Chartered Institute of Taxation
Excellence in Taxation

Raising the stakes on tax avoidance
Response by the Chartered Institute of Taxation

1. Introduction

1.1 The Chartered Institute of Taxation (CIOT) sets out its comments on the consultation: 'Raising the stakes on tax avoidance'.

1.2 HM Revenue & Customs (HMRC) should be congratulated on the progress that it has made to date in tackling tax avoidance. That together with media pressure means that the avoidance market, especially at the egregious end, has all but collapsed. The avoidance cases currently going through the courts are generally ones started in a previous era.

1.3 Although the current environment is changing, with the introduction of the General Anti-Abuse Rule (GAAR), which should be given time to bed down, we support HMRC's aims in tackling cases where promoters do not adhere to the rules in this area. We accept that promoters that HMRC call 'High-Risk Promoters' (HRPs) can cause significant problems for not only HMRC but also mainstream tax advisers and their clients, such that a pragmatic solution is required.

1.4 However, if HRPs do not comply with the current rules, why will they comply with new rules?

1.5 If further legislative steps are taken, these must not tip the 'playing field' nor unfairly target uninformed/misinformed clients of HRPs. There must be caution regarding the level of discretion given to the executive. The rule of law must be recognised and there should be safeguards that are strong enough to withstand changes of HMRC personnel.

1.6 Despite proposing 'a higher standard for reasonable excuse and reasonable care', confidentiality undertaking overrides (Chapter 4) and a tougher penalty regime for users of failed schemes who don't amend their returns (Chapter 5), there is no mention of the Human Rights Act nor Human Rights Convention and compliance therewith. This should be addressed.

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2. Executive summary

2.1 While we hold strong concerns about some of the proposals we agree that the Government, and HMRC, should be tackling this area. However we are not convinced that the consultation document sets out the most appropriate approach.

2.2 Since there appear to be so few HRPs (the consultation impact assessment refers to HMRC's estimate of only 20 firms), each of which is slightly different, we are struggling to see the need to formulate a generic definition for them coupled with new powers and whether this will solve the problem. HMRC seem to know who the HRPs are already.

2.3 On balance, we do not think that the HRP proposals will solve the current problems and are likely to create more new problems than they solve. We think a different approach is needed, to better tackle the objectionable cases, ie tackle the behaviour, and penalise that, rather than trying to carve out a definition of a particular type of promoter, which is proving extremely difficult.

2.4 We do not think the case has been made for HMRC's inability to use or adjust existing powers to tackle the problem (eg amending the existing penalty rules, to effectively set a minimum error penalty tariff for such cases). Another set of tools in the HMRC toolkit runs the risk of making tax compliance more burdensome for everyone else, while retaining the current HRP problem.

2.5 Any changes must have regard to the rule of law, the foundation of a just and fair society, as opposed to a wholly administrative procedure.

2.6 There is a deep concern that some HRPs would wear 'naming and shaming' as a badge of honour, or worse as approval by HMRC that they provide schemes that work, providing a valuable marketing tool for the unscrupulous.

2.7 If the concept of HRPs is taken up, we agree that the decision as to whether a promoter is high-risk should be taken by the Executive, but that an appeal must be to the Tribunal and the full appeal process should have expired before any public naming and other repercussions of designation.

2.8 With regard to 'failed' schemes, we think that the 'winning' case should be **determinative** of another taxpayer's position, ie not just '**relevant**' before any consequences flow.

2.9 Care needs to be taken to ensure that uninformed 'retail' clients in particular, who may only take their advice from the promoter or an intermediary, as opposed to sophisticated clients with other advisers, are not unfairly treated.

2.10 We appreciate the rationale for imposing higher penalties, however we think this could present problems for, in particular, uninformed 'retail' clients of boutiques and should be reconsidered. Penalties that did not affect standard rate taxpayers caught up in schemes may be more palatable.

2.11 We think it is fundamentally dangerous to blur the well-understood approach to 'reasonable care' and 'reasonable excuse', both extremely important taxpayer safeguards, in order to target a very small minority of taxpayers.

2.12 The proposed penalty regime for not disclosing information seems punitive.

3. Identifying a High-Risk Promoter – Chapter 3

3.1 *Professional standards*

HMRC state in the consultation document (condoc) that they expect 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.'

3.2 The appropriate set of standards is set out in Professional Conduct in Relation to Taxation (PCRT), which the key professional bodies with an interest in tax sign up to. This guidance has recently been updated and the draft has been sent to legal counsel and HMRC for review and comment prior to publication. The current version is available at: www.tax.org.uk/PrCo-tax.

3.3 In the *Mehjoo*[1] case this guidance was endorsed. At paragraph 196, the judge referred to this guidance stating that: 'In my view, the Institute's requirement does no more than set out what should be implied in the retainer of any professional person particularly where the issue is of substantial importance to the client.'

3.4 *Advising of risks*

We endorse the list of risks (page 10) of using an avoidance scheme and would in fact include others such as the risk of not winning contracts, stress and sapping management time or the risk of counteraction or even retrospective counteraction at a later date.

3.5 Such risks should be better explained to taxpayers thinking of entering schemes. We think HMRC should be doing more to explain these risks to taxpayers. Taxpayers do not necessarily look at the HMRC website, where there is much information on this area. Could HMRC be more proactive by adding something about say the top 10 avoidance scheme risks in with other communications to taxpayers, eg on notices to file tax returns, coding notices etc to say all higher rate taxpayers?

3.6 *Who is a High Risk Promoter?*

The behaviours set out at paragraph 3.6 of the condoc seem reasonable attributes to ascribe to an HRP. However the last one, which refers to 'concealment and mis-description', appears to be more akin to evasion or fraud than avoidance.

[1] **Hossein Mehjoo** v Harben Barker, [2013] EWHC 1500 at http://www.bailii.org/ew/cases/EWHC/QB/2013/1500.html

3.7 While supportive of measures to tackle egregious avoidance, we consider it unhelpful to conflate paying tax that is due and avoiding tax (paragraph 3.8). They are different concepts. Tax that has been avoided, rather than evaded, is not due, unless the avoidance is proved in law to be wrong.

3.8 We agree that, if an HRP regime is to be introduced, the identification is central to the proposals and that this must be based on very clear criteria. Clear measurable criteria are vital to any appeal system. If the initial decision by the executive is based upon subjective criteria then it makes an appeal extremely difficult, if not impossible, leading to unfair results.

3.9 As currently drafted, the criteria are far too wide. Also the application of the criteria would need to rely completely on HMRC acting reasonably in exercising judgment. We think that any such system should involve criteria that require less judgment. Certainly any criteria which may be required for high risk designation should be in statute. Otherwise it can be ignored on appeal.

3.10 ***Potential approach one***

The criteria set out in paragraph 3.13 are far too wide, not objective nor adequate, eg just picking up on several points:

a. The first attribute is whether HMRC have used an information notice in relation to that promoter or their products. This would provide HMRC with an easy route to include anyone they choose in this category;
b. The next attribute is for promoters who fail to notify a scheme. This seems to have no get out for mistake or disputes. Also, we do not understand the inclusion of 'whether or not there was a penalty for the failure'. In what circumstances would there not be a penalty and, if circumstances are such that there is no penalty why, nonetheless, should it be possible for the offender to be an HRP?;
c. A scheme that 'appears to be caught by the GAAR' would catch its promoter; that could give rise to significant abuse of power. At the very least, the measure should be whether it is caught or not rather than based on a personal opinion of an HMRC Officer. However, even then we do not think this is a fair test. Whether or not the GAAR applies is a judgement call by an adviser. That call may be made in good faith, but be found by the courts to be wrong. This should not leave the adviser at risk of being an HRP;
d. We would like to clarify what is meant by breaching a voluntary undertaking. We assume this refers only to the voluntary undertakings envisaged in paragraph 3.26 et seq and not to any voluntary undertaking or agreement between a taxpayer and HMRC (eg a PAYE settlement agreement or the Banking Code of Conduct on Taxation);
e. 'The promoter is 'offshore' smacks of discrimination under EU principles. There is no explanation as to why a compliant offshore promoter would be high risk. How would HMRC tackle an offshore promoter, especially one in another European country where under his local law he is compliant and not high risk? and
f. 'The promoter has been subject to a relevant fine or disciplinary action by … a representative body' would seem to catch most large firms, who at some time have faced action, often on issues unrelated to tax or avoidance and often in another office.

Overall, the approach would not provide certainty as the criteria are too wide and the definitions are too vague. The approach would not necessarily shine a light on the real HRPs, yet could easily entrap other promoters and tax advisers. For these reasons alone we oppose this option.

3.11 ***Potential approach two***

We note that HMRC favour this approach. This is not surprising. It provides HMRC with a huge amount of flexibility; it would permit HMRC to label almost anyone they wanted as an HRP, and announce this publicly. The only caveat stated in the condoc is that this must be done reasonably, but since the criteria could apply to almost anyone, this provides little protection for reputable advisers.

3.12 HMRC have said they 'know who the HRPs are' that they want to catch, but that gives no comfort to other advisers who may be 'playing by the rules' yet have every chance of being caught by the proposals as currently expressed.

3.13 We think the criteria need to be amended so that they are far better targeted at those HRPs. Any measures should be tested against reputable firms to ensure they do not catch the compliant. As drafted we think they could catch a large array of reputable firms.

3.14 We suggest that before any decision is taken HMRC endeavour to tackle the 'known HRPs' with existing powers to see what can be done to better target resources, rather than burden the rest of the tax and accountancy profession with a new regime that many could inadvertently fall foul of.

3.15 While some of the attributes listed appear reasonable criteria to use (eg concealment or mis-description), others have clear problems.

3.16 Comments on the criteria include:

a. The first criteria is quite unfocused (poor implementation and unrealistic view of the law); eg, when does one assess whether poor implementation has occurred? Is this at the DOTAS stage or later? Invariably, litigation experience suggests that facts relating to implementation only properly emerge in the run up to a substantive hearing, so it seems that this factor cannot assist in a prospective way in relation to any scheme. In addition, a promoter may implement one scheme well and another badly so this factor does not necessarily indicate that a promoter is high risk;
b. As to an 'unrealistic view of the law', experience indicates that views as to the interpretation of legislation can differ. It cannot be unreasonable to hold a particular view simply because HMRC disagrees with it;
c. The economic benefit bullet point appears to focus on a non-tax consideration (that the user has not got value for money in entering into the tax scheme in question) and arguably has no place in an HMRC list of high risk factors which should be limited to tax related factors;
d. The fifth and sixth bullet points (numbering them would have been useful!) compare the gains or losses realised to those 'for economic purposes'. Yet the fifth criteria (one up from the foot of page 12) 'profit…for tax purposes that is significantly less than the amount for economic purposes' might apply to any taxpayer claiming a Government sponsored relief.

e. That a promoter uses a network of intermediaries is not a feature relevant only to the promoters that we understand HMRC wish to target and is therefore an inappropriate test.
f. Inclusion of a product in Spotlight is also inappropriate – it would be open for HMRC to include any planning it did not like in Spotlight.
g. The last bullet point is also irrelevant in identifying promoters of egregious schemes (there can be an exchequer loss from any tax planning) and again provides HMRC with the ability to apply these proposals much more widely than the stated policy intention of catching promoters who do not adhere to the rules. As such it has no place in a test of what is an HRP.

3.17 We remain concerned that regardless of the criteria applied, an approach which involves HMRC deciding which criteria are relevant and how much weight to place on each is insufficiently precise as it effectively enables any promoter to be designated an HRP. However, if the Government is determined to pursue this route, we suggest that more effort is put into re-drafting these factors. Most of them even if redrafted appropriately should only contribute to a decision; they should not in themselves form the opinion.

3.18 One potential side effect of making business life in the UK unbearable for an HRP is that many of them may decide to move offshore. This would merely shift the problem and potentially provide less protection for individuals and indeed intermediaries caught up in such schemes.

3.19 'Approach two' seems to provide HMRC with the power to identify any promoter they so choose. While there may be great trust in the current HMRC team dealing with this work there are no guarantees that future teams will be as trustworthy. So while HMRC have said they would only use the measures flexibly to identify 'the elephant in the room', the CIOT is concerned that the identification could be of some other creatures.

3.20 Some of the tests are worded in the plural, as the products generally provided by a promoter must fall in that category; some are only in the singular, implying that only one product needs to be in that category. Surely that decision should be on the firm as a whole and therefore schemes as a whole.

3.21 It may well be the case that there are circumstances where it would be appropriate for HMRC to immediately designate a promoter as high risk (paragraph 3.19), but we do not agree that the circumstance set out is one of them. At the very least the test should be that the directors have been **convicted** of criminal tax offences**.** Suggesting that consequences should flow from directors being only **charged** is contrary to all principles in UK law of being innocent until proven guilty.

3.22 The tests set out at paragraph 3.6 seem to hit the nail on the head. We think it is dangerous to extend these to the subjective ones or the ones that may not be indicative of abuse as set out on pages 12 to 13.

3.23 In conclusion, we can see that HMRC would prefer Approach two, but we have deep concerns around this as currently drafted. The test should be formulated along the lines set out in paragraph 3.6.

3.24 Also, if this area is pursued, we agree that the decision as to whether a promoter is high-risk should not be taken by HMRC, but by a Tribunal. We

appreciate that this can delay final decisions, but that having proper recourse to justice is important. We would see the stages of the process, rather than as set out at paragraph 3.22 in the condoc, being:

- Informal;
- Voluntary Undertaking;
- Notification of intention to designate;
- Appeal;
- Designation; then,
- Re-categorisation.

3.25 ***Procedures for the high-risk promoter regime***

HMRC have assumed that 'The consequences of being in the high-risk category of promoters should act as an effective and powerful deterrent.' What evidence does HMRC have for this? We understand that most reputable firms would go to great lengths, potentially increasing burdens, to ensure they cannot be seen as an HRP. But is the same true of HRPs?

3.26 Is it not the case that an HRP may see the HRP label as a badge of pride, one that could be used to attract business from risk-takers? Worse still, might HRPs see the badge as approval by HMRC that they provide schemes that work, providing a valuable marketing tool for the unscrupulous?

3.27 *Voluntary undertakings*
These seem to be proliferating within HMRC and are giving rise to many concerns as to their legal basis. We think a protocol, ideally with legal backing, needs to be agreed around such agreements.

3.28 Setting out a 'voluntary undertaking' seems to ignore the commercial and legal obligations of parties undertaking a contractual relationship. A promoter has confidentiality obligations to the client and will be paid by the client to act for the client. The suggested involvement with the promoter seems more wishful than achievable as the promoters may merely move offshore and leave the 'can' with intermediaries. Paragraph 3.29 says that the voluntary undertaking will be confidential. Will the promoter's client have access to it?

3.29 *Designation and appeal*
Paragraph 3.22 refers to the designation being made before an appeal can be made. This should not be made public (ie naming) until after an appeal process, in private if requested, has run its course or is time expired. To make a designation public before the appeal can be made would not represent fair justice as by then any damage would have been done.

3.30 *Australian system*
We have received anecdotal reports around the adverse impact on attitudes to compliance in Australia as a result of some of the compliance measures taken. The UK has an extremely high compliance record compared to other countries and while we support HMRC's aim of improving that further they must be sure not to actually worsen the situation by bringing in new measures that are not supported by the compliant. While these proposals have had support from some unexpected quarters it is unlikely that such commentators will have read the detail and fully considered the implications.

3.31 ***Appeal process***

As mentioned above, we think this should always be available. It needs to be after the notification of intention to designate has been made by HMRC but before any public naming has been made or other consequences flow. We consider that an efficient and speedy appeal process is vital in providing the appellant with adequate access to justice. Public naming should therefore only run from the final decision on any appeal or when time limits for further appeal have expired.

3.32 ***Re-categorisation***

The proposals look reasonable, subject again to an adequate appeal system.

3.33 ***Successor or associated entities***

We agree that this could be considered as part of the objective measures, but whether an individual has moved to a new firm should not on its own be a significant factor. However, there is a strong possibility that certain 'bad promoters' could create numerous phoenix type companies to get round any high risk label. As a result there is an argument that the rules designation should apply to individuals within legal entities rather than the legal entity.

3.34 ***Safeguards***

It will be crucial to have adequate safeguards. We suggest that only a very small number of HMRC officers can designate firms as HRPs. We recommend that, as with Finance Act 2009 section 94 'naming' this is done by a single central team. This will aid consistency and help ensure fair treatment.

4. The High-Risk Promoter Regime – Chapter 4

4.1 This is an extremely difficult area. We are keen to support the aims of HMRC's work but are concerned that the roll out of the plans may not achieve these.

4.2 The condoc states that: 'There is evidence that many mainstream tax advisers are increasingly unwilling to advise clients to undertake tax avoidance.' Indeed, many of our members report to us that the market for tax avoidance is collapsing. HMRC seem to know the identity of the remaining major 'boutique' firms specialising in this type of work.

4.3 We wonder why resources are not being targeted at these firms using existing powers. Where those powers do not quite work they should be addressed to see if a small change would make them more effective.

4.4 ***Information powers***

The risk to HMRC is that they are inundated with a huge volume of material, to the extent they cannot cope, especially as this information is not limited to DOTAS cases, let alone avoidance cases. Therefore, presumably HMRC would need to allocate more resources to dealing with this information. If so,

would it not be better to simply allocate the resource to dealing with known HRP's, as mentioned above?

4.5 ***Naming high-risk promoters***

As stated above, if HMRC are granted a power to designate a firm as an HRP full appeal rights must be available, with no publication of names until all appeal rights have been exhausted. As mentioned above, there is a deep concern that some HRPs would wear 'naming and shaming' as a badge of honour, or worse as approval by HMRC that they provide schemes that work, providing a valuable marketing tool for the unscrupulous.

4.6 ***Intermediaries and users***

The extension of matters onto the intermediary and end user once a promoter has been flagged as high risk, as set out in paragraph 4.14, is another area which needs to be thought through more carefully. Any notification could generate action or aggravation between the intermediary, user and promoter to varying degrees. This could potentially result in legal action that might affect responses to ongoing enquiries or lead to a change in advisers etc.

4.7 ***Confidentiality***

We approve of the proposal to legislate that disclosing information to HMRC is not a breach of a confidentiality clause. We wonder if this should also be extended to disclosure to a tax adviser, independent of the promoter, so that the taxpayer can obtain adequate advice, eg on the risks.

4.8 ***Penalties for high-risk promoters, intermediaries and users:***

4.9 *Reasonable excuse and reasonable care*

We think it is fundamentally dangerous to blur the well-understood approach to 'reasonable care' and 'reasonable excuse' in order to target a very small minority of taxpayers. The existing penalty provisions and approach to assessing time limits are perfectly adequate in this regard. What is the potential upside to HMRC and the exchequer, from making it marginally easier for HMRC to argue that a penalty is due in some failed avoidance cases? We do not think that this warrants a reduction in safeguards, which are crucial in a fair tax system.

4.10 There are three types of client and promoter that seem to be of interest to HMRC:

1. Multinational enterprises and their advisers, with complex schemes of high value - if promoted by the Big 4 can cover a wide audience;
2. High Net Worth Individuals (HINWIs) (including celebrities) and the boutiques supporting them – again, a large audience; and
3. The ordinary citizen who buys eg SDLT schemes or dubious EIS schemes, through Independent Financial Advisers (IFAs) who are targeted by boutiques.

The FSMA Financial Promotion regulations 2005, and the Conduct of Business Sourcebook would class:

- Types 1 and 2 as sophisticated investors; and
- Type 3 as retail.

4.11 Where the user is the retail 'man on the street' the proposals (for a higher standard of reasonable excuse for non-filing for DOTAS and for re-setting the penalty regime when the lead case has lost) seem wholly inappropriate. The latter's only source of real information on whether DOTAS applies, or whether their case is different from the lead case, is the person who promoted the scheme in the first place, who is in their eyes an expert!

4.12 Where the user is sophisticated, the proposals still raise deep concerns about 'mission creep' on the fundamental concepts. These fundamental concepts are well understood and, in our view, provide a sensible framework to assess a taxpayer's approach to filing for the purposes of the penalty regimes and assessing provisions. HMRC risk blurring these well-understood criteria for the sake of a marginal strengthening of its position in a very limited number of cases (which in our view ought to be capable of being addressed under the existing arrangements in any event).

4.13 Specifically, it is often difficult to provide advice without any assumptions, even if it is specifically tailored to the individual client. It is a little unfair to vilify counsel for including factual assumptions in giving advice; after all, counsel does not usually control implementation; eg for cases reliant on the fact that a trade is carried on, the best that counsel can reasonably do is to assume that the promoter will ensure that a trade is in fact carried on.

4.14 In addition, barristers are unlikely to specify whether there is more than a 50% chance of success, given the innate risks involved in litigation, such as which judge hears the case, the quality of witnesses in giving evidence, whether the scheme is properly implemented and whether the promoters retain all relevant documents. There are too many variables over which counsel has no control and is unlikely to give anything other than a heavily caveated assessment of the chances of success. This proposal could lead to fewer reputable barristers being prepared to give opinions in this area, which would be unhelpful.

4.15 Another real concern is with paragraph 4.36 (which is expanded at 4.40 and 4.41). It is worrying that it states: 'Reputable taxpayers … will ensure that the advice is based on a full assessment of the facts, correctly described, and does not make assumptions.' If the taxpayer is being properly advised by a tax adviser, it should not then be up to the 'reputable taxpayer' to ensure that the advice is correct. To do this would potentially break down the relationship between the taxpayer and the reputable adviser. Given the complexity of the UK tax system, few taxpayers can fully understand the full implications of advice given and determine whether it is correct – that is why they take advice in the first place.

4.16 Underlying the issue of the reliance on opinions is the thorny issue of those legal counsel who are devising schemes and giving opinions which are relied upon. Are HMRC willing to address this with the Solicitors Regulatory Authority and Bar Council? However, we would caution against any

developments that mean it is more difficult for citizens to get proper advice, as is demonstrated by the recent changes to rules around IFA charges, which have been reported as leading to a reduction in IFAs and availability of advice.

5. Penalties for Other Users of 'Failed' Schemes – Chapter 5

5.1 We assume this applies to any failed schemes, not just those sold by HRPs.

5.2 It seems a reasonable point for all identical schemes to be treated the same if the facts are the same, but as many cases are fact dependant, small distinguishing features can make a difference and not allowing a taxpayer to have their day in court seems the wrong route; eg in a corporate financing transaction the allowable purposes arguments can be quite fact specific.

5.3 Will HMRC accept a loss in the courts and settle all outstanding matters as they are asking taxpayers to do?

5.4 We would be keen to understand why HMRC do not feel able to address the issues by reference to the existing regime, or at least by making minor amendments to the existing regime.

5.5 We suggest that rather than the 'follower penalties' model suggested in the condoc, instead, something simpler around the model used in relation to offshore centres be adopted in this area. That required a small change to the legislation in Finance Act 2007 Schedule 24. In the same way that following negotiation with HMRC each offshore centre was given a penalty basis, we suggest a small change to Schedule 24, without bringing in another definition of 'unacceptable' avoidance. Our proposal is that if a case is caught by the GAAR, and confirmed by the panel or on appeal, and that is not mentioned on the tax return, it is treated as unprompted failure to take reasonable care, so immediately leads to an automatic penalty in the 35% to 70% range.

5.6 The risk of an automatic high penalty would be a significant disincentive to participating in a risky scheme.

5.7 We are aware that there are concerns that DOTAS in respect of VAT has not worked as well as in areas of direct tax. That aside, there is an argument that the proposals should cover VAT and other EU taxes (eg customs duty) but only where it is compatible with the principles of EU law eg disclosing the names of people who advised on a number of schemes held to be abuses.

5.8 As proposed, the penalties for other users of failed schemes appear especially open to abuse by HMRC and potentially unfair. Particularly objectionable is the idea that a penalty applies automatically if HMRC consider the taxpayer's view on distinguishing features isn't reasonable, leaving the taxpayer to pursue an appeal. Certainly if that happens and the tribunal agrees there are distinguishing features HMRC should be liable for full taxpayer costs.

5.9 ***Distinguishing from the lead case***

The consultation document suggests that the penalties should apply 'where a case is **relevant** to another taxpayer'. It must be much clearer that the schemes are the same before penalties for failure to settle should apply. We think that the 'winning' case should be **determinative** of another taxpayer's position. This is because cases are often dependent on facts and circumstances, as demonstrated by *Deutsche Bank v UBS* and the *Rangers* cases.

5.10 It is contrary to the principles of natural justice if HMRC can say one taxpayer has lost at tribunal so therefore another taxpayer should settle or face penalties, when there is a right of appeal.

5.11 It is also not sufficient that a First Tier Tribunal decision be considered to be *determinative*. This should properly be a Supreme Court decision, or, at least, a Court whose judgment can set precedent, and in any event only after the time period for an appeal has passed, if relevant.

5.12 There also needs to be more information available as to the nature of the failed scheme, to allow taxpayers to consider their position. Will it be practical or possible to provide other taxpayers with sufficient information, including all relevant facts, without contravening the 'failed' scheme's taxpayer's right to confidentiality?

5.13 We suggest that the tribunal/Court (as with costs) should have the right to determine whether the penalties should apply on grounds of whether the taxpayer was reasonable to pursue the case. If found to be wholly unreasonable, then the taxpayer should face the additional penalty.

5.14 The follower taxpayers usually seek some basis for distinguishing their cases on the facts from the representative case that has lost at hearing. If the same DOTAS number has been used, the scheme as implemented must of necessity be materially similar in the case of all users. HMRC could, quite reasonably insist when choosing the 'representative case' that follower users will not seek to distinguish their cases if the representative case loses. Those unwilling to make this concession will be identified at an early stage in the process to litigation and can be asked to justify their basis for distinguishing their cases from the representative case. It will become reasonably clear at an early stage whether these taxpayers are behaving reasonably. A more rigorous approach to case-management in multi-user scheme litigation might therefore enable HMRC to achieve its desired outcome without the need for additional regulation.

5.15 ***Lead case provisions***

HMRC solicitors' office have rarely used the lead case provisions in the First-tier Tribunal (FTT), and, as far as we are aware, have never asked the FTT to make a Group Litigation Order (GLO). GLOs seem to have only been used in the High Court so far, but their advantage, from a case management perspective, is that the court orders that this is the only case on this point and those not involved are barred from litigating the point in the future. Under the FTT lead case provisions taxpayers have the right to follow a nominated lead

case and to say within 60 days of the decision whether they agree to be bound by the case or fight on.

5.16 HMRC are proposing that if they continue to contest the case, then the reasonable care element of the penalty should be revisited at that point in time. This is unnecessary if an automatic failure to take reasonable care penalty will be imposed if the GAAR is in point.

5.17 We agree with the proposal in 5.13 for HMRC to inform taxpayers individually (rather than via their website per 5.12). The onus must be on HMRC.

6. DOTAS – Prescribed information – Chapter 6

6.1 We are concerned with the changes proposed.

6.2 We do not think that the DOTAS proposals as set out will work, unless they are restricted to standardised products. It is not workable to suggest that a large volume of documentation should be supplied with the disclosure of a bespoke scheme, not least because many of those documents will not be available at the time the disclosure must be made. As has been pointed out to the PAC by the head of PwC, plenty of disclosed schemes are not implemented.

6.3 **Notifying scheme but not putting it on the return.**

HMRC can make a discovery so have ample time. We accept that HMRC do need a power to ask promoters and intermediaries for details of clients who have used any scheme (or HMRC could just ask to see the bills delivered?).

6.4 **Provision of prescribed information**

We do wonder if the requirement to provide additional information, including copies of all information provided to the client, will lead to a reduction in the willingness of promoters to provide clients with information. This would reduce transparency and put the taxpayer in an invidious position. So perhaps generic material and factual/technical analysis information should be provided, but not all client specific advice.

7. Assessment of impacts - Chapter 8

7.1 The ‘impact on individuals’ indicates that HMRC think that most scheme users would be higher rate taxpayers. However, many basic rate taxpayers are pulled into employment schemes, where they have little understanding of the scheme they are effectively joining.

8. The Chartered Institute of Taxation

8.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 17,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation

8 October 2013