ICAEW
REPRESENTATION 35/25

ENHANCING HMRC'S POWERS: TACKLING TAX ADVISERS FACILITATING NON-COMPLIANCE

Issued 7 May 2025

ICAEW welcomes the opportunity to comment on the consultation “Enhancing HMRC’s powers: tackling tax advisers facilitating non-compliance" published by HMRC on 26 March 2025, a copy of which is available from this link.

In the public interest, ICAEW supports reasonable, properly targeted and proportionate measures to tackle poor tax advice and/or non-compliance facilitated by tax agents.

However, unless the bar is set at an appropriate level that aligns with existing expectations of tax advisers, ICAEW is concerned that the measures outlined in the consultation document could affect the smooth operation of the tax advice and compliance market in the UK. This could:

- increase costs to taxpayers;
- have an adverse impact on taxpayer compliance; and
- act as a barrier to growth.

On the assumption that the government will want to proceed with changes and that the legislation will be appropriately targeted, ICAEW has sought to provide constructive feedback to ensure that any legislation contains appropriate safeguards, guardrails and sanctions that are proportionate and easy to apply.

ICAEW welcomes measures to broaden the disclosure of HMRC’s concerns about tax advisers to professional bodies as this will support ICAEW’s role as an improvement regulator to provide targeted support and deliver appropriate interventions to its members.

The consultation timeframe is just six weeks and also coincides with two bank holidays and the Easter holiday period when many people have been taking time off. We are therefore concerned that, as highlighted in the government’s consultation principles, insufficient time has been given for all respondents to consider the consultation, thereby reducing the quality of stakeholder engagement.

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This response of 7 May 2025 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 172,000 chartered accountant members in over 150 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

GENERAL COMMENTS

1. In the public interest, ICAEW supports reasonable, properly targeted and proportionate measures to tackle poor tax advice and/or non-compliance facilitated by tax agents.
2. It is in the public interest that taxpayers can readily access good tax advice at an affordable price. As ICAEW stated in paragraph 1 of our 2024 representation (ICAEW REP 49/24) on raising standards and potential regulation, “tax practitioners play a key role in the proper functioning of the UK tax system, supporting and guiding taxpayers through a highly complex and rapidly changing regime.” It is therefore welcome that the consultation document acknowledges the key role that good tax advisers play in the tax system in both the executive summary and the introduction. However, there is little in the document itself that seeks to value and support the role of the vast majority of tax agents who are doing a good job (whether professionally qualified or otherwise) by making it clear that they are not the intended target of these provisions.
3. It is imperative that any changes to HMRC’s powers are proportionate and targeted. While HMRC may seek to use the amended powers described in the consultation in limited circumstances, the risk is that if they are not sufficiently targeted and drafted in legislation in a way that limits the scope to the intended circumstances, HMRC will come under pressure to use these powers more widely in the future.
4. ICAEW supports evidence-based policymaking and the need for high quality data to support decision making. However, although the consultation document references the overall tax gap, it does not seek to quantify how much of the tax gap is attributable to such agents and how any new measures would close this part of the tax gap. Better data on this is needed to help inform any final decisions.
5. Our principal concern is that the measures described in the consultation document do not match the target outlined in the executive summary and introduction. This is because the starting point for the proposed new rules is the dishonest conduct provisions in Sch 38, FA 2012. The dishonest conduct rules were created for a different purpose. Adapting the dishonest conduct rules will result in draconian provisions applying to behaviours that fall well short of dishonest conduct.
6. Further, the title of the consultation “Enhancing HMRC's powers: tackling tax advisers *facilitating* non-compliance” should mean that this is confined to advisers who are deliberately complicit in non-compliance. The consultation provides no data on the extent to which such activity is among advisers who are affiliated to a professional body as opposed to the one third of tax advisers are not members of a tax or accountancy professional body and therefore are not subject to any professional body oversight. No distinction is generally made in the consultation between how these two groups might be treated, except for question 24.
7. There were sound reasons as to why the dishonest conduct provisions were framed as they were in 2012. There is no data in the consultation document that provides compelling evidence that the bar for those provisions was set too high. Instead, amending the processes and increasing the sanctions for dishonest conduct should be explored.
8. If these proposals go ahead as proposed, the bar will be set too low, with the result that there would be, in effect, a regulatory environment. HMRC will be acting as the de facto regulator but with none of the safeguards needed to protect the vast majority of ordinary compliant tax agents seeking to ensure that their clients pay the right amount of tax. HMRC has a clear and obvious conflict of interest in acting as a de facto regulator of tax advisers and agents and giving further disproportionate powers like those proposed in this consultation could further erode the trust that taxpayers and advisers have in the tax system.
9. If the bar is changed, then non-compliance must be defined so that the target is clear: namely tax advisers actively (and knowingly) facilitating and promoting non-compliance which results in a loss of tax. No reputable tax adviser, and especially a member of a

professional body that is signed up to Professional Conduct in Relation to Taxation (PCRT), should have this as a business model as to do so would be clearly contrary to PCRT and a potentially reportable disciplinary offence. Defining the target is key to minimising the impact on the majority of compliant advisers. We trust that, given HMRC's endorsement of PCRT and the alignment of the HMRC standard for agents with PCRT, HMRC agrees that a tax adviser or agent that complies with PCRT and the HMRC standard for agents should never be subject to these new powers. Based on the current consultation document, this is far from clear.

10. To be proportionate, a range of powers that reflect the nature of the non-compliance (with relevant safeguards) might be more appropriate.
11. ICAEW is keen to ensure that any measures do not affect the proper functioning of the tax advice and compliance market in the UK. There is a risk that mainstream tax advisers will be obligated to significantly change their governance procedures and perhaps even exit some aspects of the tax advice and compliance market. This could lead to significant increased costs for taxpayers seeking advice and a reduction in the overall supply of professional advice. This may have an adverse impact on taxpayer compliance. It may also reduce the amount of quality professional advice given to taxpayers (thereby reducing overall quality) and slow down transactions and decision-making across the economy – potentially hindering growth. Such implications are disproportionate outcomes compared with HMRC's stated aims, and contrary to the public interest.
12. If taxpayers cannot obtain professional advice, it could put more pressure on HMRC to fill the hole left by professional advisers. This could increase costs incurred by HMRC and place more burdens on HMRC at a time when it is struggling to improve its own performance.
13. ICAEW notes that the professional and business services sector is one of eight sectors identified by DBT in Invest 2035: the UK's modern industrial strategy as having the highest growth opportunity for the economy and business. If that is the government's wider vision, then HMRC should be ensure that action supports that ambition (or at least minimises any negative impact on the sector).
14. ICAEW also questions whether the proposals solve any of the following problems:
    - advisers who continue to provide tax advice despite being excluded from membership by their professional body or penalised by HMRC;
    - advisers that are difficult to identify because they do not interact directly with HMRC;
    - advisers not established in the UK; or
    - advisers who phoenix into a new business.

ANSWERS TO SPECIFIC QUESTIONS

15. While ICAEW has sought to provide comments on the majority of the questions in the consultation, it has not provided the "yes" or "no" answers requested by certain questions as the answers to the questions are rarely binary: the position is more nuanced and much will depend upon the detailed policy design. ICAEW therefore reserves its position until such time as draft legislation is published.

Exploring the proposals

Question 1: Do you agree that HMRCs powers to tackle tax advisers who harm the tax system could be more effective?

16. The scope of this consultation concerns agents facilitating non-compliance. Such activities fall outside the standards of behaviour expected from a professional tax agent such as an ICAEW member. Therefore, ICAEW does not have much visibility about the challenges that HMRC may face in using its existing powers to tackle these sorts of behaviours – in

particular the dishonest tax agents rules set out in Sch 38, Finance Act 2012. Further, there is no data in the consultation document that provides compelling evidence that the current bar as set out in Sch 38 is too high. ICAEW is aware of only one case to come before the Tribunals (Rodgers v HMRC [2018] UKFTT 0415 (TC)) concerning the issue of a conduct notice for dishonest tax agents under Sch 38. In that case, the behaviour was clearly dishonest, and the Tribunal had no hesitation in confirming the issue of a conduct notice. It is not clear from the case if the tax adviser was a member of a professional body that is signed up to PCRT, but if he was his behaviour would clearly have been prima facie in breach of PCRT and have exposed him to disciplinary action. The dishonest conduct powers in that case appeared to be working as intended. However, without further decisions, etc, it is difficult to form a judgement as to their overall effectiveness.

17. This consultation focuses predominantly on amending the Tax Agents: Dishonest Conduct rules (Sch 38, FA 2012) and the provisions for making public interest disclosures to professional bodies contained in the Commissioners for Revenue and Customs Act 2005 (CRCA). However, there are other powers available to HMRC, including:
    - error(s) in taxpayer's document attributable to another person (para 1A, Sch 24, FA 2007);
    - penalties for enablers of offshore tax evasion or non-compliance (Sch 20, FA 2016);
    - corporate offences of failure to prevent facilitation of tax evasion (Pt 3, Criminal Finances Act 2017);
    - penalties for enablers of defeated tax avoidance (Sch 16, F(No 2)A 2017);
    - penalties for facilitating avoidance schemes involving non-resident promoters (Sch 13, FA 2022); and
    - failure to prevent fraud (s199, Economic Crime and Corporate Transparency Act 2023).
18. Taken together, these provide a fairly comprehensive set of powers that could be applied to cases where tax agents might facilitate non-compliance. However, there is no discussion in the document about whether any of these provisions have been considered as part of addressing tax agent non-compliance. ICAEW believes that the use of these powers should be examined first before yet more powers are taken which could have serious impact on the tax advice market. In addition, there is no publicly available data on the use of the civil (not criminal) powers listed above. If HMRC demonstrated that it is using these powers (eg, by publishing statistics in its Annual Report), then their deterrent effect may increase.
19. If the government proceeds with these proposals, any new or amended powers should take all these existing powers mentioned above into account as there is potential overlap and duplication. HMRC should also consider if any of these existing powers can be repealed if a new power is introduced. If not, then double jeopardy rules would be required to mitigate against the possibility of tax agents being subject to two or more sets of penal provisions.

Question 2: Do you agree with the government's aim that any enhanced powers should allow for swift, effective, and proportionate action in cases of tax adviser activities that result in harm to the tax system and facilitates non-compliance?

20. In the public interest, ICAEW supports reasonable, properly targeted and proportionate measures to tackle poor tax advice and/or non-compliance facilitated by tax agents.
21. While it is appreciated that HMRC needs to be seen to take swift action, ICAEW considers that this needs to be balanced with appropriate safeguards to ensure that it is the correct action. ICAEW does not agree with the removal of some of the existing safeguards – particularly if the bar for the type of conduct is lowered (this is explored in response to questions 10 and 32).
22. ICAEW reiterates the comment it made in 2010 in TAXREP 19/10 when responding to the original draft legislation concerning tax agents. In 2010, we said: "Accessing a tax agent's working papers could destroy the agent's reputation and livelihood. Very strong safeguards are required. The agent should always be entitled to appear and speak at any Tribunal

hearing where permission is being sought to seek access or apply penalties under these provisions."

Question 3: What actions that lead to harm being done to the tax system should be within scope of the proposals outlined within this consultation? Please give reasons for your answer.

23. It is difficult to define precisely what actions should be in scope. Clearly, the scope of the consultation is tackling agents who are actively involved in, or who are facilitating or encouraging, the submission of tax returns that they know, or should know, contain errors and omissions which result in a loss of tax. However, such behaviours are far below the expected behaviour of a typical tax agent, which is to assist a client to ensure that the right amount of tax is paid at the right time.
24. For example, one of the examples given in the consultation document – submitting repayment claims for employment expenses without checking the validity of the claim – is not the expected behaviour of a professional tax adviser who would be expected to check the validity of a claim before submitting it. Instead, this 'model' effectively seeks to exploit how HMRC administers and monitors the tax system and that HMRC is unlikely to pick up for enquiry any error or omission. Efficiency of administration is crucial in the context of allowing taxpayers to claim the tax reliefs they are entitled to and supporting the delivery of policy objectives. However, this does leave the tax administration system open to abuse if it is not properly policed by HMRC, leaving space for bad actors to exploit these shortcomings. This allows poor behaviours to flourish and taint the work of the vast majority of good agents seeking to help their clients get it right.
25. However, one of the other examples – submitting R&D tax relief claims for companies that do not meet the requirements for the relief highlights the difficulty of defining what should be in scope. The agent's behaviour would clearly be in scope if there is no credible basis for the position taken – especially if this is a deliberate action. However, it may also cover situations where a tax adviser acting entirely appropriately and in accordance with PCRT takes a different but credible view of the law compared with HMRC. HMRC should make sure that any rules clearly focus on unprofessional behaviour, as broader potential application to PCRT-compliant behaviour (even if not intended by HMRC) would result in significant increased governance and hence costs for compliant advisers.
26. ICAEW considers that behaviour that intentionally seeks to exploit how the tax system is administered should fall within scope of the current rules. The current legislation states: "An individual 'engages in dishonest conduct' if, in the course of acting as a tax agent, the individual does something dishonest with a view to bringing about a loss of tax revenue." The issue is more likely to be HMRC's ability to take action under the current rules and whether the sanctions provide a sufficient deterrent.
27. The third example is also problematic, namely: "providing advice on tax to clients which they rely on and which results in inaccuracies in the clients' returns." On a straight interpretation this could apply very widely and could affect any tax adviser whose client has for whatever reason, including a mistake, made an inaccuracy in their return. It could also include the situation where a PCRT-compliant tax adviser merely takes a different, but entirely credible technical view of the law. The potential target is far too wide and therefore carries a risk that taxpayers will be unable to access the advice they need if agents fear being caught up in these rules if they get something wrong and exit the market/sector.
28. Overall, the proposal to replace the requirement for "evidence of dishonesty" with "HMRC reasonable suspicion of facilitating an inaccuracy" will be problematic. Dishonesty is a well-tried concept in general law requiring a proven intention to mislead. By contrast, an

"inaccuracy" is a much wider and often subjective term used in the context of HMRC seeking to apply penalties for failing to take reasonable care / time limits for assessment. The Upper Tribunal judgement in HMRC v Tooth [2018] UKUT 38 (TCC), which was not overturned by the Supreme Court judgement in 2021, decided that an entry in a document that is explicitly based on a bona fide albeit controversial interpretation of tax law, but which subsequently proves to be wrong, does not necessarily amount to an inaccuracy. However, this is a point which experience has shown continues to be contested by HMRC. HMRC instead takes the view that wherever a return is amended following an enquiry and closure notice (or this is accepted by contract settlement) then the original return necessarily contained an inaccuracy. This would mean, for example, that if an adjustment to any return is conceded in the interests of bringing an enquiry to a close, then HMRC is likely to treat that as demonstrating an inaccuracy.

29. Any definition must be focused on tackling the problems that HMRC is seeking to address rather than being widely drawn. This requires legislative clarity with a clearly defined scope of application. Given the potentially penal nature of these wide-ranging provisions, it is not sufficient to then narrow the scope of them based on HMRC guidance and reassurances. As time elapses and HMRC corporate history is forgotten, there is a clear danger that HMRC will use the powers in the future in ways that were not the originally intended target unless the scope is clearly defined from the outset.

30. ICAEW considers that there must be clear definitions of "non-compliance" and "facilitation". Non-compliance is defined in Sch 20, FA 2016, which relates to Penalties for Enablers of Offshore Tax Evasion or Non-Compliance. That legislation uses the term "enable" rather than "facilitate". Consideration could be given to adopting a similar definition for onshore matters. "Facilitation" is a problematic term in the context of a tax agent as any work that they undertake for a taxpayer could be argued to amount to facilitation. As the consultation acknowledges, most tax advisers provide high quality advice and support their clients to pay the right amount of tax (ie, most tax advisers are facilitating the proper functioning of the tax system).

31. ICAEW notes that respondents to the EU consultation Tax evasion & aggressive tax planning in the EU – tackling the role of enablers also spoke of the need for a clear definition of "enabler". We recognise that the UK has the power to make its own rules and regulations in this area but, given the need to encourage cross border growth and trade, it would make sense for there to be some consistency between jurisdictions.

32. ICAEW's bar for taking action is where a member is failing significantly short of professional standards. So, it is not any error or mistake – it has to be poor enough to bring discredit. Consideration should be given to using the HMRC standard for agents as the basis for the standard of which the adviser has fallen significantly short.

33. Ideally definitions would be based on familiar terms that currently exist in legislation and that have been developed through case law.

34. A clear target would be tax agents actively (and knowingly) facilitating and promoting non-compliance which results in a loss of tax – the *Rodgers* case set out above would clearly be in scope. No reputable tax adviser, and especially a member of a professional body, should have this as a business model, as to do so would be clearly contrary to PCRT and a potentially reportable disciplinary offence.

35. ICAEW considers that a mistake that occurs despite the adviser taking reasonable care (or having a reasonable excuse) should not be in scope. Otherwise, technical disputes over the meaning of legislation that are ultimately resolved in a way that differs from the original position submitted could be in scope. Where the application of the law is genuinely uncertain, there is a danger that agents would not be prepared to take on the risk of giving advice that could be challenged in this way, resulting in taxpayers being unable to access proper advice.

36. A taxpayer may decide for other reasons to not argue a point with HMRC (eg, health or financial reasons). But the adviser may consider that the taxpayer has a strong argument on a technical dispute (legislative interpretation) or factual dispute (eg, residence or whether an activity is R&D). In such circumstances, it would be inappropriate for a tax agent to be in scope of such provisions.
37. Most tax agents will be endeavouring to ensure that their clients pay the right amount of tax. However, there will be cases where – despite asking all the right questions of their clients – a client will fail to provide a key piece of information that could result in an underpayment of tax. Similarly, the client may provide incorrect information which the agent has no reason to suspect is not true. The client may have made an error in respect of VAT or payroll taxes (for which the adviser has no responsibility), but that error is then reflected in a set of accounts and leads to an incorrect profit-based tax calculation. In addition, third parties may provide inaccurate information. These should not be in scope of the proposals. Agents should not be penalised for the resulting error in the tax return.

Question 4: Do you have any other suggestions for how HMRC might enhance its powers to tackle non-compliance facilitated by tax advisers? Please give reasons for your answer.

38. Please see our comments in para 16 above, namely that most ICAEW tax agents will fall outside of the scope of these provisions and ICAEW therefore does not have much visibility about how HMRC might further enhance its powers. As a general rule, members tell us that HMRC already has more than enough powers to tackle the poor behaviours of the type highlighted in the consultation, but HMRC does not use them effectively. The proposed new agent registration requirements from April 2026 should help to provide HMRC with better data on non-compliance and, in particular, where this was facilitated by the agent. In turn, better data of this kind would help to identify the most appropriate solutions, namely ones which tackled the small minority of tax agents who undermine the tax system and damage the reputation of the wider profession. Going forward ICAEW would be happy to help and support any work in this area.

Scope of the proposals

Question 5: Do you have any comments on the proposed scope?

39. ICAEW welcomes the intention to apply the proposals to those who provide tax advice and services but who do not interact with HMRC. However, we do have questions on the proposed scope as set out below.
40. The scope section says that: “Tax advisers who interact directly with HMRC to provide tax advice and services are in scope. Tax advice and services includes submitting returns for taxpayers and supporting taxpayers during enquiries.” ICAEW would welcome confirmation that the reference to enquiries in this context is limited to statutory enquiries (eg, under s9A, TMA 1970), and that it does not encompass investigations (eg, COP9), nudge letters and other compliance checks.
41. Would HMRC please confirm that appeals are outside of the scope. Taxpayers should be able to defend their positions with help from their advisers without being concerned as to whether HMRC could use the proposed information powers to get to the advisers’ records. The Tribunals/Courts disclosure processes should be the only procedures that apply.
42. Similarly, will tax returns include standalone claims? While MTD income tax quarterly updates are not tax returns, would they be in scope?
43. How will HMRC enforce these rules if the adviser is based outside of the UK? Or in situations where there are reclaims in the UK, by a UK agent, of VAT on behalf of a non-established taxpayer?

Question 6: Are there any other groups HMRC should consider?

44. Software developers play an increasingly important role in the tax system. If a software company programs the system or app incorrectly or gives incorrect prompts/advice within the software, this could cause mistakes in thousands of tax returns. Harm to the tax system from this type of error has the potential to be significant. ICAEW acknowledges that programming errors are unlikely to be deliberate. But given the complexity of the UK tax system, this is a risk area that requires better management and oversight, including the need for adequate controls in, and testing of, software.
45. As the software market develops, we hear from our members that a growing number of SMEs are questioning whether an adviser is necessary. AI tools within software are also developing and offering greater support to taxpayers. This begs the question of when software stops being a tool and starts being an adviser.
46. ICAEW notes that the ability to obtain tax advice from other AI tools and the internet is also growing. If these are out of scope, what more can HMRC do to discourage their use for tax if the tools are not trained to use the correct sources?

Enhancing powers to enable HMRC to investigate and request information from tax advisers

Question 7: Do you agree that it should be easier for HMRC to obtain information from tax advisers where HMRC reasonably suspects the tax adviser's activity has facilitated an inaccuracy in a taxpayer's document or return.

47. ICAEW can see the potential benefit of streamlining the issue of a conduct notice and an information notice. However, given the potentially very significant implications for tax advisers and agents of HMRC being able to issue such notices, we have serious concerns about the "reasonably suspects" threshold and removing some of the safeguards under which these powers may be used (see answers below). It is imperative that robust independence is maintained in the decision-making process. ICAEW would be happy to engage with HMRC on what a revised independent decision-making process could look like as outlined in response to question 10 below.

Question 8: Do you believe that 'reasonable suspicion' is the right threshold to issue a conduct and information notice? Are there any alternatives HMRC should consider?

48. Reasonable suspicion in policing terms is a very low bar as it is used for "stop and search" powers. ICAEW considers that there must be some objective evidence to support the suspicion. It is in the nature of an HMRC officer's professional duties to "reasonably suspect" that there may be an error in a return. It is not dissimilar to the ethical requirements for ICAEW members. ICAEW members are expected to apply an inquiring mind when assisting a client with their tax affairs. The bar for HMRC to invoke these proposed provisions must be set higher than reasonable suspicion.
49. Further, HMRC may reasonably suspect, but be factually wrong. If the adviser demonstrates that on appeal, it follows that the conduct and file access notices must be cancelled – would HMRC confirm that this will be the case? However, ICAEW notes that the reputational damage to an adviser's practice may already have been done by that stage.
50. If a bar as low as "reasonable suspicion" is going to be considered adequate grounds for issuing a conduct and information notice, then issuance should be subject to HMRC having to ask the tribunal for permission with the adviser having the right to be present and

represented. If tribunal permission is removed, it must be replaced by another independent decision-making process as outlined in response to question 10 below.

51. In addition, HMRC should be obliged to reveal to a tax adviser the basis upon which HMRC is relying upon to reach a conclusion of "reasonable suspicion". This would help to ensure, as a minimum, that the tax adviser is aware of what they need to address in the process of executing any rights to appeal.

52. As an alternative, the approach in Sch 20, FA 2016 could be adopted: namely that the information power is only used when it is reasonably required to check the adviser's liability to a penalty.

Question 9: Do you agree with the proposed changes to the powers to gather information from tax advisers?

53. ICAEW considers that if the power to issue information notices is expanded beyond dishonest conduct, there is a risk of widening the gap between the professions. This is because para 17, Sch 38, FA 2012 says that a file access notice does not require the document-holder to provide any part of a document that is privileged. Consequently, lawyers will not need to provide part, or all, of the information requested. However, other professions will need to provide the information. There must be a level playing field between all tax advisers, whether or not legally qualified, as otherwise there is a danger that the policy intent will be undermined by more taxpayers seeking tax advice from legally qualified advisers.

54. If the market becomes limited, this could push up the costs of accessing tax advice and could lead to more inaccuracies if taxpayers cannot afford to seek help. This outcome would not be in the public interest.

Question 10: Do you have any comments about the proposal to remove the safeguard requiring tribunal approval for a file access notice?

55. ICAEW does not consider that delay in the current judicial process is a valid reason for changing the decision maker from being an independent tribunal to HMRC. If there are capacity issues in the legal system, these should be addressed separately.

56. Under the existing legislation, HMRC must seek approval from a tribunal to issue a file access notice to a tax adviser. HMRC is looking to amend this safeguard so that a file access notice will instead normally be only authorised by a senior approving officer within HMRC (independent from the business area investigating the agent). In our view, it is entirely inappropriate for an HMRC officer to have this role as they are not truly independent from the decision maker hence the reason for having the independent tribunal process.

57. The document indicates that tribunal approval will be retained in some cases. This will require a precise definition. The example given of "where a tax adviser has previously refused to provide information when requested" is too vague and needs clarification.

58. ICAEW is also concerned that tribunal approved notices would not have a right of appeal. It is important that the adviser has a right of audience before the tribunal so that the tribunal can understand their position (not just HMRC's position). Without a right of appeal, there is a risk that significantly more judicial reviews would be sought. This would place additional burdens on the court system potentially limiting access to justice and contrary to human rights. Tenet nine of ICAEW Tax Faculty's Ten Tenets for a Better Tax System says: "the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions."

59. If the adviser does not have a right of audience before the tribunal, then the process for making representations against the notice should be revised to ensure that the adviser's representations reach the tribunal in full rather than being summarised by HMRC.

60. If tribunal approval of a file access notice is removed, ICAEW considers that an independent decision-making process is vital. This could be a committee with non-HMRC members as a safeguard, instead of HMRC officers making the decisions.
61. Alternatively, the existing governance boards like the Customer Compliance Group Disputes Resolution Board and the Tax Disputes Resolution Board could be used to provide an appropriate level of oversight.

Question 11: Are any other changes to safeguards needed to ensure Schedule 38 can be used more swiftly and effectively?

62. There should be time limits on the use of any new powers. There are no record keeping rules or deadlines for advisers and GDPR encourages deletion.

Question 12: Are there any unintended consequences of the proposed changes?

63. As highlighted in paragraphs 27 and 35, the proposals risk taxpayers being unable to access proper advice where the application of the law is genuinely uncertain as high-quality advisers and agents would either not be prepared to take on the risk of giving the advice or the increased internal governance required would significantly increase the cost of such advice. This could reduce overall compliance in the tax system.
64. ICAEW considers that there is a risk that unscrupulous actors (advisers and taxpayers) could increasingly claim that advice is subject to legal professional privilege or seek advice from offshore (perhaps even having “phoenix” registered advisers). This could become counter-productive for HMRC.
65. The proposal to access taxpayer information through advisers where there has been no dishonesty and without the safeguard of an independent tribunal might be considered “extreme” by ordinary (scrupulous) taxpayers in other jurisdictions. This could potentially harm the perception of the UK tax system with negative consequences for inward investment.
66. The consultation does not say if HMRC would try to use the information notice power before concluding an enquiry into a taxpayer’s affairs. If an adviser faces a conduct/information notice, then presumably they would have a conflict of interest with the client if the client has an open enquiry or if HMRC is still within time to use its discovery assessment powers and would have to cease acting. This may delay resolution of enquiries into the client’s tax affairs, potentially delay of receipt of tax revenue by the Exchequer and cause the client to incur additional costs.
67. The costs (including the potential for penalties) and risks associated with delivering certain services may also affect a firm’s ability to obtain, or the costs of obtaining, professional indemnity insurance.
68. ICAEW notes that HMRC is also considering changing the penalties for failing to comply with an information notice, although that is not specifically covered by the questions in this section. If penalties became tax geared, then the issues concerning tax geared penalties that ICAEW highlights in response to question 17 below would also apply here. Further, the amount of tax loss is unlikely to be known at this stage.

Question 13: Are there additional/alternative ways HMRC should gather information related to tax advisers who cause harm to the tax system?

69. Mandatory registration of agents that interact with HMRC should improve the information available and help HMRC to better manage non-compliance in the agent community. ICAEW accepts that there will still be some tax advisers that do not interact directly with HMRC and that they may still provide tax advice or services to a taxpayer which leads to an inaccuracy

in a return. However, ICAEW recommends that agent registration should be introduced and assessed before any decision is taken forward on introducing these changes.

70. ICAEW considers that HMRC could be doing more to tackle the targeted advertising of purported tax saving ideas and tax reclaims via social media platforms – boosted by the algorithms. This advertising is targeted not only at individual taxpayers, but also businesses. The TikTok advisers are out there too, available, for everyone to see. These are exactly the sorts of activities and behaviours that should be in scope, but it is difficult to see that the proposed new powers would stop their activities – and could even encourage them if a gap opens up in the market.

Enhancing financial penalties for tax advisers who cause harm to the tax system

Question 14: Do you believe that the current penalties under Schedule 38 Finance Act 2012, Tax Agents: Dishonest Conduct provide an adequate deterrent against non-compliance that causes harm to the tax system?

71. ICAEW notes that the consultation states that the current maximum penalty of £50,000 could be seen by some tax advisers as an acceptable cost of doing business rather than an effective deterrent. No reputable tax adviser, and especially a member of a professional body, should operate on this basis. Further, for the vast majority of tax advisers providing professional services subject to PCRT, a fine of this size would never be seen as an acceptable cost of doing business.

72. However, the £50,000 penalty should not be viewed in isolation. HMRC could use its criminal investigation powers with a view to prosecution if there is dishonesty. Also, the offshore enabler penalties may apply.

73. In TAXREP 19/10, ICAEW also noted that minimum penalty of £5,000 could be too high, as it may be wholly disproportionate to the actual tax lost.

Question 15: Do you believe that penalties should be introduced for tax advisers who have facilitated non-compliance that causes harm to the tax system?

74. As stated previously (see response to question 3), facilitation and non-compliance need defining. It could be argued by an HMRC officer that any error in a tax return prepared by a tax adviser would meet this definition, which is a wholly disproportionate scope for a penalty regime. Financial penalties must be properly targeted and proportionate to the harm. If the bar for imposing penalties is lowered from the current definition of dishonest conduct, any penalty model should reflect that change.

Question 16: Should the government reassess how penalties for tax advisers are determined to enhance deterrence against non-compliance?

75. Penalties ought to reflect the behaviours they are meant to deter. As written, the potential scope of “facilitating” is so wide that it could cover anything from innocent error to fraudulent behaviour.

76. ICAEW notes that the existing civil regimes listed at paragraph 17 all use different methods to calculate the penalties. It would be simpler if the methods were re-assessed and one chosen.

77. Please also see response to question 14.

Question 17: Which approach do you think will be most effective to reduce tax advisers facilitating non-compliance in their client's returns?

A. a penalty based on the potential revenue lost

B. a penalty based on the tax adviser's fees

C. a penalty based on a business's global turnover

D. other (please specify)

Please give reasons for your answer.

78. ICAEW considers that penalties should only ever either be proportionate fixed sum amounts or be linked to a tax adviser's fees. See also the response to question 20 that sets out a potential framework for determining penalties.
79. If penalties are linked to the amount of tax at risk, some taxpayers with large tax liabilities may be unable to access proper advice as tax advisers could deem the work too risky. This could potentially reduce the level of compliance by taxpayers – the opposite of the policy intention.
80. Further, if the adviser no longer acts for the client (eg, they have resigned because of a conflict of interest as highlighted in paragraph 66), they would be unable to challenge the quantum of a tax-geared penalty as they would have no knowledge if the tax figure presented by HMRC was correct. As tax is the responsibility of the taxpayer, this is not an appropriate measure.
81. We also highlighted at paragraph 36 that a taxpayer may decide not to proceed with a dispute, even if the adviser considers that no tax is due. In that circumstance, it would be difficult or impossible for the firm to challenge the liability without the taxpayer (who may not be their client at that point) being joined in the appeal, even if the legislation permits the adviser to launch such a challenge as part of their penalty appeal.
82. The consultation document mentions that the government considered other penalty options including a fine equivalent to 10% of a businesses' global turnover. Global turnover would not be an appropriate basis for charging penalties – not least because for many businesses the turnover is unlikely to derive solely from tax fees or advice on UK tax, and any resulting penalty is likely to be wholly disproportionate. We would welcome confirmation that the government has rejected any penalty using this approach.
83. HMRC should also consider the human rights law consequences of seeking to impose significant penalties, such as tax-geared penalties or penalties related to global turnover, where these could be disproportionate and/or if these are not subject to independent Court approval.

Question 18: Do you believe there should be a maximum penalty amount?

84. Please see answers to questions 14 and 15.

Question 19: If you believe a maximum penalty should be in place, how do you feel it should be calculated? Please give reasons for your answer.

85. ICAEW has no comments on this question.

Question 20: Do you agree the penalty should escalate in stages, based on additional instances of facilitation of non-compliance?

86. ICAEW considers that varying penalties dependent upon the level of seriousness should be explored. This requires careful consideration so that objective rather than subjective tests can be applied.

87. In deciding the level of a sanction, ICAEW has experience of addressing this question as part of its role as a regulator. Our experience is that a suitable framework would need to be prepared and published. This would need to consider as a minimum three particular areas:

- intent (a behavioural aspect);
- the nature of the error (how badly wrong / was it repeated?);
- the impact of the error (tax loss or harm to taxpayers).

88. ICAEW's guidance on sanctions is an example of how a regulator assesses seriousness in calculating a financial sanction. It grades cases from A to F with starting point fines for each level of seriousness.

89. Elsewhere in the consultation, HMRC suggests that repeated mistakes after being told an adviser is getting it wrong need to be dealt with. If this is a measure for triggering a penalty, then it is vital that guardrails are set (ie, the number of mistakes in a defined time period). There is a precedent for this in para 22(2), Sch 20, FA 2016.

Question 21: What other changes to the maximum and minimum financial penalty thresholds would be needed to ensure that a penalty charged in a case is more proportionate to the tax loss poor tax advice has caused?

90. See response to questions 14 and 17. Linking the quantum of a penalty to the amount of the tax loss could limit access to advice and increase the amount of errors.

Question 22: Do you agree with the government's proposal to introduce an option to charge penalties on tax adviser business entities rather than individuals, except where it can be evidenced that the wider business was not aware of the individual tax adviser's actions?

91. ICAEW considers that having the ability to charge penalties on tax adviser business entities would be more appropriate unless it was a personal conduct matter relating to an individual.

92. If changes are made to the current penalty regime so that charges are imposed on the business, would the regime for joint liability notices also be expanded (para 5, Sch 13, FA 2020)?

93. ICAEW notes that in practice it is difficult to prove a negative (ie, as phrased in the question, "that the wider business was not aware of the individual tax adviser's actions"). The corporate criminal offence legislation provides a safe harbour of having reasonable prevention procedures. ICAEW suggests that inspiration could be taken from the corporate criminal offence in respect of these proposals, such that the business would not face a penalty if it had reasonable procedures in place.

Question 23: What else should be considered when looking at penalties charged on tax advisers?

94. As stated in response to question 17, HMRC must carefully consider whether changes to penalties could adversely affect the market for tax advice, potentially leading to an increase in the amount of errors as taxpayers try to do it themselves or turn to an unscrupulous adviser who should be the target of these rules but is likely to ignore them.

95. ICAEW's response to question 1 also highlights the need to consider whether some of the existing penalty powers can be repealed if a new power is introduced. If not, then double jeopardy rules would be required to mitigate against duplication.

96. If the goal is to improve the quality of a tax adviser's work, then there must be an incentive to make improvements. In line with taxpayer penalties, ICAEW suggests that penalties should be suspended or simply not imposed where the business agrees to some improvements or change. This would need to align with the current open consultation on Reform of behavioural penalties.

97. Most other penalties include a special circumstances reduction clause and clauses reducing the penalties depending on the level of co-operation during any investigation. This should be replicated across into any new legislation.

98. There is also a need for HMRC staff to be properly trained to deal with these powers if enacted. They would need to understand advisers' roles, PCRT, etc. ICAEW and the Chartered Institute of Taxation have previously delivered joint training on these topics to HMRC staff.

Broadening disclosure of HMRC's concerns about tax advisers to professional bodies

Question 24: Are there any reasons why HMRC should not make further non-PID disclosures to professional bodies, as well as continuing with PIDs (where appropriate)?

99. ICAEW would welcome HMRC making further non-PID disclosures to professional bodies, in addition to PIDs.

100. ICAEW is an improvement regulator. This means supporting members to do a good job, not just sanctioning them if they get things wrong. ICAEW therefore welcomes the potential to receive more information to enable it to support its members.

101. We acknowledge that the current threshold for HMRC making a PID is, rightly, a high one, but that there are other behaviours and competence concerns that would be valuable to share, even if such conduct does not meet the threshold for misconduct. We would suggest that these non-PID disclosures could be made as intelligence reports to ICAEW's risk officer or intelligence officer within the Professional Standards Department, rather than as complaints to the Conduct Department. This would mean that the information could be shared with ICAEW on the basis that it would be used to inform its overall proactive risk-based regulation of members. In contrast, a PID is made as a complaint to ICAEW's Conduct Department who then consider undertaking a formal investigation and reporting the member for potential disciplinary action.

102. The consultation document does not make it clear whether the CRCA would be amended to facilitate non-PID disclosures. ICAEW considers that a legislative change would be required to prevent HMRC from breaching its powers and exposing HMRC officers to criminal offences. An appropriate legislative gateway could be created for reports that are shared with a professional body regulator in the public interest, in that the report enables the professional body to intervene to raise standards of the tax work performed by its members, thereby protecting the public. At present any reporting to ICAEW would be routed through the investigation and disciplinary route.

103. It would also be beneficial for the operation of the current PID process to be reviewed. Typically, current PIDs can be slow to receive by the professional body, and the information can be heavily redacted to the extent that it is hard to use for the purposes of a disciplinary investigation.

Question 25: What types of behaviours or activities do you consider it appropriate for HMRC to make further disclosures about?

104. ICAEW would welcome receiving disclosures about all the issues outlined in the consultation document, as well as any other general competence or conduct concerns that do not meet the threshold for reporting as a PID. For example, if an adviser appears to be venturing into advising on an area of tax that they do not normally advise on, and this has led to errors in the individual's work.

Broadening the scope of publication of tax adviser details when they are the subject of an HMRC sanction

Question 26: Do you believe that it is in the public interest for HMRC to publish more information about its activity, such as the details of tax advisers subject to a formal sanction by, or a restriction on their dealings with, HMRC?

105. ICAEW considers that there is a balance to be struck. It is in the public interest for taxpayers to have access to information to help them choose a tax adviser, although how many taxpayers would consult such a list is not known. There could be opportunities to provide better signposting to those who are members of professional bodies.
106. However, we are concerned that the consultation seems to indicate that an agent's name might be published for making mistakes even where no penalty would be chargeable. We do not think that would be a reasonable or proportionate response. Further, given the potential detrimental and potentially catastrophic reputational impact on an adviser's business, ICAEW considers that publication should remain reserved for the most serious cases where a penalty is charged. To protect its own position from challenge, HMRC must be absolutely sure of its grounds and ensure that only the most serious cases are published.

Question 27: When considering where to set the threshold of proportionality for publication, which types of sanctions do you believe should be included, and which should be left out?

107. See response to question 26.
108. In addition, ICAEW does not consider that suspension of agent codes is a sanction that should be included. HMRC's difficulty in communicating with agents became apparent at the end of 2024 during the agent code cleansing exercise. As a result, agents will have justifiable anxiety that they could inadvertently miss a communication that could lead to an agent code being suspended. For example, we are aware that agents do have their codes suspended in cases where they (or the correct person in the firm) have not received a request to provide evidence of money laundering supervision.
109. Issues with an adviser's own tax returns should not be included without evidence that the non-compliance was damaging the wider tax system. If advisers are to be included, they should also be able argue they had a reasonable excuse such as serious illness.
110. Finally, temporary issues (that may well have been caused by an issue with HMRC's own processes) should not trigger publishing.

Question 28: Is the short-form and long-form approach to publication sufficiently flexible to allow HMRC to take a proportionate response to different degrees of poor tax adviser behaviour?

111. The form of publication depends on the intended audience and whether the information will be understandable. Long-form publications may not add value if there is a requirement for certain details to be redacted.

Question 29: What information about each tax adviser should be published, and is there anything that should not?

112. Registered office details may add little value as that address may not be linked to any business address of the adviser. Any registered office address that is also the private residential address of an adviser should not be published.

Question 30: For how long should details remained published and in the public domain for short-form publication, and for long-form publication?

113. ICAEW suggests that this should be aligned with other powers (eg, 12 months).

114. However, as acknowledged in the consultation it also depends on the nature and duration of the related sanction. For example, if a sanction has been lifted by HMRC (eg, a pause on repayment claims has been removed), ICAEW considers that it would be disproportionate to continue publicising the sanction.

Question 31: Which criteria for publication would set a fair and proportionate threshold for using publication?

115. ICAEW suggests that the current threshold for dishonest conduct should be retained for publication – particularly if it is the process rather than the threshold that is currently preventing use of the power.

Question 32: Do the proposed safeguards provide for a fair, proportionate, and workable publication framework?

116. This depends on the sanctions that could trigger publication.

117. Generally, the publication framework appears sensible.

118. There needs to be some independence in the decision-making process both for the level of sanction, and a decision to publish. Limiting the decision making to HMRC staff is an insufficient safeguard due to the likely groupthink. See the suggestions in response to question 10 above concerning introducing an independent committee or using HMRC's existing governance boards.

119. ICAEW considers it essential that agents must continue to be able make an appeal against publication to an independent tribunal.

Question 33: Are there any other safeguards which you think the government should consider for this publication power?

120. We refer to our comments in response to question 32 above. At this stage we have not identified any other safeguards that might be considered but suggest that this area is given further consideration once the policy approach is decided.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see https://goo.gl/x6UjJ5).