ICAEW
REPRESENTATION 44/25

CLOSING IN ON PROMOTERS OF TAX AVOIDANCE

Issued 16 June 2025

ICAEW welcomes the opportunity to comment on the “Closing in on promoters of marketed tax avoidance” consultation published by HMRC on 26 March 2025, a copy of which is available from this link.

Supporting HMRC's efforts
ICAEW fully supports HMRC's efforts to challenge the 20–30 individuals and organisations involved in promoting aggressive tax avoidance arrangements. Those taxpayers who are caught up in these arrangements are often on low pay, are potentially unaware that they are involved in a tax avoidance schemes, and do not have the resources to deal with the consequences if anything comes to light. Taxpayers need to be able to obtain professional and ethical advice at a reasonable cost, and these measures could make that harder to obtain – see further comment below.

Criminal sanctions
ICAEW believes that additional criminal sanctions may not deter unscrupulous promoters who already face such risks. Without proper targeting, the compliant majority of advisers will bear the burden. Criminal sanctions should be specifically targeted at those who mass-market tax avoidance schemes.

Unintended consequences
If not appropriately targeted, additional criminal sanctions may lead to unintended outcomes, such as driving up the costs of seeking tax advice and pushing taxpayers towards less reputable advisers. There is also the risk of the potential export of part of the advisory market to countries with more liberal regimes.

Promoter Action Notices (PANs)
ICAEW believes that PANs will predominantly affect UK businesses as the powers may not be enforceable in overseas jurisdictions. PANs could result in support services used by promoters moving in-house or offshore.

Universal Stop Notices (USNs)
ICAEW is concerned that, without proper targeting, the governance burdens and associated compliance costs imposed on the 85,000 tax advice firms, who are not the intended target of USNs, will be disproportionate compared to the anticipated deterrent effect on the 20–30 promoters, who are the intended targets.

ICAEW
Chartered Accountants’ Hall Moorgate Place London EC2R 6EA UK
icaew.com

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This response of 16 June 2025 has been prepared by ICAEW's Tax Faculty. Internationally recognised as a source of expertise, ICAEW's 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.

INTRODUCTION

1. ICAEW fully supports HMRC's efforts to challenge those individuals and organisations involved in promoting aggressive tax avoidance arrangements. However, ICAEW is concerned that the burden of many of the proposals will fall disproportionately on the 85,000 compliant tax advice firms.
2. As the majority of the 20-30 promoters that the government is seeking to tackle have some overseas connections, many of the proposals may lack the necessary reach to tackle the individuals and organisations concerned. ICAEW welcomes the joint statement released by the Exchequer Secretary to the Treasury and the Isle of Man Treasury Minister on joint working to crack down on promotors of tax avoidance schemes as a start in seeking to tackle some of the problems with offshore promoters. On the face of it, designing effective measures to tackle the offshore element might be a reasonable and more proportionate response.
3. ICAEW notes that in 2013, HMRC's consultation Raising the stakes on tax avoidance said "HMRC estimates that there are approximately 20 businesses that are potentially high-risk promoters". Despite the various new powers that have been introduced since 2013, the core of bad actors is not getting any smaller, but the burdens and risks applying to all advisers from inadvertently failing to comply have been growing.
4. ICAEW is concerned by the underlying assumption that additional criminal sanctions will motivate an unscrupulous promoter to comply in circumstances where they are already at risk of being subject to criminal sanctions (eg, continuing to promote arrangements meeting the description specified in a stop notice or not complying with a duty to give a copy of a stop notice to another person subject to that notice). The consultation does not contain evidence that increasing the number of potential criminal sanctions will provide an effective deterrent.
5. HMRC accepts in the consultation document that the fall in the number of disclosure of tax avoidance schemes (DOTAS) notifications is not simply due to an increase in non-compliance as: "In the main, large businesses and reputable advisers have moved away from avoidance…" ICAEW suggests that HMRC should be emphasising the success of the DOTAS regime in changing taxpayer and adviser behaviour and the related decline in the tax gap attributed to avoidance. The fall in the number notifications does not necessarily mean that criminal sanctions are required.
6. Criminal sanctions are more likely to have unintended consequences creating collateral damage by driving up the costs of seeking tax advice as the 99.9% of reputable advisers move to add further layers of internal compliance procedures/ governance which in turn propels those seeking advice straight into the hands of the cheaper less reputable end of the market. Another consequence could be the export of part of the UK's existing professional advisory market to countries with less onerous and burdensome compliance requirements.
7. HMRC has indicated an overwhelming desire to speed up HMRC's ability to sanction non-compliant promoters earlier as the key to strengthening DOTAS' impact. However, ICAEW is concerned that the creation of a criminal offence may actually add delays into the process.

ANSWERS TO SPECIFIC QUESTIONS

Chapter 2: Introduction

Question 1: What other ideas, in addition to the ones in this document, should the government consider to deliver its intent of closing in on promoters of marketed avoidance?

8. ICAEW notes that despite the various measures introduced over the past two decades (including the GAAR and the GAAR advisory panel), it still takes a very long time for cases involving tax avoidance to be heard before the tribunals. The case of Industria Umbrella Ltd [2025] UKFTT 494 (TC) is a recent example of the timeline that cases can take. Paragraphs 37-61 of the decision sets out the timeline from February 2019. It took over three years

between information notices being issued and HMRC applying to the First-tier Tribunal (FTT) for a penalty to be imposed on 11 March 2022. It then took a further three years before the case was heard on 24–27 March 2025. This gives the promoters of such arrangements far too long to continue selling or reinventing such schemes. We encourage HMRC to consider how these cases might be prioritised to reduce timescales.

9. HMRC accepts that promoters are often offshore. How often does HMRC use the current information powers in treaties? Do the current powers go far enough? Should consideration be given to widening the powers to include not only information gathering but enforcement of regulatory regimes and enforcement of fiscal debts?

10. Another alternative sanction would be incrementally increasing fines for repeated failures to notify (as with tax-geared penalties) rather than criminal sanctions.

Question 2: Is there more HMRC can do to support those who use tax avoidance schemes?

11. The tax avoidance market has changed since the introduction of the DOTAS regime. It used to be made up of a limited number of taxpayers looking to shelter large amounts of income, profits, gains or wealth. Instead, arrangements are now generally targeted at a high volume of low-income workers. Professional indemnity insurance has also played a role in changing the market.

12. Low-income workers will inevitably be attracted by any arrangement that improves their take-home pay. But they are likely to be unaware that their employment arrangements involve tax avoidance in any shape or form. If challenged, they are unlikely to have the resources available to fund the underpayment of tax, let alone any interest and penalties. The current Independent Review of the Loan Charge may inform the level of support required for certain taxpayer groups.

13. Raising awareness of schemes among the contractor population should be prioritised. This needs to be better targeted as the current approaches are not working (eg, the gov.uk website and Spotlights). Continual aware ness raising with other government departments should also help ensure that they are not indirectly involved in promoting disguised remuneration schemes. Does HMRC have any data on the extent to which the problems in the contractor sector relate to state service providers such as the NHS?

14. The evidence suggests that many individuals in the contractor sector do not realise they are involved in tax avoidance. Therefore, they will not realise that HMRC's communications on tax avoidance may be relevant to them. They may be unaware of how to find the information on gov.uk. Also, the information published in Spotlights and similar areas on gov.uk is very brief so a reader may not be able to match it to the arrangement with which they are involved, even if they become aware of these pages.

15. When taxpayers notify HMRC that they would like to exit a scheme and bring their tax affairs up to date, it can take months (sometimes over a year) before HMRC provides them with any tax computations to start the process. At other times, HMRC opens a compliance check which then stalls, leaving the taxpayer waiting to hear from HMRC. It can sometimes be many years before it resumes. Both situations leave the person in limbo, not knowing how much they owe (if anything) and unsure about making a payment on account, with considerable late payment interest continuing to accrue. HMRC should greatly accelerate its work in this area so taxpayers can pay what they owe and move on with their lives.

16. The late payment interest can be substantial where a matter remains open for several years. HMRC's interest mitigation policies (DMBM405010 onwards) are restrictive. These policies should be changed to reduce or eliminate the interest charged where the taxpayer is waiting for HMRC to continue its compliance checks or compute the liability for settlement.

17. HMRC may consider imposing tax-geared penalties for errors in relation to tax avoidance schemes. Paragraph 3A, Sch 24, FA 2007 was introduced in 2017 (s 64(2), F(No. 2)A 2017) to deter tax avoidance and encourage taxpayers to insist on bespoke advice provided to them personally and to seek second opinions. Effectively para 3A deems tax avoidance to be careless by disqualifying the advice from being considered when HMRC is assessing whether the person took reasonable care. However, taxpayers are unaware of this legislation

so they do not know they could take such steps (even if they are aware that they are involved in tax avoidance). Often, taxpayers only find out about this provision towards the end of a compliance check and then feel aggrieved as it is too late to have done anything differently, particularly if they consider that the promoter misled them in the first place. This can damage perceptions of trust and fairness in the tax system and HMRC. An alternative could be for HMRC to suspend the penalty (its policy is not to do so) and use the opportunity to educate the taxpayer on how to spot tax avoidance, what to do when that happens, etc. Helping taxpayers understand the tax system is a key part of HMRC's strategy and should help prevent future mistakes and use of inappropriate schemes. This only requires a policy change – not a legislative change. HMRC could then use para 3A if the person subsequently uses a scheme and meets the para 3A criteria.

18. HMRC does not appear to be using the serial tax avoidance regime (Sch 18, FA 2016). Awareness of the regime is low, so it appears not to be an effective deterrent against repeated use of schemes. This Schedule could be repealed, thus simplifying tax legislation.

Chapter 3: Expanding and strengthening the DOTAS regime

A hallmark for disguised remuneration

Question 3: Do you think there are features of disguised remuneration schemes that could feature in a new DOTAS hallmark that makes it clearer that disclosure is required and reduces the burden on HMRC of sanctioning non-compliance?

19. ICAEW questions whether a new disguised remuneration hallmark is necessary for a number of reasons.
20. First, as mentioned in the consultation, the primary aim of DOTAS is to provide HMRC with early information about arrangements – but HMRC already knows about disguised remuneration arrangements (although it is appreciated that there are some variants).
21. Second, the promoters who claim that the existing hallmarks do not apply will likely argue the same for any new hallmark. Enforcement is the issue rather than a weakness in the existing hallmarks.
22. Third, the proposed changes to regulate umbrella companies and to move responsibility for accounting for PAYE and NIC may tackle some of the problems.
23. Fourth, it is unclear why HMRC does not seek to counter schemes described as 'crude' by applying the Rangers case (covered in Spotlight 41) – although ICAEW notes that the Upper Tribunal recently distinguished Rangers in M R Currell Ltd v Revenue And Customs [2024] UKUT 404 (TCC).
24. Finally, there have been various tribunal decisions that have concluded that disguised remuneration arrangements should have been disclosed under (several of) the existing hallmarks – the most recent decision being Industria Umbrella Ltd [2025] UKFTT 494 (TC). The judgement lists details (at paragraph 9) of 16 relevant previous cases and (at paragraph 163) of four existing DOTAS hallmarks that are potentially relevant to disguised remuneration schemes.
25. If a disguised remuneration hallmark is ultimately considered necessary, then HMRC should undertake to update any proposed new disguised remuneration hallmark to match what are considered to be the latest avoidance arrangements – as this can be achieved via regulations and does not require a Finance Act.

Question 4: For the purposes of this DOTAS hallmark, should consideration be given to any specific exclusions, for example reimbursement of certain employment related expenses?

26. The consultation notes that disguised remuneration arrangements involve paying an employee a small amount of earnings via PAYE, with the balance paid to the employee without tax deducted. It is these "crude" schemes which the government wishes to catch with this new hallmark.

27. ICAEW is concerned that if an exclusion will be required for employment-related expenses, a disguised remuneration hallmark will be too wide in its application. How would a disguised remuneration hallmark deal with "standard" advice for owner managers where they might review annually the level of a bonus compared to dividends as dividends would be paid without tax being deducted?

28. If the application of a disguised remuneration hallmark is uncertain, it could have significant ramifications when combined with the other proposed changes such as the proposed strict liability criminal offence for failure to notify arrangements. See our response to Questions 6–8.

Question 5: Are there other areas or arrangements where a new DOTAS hallmark would help the government tackle marketed tax avoidance?

29. The latest tax gap statistics indicate that that corporation tax is the biggest and a growing component of the avoidance tax gap. However, ICAEW does not have sufficient visibility of the tax avoidance market to know what arrangements might be driving this and whether a new hallmark is required.

A criminal offence for failure to notify arrangements to HMRC under DOTAS

Question 6: Do you agree that the twofold approach of civil penalties and a criminal offence will provide a stronger deterrent?

30. ICAEW is concerned that criminalisation of non-disclosure under DOTAS could result in unintended consequences such as reducing the availability of good quality tax advice.

31. This is because the DOTAS provisions were not designed with criminal offences in mind. The DOTAS hallmarks are drafted to be deliberately uncertain to encourage disclosure and are not sufficiently certain to apply in a criminal context. The threat of a strict liability criminal offence for failure to disclose will mean that the 85,000 firms in the tax advice market will increase governance procedures (likely to result in increased costs to taxpayers) to minimise the risk of failing to make a disclosure. HMRC is targeting 20-30 firms, but the threat hangs over all firms if they fail to spot that a hallmark applies.

32. HMRC may consider that as firms already have governance processes in place to identify if a disclosure is required, no change would be required as a result of the introduction of a criminal offence. However, feedback from ICAEW members indicates that firms are likely to significantly increase governance procedures in response to strict liability criminal liabilities. This will increase the compliance burden on the compliant majority, increasing costs and reducing the situations in which advisers will be willing to act.

33. The uncertain scope of the wording of the hallmarks is highlighted by the guidance. For example, the guidance states that social investment tax relief, seed enterprise investment schemes (SEIS), quoted Eurobonds and excluded indexed securities are unlikely to be standardised tax products unless they form part of wider arrangements. Similarly, the guidance has to provide reassurance that one of the loss scheme hallmark tests is not triggered by genuine business start-ups where any losses are an unintended, albeit possibly predictable, consequence.

34. ICAEW is concerned that the threat of a criminal offence will only change the behaviour of the majority. This could lead to disclosures of matters that HMRC does not want to know about (ie, acceptable tax planning where the adviser is concerned that a hallmark may apply). The 20-30 promoters that HMRC is seeking to target are still unlikely to make disclosures.

35. The cases of Hyrax Resourcing (No 2) [2022] UKFTT 218 (TC), IPS Progression Ltd [2024] UKFTT 136 (TC) and Industria Umbrella Ltd [2025] UKFTT 494 (TC) have seen the tribunal impose some significant financial penalties for failing to make a disclosure. To date, these decisions do not appear to have influenced promoter behaviour.

36. A strategy that may allow HMRC to have the power to apply criminal sanctions against the most egregious actors while limiting the adverse impact on the vast majority of the 85,000 tax

advice firms would be to make it clear in legislation that the criminal sanctions can only apply to those who demonstrate the worst behaviour associated with the missed DOTAS notifications (ie, those who mass-market tax planning schemes). This would make it clear that those who provide bespoke tax advice to taxpayers in a manner compliant with PCRT and HMRC's Standard for Agents should not face potential criminal sanctions (while, of course, the civil penalties could still apply to such advisers).

37. In any event, if a twofold approach is introduced, civil penalties should apply in priority to criminal offences.

38. HMRC needs to recognise that the addition of criminal sanctions will increase costs across the tax advice market. The unintended consequence will be that more taxpayers will be unadvised and more likely to be susceptible to the marketing of schemes and also more likely to make mistakes leading to less compliance. This is particularly likely given that disguised remuneration schemes are now being marketed at the lower paid. The unintended consequence could be a widening of the tax gap.

Question 7: Should the criminal offence be restricted to schemes where there is a promoter acting?

39. As noted above, we do not agree that strict liability criminal offences should apply to the DOTAS regime. However, if they were introduced, they should not apply to the taxpayer. This is because where the requirement to make a disclosure is transferred to the taxpayer (eg, because there is a non-UK promoter or legal professional privilege prevents a lawyer from making the disclosure), the taxpayer could be unaware of their obligation to disclose.

40. As per our comment in relation to Question 6, we suggest that criminal sanctions should be limited to those who mass-market tax avoidance schemes. The current definition of "promoter" is too broad for these purposes and HMRC would have to develop an appropriately targeted definition.

Question 8: What reasonable care/excuse arguments would be appropriate? How might these be framed to prevent promoters from abusing these aspects? What reasons should be excluded from reasonable excuse?

41. ICAEW is concerned that it is unclear what a reasonable excuse defence might consist of in a criminal context as opposed to a civil context. However, 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 criminal prosecution if it had reasonable procedures in place.

42. Reasonable excuse is well established in civil tax case law. However, a criminal court would need to consider the concept and technical tax matters if this offence is introduced. The Ministry of Justice may need to draft in judges from the Upper Tribunal or High Court with the requisite knowledge in order that the accused gets a fair trial.

43. ICAEW also flags that consideration must be given to how the Human Rights Act 1998 would apply in a criminal context – as highlighted by the existing factsheet The Human Rights Act and DOTAS penalties — CC/FS57.

Updating the DOTAS civil penalty regime

Question 9: Do you agree that moving the issuing of DOTAS penalties from the Tax Tribunal to HMRC (appealable to the Tax Tribunal) is appropriate?

44. Provided that it is possible to appeal the penalty, ICAEW notes that this would satisfy Tenet 9 - Fair and reasonable (see Appendix 1). However, it does potentially create cost implications if advisers must appeal penalties that they consider HMRC have raised inappropriately.

Question 10: Are there any other changes to DOTAS penalties HMRC should consider?

45. ICAEW does not have any further suggestions for changes to DOTAS penalties.

Chapter 4: Universal Stop Notices (USNs) and Promoter Action Notices (PANs)

Question 11: Do you agree that the USN and PAN proposals would help to deter and tackle tax avoidance and that the deterrent effect would be proportionate to the costs of compliance?

46. ICAEW is concerned that the costs of compliance for the 85,000 tax advice firms who are not the target will be disproportionate compared to the likely deterrent effect on the 20-30 promoters who are the target. That is because firms will need to monitor the issue of new USNs and will likely have to spend a disproportionate amount of time and costs deciding whether advice that is not the target of the USN could nevertheless fall within scope. ICAEW receives feedback from members that it can be difficult to understand the arrangements described in Spotlights or Stop Notices. If similar drafting is applied to USNs, this could cause significant costs to be incurred by firms trying to 'unpack' the message.
47. potential way of making USNs more proportionate is to ensure that they apply only to those who seek to mass-market tax avoidance schemes and not to tax advisers who provide bespoke tax advice to their clients in a manner compliant with the PCRT and HMRC's Standard for Agents. It is much more reasonable for those who develop mass-market tax avoidance schemes to be required to ensure that these do not fall within existing USNs.
48. ICAEW would also highlight that PANs will predominantly affect UK businesses. HMRC may consider that it would have the power to issue PANs to businesses in other jurisdictions, but the powers may not be enforceable there. This means that there is a risk that the provision of these support services to promoters will shift to being in-house or offshore. Should the ability to issue PAN notices to businesses in other contracting states be included in tax treaties?

Question 12: Do you have any concerns or foresee any practical difficulties with the USN or PAN proposals outlined above?

49. See response to Question 11.

Question: 13: Do you have any alternative suggestions around how businesses would be able to tackle the issue of promoters using their products and/or services?

50. ICAEW questions whether it is appropriate to place burdens on businesses where a promoter happens to use their services.

Question 14: Do you consider that the first contact letter mentioned above would support legitimate businesses to engage with HMRC?

51. The consultation recognises that businesses will likely need a legal basis to take action (ie, they would need a PAN or something similar).
52. The benefit of the first contact letter is likely to be limited to putting a legitimate business on notice that a PAN may be issued so that it is ready to act if it receives a PAN.
53. ICAEW does not consider that the first contact letter would enable the business to engage with HMRC.

Scope

Question 15: Do you think that the USN is appropriately targeted? If not, could you indicate where you see the issues are and how these could be resolved?

54. See response to Question 11.
55. Further, has enough time been given to assess the impact of the strict liability offence for stop notices as this was only introduced with effect from 22 February 2024?

56. ICAEW considers that there must be a more proportionate way to tackle 'phoenixing' than creating a burden for all tax advisers to monitor USNs. For example, there must be a way of targeting a stop notice at all vehicles controlled directly and indirectly by a promoter. HMRC appears to be very aware of who it wants to stop, even if it cannot demonstrate connections necessary for its chosen methods of enforcement currently. If that is the case, then if USNs could be issued to specific parties, even if a connection could not be proved, then that would significantly reduce the unnecessary compliance burden for the majority of advisers. The compliant majority would take comfort in the knowledge that the published USNs only applied to them if they had been notified that a particular one might apply. Even if HMRC inappropriately issued a USN to a particular adviser then the adviser's attention would be drawn to it and they would be able to consider the notice in the context of their own facts.
57. The consultation does not make it clear whether there is an intention to retain the existing legislation concerning stop notices alongside USNs.

Question 16: How reasonable do you think it is for those involved in promoting or enabling tax avoidance to be expected to be aware of a universal stop notice published on GOV.UK and what more could HMRC do to ensure that all those affected by a USN are aware?

58. As set out in response to Question 11, it won't be just those involved in promoting or enabling tax avoidance who will monitor the publication of USNs – it will be the whole tax advice market of 85,000 tax advice firms which is wholly disproportionate.
59. Further, the promoters that are the target may consider themselves beyond the reach of the power if they are based overseas and therefore may not actively monitor lists of USNs.

Question 17: What reasonable care/excuse arguments would be appropriate? How might these be framed to prevent promoters from abusing these aspects?

60. ICAEW notes that the consultation suggests that HMRC is considering using restrictions similar to those in para 3A, Sch 24, FA 2007 regarding reasonable care and reasonable excuse to prevent promoters from abusing these arguments. ICAEW is concerned that these powers (and the proposed restrictions) could have the unintended consequence of creating an 'industry' to argue that a USN does not apply.

Question 18: How should the government approach defining whether a service or product provided to a suspected promoter is connected to the promotion of avoidance?

61. ICAEW considers that there must be a clear connection between the service and the promotion of tax avoidance. For example, without that service, the operation of the scheme would not have been possible.

Question 19: Should the government exclude categories of products or services from the scope of the PAN, and if so, what would those be and why?

62. ICAEW notes that the consultation indicates that PANs would not apply to:
    a. legal services; or
    b. services provided to a promoter where those services are unconnected with tax avoidance.
63. ICAEW assumes that the carve out for legal services is to enable legal representation if challenging the issue of a USN or PAN. While the seeking/obtaining of legal advice should not be deterred, promoters use legal services to facilitate avoidance (including the drafting of documents for schemes). Therefore, there may be an argument for PANs to apply to these services.
64. Arguably PANs should not apply to matters such as the audit of the promoter's accounts or tax compliance services. While we do not condone the activities of promoters, they should still submit returns and pay tax on their profits.

65. Care will be needed concerning the extent to which a PAN affects products and services supplied before the PAN is issued but for which the legitimate business is yet to be paid as well as those contracted for before the PAN but which are yet to be supplied (in whole or part).
66. The impact on insurance policies must also be considered. For example, could a PAN affect payouts under existing policies or the issuance of new insurance policies?

Question 20: Do you consider that a business would be able to comply with the obligations in a PAN? If not, please explain where you see the difficulties and challenges and what could be done to overcome these.

67. It is not clear from the consultation what the obligations would be other than to stop providing the product or service. The ability of a business to comply will depend on their contractual or other legal obligations to provide the product or service, and any obligations would have to be framed so as to override any existing legal obligations – this may in itself expose a business to legal challenge.
68. Businesses need protection so they cannot get sued for complying with a PAN, even if it was invalidly issued. This is not a novel concept and HMRC could look to model such a protection on para 18, Sch 8, F(No. 2)A 2015. That provision provides protection for deposit takers acting in good faith from a claim for damages.
69. Businesses would also need sufficient time to comply with a PAN. Given the slow post from HMRC, 60 days seems appropriate, particularly to also allow the business to take professional advice in relation to complying with the PAN.

Question 21: What level and type of information do you consider would a business need to comply with a PAN?

70. If the intention is that the PAN could apply wider than to the person or entity that engages the business, then it is likely that a business could not comply unless HMRC specifically names them. However, that would not prevent services being provided in the future if the promoter establishes new entities or structures.

Safeguards and protections

Question 22: Are the safeguards for USNs and PANs likely to be effective? If not, please state what could be done to enhance them.

71. ICAEW considers that there needs to be greater independence in the process. It is not clear whether the Authorised Officer (AO) considering any representations would be different to the AO that authorised the issue of the USN or PAN.
72. As noted above, ICAEW considers that the USN regime should targeted only at those who mass-market tax avoidance schemes (ie, the 20 or 30 promoters that HMRC has concerns about). If the regime is appropriately limited in this regard, the safeguards noted here are likely to be more reasonable.
73. To provide adequate independence, a tribunal appeal would be better than a representations process for USNs.

Question 23: Do you agree that these safeguards provide the right level of protection for those who may face potential criminal prosecution? If not, what additional safeguards could be introduced?

74. It is unclear whether a criminal prosecution could proceed if a failure to comply with a USN or PAN was struck down by the tax tribunal.
75. A suitable safeguard could be that the criminal offence case is referred to the Crown Prosecution Service when the person doesn't comply with the notice, but if the person wins their appeal against the notice, then the criminal case is not taken to court.

Question 24: Are there any other safeguards that HMRC should consider to ensure the proposed power is only used in appropriate cases?

76. Use of the power could be added to the list of responsibilities of HMRC's Tax Dispute Resolution Board (or the Tax Assurance Commissioners).

Sanctions for not complying with a USN

Question 25: Do you consider the proposed sanctions for a USN are proportionate? If not, what sanctions should be applied in these circumstances?

77. The consultation document proposes a range of possible sanctions for failure to comply with a USN. These are civil penalties, naming the promoter, a strict liability criminal offence, and providing client lists.
78. These broadly reflect the range of sanctions that currently apply under the POTAS regime. However, that regime is promoter specific whereas USNs are intended (by their nature) to be universal.
79. ICAEW is therefore concerned that unless USNs are appropriately targeted and sanctions are proportionate, advisers will decide that the risks associated with advising on certain transactions, which are not the intended target of the proposals, will be too high and will withdraw from the tax advice market. If taxpayers cannot access advice, this could have an adverse impact on economic growth and it is not in the public interest.
80. As noted above, we consider that the USN regime should be targeted only at those who mass-market tax avoidance schemes. If the regime is appropriately limited in this regard, the sanctions noted here are likely to be more reasonable.

Question 26: Do you have any suggestions regarding the basis for determining a financial penalty for a USN? What scale of penalty would you consider proportionate?

81. Financial penalties for failure to comply with a stop notice under the POTAS regime range from £5,000 to £1m, or more than £1m on application to the First-tier Tribunal. Mirroring this would appear to be appropriate if USNs were to be introduced and are limited to apply to those who mass-market tax avoidance schemes.

Question 27: Do you agree that failure to comply with a USN should be a criminal offence? If not, what sanction should there be and how would this deter those that are currently promoting tax avoidance schemes?

82. As set out in response to Questions 11 and 25 above, ICAEW is concerned that the governance processes associated with USNs will disproportionately affect compliant businesses. ICAEW notes that the consultation document proposes that criminal investigations would be reserved for the most serious cases. ICAEW considers that limiting this power to the most serious cases is appropriate.

Question 28: In addition to publication, financial penalties and criminal offences, are there any other sanctions or restrictions that could be applied to promoters/enablers including those who have control or significant influence over them?

83. As many of the promoters – in particular those who control or influence them – are based overseas, ICAEW is concerned that it will be difficult to apply any sanctions to them.

Sanctions for not complying with a PAN

Question 29: Which sanctions do you consider to be proportionate for non-compliance with a PAN? If penalties were applied, what scale would you consider proportionate?

84. ICAEW envisages that most of these businesses will not be knowingly associated with facilitating tax avoidance. There may be legal, regulatory or practical reasons that prevent a business from immediately withdrawing their service. To give a practical example, a

marketing agency may not be able to prevent scheduled advertising from appearing if the slot cannot be resold.

85. Businesses should be given a reasonable period to engage with HMRC and withdraw their services. Sanctions must be proportionate.

Question 30: Under which circumstances do you consider that these sanctions should be applied?

86. See response to Question 29 above.

Question 31: Where a business fails to comply with a PAN, do you consider they should be named publicly as a consequence?

87. ICAEW notes that while publicity does carry a reputational threat, publicity about non-compliance with a PAN could have the unintended consequence of attracting more promoters to use the services of that business.

Question 32: Are there any circumstances where you consider a failure to comply with a PAN should be a criminal offence?

88. ICAEW cannot envisage any circumstances where a criminal offence would be an appropriate sanction.

Chapter 5: Stronger information powers to effectively investigate those who own and control promoter organisations

Connected Parties Information Notice

Question 33: Do you have any views on who should or should not be covered by the CPIN proposal?

89. ICAEW welcomes the intention to better capture information about the controlling minds behind the tax avoidance schemes. It is understood that this power is required as HMRC cannot currently open an enquiry into an intermediary if there is no tax at risk in that intermediary itself.

90. However, although disguised remuneration schemes will generally have a UK footprint, it is difficult to see how any information powers will have the necessary international reach other than with jurisdictions where HMRC has existing arrangements (for example in relation to assistance in collection or exchange of information).

91. The consultation proposes including individuals or entities who benefit directly or indirectly from the proceeds of the promoter. This could be problematic unless carefully defined in legislation. For example, does it include other businesses with whom the promoter works (on matters unconnected to the tax avoidance arrangement, including – where relevant – businesses auditing the promoter's accounts or providing tax compliance services)? Does it include the minor children or other family members of the promoter who are bought presents from the monies that the promoter derives from promoting the arrangement?

92. Further, ICAEW notes that material subject to legal professional privilege and other excluded material would not be in scope. It is easy to envisage that small changes to structures and how advice is provided could easily put the controlling minds beyond the reach of a CPIN.

Question 34: Do you agree that a criminal offence should be a potential consequence for failure to comply with a CPIN or providing false or misleading information?

93. Normally, a criminal offence only applies to tribunal approved information notices under para 53, Sch 36, FA 2008 and only where the person conceals, destroys or otherwise disposes of, or arranges for the concealment, destruction or disposal of, that document. The consultation proposes that a criminal offence would apply for failure to comply with a CPIN regardless of whether the issue of the CPIN had been authorised by the tribunal.

94. While ICAEW supports the ability for HMRC to obtain information about promoters and the controlling minds, it considers that any criminal offence should mirror existing criminal sanctions related to information powers.

Question 35: Do you have any views on how to set civil penalties at a level which would encourage compliance from parties connected to the promotion of marketed tax avoidance schemes?

95. ICAEW understands from conversations with HMRC during the consultation process that HMRC would like the level of civil penalties to be set higher than for existing information powers to provide a greater deterrent effect and/or incentive to comply with a CPIN.

96. ICAEW does not have a view on what level of penalties would encourage compliance with a CPIN.

Question 36: Do you have any suggestions for alternative or additional proportionate potential consequences for non-compliance with a CPIN?

97. ICAEW does not have any alternative suggestions.

Safeguards and protections

Question 37: Do you agree that these safeguards provide the right level of protection for recipients of the notice? If not, what additional safeguards could be introduced?

98. ICAEW notes that the consultation intends to apply the same safeguards contained in Sch 36, FA 2008 that apply generally to information notices. There are issues with the Sch 36, FA 2008 process for making representations for tribunal approved notices. The person makes representations to the HMRC officer, but the officer only has to provide a summary of the representations to the FTT and the person has no right of audience at the hearing.

99. Given the seriousness of the proposed sanctions, ICAEW suggests that HMRC should be required to give the full representations to the FTT before the hearing. Alternatively, the person should be given the ability to submit the representations directly to the FTT.

Question 38: Are the safeguards for this measure likely to be effective? If not, please state what could be done to enhance them.

100. See answer to Question 37.

Promoter Financial Institution Notice (PFIN)

Question 39: What are your views on extending obligations under information powers as indicated by the PFIN proposal?

101. ICAEW expressed serious concerns about the introduction of the FIN power as it overrides long-established self assessment safeguards (see ICAEW REP 42/21). ICAEW suggested that this power should be restricted to FINs issued by overseas tax authorities to enable the UK to comply with its international tax obligations. However, the reports on how HMRC has used the power indicate that it is being used predominantly for domestic requests.

102. While ICAEW supports HMRC being able to obtain more information to tackle promoters, it is concerned that PFIN must be appropriately limited to the target.

103. The consultation states that a “PFIN would be used for the purpose of checking the obligations of a promoter were being met, establishing and evidencing compliance with the proposed USN power and undertaking activity in relation to the proposed PAN”. This does seem like a potentially unfettered power that could be used to obtain information before any connection is proven and could therefore be used to obtain financial information about any individual or entity. For example, the consultation suggests using the power to obtain information about a business subject to a PAN. ICAEW considers that this would not be appropriate.

Question 40: Are issues envisaged around defining FIs – for example, in relation to alternative 'payment platforms'? How might HMRC overcome such problems?

104. ICAEW is not sure why a different definition of FI would be required as compared to the current definition used in the FIN legislation.

Safeguards and protections

Question 41: Should this power be subject to any additional restrictions or safeguards? If so, please state the restrictions or safeguards.

105. The consultation suggests using this power without first trying to obtain the information from the person whose position they are checking and that the power could be exercised by approval by an HMRC AO. However, it is understood that HMRC's thinking has evolved during the consultation period and that it is proposed that the issue of a PFIN would be subject to tribunal approval. ICAEW would welcome this safeguard as the lack of tribunal approval for the issue of a FIN was a key concern.

Question 42: Do you have any other ideas for options that could deliver both the objective of speeding up the process for obtaining promoters' financial information and providing appropriate safeguards?

106. See response to Question 41.

Question 43: Do you have any views on the requirement described above that aims to prevent the third party from notifying the promoter of the information request as described? Do you have any suggestions about any other ways that this aim could be achieved?

107. The consultation suggests that the FI must not disclose for 12 months the requirements in a PFIN. Any FI breaches of this requirement will incur a penalty, with the usual appeal rights. It is understood that this is to avoid tipping off the promoter. This is in line with existing powers as third parties (including banks in receipt of FINs) can already be required by the tribunal not to inform taxpayers about information notices issued by HMRC to the third party in relation to a taxpayer's tax position.

108. ICAEW is not in a position to comment on whether this would place any undue burdens and risks on FIs.

Chapter 6: Legal professionals

Disclosure of avoidance scheme by legal professionals who promote tax avoidance schemes

Question 44: Should Regulation 6 be repealed?

109. ICAEW notes the standing committee debates for Finance Bill 2004 where it was effectively envisaged under the primary legislation that all promoters would have to make disclosures as the material provided would be anonymised. ICAEW was concerned that that would not be the case (see paragraph 395 of TAXREP 19/04).

110. There is also commentary that suggests the exemption for Legal Professional Privilege (LPP) in the primary legislation was necessary in order that leading counsel for the Inland Revenue could endorse that the DOTAS provisions in FA 2004 complied with the human rights legislation (see Simon's Taxes A7.225).

111. Despite the initial intentions of the primary legislation, Regulation 6 was inserted at the eleventh hour to enable disclosures to be made where the legal profession were concerned about the ability to comply with the disclosure rules (see the Explanatory Memorandum).

112. ICAEW supports the proposed change, although it is difficult to envisage how Regulation 6 can now be repealed without reigniting the concerns that lead to its introduction.

Question 45: Are there any risks in making such a change? For example could the change bring into scope those that we might not wish to include?

113. See answer to Question 44 above.

Question 46: Does the government's proposal to retain the statutory protection for LPP material in primary legislation provide an adequate safeguard?

114. See answer to Question 44 above.

Publishing the names of legal professionals who design tax avoidance schemes

Question 47: Should the rules on publishing be changed to allow HMRC to publish the names of legal professionals that design tax avoidance schemes, even when most of or all their activity is subject to legal professional privilege?

115. When the POTAS rules were introduced in FA 2014, ICAEW questioned whether HMT had taken legal advice to satisfy itself that the proposals would be acceptable as complying with competition law (see paragraph 29 of ICAEW REP 78/14). However, ICAEW has no visibility of the extent to which LPP has prevented HMRC from naming legal professionals.

Question 48: Could there be any unintended consequences from making this change?

116. ICAEW does not have any comments on this question.

Question 49: If the government does change the rules, as per question 47, how should HMRC utilise this information to assist taxpayers and representative bodies?

117. ICAEW supports the timely sharing by HMRC of any information concerning ICAEW members or member firms actively involved in promoting aggressive tax avoidance arrangements so that we can investigate them under the appropriate disciplinary procedures. This is a point that ICAEW also made in paragraph 1 of ICAEW REP 69/20.

Safeguards

Question 50: How should we deal with the issue of representations against publishing the details of a legal professional who has designed a scheme when LPP applies?

118. ICAEW does not have any comments on this question.

An LPP waiver in respect of promoters who utilise legal opinions to market schemes

Question 51: Would you support the introduction of a deemed waiver of LPP?

119. ICAEW supports the introduction of a deemed waiver, but this may be difficult to achieve in practice. Privilege is a right that a client can waive – but they cannot waive the right selectively. This means that if part of a privileged document is revealed in evidence, then the whole document must be disclosed.
120. There are only selected exceptions to when LPP applies such as where the advice is intended to facilitate the commission of a crime (see s 10(2), Police and Criminal Evidence Act 1984).
121. Any deemed waiver would require a statutory basis but that may cause issues with compliance with human rights legislation.
122. This power would need to be targeted to situations where only the promoter is the legal professional's client (ie, exclude cases where the taxpayer is the client).

Question 52: In which circumstances should LPP be waived?

123. See answer to Question 51 above.

Question 53: Could a deemed waiver of LPP have any unintended consequences?

124. See answer to Question 51 above.

Question 54: If you support a deemed waiver, do you consider that it should be a waiver for all purposes or only limited ones? If the latter, what purposes?

125. See answer to Question 51 above.

Question 55: Are there other things HMRC should do to address instances where promoters rely on dubious legal advice to market avoidance schemes, or use legal advice to market avoidance schemes to persons to whom the advice was not given?

126. The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (SI 2009/1916) provides the process for resolving LPP disputes concerning information notices. Will this need to be disapplied in any new primary legislation so the promoter cannot try to use it to delay producing the documents, despite the deemed waiver then being in law?
127. Additionally, HMRC could consider increasing the penalties charged under the enablers of tax avoidance scheme rules (Sch 16, F(No. 2)A 2017) where HMRC can clearly evidence that the promoter used legal advice that it obtained (ie, generic advice/opinions) to market avoidance schemes to persons to whom the advice was not given/addressed. This could further disincentivise the use of generic opinions.

Question 56: Is there any further action that HMRC should be taking to tackle those legal professionals that are involved in the promotion of tax avoidance?

128. ICAEW welcomes HMRC's engagement with regulators and professional bodies in the legal sector, including the Bar Standards Board.

Chapter 7: Future direction

Ensuring that promoters face significant consequences

Question 57: Are there any existing powers targeted at promoters which could be strengthened with the addition of new criminal offences for non-compliance?

129. ICAEW is concerned that the risks associated with the introduction of criminal offences could result in unintended consequences such as reducing the availability of tax advice.
130. Therefore, ICAEW does not recommend strengthening existing powers with criminal offences for non-compliance.

Question 58: In what other situations would criminal sanctions be appropriate for undeterred promoters?

131. As highlighted previously, none of the changes introduced since 2013 appear to have reduced the small number of promoters. It is therefore difficult to envisage any sanctions that could provide sufficient deterrent.

Question 59: What in your view are the type of sanctions that would deliver the aim of significantly disrupting the lifestyles of controlling minds?

132. Travel and driving restrictions may disrupt some promoters' lifestyles, but they may be contested under human rights laws. Promoters based overseas may not be affected by them as HMRC will not be able to remove non-UK passports or drivers' licences.

Providing HMRC with the tools needed to act quickly and decisively

Question 60: What further changes could be made to DOTAS to capture a wider range of tax avoidance?

133. ICAEW is not aware that there is tax avoidance being promoted that would not fall within the existing regime. See response to Question 3 above.

Question 61: How can HMRC ensure that it obtains information from third parties in a timely fashion?

134. ICAEW does not consider that the answer lies solely with information powers. HMRC also needs to make better use of the data already available (eg, Companies House records), to track down those who use and promote these schemes and ban offenders from being directors (although ICAEW accepts that this would not prevent the insertion of 'stooge' directors).

Fully optimising advances in technology to ensure the maximum impact of HMRC's actions

Question 62: How best do you think HMRC can use advances in technology including AI to aid its work tackling marketed tax avoidance?

135. ICAEW considers that a combination of data and technology advances should be deployed to better assist HMRC in identifying avoidance and promoters. This includes electronic invoicing and digital reporting requirements.

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).