting an 8-digit scheme reference number to HMRC. For inheritance tax schemes the scheme reference number has to be reported in one of two ways and this is explained below.

This reference number is allocated by HMRC at the time the scheme is disclosed and is given to the person or persons who disclosed the scheme. They then in turn pass it to the scheme user, sometimes via a third party client, in accordance with the rules explained below. Where a scheme user is the person required to disclose the scheme, HMRC will provide the number directly to him, who nevertheless must report the number on his inheritance tax account (form IHT100) or the specified form.

The allocation or notification of a scheme reference number does not indicate that HMRC accept that the scheme achieves or is capable of achieving any purported tax advantage.

**Warning:** You may incur a penalty if you fail to comply with the rules outlined in this section (see section 22).

### **19.2 Promoters must provide scheme reference number to clients**

As the promoter of an inheritance tax scheme you will have been provided with a reference number by HMRC because you disclosed an inheritance tax scheme. You **must**:

- provide it to any other person (your "client") to whom you provide, or have provided, services in connection with the disclosed scheme or any scheme that is substantially the same. Your client may be the person who is intended to obtain the tax advantage or he may be a third party (i.e. a person who does not himself enter into the scheme and/or expect to obtain a tax advantage);
- do so using form AAG 6 (IHT) available by clicking the relevant links on the Counter-Avoidance Directorate website at <http://www.hmrc.gov.uk/aiu/index.htm>; and

- do so within 30 days of either being provided with the scheme reference number or becoming aware of any transaction that forms part of the scheme, whichever is later.
- include the client on a client list – see chapter 16.

While there is no obligation to do so, you may find it more convenient to provide the number to a client when you make the scheme available rather than wait until it has been implemented. If, but only if, you do so using the form AAG 6 (IHT), you need not re-notify the number to your client when you become aware of a transaction forming part of the scheme.

If you have been provided with more than one scheme reference number in relation to any given scheme, you only need provide one of those numbers to your client.

### **19.3 On receipt of scheme reference number clients must provide certain information to the promoter (FA2004 s.312B and SI 2013/2592)**

Within ten days from the later of the date that the client receives a scheme reference number or the date that the client first enters into a transaction forming part of the arrangements the client has to notify the promoter of their:

- National insurance number
- Unique taxpayer reference
- Or if they have neither of these, confirmation that they do not hold a national insurance number or a unique taxpayer reference.

The promoter will then provide this information to HMRC in accordance with chapter 16 above.

### **19.4 Clients must provide scheme reference number to parties to the scheme**

As explained at paragraph 19.2 above, if a promoter provides, or has provided, you with services in connection with a disclosable scheme, he may also provide you with a scheme reference number. This should be given to you on an HMRC form AAG 6 (IHT) containing guidance about when and how to report the reference number to HMRC or provide it to other parties.

When you have been provided with a scheme reference number, by whatever route, you must:

- provide it to any other person who you might reasonably expect to be a party to, and whom might reasonably be expected to gain a tax advantage from, the scheme;
- do so using form AAG 6 (IHT) available by clicking the relevant links on the Counter-Avoidance Directorate website at <http://www.hmrc.gov.uk/aiu/index.htm>; and
- do so within 30 days of either being provided with the scheme reference number by the promoter or becoming aware of any transaction that forms part of the scheme, whichever is the later.

#### **19.4.1 Reasonable expectation**

Your obligation, as the client of a promoter, to pass a scheme reference number to third parties applies only when you have sufficient commercial connection with that party to have a reasonable expectation that they will gain a tax advantage from the scheme.

You are not required to provide a number to a person simply because, for example, you learn about their use of a scheme through hearsay, reading about it in the press or a Tribunal decision, etc.

#### **19.5 Scheme user receiving an inheritance tax advantage must include the scheme reference number and other information on an inheritance tax account (form IHT100) or on form AAG 4 (IHT)**

As explained at paragraphs 19.2 and 19.3, if you are party to an inheritance tax scheme, the promoter of the scheme or his client may provide you with a scheme reference number. This should be provided to you on an HMRC form AAG6 (IHT), which contains guidance about when and how to report the reference number to HMRC. In some cases you may receive the number directly from HMRC as a result of disclosing the scheme yourself (see paragraphs 3.9 to 3.11).

If you expect to obtain a tax advantage as a result of being a party to the scheme, you **must**:

- Include the scheme reference number on your inheritance tax account (form IHT100) or on form AAG 4 (IHT) – see paragraph 17.4.2 ; and
- State the tax year in which or date on which you expect the advantage to be obtained.

The Scheme reference number for inheritance tax schemes should never be entered on any other inheritance tax account form or Self Assessment tax return. Such an entry will not discharge your obligations as a scheme user under DOTAS.

**Warning:** You may incur penalties if you fail to notify prescribed information within the prescribed time limits (see section 22).

#### **19.5.1 Date for notifying the scheme reference number**

You must notify HMRC of the information at paragraph 19.4 above within 12 months of the end of the month in which you first entered into a transaction forming part of the notifiable arrangements.

#### **19.5.2 When to enter information on an inheritance tax account (form IHT100) or on form AAG 4 (IHT)**

You must enter the information (at paragraph 19.4) on your inheritance tax account (form IHT100) if:

- You are liable to submit an inheritance account (form IHT100) in respect of a transaction forming part of the notifiable arrangements; **and**

- The statutory time limit for submitting the inheritance account is no later than the date by which you must notify the scheme reference number and you submit the account within that time limit.

You must enter the information on form AAG 4 (IHT) in all other circumstances, including in the following situations:

- You are not liable to submit an inheritance account;
- You are liable to submit an inheritance account (form IHT100) but the statutory date for doing so is later than the date by which you must report the scheme reference number;
- You are liable to submit an inheritance tax account (form IHT100) in respect of a transaction forming part of the notifiable arrangements by the date by which you must report the scheme reference number but your account will not be submitted by the statutory filing date or you have already submitted it without the scheme reference number;
- You are liable to submit an inheritance tax account (form IHT100) in respect of a transaction forming part of the notifiable arrangements by the date by which you must report the scheme reference number but, exceptionally, you have more than one scheme reference number to report. You must enter the excess scheme reference numbers on form AAG 4 (IHT).

#### **19.5.3 What to enter on form AAG 4 (IHT)**

- The scheme reference number;
- The name and address of the person providing the scheme reference number (the person who expects to obtain an inheritance tax advantage);
- The unique taxpayer reference of the person providing the scheme reference number, if one has been allocated by HMRC;
- The inheritance tax reference number, if one has been allocated by HMRC;
- The tax year in which or the date on which the person expects to obtain the inheritance tax advantage;
- The name of the person providing the declaration as to the accuracy and completeness of the notification.

The person obtaining the inheritance tax advantage from the arrangements should sign the declaration. The form may be drafted by a solicitor, legal executive or accountant but the person obtaining the advantage must ensure that the information given on the AAG 4 (IHT) is complete and correct and sign the declaration accordingly.

#### **19.5.4 Where to send form AAG 4 (IHT)**

Form AAG 4 (IHT) must be sent to the Counter-Avoidance Directorate (Intelligence) at the address in paragraph 1.7.



#### **19.5.5 Expectation of obtaining a tax advantage**

If you are a party to a scheme, have been provided with a scheme reference number, but do not expect to obtain a tax advantage (for example, because the advantage is expected to be obtained by another person or you have not yet decided to implement the scheme), you need not include the number on form AAG 4 (IHT) unless and until such time as your expectation changes.

#### **19.6 How to obtain and submit form AAG 4 (IHT)**

You can obtain and submit form AAG 4(IHT) online by clicking the relevant links on the Counter-Avoidance Directorate website at <http://www.hmrc.gov.uk/aiu/index.htm>

You can obtain PDF version of the form for printing out by clicking the relevant links on the same web page, or by contacting the Counter-Avoidance Directorate (Intelligence) within HMRC at the address shown at paragraph 1.7. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should then be sent by either post or e-mail to the Counter-Avoidance Directorate (Intelligence) at the address shown at paragraph 1.7. Word versions of the above forms are no longer available.

## **20. What to do if you receive a scheme reference number relating to an Annual Tax on Enveloped Dwellings Scheme**

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### **20.1.1 Outline of the scheme reference number system**

The scheme reference number system is a means of identifying the users of disclosed schemes, allowing HMRC to prioritise and co-ordinate enquiries into users' returns. The scheme reference number system applies to ATED proposals and arrangements (called schemes below) which became notifiable on or after 4 November 2013.

If you are in doubt as to whether a reference number you have received should be passed on or notified to HMRC you should contact Counter-Avoidance Directorate using the contact details at paragraph 1.7.

The scheme reference number system works by scheme users reporting an 8-digit scheme reference number to HMRC. For ATED schemes the scheme reference number has to be reported in one of two ways and this is explained below.

This reference number is allocated by HMRC at the time the scheme is disclosed and is given to the person or persons who disclosed the scheme. They then in turn must pass it to the scheme user, sometimes via a third party client, in accordance with the rules explained below. Where a scheme user is the person required to disclose the scheme, HMRC will provide the number directly to him, who nevertheless must report the number on his ATED return or the specified form.

The allocation or notification of a scheme reference number does not indicate that HMRC accept that the scheme achieves or is capable of achieving any purported tax advantage nor that the disclosure is complete.

**Warning: You may incur a penalty if you fail to comply with the rules outlined in this section (see section 22).**

### **20.1.2 Promoters must provide scheme reference number to clients (FA2004, s.312 and SI 2012/1836, Reg. 6)**

As the promoter of an ATED scheme you will have been provided with a reference number by HMRC because you disclosed an ATED scheme, or because you were named as co-promoter by another promoter at the time they disclosed the scheme (see paragraph 14.2.2 at (a)). Alternatively you may have been provided with a scheme reference number by another promoter as a result of becoming a co-promoter some time after the main promoter made their disclosure (see paragraph 14.2.2 at (b)).

However you come to be in receipt of a scheme reference number you must:

- provide it to any other person (your "client") to whom you provide, or have provided, services in connection with the disclosed scheme or any scheme that is substantially the same. Your client may be the person who is intended to obtain the tax advantage or he may be a third party (i.e. a person who does not himself enter into the scheme and/or expect to obtain a tax advantage);

- do so using form AAG 6 (ATED) available by clicking the relevant links on the Counter-Avoidance Directorate website at <http://www.hmrc.gov.uk/aiu/index.htm>; and
- do so within 30 days of either being provided with the scheme reference number or becoming aware of any transaction that forms part of the scheme, whichever is later.
- include the client on a client list – see chapter 16.

While there is no obligation to do so, you may find it more convenient to provide the number to a client when you make the scheme available rather than wait until it has been implemented. If, but only if, you do so using the form AAG 6 (ATED), you need not re-notify the number to your client when you become aware of a transaction forming part of the scheme.

If you have been provided with more than one scheme reference number in relation to any given scheme, you only need provide one of those numbers to your client.

### **20.1.3 Clients must provide scheme reference number to parties to the scheme (FA 2004, s 312A and SI 2012/1836, regs 6 to 8).**

As explained at paragraph 20.1..2 above, if a promoter provides, or has provided, you with services in connection with a disclosable scheme, he may also provide you with a scheme reference number. This should be given to you on an HMRC form AAG 6 (ATED) containing guidance about when and how to report the reference number to HMRC or provide it to other parties.

When you have been provided with a scheme reference number, by whatever route, you must:

- provide it to any other person who you might reasonably expect to be a party to, and whom might reasonably be expected to gain a tax advantage from, the scheme;
- do so using form AAG 6 (ATED) available by clicking the relevant links on the Counter-Avoidance Directorate website at <http://www.hmrc.gov.uk/aiu/index.htm>; and
- do so within 30 days of either being provided with the scheme reference number by the promoter or becoming aware of any transaction that forms part of the scheme, whichever is the later.

### **20.1.4 Reasonable expectation**

Your obligation, as the client of a promoter, to pass a scheme reference number to third parties applies only when you have sufficient commercial connection with that party to have a reasonable expectation that they will gain a tax advantage from the scheme.

You are not required to provide a number to a person simply because, for example, you learn about their use of a scheme through hearsay, reading about it in the press or a Tribunal decision, etc.

**20.1.5 On receipt of scheme reference number clients must provide certain information to the promoter (FA2004 s.312B and SI 2013/2592)**

Within ten days from the later of the date that the client receives a scheme reference number or the date that the client first enters into a transaction forming part of the arrangements the client has to notify the promoter of their:

- National insurance number:
- Unique taxpayer reference:
- Or if they have neither of these, confirmation that they do not hold a national insurance number or a unique taxpayer reference.

The promoter will then provide this information to HMRC in accordance with chapter 14 above.

**20.1.6 Parties to an ATED scheme must include the scheme reference number and other required information on its ATED return or on form AAG 4 (ATED)**

As explained at paragraphs 20.1..2 and 20.1..3, if you are party to an ATED scheme, the promoter of the scheme or his client may provide you with a scheme reference number. This should be provided to you on an HMRC form AAG6 (ATED), which contains guidance about when and how to report the reference number to HMRC. In some cases you may receive the number directly from HMRC as a result of disclosing the scheme yourself.

If you expect to obtain a tax advantage as a result of being party to the scheme, you **must**:

- Include the scheme reference number on your ATED return or on form AAG 4 (ATED) – see paragraph 20.1.2 ; and
- State the chargeable period in which you expect the advantage to be obtained.

The Scheme reference number for ATED schemes should never be entered on any other Self Assessment tax return. Such an entry will not discharge your obligations as a scheme user under DOTAS.

**Warning: You may incur penalties if you fail to notify prescribed information within the prescribed time limits (see section 22).**

#### **20.1.7 Date for notifying the scheme reference number**

You must notify HMRC of the scheme reference number and other required information within 30 days of the later of:

- The effective date of the first transaction which forms part of the arrangements; or
- The date of the receipt of the scheme reference number.

#### **20.1.8 When to enter information on the ATED return or on form AAG 4**

You must enter the information above on your ATED return if:

- You are liable to submit an ATED return; and
- The statutory time limit for submitting the ATED Return is no later than the date by which you must notify the scheme reference number and you submit the Return within that time limit.

You must enter the information on form AAG 4 (ATED) in all other circumstances, including in the following situations:

- You are not liable to submit an ATED Return;
- You are liable to submit an ATED Return but the statutory date for doing so is later than the date by which you must report the scheme reference number;
- You are liable to submit an ATED Return in respect of a transaction forming part of the notifiable arrangements by the date by which you must report the scheme reference number but your Return will not be submitted by the statutory filing date or you have already submitted it without the scheme reference number;
- You are liable to submit an ATED Return in respect of a transaction forming part of the notifiable arrangements by the date by which you must report the scheme reference number but, exceptionally, you have more than one scheme reference number to report. You must enter the excess scheme reference numbers on form AAG 4 (ATED).

#### **20.1.9 What to enter on form AAG 4 (ATED)**

- The scheme reference number;
- The name and address of the person providing the scheme reference number (the person who expects to obtain an ATED advantage);
- The address of the relevant property (see paragraph 20.1.10);
- The title number or numbers of the property (see paragraph 20.1.11);
- Any tax reference number or other business unique identifier allocated by HMRC or a foreign tax authority (see paragraph 20.1.12);

- Where a foreign authority has allocated a business unique identifier, the name of the country on behalf of which that foreign authority acts and the type of business unique identifier allocated (see paragraph 20.1.13);
- The first chargeable period in which the person expects to obtain the ATED tax advantage (see paragraph 20.1.14);
- The name of the person providing the declaration as to the accuracy and completeness of the notification and the capacity in which they are acting (see paragraph 20.1.15).

#### **20.1.10 Address of the Relevant Property**

Give the full address including the postcode of the property forming the subject of the arrangements. If the property doesn't have a postcode or a building number then you must provide sufficient information of the nature and location of the property to enable it to be accurately identified;

#### **20.1.11 Title number**

Give the title number (if any is allocated) of the property forming the subject of the arrangements e.g. the UK HM Land Registry title number (or equivalent for Scotland and Northern Ireland). In some cases the property subject to ATED may be registered under more than one title number, for example where properties under separate title numbers are treated as one for ATED purposes. In this scenario, you should enter one title number in the 'Property title number' box and any other title numbers in the Notes section of the form.

#### **20.1.12 Business unique identifier**

Enter any Business Unique Identifier (for example, your HMRC Corporation Tax Unique Taxpayer Reference Number or Self Assessment Unique Taxpayer Reference). If you do not hold such a reference number you can enter the Company Registration Number allocated by the Registrar of Companies where the company is incorporated, the VAT Registration Number or Employer PAYE reference number.

#### **20.1.13 Country of origin and type of business unique identifier**

Enter the name and country of the organisation that allocated the reference, plus the type of tax reference quoted, for example HMRC UK VAT Registration Number.

#### **20.1.14 First chargeable period in which tax advantage arises**

Enter the start date of the first chargeable period in which you expect to gain a tax advantage from using the scheme, for example 01 04 2013.

#### **20.1.15 Declaration as to accuracy and completeness**

The person obtaining the ATED advantage from the arrangements should sign the declaration. The form may be drafted by a solicitor, legal executive or

accountant but the person obtaining the advantage must ensure that the information given on the AAG 4 (ATED) is complete and correct and sign the declaration accordingly.

#### **20.1.16 Where to send form AAG 4 (ATED)**

Form AAG 4 (ATED) must be sent to the Counter-Avoidance Directorate (Intelligence) at the address in paragraph 1.7.

#### **20.1.17 Expectation of obtaining a tax advantage**

If you are a party to a scheme, have been provided with a scheme reference number, but do not expect to obtain a tax advantage (for example, because the advantage is expected to be obtained by another person or you have not yet decided to implement the scheme), you need not complete form AAG 4 (ATED) unless and until such time as your expectation changes.

#### **20.1.18 How to obtain and submit form AAG 4 (ATED)**

You can obtain and submit form AAG 4(ATED) online by clicking the relevant links on the Counter-Avoidance Directorate website at <http://www.hmrc.gov.uk/aiu/index.htm>.

You can obtain PDF version of the form for printing out by clicking the relevant links on the same web page, or by contacting the Counter-Avoidance Directorate (Intelligence) within HMRC at the address shown at paragraph 1.7. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should then be sent by either post or e-mail to the Counter-Avoidance Directorate (Intelligence) at the address shown at paragraph 1.7. Word versions of the above forms are no longer available.

## **21. Information powers**

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### **21.1 Summary**

Information powers introduced in FAs 2007, FA2010 and FA2013 enable HMRC to:

- require an introducer (a person who introduces clients to a promoter) to identify the person who provided them with information relating to the scheme;
- enquire into the reasons why a promoter has not disclosed a scheme;
- enforce disclosure in appropriate cases
- call for more information where a disclosure is incomplete; and
- request further information from the promoter on the end user of a proposal or arrangement..

These provisions are mostly exercisable through the Tribunal and provide a mechanism for resolving disagreements as to whether a scheme is required to be disclosed.

### **21.2 Invoking the powers**

In order to use many of the powers described above, HMRC must have reasonable grounds to suspect that a person has been non-compliant in relation to a particular scheme. In the majority of cases, HMRC expect to be able to resolve the issue in an informal way, with use of the powers limited to those occasions where a person does not provide sufficient information to resolve the issue or where there is a genuine dispute as to notifiability which can only be resolved before the Tribunal.

The powers will be exercised only by officers within HMRC's Counter Avoidance Directorate (Intelligence).

### **21.3 Application hearings**

The majority of the powers described above are dependant upon the Tribunal making a relevant order following an application from HMRC. The precise procedure is a matter for the Tribunal and you will find more about applications to a Tribunal at

<http://www.hmrc.gov.uk/manuals/artgmanual/index.htm>.

The Tribunal rules require the Tribunal to notify other parties of an application by HMRC. However, when making an application, HMRC will notify potentially affected persons at the same time.



## **21.4 Pre-disclosure enquiries into non-disclosure of a scheme**

### **21.4.1 Explaining why a scheme has not been disclosed (FA 2004, s.313A and SI 2012/1836, reg. 9(5) and 2(3))**

Section 313A allows HMRC by written notice to require a person, whom we suspect of being a promoter or introducer of a disclosable scheme, to provide an explanation of why they think that scheme is not notifiable by them. The notice must specify the scheme in relation to which the person's opinion and reasons are sought.

Introducers are included in this power because it is not always obvious whether a person advertising a scheme to potential buyers is a promoter of that scheme or merely an introducer. In such circumstances HMRC may not have sufficient evidence to suspect that person of being the promoter, but it is important to find out who the promoter is.

If the person to whom the notice is issued is an introducer, their reply should be that the scheme is not notifiable by them because they are an introducer and not the promoter. The explanation should provide sufficient detail of their role in relation to the scheme to enable us to confirm that they are not a promoter. The explanation does not strictly need to identify the promoter in order to satisfy the person's obligation under section 313A, but it would be helpful if that information were to be provided. If it is not provided in response to the notice under section 313A, HMRC have further powers to require it (see paragraph 21.4.3 below).

If the person is a promoter of the scheme, they must provide an explanation of why they consider the scheme is not disclosable by them. In doing so it is insufficient for the reply to simply refer to the fact that a lawyer or other professional has given an opinion to that effect. Instead it must engage with all the relevant legal tests.

In particular, where the promoter maintains that the arrangements do not fall within any hallmark in the Descriptions Regulations, the explanation must provide sufficient information for HMRC to verify whether this is the case.

The information required at this preliminary stage is that which is required to test whether or not a scheme is disclosable, not information that describes how the scheme works.

Because we will normally issue a section 313A notice only following an informal approach (see paragraph 21.2), it will usually be apparent which legal tests are engaged and the promoter's explanation can focus on those tests.

#### *Example 1*

*In a reply to a s313A notice issued by HMRC a promoter states that although scheme Alpha is a standardised tax product it is substantially the same description as a scheme first made available before 1 August 2006. Consequently, it is covered by the 'grandfathering' rule in the hallmark. The explanation should identify the predecessor scheme and provide information as to what evidence (e.g. published guidance, journals, tax press etc) informed the promoter's view that the scheme was first made available before 1 August 2006. It must engage with all the relevant legal*

*tests so in addition the explanation should cover all the other relevant hallmarks e. g. confidentiality.*

The information must be provided to HMRC within 10 days, beginning with the day after the notice is issued, or longer if HMRC has so directed. Failure to do so may result in a penalty (see paragraph 22.6). Weekends, Bank Holidays, Good Friday and Christmas Day are not counted in calculating the 10 days.

#### **21.4.2 Orders for supplementary information or documents (FA 2004, s.313B and SI 2004/1864, reg. 8A(2))**

HMRC may apply to the Tribunal for an order that a person provide specified information or documents in support of his stated reasons as to why a scheme is not disclosable, whether or not the reasons were given in response to a notice under s.313A (see paragraph 21.4.1 above).

Again, the information or documents required at this preliminary stage are those which are required to test whether or not a scheme is disclosable, not information that describes how the scheme works.

#### ***Example 2***

*Scheme Beta involves a trading partnership and is expected to provide the partners with tax losses which can be used to offset personal income and gains. The promoter's reply to a section 313A notice says that the tax losses are not the main benefit, or one of the main benefits, of using the scheme, which is wholly commercial. The promoter chooses not to explain this position in further detail. HMRC uses section 313B to seek information and documents relating to how the various benefits, in particular the potential for taxable income, have been quantified and measured against the benefit of the tax losses.*

The information must be provided by the 14<sup>th</sup> day after the date of the order or any longer period directed by HMRC. HMRC will agree to a longer period where we are satisfied there is good reason why the promoter cannot provide the information within 14 days. Failure to comply may result in a penalty (see paragraph 22.6). Weekends, Bank Holidays, Good Friday and Christmas Day are not counted in calculating the 14 days.

#### **21.4.3 Notice requiring introducer to provide information leading to promoter of scheme (FA 2004, s313C and regulation 8C)**

Where HMRC suspect a person of acting as an introducer for a notifiable scheme which has not been disclosed, it may, by written notice, require them to provide the name and address of any person who has provided them with information about that scheme. That person may be the promoter or another intermediary.

This formal power will be used only if the introducer is not willing to identify the promoter voluntarily.

The information must be provided to HMRC within 10 days, beginning with the day after the notice is issued, or longer if HMRC so directs. Failure to do so may result in a penalty (see paragraph 22.6). Weekends, Bank Holidays, Good Friday and Christmas Day are not counted in calculating the 10 days.

## **21.5 Resolving disputes and enforcing disclosure**

### **21.5.1 Orders stating a scheme is disclosable (FA 2004, s.314A; TMA 1970, s.98C(2E) and regulation 16(2) and 2(3) of SI 2012/1836)**

HMRC may, in relation to a specified promoter, apply to the Tribunal for an order stating that a scheme is disclosable.

The Tribunal will make an order if it is satisfied on the evidence that the scheme falls within s.306 FA 2004

Such an order has the effect of confirming that a scheme is, and was always, disclosable within the time limits prescribed in the Information Regulations.

Failure to disclose a scheme is liable to a penalty (see paragraph 22.5). Failure to disclose a scheme within 10 days, beginning with the day after a section 314A order is made, is liable to a higher penalty (see paragraph 22.5.4). Weekends, Bank Holidays, Good Friday and Christmas Day are not counted in calculating the 10 days.

### **21.5.2 Orders deeming a scheme to be disclosable (FA 2004, s.306A, TMA 1970 s.98C(2E) and regulations 5(2),16(1) and 2(3) of SI 20/1836)**

HMRC may, in relation to a specified promoter, apply to the Tribunal for an order that a scheme is to be treated as disclosable.

The Tribunal can only make an order if they are satisfied that HMRC have reasonable grounds for suspecting that the scheme may be disclosable and have taken all reasonable steps to establish whether it is.

Grounds for suspicion may include:

- the fact that the arrangements fall within any 'hallmark' prescribed in the relevant regulations;
- an attempt to avoid or delay complying with s.313A or s.313B; or
- a failure to comply with s.313A or s.313B in relation to another scheme.

The effect of an order is that a scheme is deemed to be disclosable under s.308 and must be disclosed.

The granting of a section 306A order does not determine whether or not the scheme would have been disclosable, absent the order. Consequently, the granting of the order may create a requirement to disclose that might not otherwise arise and the Information Regulations provide a time limit for complying with that requirement. Disclosure must be made within 10 days, beginning with the day after the order is made.

Failure to disclose a scheme is liable to a penalty (see paragraph 22.5). Failure to disclose a scheme within 10 days, beginning with the day after a section 306A order is made, is liable to a higher penalty (see paragraph 22.5.5). Weekends, Bank Holidays, Good Friday and Christmas Day are not counted in calculating the 10 days.

However, even if disclosure is made within the time period described above, if, on the basis of information that subsequently comes to light, HMRC can demonstrate that the scheme was always disclosable, an application to the Tribunal for a late notification penalty (see paragraph 22.5) may still be made.

#### **21.6 Incomplete disclosures (FA 2004, s.308A and regulation 5(3) and 2(3) of SI 2012/1836)**

If HMRC believes that a promoter has not provided all the prescribed information in relation to a disclosure, they may apply to the Tribunal for an order that the promoter provide specified information and/or related documents. A scheme reference number may be issued to ensure that users of the arrangements are able to comply with their obligation to notify HMRC. It does not imply that HMRC considers that a complete disclosure has been made.

The Tribunal can make an order only if satisfied that HMRC has reasonable grounds for suspecting that the specified information or documents form part of, or will support or explain, the prescribed information.

The effect of an order is that the specified information and/or documents must be provided to HMRC in the same way as if it were prescribed information. This must be done by the 10th day after the date of the order. Failure to do so may result in HMRC applying to the Tribunal for a late notification penalty (see paragraph 22.5.1). Weekends, Bank Holidays, Good Friday and Christmas Day are not counted in calculating the 10 days.

If the information or documentation is provided within the time period described above but HMRC nevertheless believes the information was always disclosable as prescribed information, and has been provided later than the normal disclosure due date, an application to the Tribunal for a late notification penalty may still be made.

#### **21.7 Further information on the end user of a proposal or arrangement (FA2004, s.313ZB and SI 2013/2592)**

With effect from the 4<sup>th</sup> November 2013 HMRC can, if it suspects that the client on a client list is not a user of the proposal or arrangement but an intermediary, require the promoter to provide further information. The promoter is only required to provide the information it has in its possession at the time the written notice requiring the further information is received. The required information is:

- The name and address of the any person other than the client on the client list who is likely to sell the arrangements to another person or achieve a tax advantage by implementing the arrangements
- The unique taxpayer reference of that person
- Sufficient information to enable an officer of HMRC to understand the way in which that person is involved in the arrangements.

The information has to be provided within 10 days from the date that the promoter receives the written notice requiring the information.

## **22. Penalties**

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### **22.1 General**

HMRC's focus is upon enabling scheme promoters and users to comply with their DOTAS obligations. However, a penalty regime is necessary to deter non-compliant behaviours.

The penalties for failure to comply with a DOTAS obligation without reasonable excuse are provided for in section 98C Taxes Management Act 1970, as amended by FAs 2007 and 2010 (or regulation 22 of SI 2012/1868 in relation to national insurance contributions).

Broadly, DOTAS penalties fall into three categories:

1. Disclosure penalties – apply to failure to disclose a scheme. There are variations in cases where a Tribunal has issued a disclosure order.
2. Information penalties – apply to all other failures to comply with DOTAS except for those covered by 3 below;
3. User penalties – apply to failure by a scheme user to report a scheme reference number to HMRC.

Disclosure penalties and Information penalties involve an initial penalty and a further penalty if non-compliance continues. The initial penalty is determined by a Tribunal.

### **22.2 Tribunal penalty proceedings**

#### **22.2.1 General**

The procedure is that HMRC will apply to a Tribunal to impose a penalty on a specified person (or persons) for breach of a specified DOTAS obligation. You will find more about the Tribunal system at

<http://www.hmrc.gov.uk/manuals/artgmanual/index.htm>

Applications will be subject to a hearing involving HMRC and the specified person at which each will put their case.

Decisions on the selection of cases for penalty proceedings will be made in Counter-Avoidance Directorate. Cases of suspected non-compliance are investigated by disclosure case workers in AAG who report to a team leader. A decision to institute penalty proceedings before a Tribunal will be taken by the Head of Counter-Avoidance Directorate, or in their absence, a nominated deputy.

When considering penalties we will look at each case carefully on its facts.

We are not able to institute proceedings in cases where we consider a person had a reasonable excuse for not doing what they were otherwise required to do as the legislation deems that no failure exists (see paragraphs 22.3 and 22.5.3).

If we consider that a person does not have a reasonable excuse, the factors that we will consider in deciding whether or not to institute penalty proceedings will include:

- The level of knowledge/experience the person could reasonably be expected to have of DOTAS;
- The person's previous behaviour in relation to DOTAS;
- The adequacy of the systems the person has put in place to ensure compliance with DOTAS;
- The nature of the behaviour that led to the failure (e.g. was it isolated error, carelessness or a deliberate act);
- Whether the person alerted HMRC to the failure before we raised the issue; and
- What the person did after the failure was discovered, or brought to their attention, to prevent any recurrence.

HMRC's role at a penalty hearing is to put to the Tribunal the case that a specified person has failed to comply with a DOTAS obligation.

If it accepts HMRC's case that there was a *prima facie* failure to comply, the Tribunal must consider whether the person had a reasonable excuse (see paragraphs 22.3 and 22.5.3).

If the Tribunal decides that the person did fail to comply as required, it must decide upon the amount of the penalty (see paragraphs 22.5 and 22.6)

#### **22.2.2 Stamp duty land tax schemes**

Use of stamp duty land tax schemes is always notified on form AAG4 (SDLT) so there is no requirement to enter a scheme reference number on a stamp duty land tax return.

HMRC will only require one AAG 4 (SDLT) from a partnership in respect of each notifiable arrangement, regardless of the number of partners. All partners are jointly and severally liable for any penalties arising from any non-compliance as detailed at paragraph 22.2 above.

#### **22.3 Reasonable excuse – general**

Section 118(2) TMA 1970 provides that:

*“For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.”*

This means that in the event of a reasonable excuse the legislation deems that no failure occurred.

The law does not define 'reasonable excuse', and it is left to the judgment of the tax authorities and the tribunals as to whether a reasonable excuse exists in any particular case. This recognises that there probably cannot be a single absolute standard by which the words 'reasonable excuse' can be defined.

What constitutes a reasonable excuse will vary according to the nature of the failure and the type and circumstances of the person concerned. But generally, reasonable excuse is seen by HMRC, as developed by case law, as being an unusual event that is either unforeseeable or beyond the person's control (e.g. serious illness) that formed an insurmountable obstacle to timely compliance.

**Example:**

*Promoter P has put a reasonable and proportionate system in place to ensure that schemes are captured and disclosed on time. Something occurs, so unusual that it cannot be captured by the system and reported on time. P discovers the error and then discloses the scheme promptly with an explanation of what has happened. We would consider P to have a reasonable excuse.*

## **22.4 Appeals**

There is a right of appeal against any penalty imposed by HMRC or determined by a Tribunal. In the case of a penalty imposed by HMRC, the appeal will be to the First-tier Tribunal. In the case of a penalty determined by a First-tier Tribunal, the appeal will be to the Upper Tribunal. Appeals against penalties determined by the First-tier Tribunal may be made both on points of law arising from the Tribunal decision and against the amount of the penalty (see guidance on the appeals system at

<http://www.hmrc.gov.uk/manuals/artgmanual/index.htm>).

## **22.5 Disclosure penalties**

### **22.5.1 Cases where no disclosure order is involved**

For failure to disclose a scheme by the due date or in the specified form and manner a Tribunal may impose a penalty of an amount not exceeding £600 a day during the "initial period". Such a failure may be:

- A failure by a scheme promoter to notify a scheme as required by section 308(1) or (3) FA 2004; or
- A failure by a scheme user to notify a scheme as required by section 309(1) or section 310 FA 2004.

In each case the "initial period" begins with the first day following the end of the period prescribed (by the Information Regulations) in which the scheme should have been disclosed. In each case the initial period ends with the earlier of:

- The day on which the Tribunal determines the penalty; or
- The last day before the day on which the scheme is disclosed, thereby ending the failure;

If the Tribunal considers that the maximum penalty it can set using the daily penalty described above would be insufficient deterrent, it may determine a higher penalty, not exceeding £1 million.

HMRC may impose a secondary daily penalty, not exceeding £600, for each day that the failure to disclose continues after an initial penalty has been imposed.



**Warning:** You may incur penalties of up to £1m if you fail to disclose a notifiable scheme.

### **22.5.2 Determining the amount of a penalty**

If a Tribunal decides that a person has failed to comply with a DOTAS obligation, the amount of the initial penalty is a matter for the Tribunal.

A Tribunal may impose any amount up to a maximum provided for in the law (see paragraph 22.5.1). The wide range of amounts enables a Tribunal to select an amount that is appropriate to the circumstances in order to deter that person, or another, behaving in the same way again. So for example, it may impose a much higher penalty on a promoter in a case of deliberate non-compliance than it would in a case of carelessness.

The law provides that in considering deterrence, a Tribunal shall have regard (in particular) to:

- in the case of a failure to disclose by a promoter, the amount of fees received, or likely to have been received by the promoter in connection with the scheme;
- in the case of a failure to disclose by any other person, the amount of the tax advantage gained, or sought to be gained.

This enables the Tribunal to estimate the amount of the fees received or tax advantage gained where the actual figures are not known.

If a failure to comply with DOTAS continues after a Tribunal has imposed an initial penalty, HMRC may impose a continuing daily penalty. In such cases we will normally begin by imposing a daily amount that is proportionate to the amount imposed by the Tribunal, compared to the maximum.

If the failure continues, HMRC will consider increasing the amount, up to the maximum.

### **22.5.3 Reasonable excuse – reason to consider a scheme is not disclosable**

HMRC will consider a person to have a reasonable excuse for not disclosing a scheme where they are satisfied that there were reasonable grounds to consider that the scheme was not disclosable.

HMRC does not consider that the fact a person has legal advice that the scheme is not disclosable *in itself* provides a reasonable excuse. Case law (in relation to s.118 (2) TMA 1970 generally) indicates that what is *reasonable* in such circumstances depends upon the particular facts. We consider that the proper test here, in the DOTAS context, is whether it was reasonable for a particular person to rely upon the particular advice received in relation to the particular facts of the case.

The factors we will consider in relation to a promoter may include the following:

- What level of knowledge did the promoter have, or might be expected to have, of DOTAS?



- What level of knowledge did the promoter have, or might be expected to have of the tax system generally and specifically of the parts engaged by the scheme?
- Did the promoter provide the legal adviser with full and accurate information about the scheme?
- Are any of the details of the scheme in dispute significantly different from those of the one to which the legal advice relates?
- Was any analysis or assumption made by the instructing promoter correct or reasonable (e.g. in a tax loss scheme, are any assumptions made about how much trading income the participants may receive reasonable and supported by evidence)?
- To what degree does the legal advice explain why the scheme is not disclosable, by reference to the relevant tests in the DOTAS legislation?

In cases where a disclosure order is issued by the Tribunal (see paragraph 21.5) any reasonable excuse which relies on doubt as to whether the arrangements are notifiable ends 10 days following the day that the Tribunal issues the order. This includes instances where the promoter has legal advice that the arrangements are not notifiable.

#### **22.5.4 Cases where a section 314A order has been made**

A section 314A order issued by a Tribunal determines that a scheme is notifiable and confirms that there has been a failure to disclose it (see paragraph 21.5.1).

If the promoter had reasonable grounds to believe that the scheme was not disclosable before the issue of the order, the order removes that doubt, and the law provides that the promoter cannot rely on doubt as to notifiability as an excuse more than 10 days after the order.

If the promoter does not disclose the scheme within 10 days, beginning with the day after which the order is made, the maximum amount of both the initial daily penalty (which may be determined by a Tribunal) and the secondary daily penalty (which may be imposed by HMRC) increase to £5,000 for each day that the failure continues after the 10 days. Weekends, Bank Holidays, Good Friday and Christmas Day are not counted in calculating the 10 days.

#### **22.5.5 Cases where a section 306A order has been issued**

A section 306A order issued by a Tribunal determines that a scheme is to be treated as notifiable and must be disclosed within 10 days, beginning with the day after the order is made (see paragraph 21.6). The law provides that the promoter cannot rely on doubt as to notifiability as an excuse more than 10 days after the order.

If the promoter does not disclose the scheme within 10 days of the order, the maximum amount of the initial daily penalty (which may be determined by a Tribunal) and the secondary daily penalty (which may be imposed by HMRC) is the higher amount of £5,000 rather than £600. Weekends, Bank Holidays, Good Friday and Christmas Day are not counted in calculating the 10 days.

If it becomes apparent later (e.g. from the information included in the disclosure itself) that the scheme was disclosable in any event under section 306 and should have been disclosed before the section 306A order was made, HMRC may apply to the Tribunal to backdate a penalty to the date the scheme should have been disclosed. Any backdated penalty would be at the lower maximum rate of £600 per day.

## **22.6 Information penalties**

Information penalties apply to the following instances of failure to provide prescribed information by the due date and in the form and manner specified in this guidance:

- A promoter who does not respond to a pre-disclosure enquiry when required to do so (see paragraphs 21.4.1 and 21.4.2);
- An introducer who does not provide, when required to do so, the identity of the person who supplied them with information about the scheme (see paragraph 21.4.3);
- A promoter who does not provide his client with a scheme reference number (see paragraph 17.2);
- A client of a promoter who fails to provide the scheme reference number to the “end-user” (any other person whom he might reasonably expect to be a party to the scheme and expected to obtain a tax advantage from using it) (see paragraph 17.3)
- A promoter who fails to provide HMRC with details of a client to whom he is obliged to issue a scheme reference number ( see – section 16)
- A client who does not provide their national insurance number, unique taxpayer reference or assurances that neither applies (see paragraph 17.4)
- A promoter that does not supply further information on clients when required to do so by written notice (see – section 21)

In each case the failure includes cases where information is provided after the end of the period prescribed in the Information Regulations or in a format other than that specified in the DOTAS guidance.

For this class of failures a Tribunal may determine an initial penalty for each failure of an amount not exceeding £5,000. HMRC may impose a daily penalty, not exceeding £600, for each day that each failure to provide information continues after an initial penalty has been determined. The maximum daily penalty increases to £5000 per day after an order under sections 306A or 314A.

## **22.7 The user penalty**

A scheme user who fails to comply with a section 313 obligation to report a scheme reference number and related information (on a return or separately, as prescribed in the Information Regulations) is liable to a penalty of:

- £100 per scheme (i.e. each scheme to which the failure relates) for a first occasion;
- £500 per scheme on the second occasion within 3 years (whether or not it relates to the same scheme involved in the previous occasion); and

- £1,000 per scheme on the third and subsequent occasions (whether or not the failure relates to schemes involved in a previous occasion).

A scheme user required to report information separately from a return who fails to do so in the form and manner specified in the DOTAS guidance is liable to the same penalties.

These penalties are imposed by HMRC.

#### **22.8 Failures involving both disclosable NI contribution arrangements and disclosable income tax arrangements (SI 2012/1868, reg 22(14))**

No penalty will be charged for a failure to disclose a NI contribution arrangement if the arrangement, or substantially the same arrangement, is also a disclosable income tax arrangement and a penalty has been imposed for failing to disclose that arrangement.

The same principle applies in relation to information and user penalties.