



HM Revenue
& Customs

Raising the stakes on tax avoidance

Consultation document

Publication date: 12 August 2013

Closing date for comments: 4 October 2013

Subject of this consultation:	This consultation makes proposals on two avoidance issues. The first proposes a new set of obligations for high-risk promoters, their intermediaries and users. The second is to encourage users of avoidance schemes to settle their tax affairs after similar cases have lost in court or tribunal.
Scope of this consultation:	<p>The Government seeks views on proposals to tackle the behaviour of high-risk promoters to increase transparency and obtain information about their products, intermediaries and users.</p> <p>It also seeks views on proposals that will oblige taxpayers who have used avoidance schemes which are defeated in another party's litigation to amend their tax returns accordingly. They would face a tax-geared penalty if they could not satisfy HMRC there was a reasonable basis for not making an amendment.</p> <p>Finally the Government also seeks views on a proposed extension to the prescribed information to be provided under the Disclosure of Tax Avoidance Schemes (DOTAS) rules.</p>
Who should read this:	We would like to hear views from representative bodies, tax advisers and promoters, as well as businesses and individuals who may have received marketing material from high-risk promoters, taken advice about tax avoidance schemes, or who are or would be a follower case in avoidance litigation.
Duration:	The consultation starts on 12 August and ends on 4 October 2013.
Lead official:	Lesley Hamilton, HMRC for high-risk promoters, DOTAS and mis-selling (sections 3, 4, 6 and 7) Peter Woodham, HMRC for follower penalties (section 5).
How to respond or enquire about this consultation:	<p>HM Revenue and Customs, CTISA Anti-Avoidance Group, 3C/04, 100 Parliament Street, London SW1A 2BQ</p> <p>e-mail – aag.consultation@hmrc.gsi.gov.uk</p> <p>Please note that the mailbox will not accept e-mails larger than 10mb.</p>
Additional ways to be involved:	HMRC is willing to meet with interested parties to discuss this consultation. Please contact the e-mail address above if you would like to arrange a meeting.
After the consultation:	A summary of responses will be published after the consultation. If the high-risk promoter, follower penalty and DOTAS proposals move onto the next stage, draft legislation will be published.
Getting to this stage and previous engagement:	A formal consultation "Lifting the Lid on Tax Avoidance Schemes" that included a hallmark for high-risk promoters took place in summer 2012. This was followed up informal discussions in early 2013 with a few interested parties.

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Foreword

The Government is committed to robustly tackling tax avoidance and has a strong track record of intervening quickly to close down avoidance schemes through legislation and of improving the way that tax avoidance is prevented, detected and counteracted.

“Raising the stakes on tax avoidance” marks a significant new development in the way we approach avoidance as it proposes measures that will tackle both the supply of and demand for tax avoidance schemes. It follows on from our consultation “Lifting the Lid on Tax Avoidance Schemes” published in 2012 and provides detail on a new information disclosure and penalty regime focused specifically on high-risk promoters of tax avoidance.

There is evidence that many mainstream tax advisers are increasingly unwilling to advise clients to undertake tax avoidance. For those who persist in promoting avoidance, we expect them to be transparent with HMRC about what they are doing and transparent with their clients about the risks involved in undertaking tax avoidance. Reputable advisers recognise it is their professional responsibility to be transparent and we will not tolerate promoters who sidestep their responsibilities.

Those promoters are out of step with the sector in which they work, with the vast majority of tax advisers keen to distance themselves from the few high-risk promoters. They are also out of step with society at large, which has made it clear there is no tolerance for tax avoidance.

Through new proposals to:

- identify publicly high-risk promoters of avoidance schemes;
- isolate them from mainstream advisers;
- use information powers to get early information about their products; and
- make it clear to their customers who they are dealing with

we will make it significantly harder to market avoidance in the first place.

That will be underscored by significant new penalties for failure to comply with the new regime and higher standards for reasonable excuse and reasonable care that will apply to attempts to sidestep it.

To counteract delays in settling cases the Government is also consulting on a new way of encouraging faster settlement among users of avoidance schemes that have failed in the courts. That too will help reinforce the message that tax avoidance does not work and does not pay.

These measures complement other action taken by the Government including the introduction of the General Anti-Abuse Rule and constitute a coherent strategy to tackle tax avoidance both by reducing opportunities for avoidance and by increasing transparency.

Never before have the stakes been raised so high and the disincentives to market and participate in avoidance so strong. I welcome public input into the proposals in this document and their further development.

A handwritten signature in black ink, appearing to read "David Gauke". The signature is written in a cursive, flowing style.

David Gauke MP
Exchequer Secretary to the Treasury

1. Executive Summary

- 1.1 This consultation document covers a number of issues relating to the promotion and use of avoidance schemes, namely:
- forcing high-risk promoters of avoidance schemes to provide details of their products to HMRC using suitable information powers and penalties;
 - ensuring that users of high-risk promoters' schemes appreciate the risks they are running and understand the consequences;
 - raising the standard of reasonable excuse and reasonable care for high-risk promoters and the users of their avoidance schemes;
 - encouraging users of avoidance schemes to settle their tax affairs after similar cases have lost in court; and
 - amending the Disclosure of Tax Avoidance Schemes (DOTAS) regime to make sure the right information gets to HMRC at the right time.
- 1.2 **Chapter 2** sets out the background to this consultation and the genesis of HMRC's strategy for high-risk promoters.
- 1.3 **Chapter 3** describes two possible approaches to the identification of high-risk promoters and proposes an administrative process for the high-risk promoter regime.
- 1.4 **Chapter 4** sets out what consequences will apply to high-risk promoters, including new information requirements, penalties and a proposal for naming high-risk promoters. In this chapter are details of proposed higher standards for the defences of reasonable excuse and reasonable care for high-risk promoters and users of their schemes. It also contains proposals for new information powers for the intermediaries of high-risk promoters and users of their avoidance schemes.
- 1.5 **Chapter 5** sets out how a new regime for follower cases could be used to encourage people who have used an avoidance scheme to settle their tax affairs once the scheme is defeated in the courts.
- 1.6 **Chapter 6** proposes a change to the information to be provided under DOTAS so that HMRC has sufficient information when examining a disclosed scheme.
- 1.7 **Chapter 7** provides an update on the work done by HMRC on mis-selling to date.
- 1.8 This consultation corresponds to Stages 1 and 2 of the Government's Tax Consultation framework. Any changes to legislation in the light of this consultation and responses to it will be put forward in Finance Bill 2014.

2. Introduction

- 2.1 The vast majority of taxpayers in the UK comply in full with their tax obligations without resorting to tax avoidance schemes. However there are a minority of taxpayers who use artificial arrangements to try to dodge their tax bills and who by now should have realised that their schemes are very unlikely to deliver the tax results they expect. More needs to be done to deter avoiders from using avoidance schemes and more needs to be done to protect the public and the Exchequer from the small minority of tax advisers and intermediaries – the promoters – who create and sell avoidance schemes.
- 2.2 This was recognised by HMRC in “Lifting the Lid on Tax Avoidance” in July 2012. That consultation made a number of proposals about how HMRC communicates about avoidance and for some technical changes to the DOTAS rules. Following that consultation, HMRC has taken a number of steps to discourage avoidance. It has boosted its use of communications to make taxpayers aware of the risks of engaging in avoidance. It has improved its [website](#) to make it easier for people to find out about how it is tackling tax avoidance. It publishes more information about successful litigation against tax avoidance schemes and it publishes more [Spotlights](#) to warn taxpayers about high-risk tax avoidance schemes.
- 2.3 In addition, HMRC is writing to users of certain avoidance schemes to make sure they understand the risks and consequences of their attempts to avoid tax and to persuade them to change their behaviour. The technical changes to the DOTAS rules proposed in “Lifting the Lid on Tax Avoidance” are partly contained in the 2013 Finance Act and partly in regulations to be laid later this year. In “Lifting the Lid” HMRC also proposed a DOTAS hallmark based on the behaviour of promoters of tax avoidance. The responses to that consultation and further discussions with tax advisers and their representative bodies highlighted that the behaviour of some promoters was also a problem for mainstream tax advisers. These promoters would commonly encourage tax advisers’ clients to enter into avoidance schemes, attempt to impose conditions of confidentiality on clients and disrupt the relationship between the tax adviser and their client. This consultation sets out proposals to address the behaviour of high-risk promoters of tax avoidance schemes.
- 2.4 Given that the evidence shows that these schemes overwhelmingly do not work, and have very little chance of succeeding from the outset, a key question to consider is why they continue to be used by taxpayers, usually at the cost of a significant fee. Since summer 2012 HMRC has gained a better understanding of the market for avoidance schemes and the key players involved. Key factors emerging from the research to date are:
- provision of minimal amounts of information by promoters to potential clients and their ‘mainstream advisers’;
 - disclosure to HMRC of the avoidance scheme only when absolutely necessary, and a willingness to challenge the application of DOTAS;

- reassurance to potential clients that the product is backed up by legal advice, but with only minimal information about how and why; and
- a willingness by taxpayers to accept a level of risk on the basis that a product might succeed or that they will not be challenged by HMRC.

2.5 The proposals in this consultation are targeted squarely at those promoters who have chosen to work outside the professional standards HMRC expects of mainstream advisers – promoters HMRC considers “high-risk”. The proposals include ways to identify high-risk promoters, based on objective criteria and on HMRC’s understanding of the promoter and the market. They explore in detail the regime that could apply specifically to high-risk promoters.

2.6 The key objectives are:

- deterring the use of avoidance schemes from the outset
- changing the behaviour of high-risk promoters and those who are potentially high-risk
- forcing high-risk promoters to provide details of their products to HMRC
- requiring high-risk promoters to inform their clients of the consequences of their high-risk designation
- establishing a higher threshold for reasonable excuse and reasonable care
- ensuring that the high-risk promoter’s clients understand the risks and consequences of engaging in these schemes, including the new follower penalties.

2.7 These objectives will enable HMRC to target its resources effectively, allowing early intervention with the users of the high-risk promoter’s products. The success of this policy rests not only on the imposition of obligations on the high-risk promoters but also on the extent to which the behaviour of high-risk and potentially high-risk promoters changes.

3. Identifying a High-Risk Promoter

- 3.1 HMRC recognises that tax advisers are vital to the administration of the tax system. They provide invaluable support to taxpayers to help them comply with their tax obligations. There is a wide range of tax advisers operating in the UK providing a wide range of services to their clients ranging from volunteers assisting family members to international firms. The services they provide vary from completing tax returns to advising on complex business transactions. The vast majority of tax advisers enable their clients to comply fully with their tax obligations without resorting to tax avoidance schemes.
- 3.2 HMRC expects tax advisers to meet professional standards of service to their clients, including ensuring they are fully aware of the risks of any transactions or other arrangements they are considering entering into. HMRC also expects that tax advisers should be transparent and co-operative with HMRC.
- 3.3 Within the broad spectrum of tax advisers there are some who play significant and influential roles. These advisers are key to HMRC's understanding of the avoidance market, for example advisers who:
- have a significant place in the market such as a large accountancy or law firm
 - advise a particular kind of client – for example high net-worth individuals
 - mainly sell tax products rather than other tax services, or
 - have influence over a large number of clients or other advisers and intermediaries.
- 3.4 It is particularly important for these key advisers to be open and transparent with HMRC. HMRC regards a high level of openness and transparency as best practice for all advisers. This is demonstrated when they behave in a way that reflects their key role and enables them to make a positive contribution to minimising tax avoidance. HMRC has transparent and open dialogue with many key tax advisers and sees it as important to engage with these key advisers.
- 3.5 HMRC meets with advisers to better understand their business models, discuss their products and practices, and the behaviours of their clients, and to obtain wider intelligence about the market for tax avoidance. HMRC is using the information gathered in a number of ways including:-
- identifying new avoidance schemes early so that HMRC can take swift action
 - ensuring that any action taken is appropriate to the customers identified as using the scheme
 - administering the DOTAS rules, and ensuring that there is compliance with the legislation.

- 3.6 There are some advisers who promote tax avoidance schemes and are not or do not want to be transparent with HMRC – these advisers are potentially high-risk promoters. Instead they commonly display other behaviours that are detrimental to the fairness of the tax system such as:
- designing, marketing or implementing products that on analysis have negligible probability of working
 - relying on non-co-operation with HMRC to achieve a tax advantage for their clients
 - selling products that rely on concealment and mis-description of elements to succeed.
- 3.7 Promoters of these schemes pose a high risk to the Exchequer through tax lost and are a burden on HMRC which has to re-direct resources to tackle these promoters and their products. The proposals in this consultation are designed to enforce the minimum standard of professional conduct on those promoters who do not comply with them voluntarily.
- 3.8 It is important to remember that the vast majority of taxpayers in the UK pay the tax that is due. High-risk promoters are looking to assist their users in avoiding tax. High-risk promoters pose a high risk to the users of their schemes who do not always have a proper appreciation of what they are doing when using those products.

Risks of using an avoidance scheme:

- **the avoidance scheme does not work**
- **an HMRC enquiry with skilled and specialist investigators probing the user's tax affairs**
- **delays in settling the user's tax affairs**
- **in addition to the tax, the user pays interest and potentially a significant penalty and incurs non-refundable professional fees**
- **some schemes leave the user with a larger tax bill than the tax they tried to avoid**
- **embarrassment and reputational damage because litigation is in public.**

3.9 The Government's objective is to encourage advisers to move away from high-risk behaviour and discourage people from using their schemes. But to achieve this there need to be consequences for high-risk promoters and so the Government proposes that there should be a specific regime to tackle their behaviour.

Options for identifying high-risk promoters

3.10 If specific information powers and penalties are to apply to high-risk promoters then identification is central to the proposals in this consultation. While the common behaviours of high-risk promoters can be identified these need to be translated into clear criteria which would allow non-high-risk promoters to easily determine that they are not subject to the additional information powers and penalties. Any criteria should also offer some flexibility so that the consequences are focussed on the right target.

3.11 The Government has considered two possible approaches for identifying high-risk promoters. Under both, objective criteria to define a high-risk promoter would be legislated. Under the first approach, the only way to determine if a promoter is high-risk would be through the legislated objective criteria and the designation would therefore happen automatically. Under the second, as well as the legislated objective criteria, HMRC would take a number of factors into account before a promoter became high-risk.

Potential Approach One

3.12 This would specify in legislation certain objective criteria to identify a high-risk promoter. Under this approach primary legislation would mean a promoter would automatically be classified as high-risk where one or more of the criteria are triggered.

3.13 Examples of possible objective criteria are:

- HMRC has used an information power to obtain information in relation to that promoter or their products
- the promoter has failed to notify a scheme under DOTAS, whether or not there was a penalty for the failure
- the promoter has designed, sold or implemented an avoidance scheme that is caught, or appears to be caught, by the GAAR, or that fails due to the Halifax abuse of law principle
- the promoter has breached a voluntary undertaking with HMRC
- the promoter is offshore in, for example, a UK overseas territory or a crown dependency, but has users that are subject to tax in the UK
- the promoter has been subject to a relevant fine or disciplinary action by a regulatory authority such as the Financial Conduct Authority, the Solicitors Regulation Authority or the Bar Standards Board, or a representative body for accountants or tax agents.

- 3.14 The advantage of this approach is that it gives certainty to promoters who are outside those criteria. However, without taking anything else into account, the criteria may miss their target either by flagging otherwise compliant promoters as high-risk or by not adequately identifying promoters who should be flagged as high-risk.
- 3.15 This can be illustrated by an example using the criterion that the promoter is late in notifying a scheme under DOTAS, whether or not there was a penalty for the failure. A promoter who generally complies with frequent obligations under DOTAS but is a day late notifying a single arrangement would automatically be high-risk under the objective criteria despite otherwise compliant behaviour. Contrast this with a promoter who has not notified any of their products under DOTAS and refuses to discuss the reasons for not notifying with HMRC. Lack of transparency indicates that the promoter is probably high-risk but it will not automatically trigger the late notification criterion until HMRC discovers and proves a DOTAS failure.
- 3.16 The lack of flexibility leads to the conclusion that this would not be workable, consequently the Government does not intend to adopt this approach.

Possible Approach Two

- 3.17 This consultation proposes a second approach which is believed to be workable. In addition to the objective criteria described above, the suggestion is that HMRC would take an overall view of the promoter's business and the level of risk when deciding whether or not the promoter is high-risk. Under this option, HMRC would have the power to publicly designate a promoter as high-risk (where in all the circumstances this is reasonable), but having regard to the objective criteria, such as set out in the bullet points above, and other factors. Some examples of the factors that HMRC could take into account in addition to the objective criteria include the following:
- all or substantially all of the promoter's business consists of designing, marketing or implementing products whose sole or main purpose appears to be the provision of a tax saving to the user
 - the products appear to have a limited probability of working because they take an optimistic and unrealistic view of the law or are poorly implemented
 - the product appears to be a complex arrangement with a degree of artificiality that is designed to achieve a result not intended by Parliament
 - the success of the product relies on non-co-operation with HMRC, concealment or mis-description
 - the economic benefit of the product appears not to be commensurate with the risk
 - the product results in an amount of income, profit or gains for tax purposes that is significantly less than the amount for economic purposes
 - the product results in a deduction or loss for tax purposes being significantly greater than the amount for economic purposes

- the promoter either explicitly or implicitly requires the user of the product to keep details of the product confidential from their other advisers or from HMRC
 - the promoter uses a network of intermediaries to sell its product
 - the advertising of the product appears not to explain the risks adequately or appears to imply that notification of the product under DOTAS gives HMRC approval to the product
 - HMRC includes the promoter's products in Spotlights
 - the promoter's products appear to pose a significant risk to the Exchequer.
- 3.18 The Government proposes that under this approach HMRC should consider promoters on a case-by-case basis and weigh the factors in the round. In certain cases some of these factors may carry more weight than others when determining if a promoter is high-risk. For example, all of a promoter's business may be in marketing products but if the promoter complies with its DOTAS obligations this alone would not be significant enough to make the promoter high-risk. However, if the promoter markets a product that is not notified under DOTAS when it should be, and the product has several hundred users and significant amounts of tax at risk then it is likely that the promoter will be high-risk.
- 3.19 There may be circumstances where it would be appropriate for HMRC to immediately designate a promoter as high-risk, for example if the directors of the firm have been charged with criminal tax offences.
- 3.20 The advantage of Approach Two is that it is tailored to the particular facts of the case. It enables the rules to apply while taking into account the history of the promoter's behaviour and its business. HMRC will publish guidance on the factors that indicate that a promoter is high-risk.

Q1 - Do you think that the objective criteria in Approach One are, on their own, sufficient to identify high-risk promoters or do you agree that the second approach would be more effective?

Q2 - Do you consider that the suggested objective criteria would provide effective reassurance for advisers who are not high-risk promoters?

Q3 - In relation to the objective criterion based on disciplinary proceedings, do you think it is necessary to narrow the criterion to specific disciplinary matters?

Q4 - Are there any other objective criteria you would suggest?

Q5 - Are there any other factors you would suggest for the second approach?

Q6 - Are there any other circumstances where you think it would be appropriate for an immediate high-risk designation?

Procedures for the high-risk promoter regime

- 3.21 The objective of the high-risk promoter regime is to improve promoter behaviour. The consequences of being in the high-risk category of promoters should act as an effective and powerful deterrent. However, the Government recognises that the best result would be for the high-risk behaviour to cease at an early stage before designation becomes necessary. To facilitate this and in view of the information and penalty powers attaching to a promoter designated as high-risk, the Government recognises that the process surrounding such a designation must be fair.
- 3.22 Consequently we propose that there are several stages to the process:
- Informal
 - Voluntary Undertaking
 - Designation
 - Appeal
 - Re-categorisation.
- 3.23 Under the preferred approach, HMRC would set out its concerns informally and discuss whether or not the potential high-risk promoter should enter into a voluntary undertaking before designation. This will allow the potential high-risk promoter to demonstrate that it is not high-risk or give it the opportunity to address its high-risk behaviours without, at the same time, suffering the consequences of a high-risk designation. This supports the Government's aim of changing high-risk promoter behaviour.

Informal

- 3.24 At the start of the informal stage, HMRC would approach the potential high-risk promoter and seek detailed explanations of the nature of their business, their behaviours, their intermediaries and users.
- 3.25 HMRC would then explain the reasons for considering making a high-risk designation. Potential high-risk promoters could discuss and agree with HMRC changes to their behaviour and transparency so that HMRC would not need to designate them as high-risk. This could include the promoter entering into a voluntary undertaking.

Voluntary Undertaking

- 3.26 A voluntary undertaking is an agreement between HMRC and the promoter that the promoter will address the behaviours that make it high-risk so that formal designation becomes unnecessary.

- 3.27 Voluntary undertakings have been possible under the Australian promoter rules¹ for a number of years and could be a useful tool. Importantly, a voluntary undertaking gives the potential high-risk promoter the chance to improve its behaviour and transparency without having to deal with the consequences of being designated high-risk at the same time.
- 3.28 Therefore the Government proposes that existing and potential high-risk promoters should be given an opportunity to enter into a voluntary undertaking with HMRC.
- 3.29 The voluntary undertaking would be confidential and tailored to each high-risk promoter but it would always require them to be transparent with HMRC, providing all information that HMRC reasonably requires. Each undertaking will be time-bound and be actively monitored by HMRC to ensure that the terms are kept.
- 3.30 The monitoring of the voluntary undertaking by HMRC should ensure that the high-risk promoter satisfies the agreement. However there needs to be a deterrent to using a voluntary undertaking merely to buy time before being designated as high-risk. Consequently, the Government proposes that one of the objective criteria for designation as high-risk will be that the promoter has not kept to a voluntary undertaking.
- 3.31 A regime for voluntary undertakings can be introduced under HMRC's existing powers.

Designation

- 3.32 The Government hopes that all high-risk promoters will stop their high-risk behaviours. However, it would be realistic to expect that a few will need HMRC to use statutory powers to encourage them to do so. Apart from those circumstances that justify immediate designation, most high-risk promoters will be designated if they have failed to demonstrate, at the informal stage, that they are not in fact high-risk.
- 3.33 The Government proposes that a high-risk designation will be formally made by HMRC issuing a notification to the high-risk promoter, explaining the reasons for the designation and the consequences. Any designation of a high-risk promoter would be subject to agreement at a senior level in HMRC.

¹ [Australian Tax Office website](#)

Appeal against initial designation

- 3.34 The consequences of being designated as a high-risk promoter could be very significant. The Government recognises that there would need to be a right of appeal by the promoter against being designated high-risk. There are two ways of achieving this; firstly one or more of the consequences of designation could apply immediately until removed following a successful appeal. This would make it vital for HMRC to expedite the appeal process. Alternatively the designation will only apply after the appeal has been upheld which could encourage the promoter to make the process long and drawn-out.
- 3.35 In either case it is not appropriate for the appeals process to be long and drawn-out. Consequently, every attempt should be made to expedite the appeals process so that such appeals are heard by the Tribunal at the earliest possible date.

Q7 - Should a high-risk designation apply from the date of designation or the date that any appeal against the designation is dismissed?

Re-categorisation

- 3.36 The proposals for high-risk promoters are designed to encourage the high-risk promoter to improve its behaviours and penalise those who do not. If this objective is achieved and the high-risk promoter changes its behaviours then there should be a mechanism for recognising this.
- 3.37 The Government therefore proposes that if HMRC agrees that the promoter is no longer high-risk then the high-risk designation should be formally removed.
- 3.38 HMRC would be required to issue a notice formally removing the high-risk designation from the promoter and would use the same communication channels used for naming the high-risk promoter to convey that the designation has been removed. The high-risk promoter will also be able to inform intermediaries and users of its services that, from a specific date, its high-risk designation has been removed. After re-categorisation the promoter will be monitored by HMRC for a set period to ensure that the promoter does not revert to high-risk promoter behaviours.
- 3.39 The Government also proposes that a high-risk promoter should have a right of appeal if HMRC refuses a request to be re-categorised as non-high-risk. The appeal process should be the same as for an appeal against the initial designation. However until the appeal is determined in the high-risk promoter's favour the promoter will remain high-risk.

Q8 - Do you think that these safeguards are sufficient to ensure that only promoters that are genuinely high-risk will be designated as such?

Q9 - Do you have any suggestions to improve the process?

Who should be included in the high-risk promoter regime?

- 3.40 A high-risk promoter may take a number of legal forms; for example it could be an individual, a company or a partnership. An individual may be designated as a high-risk promoter in their own capacity. However where an entity is used, the entity may be designated as a high-risk promoter. There are risks arising from the flexibility high-risk promoters have to establish themselves as different entities.
- 3.41 For example, once an entity has been designated high-risk, its business may be transferred into another entity that does not have that designation but which is controlled by the same person or persons as the high-risk promoter (a 'successor entity'). In these circumstances, designating an entity as high-risk may only have limited application if the business and employees of the designated entity are transferred to the successor entity. Additionally, an individual or number of individuals may control more than one entity (so that the entities are 'associated entities') and if one of those entities is designated high-risk then it seems likely that the other entities will similarly be high-risk.
- 3.42 When establishing whether or not entities are successor or associated entities of a high-risk promoter, the Government proposes that the connection could also be established through key individuals. A key individual would be a person who has played a significant role in the high-risk promoter, for example through making decisions about how the high-risk promoter's activities or a substantial part of those activities are managed or organised. They may also have had a significant role in the decision making or management of the design, marketing or implementation of the high-risk promoter's product.
- 3.43 The movement of a key individual from a high-risk promoter to a successor or associated entity could indicate that the successor or associated entity is or will in the future display high-risk behaviours and so should be considered for inclusion in the high-risk promoter regime.
- 3.44 Therefore the Government proposes that the high-risk promoter regime be extended so that the successor and associated entities to a high-risk promoter may be included in the high-risk promoter regime.
- 3.45 The fact that these entities are more likely to be high-risk could be reflected by the inclusion as an objective criterion that the entity is a successor or associated entity of an existing high-risk promoter.

Q10 - Do you think it is reasonable to include in the objective criteria or factors for designating a promoter high-risk the fact that an entity is a successor entity or associated entity of an existing high-risk promoter?

Q11 - Do you think that whether or not an entity is a successor or associated entity could be established through key individuals?

4. The High-Risk Promoter Regime

- 4.1 The obligations and sanctions for high-risk promoters, their intermediaries and users have a number of elements. Included in this chapter are proposals for the following:
- information powers for high-risk promoters
 - naming high-risk promoters
 - information powers for intermediaries
 - an obligation for a user of a high-risk promoter product to notify HMRC
 - protection for users subject to confidentiality clauses
 - penalties for failure to comply with information powers
 - a higher standard for the defences of reasonable excuse and reasonable care.

Information powers

- 4.2 One of the behaviours commonly exhibited by high-risk promoters is that they try to make sure that their products are not notifiable under DOTAS so that HMRC is unable to intervene at an early stage.
- 4.3 The Government proposes to address this by having specific statutory information powers apply to high-risk promoters so that HMRC can obtain early information about their products, intermediaries and users in order to direct its compliance effort accordingly.

Types of information powers

- 4.4 To ensure that high-risk promoters provide information on their products at an early stage the proposal is that they be subject to two information powers. Both powers would apply to the same information but one would be more focused than the other. These powers will operate separately from any obligation to provide information under DOTAS.
- 4.5 It is proposed that the first power could enable HMRC to require the high-risk promoter to provide information in response to a specific request from HMRC. This power would apply to information about the high-risk promoter's products, intermediaries and users. The power would focus on one aspect of the high-risk promoter's business, for example a particular product or category of products or a particular type of user.
- 4.6 There will be circumstances where this is insufficient and HMRC will need to have continuing information on all the products the high-risk promoter markets or implements. To this end, the Government proposes that there be a continuing information power.

This could impose an on-going requirement on the high-risk promoter to provide details of all of its products, intermediaries and users to HMRC within five days of any communication requesting that information, in a similar way to the requirement under DOTAS for notifiable arrangements and client lists, or at other specific times. For example the promoter could be required to provide to HMRC information about a product five days before it is launched.

4.7 The Government proposes under both information powers that the high-risk promoter should be required to provide a description of its product or products, all marketing material, any agreements that the user enters into when the product is marketed or implemented and certain information on users and intermediaries as below:

- the name and address of each user
- their national insurance number and unique tax reference number
- the amount they have invested in the product
- the intermediary's name, address, national insurance number and unique taxpayer reference
- the fee paid directly or indirectly to the intermediary.

Q12 - Do you think that the proposed information powers will be both appropriate and sufficient to provide HMRC with the information necessary to understand the promoter's products and trace its intermediaries and users?

Q13 - Are there any other information powers that it would be useful to apply to high-risk promoters?

Naming high-risk promoters

4.8 The Government considers that high-risk promoters do not pose a risk just to the Exchequer but they also pose a significant risk to users of their products. To make sure that the public is aware of high-risk promoters and to alert intermediaries and users of the consequences for them, the Government proposes to name promoters once they become high-risk.

4.9 HMRC is subject to legislation that prevents it disclosing information about any person unless prescribed circumstances apply. To ensure that high-risk promoters can be named the Government proposes that the ability of HMRC to name a promoter as high-risk should be provided for by legislation.

4.10 The Government proposes that there should be two aspects to the naming. Firstly there will be publicity about that high-risk promoter. Their details will be publicised on the HMRC website so that potential customers for the high-risk promoter's products are advised of the consequences of using a product sold by that promoter.

- 4.11 Secondly there should be an obligation on the high-risk promoter to inform all their intermediaries and users that they are high-risk and the consequences of that for the promoter, intermediary and user using a prescribed form of words. Once a promoter is high-risk then the Government proposes that they will be given a specific reference to be passed on to their intermediaries and users. It is intended that the user will be under an obligation to notify HMRC that they have implemented one of the high-risk promoter's products through including the high-risk promoter reference on their tax return or by other means.
- 4.12 If the high-risk promoter uses an intermediary (whether on or offshore) then the obligation will be on the high-risk promoter to make sure that the intermediary informs their clients that the promoter is high-risk.
- 4.13 The Government proposes that there should be a penalty on the high-risk promoter if it fails to notify all of its intermediaries and users. In addition, compliance with this obligation could be one of the factors when considering an application by the high-risk promoter for the designation to be removed.

Q14 - Do you agree that naming high-risk promoters will serve to put their intermediaries, users and the public on notice of their high-risk status and the consequences?

Q15 - What safeguards should be provided?

Intermediaries and users

- 4.14 If an intermediary continues to market or implement products for the high-risk promoter or a user purchases such a product then HMRC will need to be told. Therefore the Government proposes that specific disclosure obligations should be imposed on intermediaries and users so that HMRC obtains all relevant information to support its compliance effort.

Intermediaries

- 4.15 Intermediaries, for the purposes of this consultation, are the persons who stand between the high-risk promoter and the user. They may introduce the user to the high-risk promoter or they may take a more active role in marketing and implementing its products, either directly or as part of a chain. The Government proposes that, once a promoter has become high-risk, intermediaries for that high-risk promoter should be subject to certain information powers.
- 4.16 It is proposed that there should be two types of information power that could be used by HMRC to obtain information from the intermediary, one focused and the other a continuing obligation. The powers would apply to information about the high-risk promoter(s), the product or type of products marketed or implemented by the high-risk promoter and the users of those products.

- 4.17 If the intermediary is part of a chain servicing the high-risk promoter's products, it may not be aware of the final users of the product. In this case, it is proposed that the specific information power will only require the intermediary to supply the information in its possession which should, at the very least, include the details of the next intermediary in the chain. The next intermediary could themselves be subject to the same information power.
- 4.18 In addition, the Government proposes that there be a continuing information power whereby the intermediary could be subject to an ongoing information requirement. The information required would have to be provided at regular intervals without a specific request from HMRC. Once the intermediary became subject to the continuing information power, it would continue to be so until it stopped being an intermediary for the high-risk promoter.
- 4.19 The Government proposes under both information powers that the intermediary should be required to provide a description of the product or products, all marketing material and any agreements that the user enters into when the product is marketed or implemented and certain information on users. The information on users or the next intermediary in the chain could include:
- their name and address
 - their national insurance number and unique tax reference number
 - the amount they have invested in the product (if applicable).

Q16 - Are there any issues with the proposed obligations on the intermediary?

Q17 - Are there any further obligations that should be imposed on an intermediary acting for a high-risk promoter?

Q18 - Should there be any further safeguards provided for an intermediary acting for a high-risk promoter?

Users

- 4.20 The final person in the ambit of the high-risk promoter regime is the user of a product directly or indirectly sold by a high-risk promoter. Once a promoter has become high-risk, existing and future users of its products should be on notice of its high-risk status. The Government proposes that, when a user uses a product from a high-risk promoter, they should be subject to certain requirements.
- 4.21 The obligations on the user should enable HMRC to identify the user and direct its compliance efforts to those users. The information that HMRC could obtain using its proposed information powers against high-risk promoters and their intermediaries could also be used to identify users who are subject to UK tax.

- 4.22 The proposal is that there could be a requirement on the user to include the high-risk promoter's reference number on their tax return so that HMRC is aware that the user has purchased a product from a high-risk promoter. If the user does not complete a tax return as a matter of course, then they should be obliged to notify HMRC by other means. If the user does not comply with this requirement then there will be a penalty.
- 4.23 There are other aspects of tax law that it may be appropriate to apply to the user of a high-risk promoter's product. In particular, if a user does not notify a scheme reference number under DOTAS, and there is a resulting loss of tax, then HMRC can raise discovery assessments under section 36 Taxes Management Act 1970 outside the normal time limits. The extended time limit is twenty years. The Government proposes that there could be a similar extended time limit for discovery assessments if there is a loss of tax due to the failure of the user to notify HMRC of the high-risk promoter reference number.

Q19 - Do you agree that the user of a product marketed or implemented by a high-risk promoter should be required to declare to HMRC that they have done so?

Q20 - Do you think it is reasonable that users of products marketed or implemented by high-risk promoters should be subject to extended time limits for assessing?

Confidentiality

- 4.24 It is not unknown for some high-risk promoters to include in their contracts with an intermediary or user a confidentiality clause, or to require them to sign a non-disclosure agreement. These are designed to keep details of the high-risk promoter's products confidential from the user's tax advisers and HMRC. This is one of the strategies commonly used by high-risk promoters to disrupt HMRC's compliance effort.
- 4.25 The Government does not believe that intermediaries and users should be so constrained while at the same time facing enquiries from HMRC or otherwise wanting to disclose the product to HMRC. Consequently, the Government proposes that there should be specific legislation that will override the contractual confidentiality clause or non-disclosure agreement so that a user or an intermediary may provide information to HMRC.
- 4.26 Such a rule might apply whether the information was provided in response to a specific HMRC enquiry or if the intermediary or user wished to spontaneously provide the information to HMRC. We will also consider extending these protections to others, who may not be users of a product or intermediaries, but who wish to provide information to HMRC concerning a high-risk promoter's products.

Q21 - Is this proposal to create a specific rule that will allow intermediaries and users to disclose information to HMRC reasonable?

Q22 - What would this legislation need to achieve to be effective? Do you think it will achieve its aim of improving transparency and encouraging users to provide information to HMRC?

Penalties for high-risk promoters, intermediaries and users

- 4.27 This part of the consultation focuses on proposals for penalties under the high-risk promoter regime. Penalties are designed to act as incentives to taxpayers to comply with their tax obligations, and to reassure those who do comply that they will not be disadvantaged in comparison with those who do not. A regime of penalties must work to achieve these objectives efficiently, and include proper safeguards.
- 4.28 One of the aims of the high-risk promoter regime is to increase the transparency surrounding the products and behaviours of high-risk promoters, their intermediaries and their users, so that HMRC can more effectively target its compliance effort. There are a number of proposals in the consultation designed to achieve this aim but without a suitable penalty regime there would be no new incentive for high-risk promoters to change their behaviours, for their intermediaries to stop marketing their products, or for their users to stop purchasing their products.
- 4.29 Consequently, the Government proposes that there should be robust penalties for failing to comply with obligations under the high-risk promoter regime.

Information penalties

- 4.30 The Government proposes that there should be significant penalties for a high-risk promoter who fails to comply with either of the information powers described above. The proposal is for an initial penalty followed by a daily penalty for a continuing failure to provide the information – the level of penalty to be set by the Tribunal. It is proposed that the initial penalty on the high-risk promoter could be up to £1 million with a continuing failure penalty of £10,000 for each day that the failure continues after the initial penalty is imposed.
- 4.31 It is important to make sure that high-risk promoters have an incentive to meet their obligation to let intermediaries and users know of their high-risk status. Therefore, the Government proposes that there should be a financial penalty on those high-risk promoters who do not comply with this obligation. It is proposed that the penalty be levied by reference to each user not informed and that the level of penalty should be £5,000 per user who has not been informed.

Q23 - Is this level of penalties appropriate for high-risk promoters?

Q24 - Do you have any other suggestions on the level of penalty appropriate for high-risk promoters?

Reasonable excuse

- 4.32 When there is a penalty for failing to comply with an information notice, the penalty can only be avoided if there is a reasonable excuse for not complying. HMRC's general guidance on reasonable excuse is in the [Compliance Handbook](#).
- 4.33 The vast majority of tax advisers, when approached by HMRC to discuss whether or not a product should have been disclosed, will discuss their reasoning with HMRC and will notify the product if it is agreed that the product is, after all, notifiable. A small number will not discuss whether or not a product should have been notified under DOTAS and use this lack of transparency in their dealings to frustrate HMRC in its efforts to deal with the product. If it is later determined that a scheme is notifiable then the high-risk promoter will use the defence of reasonable excuse to avoid any penalty for not meeting their current obligations. Commonly the high-risk promoter will argue that it has been given advice, for example a legal opinion, which says that it does not have to notify HMRC of the scheme, and that the existence of such advice provides it with a reasonable excuse.
- 4.34 HMRC's view on reasonable excuse is that the existence of legal advice is not sufficient, in itself, to provide a reasonable excuse. What is a reasonable excuse depends on the particular facts of the case, including the level of knowledge the promoter had, or might have been expected to have, about DOTAS and if the advice is based on full and accurate information about the product. If the legal advice includes assumptions, it is the responsibility of the person relying on the advice, be it the high-risk promoter, intermediary or user, to ensure that the assumptions apply to their own particular circumstances.

Reasonable care

- 4.35 When a person supplies information to HMRC, for example in response to an information power or in completing a tax return, then they are under an obligation to take reasonable care to make sure that the information provided is accurate. The level of reasonable care depends on the level of knowledge of the person providing that information.
- 4.36 Where there is doubt about the tax treatment of a transaction, legal or other professional advice is often taken. Reputable taxpayers and advisers will ensure that the advice is based on a full assessment of the facts, correctly described, and does not make assumptions. But typically high-risk promoters will not provide the full facts and may make assumptions so that the ability of the adviser to provide a fully informed opinion is constrained. In these circumstances it is difficult to see that the person relying on the advice has demonstrated reasonable care.

A higher standard for reasonable excuse and reasonable care

- 4.37 The Government proposes to impose a higher standard for a reasonable excuse or reasonable care defence. This would effectively test whether the advice relied upon has a sound factual basis – rather than being based on unrealistic assumptions.
- 4.38 The proposal is that no advice will be admissible as part of a defence of reasonable excuse or reasonable care unless it can be demonstrated to the Tribunal's satisfaction that:
- the advice is based on an accurate description of the facts; and
 - it makes no assumptions on matters that may be relevant; and
 - the advice concludes that if the case went before the courts that the courts were more likely than not to decide in the person's favour.
- 4.39 The higher standard would apply to high-risk promoters, not only to the information powers that are specific to the high-risk promoter regime, but also to other circumstances where there is a reasonable care or reasonable excuse defence, such as for not notifying an avoidance scheme under DOTAS.
- 4.40 Users commonly rely on assurances from the high-risk promoter and intermediaries that they have advice that the product achieves the tax benefit, but this advice may not be available to the user to consider or share with their own tax advisers. As noted above, the advice may not be based on a full assessment of the facts, it may make assumptions that are untested and may not conclude that the scheme has a realistic chance of succeeding.
- 4.41 The Government proposes that the higher standards for reasonable excuse and reasonable care should apply to users when they have relied upon on advice provided by or for the high-risk promoter, unless they can demonstrate, to the Tribunal's satisfaction, that the advice meets the criteria described above.

Q25 - Do you foresee any issues with imposing the higher standard for reasonable excuse and reasonable care?

Q26 - Is it reasonable to extend the higher standard to other circumstances for high-risk promoters?

5. Penalties for Other Users of ‘Failed’ Schemes

- 5.1 Buyers of a tax avoidance scheme will submit their returns to HMRC on the assumption that the scheme reduces their tax liability. Where a tax avoidance scheme is mass-marketed, as they often are, HMRC is presented with a large number of returns all based on the same assumption that the scheme will have reduced the person’s tax liability in a particular way. Where HMRC holds that the scheme does not work, it follows that it will argue that any returns based on that scheme are incorrect.
- 5.2 When faced with a large number of very similar cases, it is sometimes most efficient for HMRC to investigate ‘representative cases’, taking them to litigation if necessary. However, when HMRC wins a representative case in the courts, other taxpayers who have used the same or very similar schemes sometimes see little incentive to settle their cases with HMRC. When HMRC pursues litigation in a number of very similar cases the Tribunal rules allow for the cases to be heard together in certain circumstances, but this only applies to cases which have been notified to the Tribunal. To get to this stage HMRC has to investigate these cases to litigation standard and close them. Not only does this use up the Tribunal’s resources, but it also places a strain on HMRC’s compliance resources, wastes HMRC’s time and delays the collection of the right tax.
- 5.3 This consultation proposes that taxpayers who use an avoidance scheme that has been shown to fail in another party’s litigation, and HMRC has opened an enquiry into their return, should either:
- confirm with HMRC that they accept that the judgment also applies to them, advise HMRC of the amount of tax advantage they previously gained by using the scheme and amend their return accordingly, or
 - if they believe the litigated case was not relevant to their circumstances, they should tell HMRC why they think it is not relevant but should then be subject to a penalty if they do not have a reasonable basis for their conclusion.

Sanctions

- 5.4 To ensure this requirement is met, the Government proposes that a penalty, geared to the tax advantage gained, would be applied if the taxpayer fails to make the required adjustment to their return or, if they decide that the litigated case is not relevant to them, they had no reasonable basis for that conclusion.
- 5.5 This would remove the incentive that currently exists to delay settlement with HMRC and would encourage taxpayers to settle their case and pay the tax they owe much sooner than at present, without HMRC having to expend resources needlessly pursuing cases with the same material facts.

How it would work in practice

- 5.6 As happens now, where a number of taxpayers use a marketed avoidance scheme, HMRC will open enquiries into the returns of all the scheme users it identifies. HMRC may work enquiries fully into a number of these returns based on a risk assessment, conclude the enquiries and amend the returns to reflect HMRC's conclusions.
- 5.7 The proposal is that if one or more taxpayers appealed against HMRC's conclusion and subsequently lost the appeal then HMRC would notify all other users of the scheme for whom it has opened enquiries that the scheme has been shown to fail. The users would be required to acknowledge that the judgment is relevant to their return and to advise HMRC of the amount of tax advantage gained by applying the scheme. If the user considered that the appeal applied to their circumstances then they would amend their return accordingly. If the taxpayer did not think that the appeal applied and so did not make the required amendment by the time stated, they would become liable to a penalty.

Q27 - Should there be a statutory limit for the period that HMRC allows for taxpayers to amend their returns?

Q28 - Alternatively should there be a statutory minimum period which could be extended at HMRC's discretion?

- 5.8 The intention is that HMRC would only be able to impose this requirement if the litigation process in respect of the avoidance scheme was exhausted. This would be either where HMRC wins in the Supreme Court, or because the taxpayer is refused permission to appeal further, or decides not to after a loss in a lower court or tribunal.

Q29 - Should HMRC be able to impose this requirement if they win a case at any point at a tribunal or court where the taxpayer does not appeal further, or is there a minimum level in the court hierarchy that should be reached before the requirement can be imposed?

- 5.9 This proposal would require some amendments to existing legislation, such as the time limits for taxpayers subject to this requirement to amend their returns.
- 5.10 At present, the proposal is that these requirements should apply only in relation to direct taxes, including Stamp Duty Land Tax. However, we would welcome comments on its possible use in indirect taxes, particularly VAT.

Identifying schemes

- 5.11 The Government proposes that HMRC would be able to impose the new requirement in respect of any scheme.

Q30 - Would defining a scheme as “any scheme or arrangement for which it would be reasonable to conclude that the obtaining of a tax advantage was the sole or main purpose” capture the tax avoidance schemes that this measure is intended to catch?

Q31 - Are there any other suitable criteria that could be applied?

Notifying taxpayers of their requirement to amend returns

- 5.12 When HMRC wins a relevant tax avoidance case, other users of the scheme would have to be notified of the judgment and HMRC would expect them to take action. This could be achieved in a number of ways. For example, HMRC could publish its view of the case on its website, advising all other users of the scheme that they must now amend their self-assessment or advise HMRC that they do not believe that the judgment is relevant to their circumstances.
- 5.13 Alternatively, HMRC could notify taxpayers individually that in HMRC’s opinion the judgment applied to them. This would ensure everyone identified by HMRC as being required to amend their return would have a clear view of what is required of them.

Taxpayer’s acknowledgement

- 5.14 Once HMRC has notified taxpayers that the relevant litigation has finished and the scheme been shown to fail, they would be required to acknowledge that notification. This could be achieved in a number of ways.
- 5.15 One option would be for taxpayers to confirm to HMRC in writing that they accept that the court’s findings apply to their own case and that they undertake to settle their enquiry accordingly. They would then accept the amendments HMRC makes in the closure notices.
- 5.16 However, this does not provide certainty for HMRC and it would be open to taxpayers to change their minds later in the process and further delay settlement. This would defeat the object of these proposals.
- 5.17 To provide greater certainty and reduce the ability to delay settlement, we propose that following notification from HMRC, taxpayers should be required to amend their self-assessments which are under enquiry to negate the tax advantage they had gained. This adjustment would take effect when HMRC close the enquiry. This option would require changes to the time limits for amending returns, but these changes would not be applied generally and would be restricted to amendments to returns required under these proposals.

Q32 - Do you agree that once notified that the avoidance scheme they have used has been proven to fail in litigation, other users of the scheme should be required to amend their self-assessments to negate the tax advantage they had gained?

Q33 - Are there other ways to bring the tax to account without offering scheme users further opportunities to delay settlement?

- 5.18 Taxpayers who do not believe that the judgment in the 'representative' case is relevant to their circumstances will be required to advise HMRC of their position and why they hold that view. If HMRC agrees with this reasoning, there would be no further action taken under this measure and no penalty would be charged.
- 5.19 If HMRC does not agree with the reasoning, taxpayers would become liable to a penalty if they fail to amend their self-assessment within a notified, short period.

Penalties and safeguards

- 5.20 Penalties are designed to act as incentives to taxpayers to comply with their tax obligations and to reassure those who do comply that they will not be disadvantaged by those who do not. A regime of penalties must work to achieve these objectives efficiently, and include proper safeguards for taxpayers.
- 5.21 The Government proposes that scheme users who do not amend their tax return or explain why the court's judgment does not apply to their circumstances would be subject to a tax-geared penalty at this point unless they can demonstrate that there is a reasonable basis for their position. Taxpayers would have a right of appeal if they disagreed with HMRC's conclusion about the reasonableness of the position.
- 5.22 The penalty would be geared to the amount of tax advantage gained through the application of the avoidance scheme.
- 5.23 Scheme followers who incur a penalty because they do not respond to HMRC's notification, or because HMRC does not agree that they have a reasonable basis for distinguishing their case from the litigation may have their penalty mitigated for their co-operation. This would encourage people in this position to amend their self-assessment as soon as possible. The penalty would be reduced to take account of the nature, timing and extent of taxpayers' co-operation between the penalty point and settlement of the case.

Q34 - Do you agree that a penalty should work in this way to encourage taxpayers to comply with these obligations?

Q35 - Do you have any further comments on how this new requirement and penalty should work in detail?

Q36 - Are there any other penalty models or structures which you believe would work more effectively?

6. DOTAS – Prescribed Information

- 6.1 The Government is committed to tackling tax avoidance and ensuring that the tools available to HMRC are robust and effective. The DOTAS regime has played a successful part in HMRC's anti-avoidance strategy. However, while some promoters fulfil all their obligations when providing prescribed information to HMRC and provide further information when requested about a notifiable proposal or arrangement, this is by no means universal.
- 6.2 It is not uncommon for promoters to fail to provide sufficiently clear information explaining each element of the arrangements. HMRC can apply to the Tribunal for an order requiring further information under section 308A of the Finance Act 2004. However this prevents HMRC from receiving timely information about the proposal or arrangement intended by the DOTAS rules and allows some promoters to obtain a market advantage over other promoters.
- 6.3 In order to ensure that HMRC receives, at an early stage, sufficient information to enable it to understand and analyse the tax effect of notifiable proposals and arrangements, the Government proposes that the prescribed information to be provided to HMRC about a notifiable arrangement or proposal should include all material provided to prospective users of the arrangement, sample copies of all documents signed by the users as part of the arrangement, a full analysis of the tax advantage that the arrangement is designed to obtain and an explanation of how the arrangement produces the tax advantage. If this information changes then the promoter would be able to provide a revised version.
- 6.4 This requirement enables HMRC to receive more complete information at an early stage on how a notifiable proposal or arrangement achieves a tax benefit. It will enable HMRC to more accurately analyse notifiable proposals or arrangements to determine if they achieve the expected tax advantage, it will reduce delays and allow HMRC to direct its resources to towards the greatest avoidance risks.

Q37 - Do you think it is reasonable for the prescribed information to include all material provided to prospective users of an arrangement, sample copies of all documents signed by users, a full analysis of the tax advantage that the arrangement is designed to obtain and an explanation of how the arrangement produces the tax advantage?

Q38 - Alternatively do you think that such material should only be provided following a specific request from HMRC?

7. Update on Mis-selling

- 7.1 Most advisers operate in accordance with the strict ethical codes of their professional bodies and therefore, we believe, mis-selling should be an issue only for a small number - those that are either not members of any professional body or who choose not to maintain the expected high standards.
- 7.2 Mis-selling can include unrealistic claims to make tax 'disappear', mis-representing the risks of a product, failing to explain the transactions and their function. Regulatory rules on mis-selling have historically focused on the way that a product is sold rather than whether the product itself works. However, this is changing: with greater emphasis on the quality of product by the regulator which increasingly aligns their interest with HMRC's primary concern.
- 7.3 Recent months have also seen reports of users of failed avoidance schemes taking successful action against promoters through the courts and to the Financial Ombudsman Service.
- 7.4 The Lifting the Lid on Tax Avoidance consultation proposed that the Government explore with interested parties building on the financial services mis-selling rules where a tax avoidance scheme does not provide the purported tax benefit or otherwise falls short in terms of the quality of the advice provided, or a description of the risk and rewards. This was supported in the responses to that consultation.
- 7.5 Since then, HMRC has been working with the Financial Conduct Authority (FCA) and other consumer protection regulators to establish:
- if and how HMRC can utilise existing regulations to control high-risk promoters
 - which tax products are already within a regulatory framework, for example subject to FCA conduct of business rules
 - if tax products in a more generic way could be included in a regulatory regime.
- 7.6 HMRC has also been working to establish how the recently widened Financial Services and Marketing Act legal information gateway between the FCA and HMRC will be fully utilised and how to optimise other legal gateways that will allow HMRC to share relevant information with regulatory authorities and vice versa.
- 7.7 HMRC is committed to continuing the work on this issue with interested parties.

8. Assessment of Impacts

8.1 The Tax Impact Assessments for high-risk promoters and follower penalties are presented separately below. The information presented represents our current understanding of the impacts of the policies and responses to the consultation will inform the final assessment.

Q39 - Do you think that the high-risk promoter and follower penalty proposals will have a wider impact on individuals and households than that already identified?

Q40 - Do you have any comments on the assessment of the equality impacts for either proposal?

Q41 - The high-risk promoter proposals will only impact a small number of promoters some of which may change their behaviours to avoid being designated high-risk. The impact of the proposals on promoters designated high-risk will vary depending on the type of information power and level of penalties to which the promoter is subject. What do you think will be the cost to the high-risk promoter of the following?

- a) Providing information under the specific information power
- b) Providing information under the general information power
- c) Informing intermediaries and users of their high-risk designation.

Q42 - What changes in costs will businesses face in complying with the follower penalty proposal compared to the current situation? Please refer to compliance costs not potential penalties and tax settlements.

High-risk promoters

Summary of Impacts

Exchequer impact (£m)	2013-14	2014-15	2015-16	2016-17	2017-18
	nil	+5	+35	+35	+35
	These figures were set out in Table 2.1 of Budget 2013 and have been certified by the Office for Budget Responsibility. More details can be found in the policy costings document published alongside the Budget.				
Economic impact	The measure is not expected to have any significant economic impacts.				
Impact on individuals and households	The measure will mainly impact on those individuals who are, or work for, high-risk promoters. There may also be an impact on the users of avoidance schemes if the measure includes such users. Individuals who use avoidance schemes will generally be higher rate taxpayers.				
Equalities impacts	HMRC does not hold information about the protected characteristics of high-risk promoters but there is no reason to suppose there is any particular equality impact. It is not expected that the policy would impact adversely or disproportionately on equality groups.				
Impact on businesses and Civil Society Organisations	HMRC estimates that there are approximately 20 businesses that are potentially high-risk promoters. The measure is to encourage behavioural change and so some businesses will not incur any additional compliance or administrative costs under the measure. It will impose some additional reporting obligations on those firms subject to the information powers. For the businesses affected we expect the impact to be negligible.				
Impact on HMRC or other public sector delivery organisations	Dealing with additional information and reporting of information will have negligible impact on HMRC				
Other impacts	<u>Small firms impact test</u> : businesses of any size develop, market and use tax avoidance schemes. The Government expects this measure will have little, if any, impact on small businesses either in absolute terms (considering the overall effect on them) or in relative terms (considering the effect on specific businesses).				

Monitoring and Evaluation

Information collected from the limited population of high-risk promoters and their users will be analysed to monitor the measure.

Follower penalties

Summary of Impacts

Exchequer impact (£m)	2013-14	2014-15	2015-16	2016-17	2017-18
	nil	+55	+60	+5	+10
	These figures were set out in Table 2.1 of Budget 2013 and have been certified by the Office of Budget Responsibility. More detail can be found in the policy costings document published alongside the Budget.				
Economic impact	The measure is not expected to have any significant economic impacts.				
Impact on individuals and households	There will only be an impact on those individuals who engage in tax avoidance. HMRC expects most of these to be higher-rate taxpayers.				
Equalities impacts	HMRC does not expect the measure to impact adversely or disproportionately on any equality group				
Impact on businesses and Civil Society Organisations	<p>The measure is expected to have a negligible impact on businesses and civil society organisations. There will only be an impact on businesses if they participate in mass-market avoidance schemes.</p> <p>This measure will have no impact on businesses and civil society organisations undertaking normal commercial transactions.</p>				
Impact on HMRC or other public sector delivery organisations					
Other impacts	<u>Small firms impact test</u> : small firms will only be affected if they participate in tax avoidance schemes marketed by high-risk promoters. It is expected that a negligible number of small firms will be affected.				

Monitoring and Evaluation

Information collected from HMRC enquiries will be used to monitor this measure.

9. Summary of Consultation Questions

Identifying a high-risk promoter

Q1 - Do you think that the objective criteria in Approach One are, on their own, sufficient to identify high-risk promoters or do you agree that the second approach would be more effective?

Q2 - Do you consider that the suggested objective criteria would provide effective reassurance for advisers who are not high-risk promoters?

Q3 - In relation to the objective criterion based on disciplinary proceedings, do you think it is necessary to narrow the criterion to specific disciplinary matters?

Q4 - Are there any other objective criteria you would suggest?

Q5 - Are there any other factors you would suggest for the second approach?

Q6 - Are there any other circumstances where you think it would be appropriate for an immediate high-risk designation?

Q7 - Should a high-risk designation apply from the date of designation or the date that any appeal against the designation is dismissed?

Q8 - Do you think that these safeguards are sufficient to ensure that only promoters that are genuinely high-risk will be designated as such?

Q9 - Do you have any suggestions to improve the procedures supporting the high-risk promoter regime?

Q10 - Do you think it is reasonable to include in the objective criteria or factors for designating a promoter high-risk the fact that an entity is a successor entity or associated entity of an existing high-risk promoter?

Q11 - Do you think that whether or not an entity is a successor or associated entity could be established through key individuals?

The high-risk promoter regime

Q12 - Do you think that the proposed information powers will be both appropriate and sufficient to provide HMRC with the information necessary to understand the promoter's products and trace its intermediaries and users?

Q13 - Are there any other information powers that it would be useful to apply to high-risk promoters?

Q14 - Do you agree that naming high-risk promoters will serve to put their intermediaries, users and the public on notice of their high-risk status and the consequences?

Q15 - What safeguards should be provided?

Q16 - Are there any issues with the proposed obligations on the intermediary?

Q17 - Are there any further obligations that should be imposed on an intermediary acting for a high-risk promoter?

Q18 - Should there be any further safeguards provided for an intermediary acting for a high-risk promoter?

Q19 - Do you agree that the user of a product marketed or implemented by a high-risk promoter should be required to declare to HMRC that they have done so?

Q20 - Do you think it is reasonable that users of products marketed or implemented by high-risk promoters should be subject to extended time limits for assessing?

Q21 - Is this proposal to create a specific rule that will allow intermediaries and users to disclose information to HMRC reasonable?

Q22 - What would this legislation need to achieve to be effective? Do you think it will achieve its aim of improving transparency and encouraging users to provide information to HMRC?

Q23 - Is this level of penalties appropriate for high-risk promoters?

Q24 - Do you have any other suggestions on the level of penalty appropriate for high-risk promoters?

Q25 - Do you foresee any issues with imposing the higher standard for reasonable excuse and reasonable care?

Q26 - Is it reasonable to extend the higher standard to other circumstances for high-risk promoters?

Penalties for other users of failed schemes

Q27 - Should there be a statutory limit for the period that HMRC allows for taxpayers to amend their returns?

Q28 - Alternatively should there be a statutory minimum period which could be extended at HMRC's discretion?

Q29 - Should HMRC be able to impose this requirement if they win a case at any point at a Tribunal or court where the taxpayer does not appeal further, or is there a minimum level in the court hierarchy that should be reached before the requirement can be imposed?

Q30 - Would defining a scheme as “any scheme or arrangement for which it would be reasonable to conclude that the obtaining of a tax advantage was the sole or main purpose” capture the tax avoidance schemes that this measure is intended to catch?

Q31 - Are there any other suitable criteria that could be applied?

Q32 - Do you agree that once notified that the avoidance scheme they have used has been proven to fail in litigation, other users of the scheme should be required to amend their self-assessments to negate the tax advantage they had gained?

Q33 - Are there other ways to bring the tax to account without offering scheme users further opportunities to delay settlement?

Q34 - Do you agree that a penalty should work in this way to encourage taxpayers to comply with these obligations?

Q35 - Do you have any further comments on how this new requirement and penalty should work in detail?

Q36 - Are there any other penalty models or structures which you believe would work more effectively?

DOTAS – Prescribed information

Q37 - Do you think it is reasonable for the prescribed information to include all material provided to prospective users of an arrangement, sample copies of all documents signed by users, a full analysis of the tax advantage that the arrangement is designed to obtain and an explanation of how the arrangement produces the tax advantage?

Q38 - Alternatively do you think that such material should only be provided following a specific request from HMRC?

Assessment of Impacts

Q39 - Do you think that the high-risk promoter and follower penalty proposals will have a wider impact on individuals and households than that already identified?

Q40 - Do you have any comments on the assessment of the equality impacts for either proposal?

Q41 - The high-risk promoter proposals will only impact a small number of promoters some of which may change their behaviours to avoid being designated high-risk. The impact of the proposals on promoters designated high-risk will vary depending on the type of information power and level of penalties to which the promoter is subject. What do you think will be the cost to the high-risk promoter of the following?

- a) Providing information under the specific information power**
- b) Providing information under the general information power**
- c) Informing intermediaries and users of their high-risk designation.**

**Q42 - What changes in costs will businesses face in complying with the follower penalty proposal compared to the current situation?
Please refer to compliance costs not potential penalties and tax settlements.**

10. The Consultation Process

- 10.1 This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:
- Stage 1 Setting out objectives and identifying options.
 - Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
 - Stage 3 Drafting legislation to effect the proposed change.
 - Stage 4 Implementing and monitoring the change.
 - Stage 5 Reviewing and evaluating the change.
- 10.2 This consultation combines during stages 1 and 2 of the process. Part of the consultation seeks views on the policy design and any suitable possible alternatives, other parts seek views on the detailed policy design.

How to respond

- 10.3 A summary of the questions in this consultation is included at chapter [X].

Responses should be sent by 4 October 2013, by e-mail to aaq.consultation@hmrc.gsi.gov.uk - please note that the mailbox will not accept e-mails larger than 10mb.

Responses can also be sent by post to:

Tunde Ojetola
HM Revenue and Customs
Room 3C/03
100 Parliament Street
London
SW1A 2BQ

Telephone enquiries: 020 7147 0087

- 10.4 Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from [HMRC Inside Government](#). All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.
- 10.5 When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

- 10.6 Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.
- 10.7 If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HMRC.
- 10.8 HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Principles

- 10.9 This consultation is being run in accordance with the Government's Consultation Principles. HMRC is willing to meet interested parties to discuss the proposals in the consultation.
- 10.10 The Consultation Principles are available on the Cabinet Office website: <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>
- 10.11 If you have any comments or complaints about the consultation process please contact:

Amy Burgess,
Consultation Coordinator, Budget Team,
HM Revenue & Customs,
100 Parliament Street,
London,
SW1A 2BQ.

Email: hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

Please do not send responses to the consultation to this address.

Annex A: Relevant (current) Government Legislation

DOTAS Legislation

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

- section 306 – defines 'notifiable arrangements' and 'notifiable proposals' and also provides for Treasury regulations to prescribe descriptions of arrangements required to be disclosed;
- section 307 – defines 'promoter';
- section 308 sets out the duties of a promoter to provide prescribed information;
- section 309 concerns the situation where a promoter is outside the UK (in which case if the promoter does not provide prescribed information, the obligation passes to the client who uses the arrangements);
- by virtue of section 310 the obligation to provide prescribed information also passes to the scheme user if no person is obliged to provide information under either of sections 309 or 310. In practice this applies where either, the arrangements are designed by an 'in-house' tax department' or the promoter is a lawyer who cannot make a full disclosure without providing legally privileged information.

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

The Tax Avoidance Schemes (Information) Regulations 2012, SI 2012/1836 prescribe the information to be provided under DOTAS and the time limits for providing it.

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