



HM Revenue  
& Customs

# Strengthening the Tax Avoidance Disclosure Regimes

**Summary of Responses**  
December 2014

# Contents

Foreword	3
1. Executive Summary	4
2. Introduction	5
3. What has to be disclosed?	7
4. Who has to disclose?	14
5. Protecting whistleblowers and good administration	18
6. Draft Financial Product Hallmark	21
7. VAT Disclosure	24
8. Further Issues	26
9. Next Steps	28
Annexe A: List of stakeholders consulted	29
Annex B: Consultation process and statistics	30

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# Foreword

This Government has taken strong and sustained action to tackle tax avoidance and will continue to be relentless in addressing it where it arises. It is not right that a small minority continue to seek out unacceptable ways to reduce the amount of tax they pay and we will ensure that HMRC has the tools to tackle such activity.

We have made considerable progress already, with the introduction this year of Accelerated Payments and Follower Notices. Under these powers, HMRC has, since July, issued over 1750 notices requiring payment of £400m of disputed tax. Over the next fifteen months, HMRC will issue 43,000 notices requiring payment of over £7bn. This is essential to put those who try to avoid paying tax on the same footing as the vast majority of British taxpayers who pay their tax up front. This document sets out some of the Government's next steps to build further on its work.

The Disclosure of Tax Avoidance Schemes (DOTAS) regime is key to Accelerated Payments. The existence of a DOTAS scheme reference number is one of the main criteria for issuing an Accelerated Payment notice to users of a scheme.

More generally the regime supports HMRC's fight against avoidance and should be updated and refined regularly to ensure it captures all avoidance. As avoidance policy evolves, behaviour changes and the development of avoidance schemes alters. It is important that DOTAS keeps pace with these developments. We will therefore continue to develop our DOTAS policy and the regime to ensure it works effectively and fairly to detect avoidance that is being designed or marketed now.

The time is right to strengthen and update DOTAS so that promoters who design schemes employing contrived arrangements with the intention of selling them to people who want to avoid paying their fair share cannot get around disclosing those schemes to HMRC. These changes will ensure HMRC has the tools it needs and can continue to take action against avoidance.

The proposals in the consultation sent out a strong message that we are committed to retaining and strengthening the disclosure regimes as key tools in tackling tax avoidance. The Government intends to implement the proposals as set out in this document and will use the consultation responses to help frame the legislation.



**David Gauke**

**Financial Secretary to the Treasury**

# 1. Executive Summary

- 1.1 The consultation “Strengthening the Tax Avoidance Disclosure Regimes” was published on 31 July 2014 and closed on 23 October 2014. It set out proposals to improve the information available to HMRC through the Disclosure of Tax Avoidance Schemes regime (DOTAS) by changing the descriptions of what has to be disclosed and to strengthen compliance with the rules to ensure that DOTAS supports Accelerated Payments. Draft legislation to require arrangements involving certain financial products to be disclosed was included in the consultation.
- 1.2 The consultation also sought views on how the VAT Avoidance Disclosure regime (VADR) might be updated and improved and included a final section seeking views on what more could be done to ensure HMRC receives the information it needs to effectively detect and tackle marketed avoidance.
- 1.3 Response to the consultation was broadly supportive, with respondents understanding and agreeing with the Government’s aims to ensure that DOTAS identifies avoidance and that promoters should not be able to find ways around disclosing tax avoidance schemes. The main area of concern was to ensure that the changes being proposed to the hallmarks which describe the characteristics of arrangements that must be disclosed are targeted so that they describe the avoidance which HMRC needs to be made aware of while not inadvertently requiring disclosure of arrangements which do not amount to avoidance.
- 1.4 The Government intends to implement the proposals made in the consultation as set out in this response document. In doing so, it will pay close attention to the responses received suggesting how the hallmarks can be targeted to ensure that they accurately identify the types of arrangement HMRC needs to identify.
- 1.5 It is proposed to include legislation in Finance Bill 2015 to implement the changes required to the DOTAS rules in Part 7 of the Finance Act 2004. Regulations to make changes to the hallmarks will be consulted on next year before coming into effect after Royal Assent to Finance Bill 2015.

## 2. Introduction

- 2.1 As part of the Government's strategic response to tackling tax avoidance, the "Strengthening the Tax Avoidance Disclosure Regimes" consultation was published on 31 July 2014. The document set out proposals to ensure the DOTAS regime keeps pace with developments in the avoidance landscape, continues to work fairly and consistently, and supports the introduction of Accelerated Payments. It also sought views on how the VAT Avoidance Disclosure regime (VADR) can be updated and posed a wider question about what more could be done to ensure HMRC receives the information it needs to effectively detect and tackle marketed avoidance, now and in the future.
- 2.2 This consultation considered options to improve the information available to HMRC through DOTAS. In particular it:
  - proposed changes to the descriptions of schemes required to be disclosed;
  - proposed changes to ensure continued compliance with the rules by promoters not resident in the United Kingdom;
  - proposed changes to the penalties applicable to users who fail to notify their use of a scheme;
  - considered the introduction of protection for those who wish to volunteer information about breaches of the DOTAS rules to HMRC; and
  - considered a number of other changes to improve the regime's operation generally, including processes around the issue of scheme reference numbers to provide greater certainty regarding how HMRC may respond to the notification.
- 2.3 Chapters 2 and 5 considered changes to the hallmarks which describe in regulations the characteristics of arrangements that must be disclosed under DOTAS to ensure that the regime operates effectively, delivers its policy objectives and supports Accelerated Payments consistently.
- 2.4 Chapter 2 proposed changes to three of the hallmarks to better describe schemes comprising standardised tax products, those designed to create losses for use by individuals and extending the scope of the existing Inheritance Tax (IHT) hallmark so that avoidance schemes designed to avoid or reduce IHT have to be disclosed. Chapter 5 exposed draft regulations for comment for a new hallmark describing schemes involving the use of financial products.
- 2.5 Chapter 3 set out proposals to broaden the meaning of the term "promoter". The proposals aimed both to ensure continued compliance with the rules by promoters not resident in the United Kingdom and to enable HMRC to identify users and promoters of undisclosed avoidance schemes.

- 2.6 Chapter 4 proposed the introduction of protection for people who wish to volunteer information to HMRC about potential breaches of the DOTAS regime. The chapter also proposed extending the period within which HMRC must decide whether to issue a scheme reference number to 90 days. This will provide greater certainty that where a reference number is issued by HMRC it is unlikely to be withdrawn and the arrangements will therefore be within the Accelerated Payment regime.
- 2.7 Chapter 6 sought views on how the VAT Disclosure regime can be updated.
- 2.8 Chapter 7 asked what more could be done to ensure HMRC receives the information it needs to detect and tackle marketed avoidance.

### Overview of responses

- 2.9 HMRC received 40 responses to the consultation including written responses and also comments during meetings. A breakdown of the capacities in which respondents made their comments is below:
- 13 from representative bodies
  - 6 from consultants
  - 11 from accountancy firms
  - 7 from law firms
  - 3 from other businesses
- 2.10 A list of respondents to the consultation, excluding individuals, is in Annex A.
- 2.11 The Government is grateful for the responses to the consultation document.

### 3. What has to be disclosed?

#### Background:

- 3.1 The “Strengthening the Tax Avoidance Disclosure Regimes” consultation document set out proposals to ensure that tax avoidance that is currently being promoted or newly implemented is disclosed and that promoters cannot sidestep disclosure. In particular it proposed:
- Redesigning the Standardised Tax Product hallmark to consider the overall product being offered rather than focussing on the detail of the documentation or transactions. Refocusing the hallmark in this way will enable the removal of grandfathering. This will ensure that any scheme which triggers the revised hallmark must be disclosed and that promoters cannot contend that the scheme relies in some way on features used elsewhere before this hallmark was introduced to avoid having to disclose the scheme now.
  - Refining the Loss hallmark to ensure that schemes intended to generate contrived losses for individuals have to be disclosed. The revised Loss hallmark would work in conjunction with the proposed new Financial Product hallmark.
  - Extending the scope of the Inheritance Tax (IHT) hallmark to require disclosure of IHT avoidance schemes which are not detected by the current hallmark. It is proposed that this will apply where a scheme is newly devised and sold, and where new variants of pre-existing schemes are brought to market, after the changes take effect.

#### General Responses on what needs to be disclosed:

- 3.2 The majority of responses were supportive of the Government’s commitment to tackle tax avoidance. Respondents agreed that, in the changing avoidance landscape, it is necessary to strengthen DOTAS and reconsider what has to be disclosed.

*“We agree that it is critical that the UK’s disclosure regimes keep pace with developments in the avoidance landscape and the wider legislative framework, so that they work fairly and consistently, and we support the principle underpinning the disclosure of tax avoidance schemes (DOTAS) regime.”*

- 3.3 A number of respondents felt that a greater administrative burden would be incurred if the targeting of the hallmarks is not accurate. Respondents suggested the use of lists or comprehensive guidance to exclude existing arrangements of which HMRC is aware and finds acceptable.

## Government response

- 3.4 The Government is grateful for all those who responded to the consultation and welcomes the support and suggestions received. The Government has made clear that, to retain the effectiveness of the DOTAS regime and to ensure it supports Accelerated Payments fairly and consistently, it needs to detect avoidance that is being sold and used now.
- 3.5 The Government acknowledges concerns that inaccurate targeting of the hallmarks could result in benign and acceptable arrangements being caught. HMRC equally does not want disclosure of ordinary tax planning arrangements or genuine retail saving and investment products that result in a tax saving intended by Parliament. The Government would like to thank respondents for the examples provided of such products to help in designing the detail of the changes to the hallmarks.

## The Standardised Tax Products Hallmark

- 3.6 This hallmark was designed to capture what are often referred to as “mass market schemes”, the fundamental characteristic of which is the ease with which the schemes can be replicated rather than how they are dressed up to appear bespoke to a particular client. The policy objective has been to identify schemes where the client effectively purchases a prepared tax product that requires little modification to suit their circumstances.
- 3.7 The consultation proposed changing how the tests operate to determine whether arrangements are within the hallmark by placing a focus on the overall product being offered by the promoter rather than focusing on the standardisation of documentation and transactions.
- 3.8 It is also proposed to remove the grandfathering provision which exempts arrangements from disclosure if they are substantially the same as anything made available before the hallmark was introduced. This will ensure that any scheme which triggers the revised hallmark must be disclosed and that promoters cannot contend that the scheme relies in some way on features used elsewhere before this hallmark was introduced to avoid having to disclose the scheme now.

Question 1 – Will removing grandfathering in this way deliver greater consistency in the application of this hallmark?

Question 2 – Do you foresee any issues with removing grandfathering prospectively for schemes made available or implemented from a certain date?

- 3.9 The majority of respondents agreed that removing grandfathering would deliver greater consistency. It was felt that this would ensure the hallmark applied to all relevant arrangements, irrespective of when they were first made available to clients. One prominent accounting body said that:

*“The proposed legislation to remove grandfathering will prevent promoters from seeking exemption on the basis that a new scheme is somehow a slightly modified version of a scheme that existed before 1 August 2006, thus providing greater consistency in the application of this hallmark.”*

- 3.10 Respondents from the accountancy profession did not consider that removing grandfathering would create particular difficulties as they felt few grandfathered ‘products’ exist that remain effective and about which HMRC is unaware. In addition, respondents were particularly supportive of the Government’s decision to remove grandfathering as long as arrangements already entered into prior to the change taking effect are not affected.
- 3.11 Some felt that removing grandfathering was not necessary and some were concerned that a number of inoffensive and benign arrangements would have to be disclosed if the targeting was not accurate. A number of respondents discussed the merits of having clear guidance so that it was evident which schemes would require disclosure, thus avoiding any unnecessary compliance burdens.

#### Government Response

- 3.12 The Government welcomes the overall consensus that removing grandfathering will deliver greater consistency and acknowledges concerns that simply removing grandfathering without also changing how the hallmark is targeted could catch ordinary tax planning arrangements or retail products. It will use the suggestions made and examples provided to help ensure this does not happen.

Question 3 – Will recasting the hallmark to consider the overall product being offered rather than the underlying documentation and scheme structure ensure greater consistency in the application of the hallmark?

Question 4 – Do you agree that widening the main purpose test to “the, or one of the, main purposes” will help ensure the policy objective is met?

Question 5 – Would including additional characteristics such as the existence of a fighting fund in this hallmark ensure disclosure of all schemes which include such elements or would a separate hallmark be a better way to achieve this?

- 3.13 Responses to question 3 were mixed but constructive. Respondents recognised the Government’s aims with some saying that it was a ‘positive step’. Others felt that the degree to which it would ensure greater consistency lay in the drafting of the legislation.
- 3.14 Responses to question 4 centred on the difficulty in ensuring that arrangements, where tax might be a relevant consideration but not the main purpose for entering into the product, are not caught where there is no intention to avoid tax. Of those responses which did address question 4, a

number felt that widening the main purpose to “the, or one of the, main purposes” might not be necessary when considering some of the other alterations to the hallmark. One response felt that widening the purpose test would ensure the policy objective is met:

*“Yes. Particularly in the case of schemes such as the so-called ‘Section 131’ schemes which by their nature require investors and promoters to maintain that tax is not the main purpose of investing, but which it is difficult to see in practice why investors would invest without some consideration to the perceived tax benefits.”*

- 3.15 Some respondents suggested that if the hallmark were recast as in question 3 then the main purpose test should remain unchanged and additional characteristics as suggested in question 5, might be used to filter out ordinary tax planning arrangements, thus leaving only avoidance.
- 3.16 Responses in relation to question 5 and the existence of a fighting fund were equally divided. A number felt that including this as part of the hallmark was a good idea: *“We feel an inclusion in this hallmark would be most appropriate and assist with the subjective approach one might have to take at looking at the ‘product’ as a whole.”*
- 3.17 Some saw the merit of having a stand-alone hallmark: *“It would seem cleaner to make this is [sic] separate hallmark.”* Others felt that the creation of a fund to finance any challenge to HMRC’s views on a particular issue does not necessarily characterise tax avoidance and so should not be considered as part of a stand-alone hallmark nor as a way of identifying tax avoidance: *“the existence of a ‘fighting fund’ is not exclusive to circumstances involving tax avoidance.”*
- 3.18 There was also a broad view that defining what is meant by a ‘fighting fund’ in the context of avoidance would be difficult and potentially something which those intent on avoiding disclosure could circumvent relatively easily.

### **Government Response**

- 3.19 The Government acknowledges that the revisions to how this hallmark operates need to be well targeted so that tax avoidance that is being marketed or newly implemented following the introduction of the revised hallmark must be disclosed but that the hallmark should not require disclosure of ordinary tax planning or genuine retail savings and investment products. This will be achieved through careful drafting.

### **The Loss Hallmark**

- 3.20 The consultation sought views on proposals to widen the benefit test in this hallmark from *‘the main benefit’* to *‘the main benefit or one of the main*

'benefits' and adding a specific safeguard requiring consideration of the extent to which the loss arising for tax purposes differs from the economic cost to the client of implementing the scheme, even though this should already form part of the consideration of the benefit accruing to the users of the scheme under the existing hallmark.

- 3.21 The Government also sought views on a draft new Financial Products hallmark in Chapter 5 of the consultation and acknowledged that the new hallmark may help ensure that schemes designed to create artificial losses are disclosed. This is because many such schemes are only able to generate a loss for tax purposes which differs from the real economic position because of the way in which the scheme is financed.

**Question 6 – Do you think that a combination of the new draft Financial Products hallmark and the revisions proposed to the Loss hallmark will result in more tax avoidance schemes being disclosable without adversely impacting on normal business activity?**

- 3.22 A number of respondents agreed that the proposed alterations to the Loss hallmark would result in a greater number of disclosures and that consideration of the differential between the real economic cost and tax result would provide an appropriate safeguard. One respondent commented: "*The proposed revisions are closer to a workable model which would reduce the risk of catching genuine business ventures*".
- 3.23 Others felt that the proposal to change the benefit test from 'the main benefit' to 'one of the main benefits' might capture more schemes than HMRC intended and as a consequence increase the administrative burden for firms and HMRC alike.

### **Government Response**

- 3.24 The Government remains determined to ensure that those who develop and market schemes which create tax losses for individuals which bear little or no resemblance to the real economic impact on those individuals should be required to disclose those schemes. But in achieving this objective the Government recognises the concerns expressed by some respondents, which are similar to views expressed in response to the earlier *Lifting the Lid on Tax Avoidance Schemes*<sup>1</sup> consultation, that ordinary business start-up losses should not become disclosable.
- 3.25 The Government believes that the proposed revisions to this hallmark, suitably worded, in conjunction with the new Financial Products hallmark and consideration of the inclusion of additional material in the DOTAS guidance in this respect, will achieve this.

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<sup>1</sup> <http://www.hmrc.gov.uk/budget-updates/11dec12/lifting-the-lid.pdf>

## Inheritance Tax

- 3.26 The consultation set out proposals to broaden the IHT coverage of DOTAS to obtain disclosure of schemes designed to avoid IHT. The proposals included:
- extending the scope of the existing hallmark so that schemes and arrangements designed to avoid or reduce IHT on lifetime transfers or on death have to be disclosed;
  - removing the current grandfathering provision so that schemes which are newly devised, implemented or sold to clients after the proposed changes take effect, would be disclosable;
  - including IHT within the scope of other hallmarks such as confidentiality and premium fee, so that anything particularly innovative or where a promoter seeks to design their way around the detail of the revised IHT hallmark would have to be disclosed;
  - safeguards to ensure that the hallmark is appropriately targeted so that only arrangements which an informed observer could reasonably conclude are an IHT avoidance scheme or arrangement would be disclosable and the straightforward use of reliefs and exemptions would not be caught.
- 3.27 An Accelerated Payment notice can only charge tax from the date IHT would have been payable if someone had not entered into an avoidance scheme. Where someone enters a scheme to avoid IHT on death, a notice cannot accelerate the tax payment to before death. IHT can arise on certain limited events during a person's lifetime. Only in those situations would an Accelerated Payment be due before death.
- 3.28 The consultation sought views on whether the proposed approach would ensure that the revised hallmark was appropriately targeted.

**Question 7 – To what extent do the proposals strike the right balance between ensuring that IHT avoidance is brought within DOTAS but that legitimate estate planning is not disclosable? If not, how might this balance be best achieved?**

**Question 8 – Does the proposed approach ensure so far as possible that legitimate claiming of reliefs and exemptions does not have to be disclosed? If not, what alternative proposals would achieve that aim?**

- 3.29 There was general support for the proposals in the consultation but many respondents were concerned whether the changes would be well targeted to identify the avoidance HMRC wants to know about. Respondents wanted to ensure that the changes would not require disclosure of mainstream benign and inoffensive estate planning arrangements that seek to do no more than use available reliefs and exemptions in a straightforward manner.
- 3.30 Respondents generally felt that the existing hallmark should be amended to catch arrangements designed to avoid IHT. “*There is little justification for IHT*

*schemes to be treated differently from other tax schemes...*" Bringing IHT into the confidentiality hallmark in particular may help act as a backstop to catch particularly innovative arrangements that may not be easily included in a well-targeted but more general IHT hallmark.

- 3.31 Some respondents from the insurance industry indicated that they felt the current proposals might be drafted too widely and expressed concern that the withdrawal of grandfathering for IHT in particular might force the disclosure of estate planning arrangements of which HMRC is already aware and considers to be acceptable.
- 3.32 A number of respondents agreed that removing grandfathering prospectively, to ensure that disclosure is required for schemes newly sold or implemented after the change, would achieve the aims set out in question 8. Others suggested that a regularly updated list and comprehensive guidance would help advisors understand what would and wouldn't need to be disclosed.

*"...the proposal in paragraph 2.44 to introduce a definition of acceptable tax planning into the IHT hallmark is encouraging. This is vital if the revised Inheritance Tax hallmark, particularly combined with the effective removal of grandfathering is not to bring mainstream family tax planning within the DOTAS regime (which we understand is not HMRC's intention)."*

### Government Response

- 3.33 The Government recognises the complexities involved in designing a hallmark for IHT that is well targeted and which does not catch inoffensive use of reliefs and exemptions or arrangements which are not made for tax avoidance purposes. Nonetheless the Government remains committed to ensuring that schemes and arrangements used to avoid IHT are disclosable.
- 3.34 The Government welcomes the examples provided and suggestions made by respondents about how the hallmark might be structured and will consider them in detail when finalising the hallmark. It will also incorporate examples of disclosable and non-disclosable schemes and arrangements in the guidance as requested.

## 4. Who has to disclose?

### Background:

- 4.1 The “Strengthening the Tax Avoidance Disclosure Regimes” consultation set out proposals to ensure that, if a promoter who is not resident in the United Kingdom fails to disclose a scheme, then the requirement to disclose would attach to any person resident in the United Kingdom who is working with the offshore promoter. It also proposed expanding the population from whom HMRC can obtain information to enable it to identify persons who may be required to disclose in the event that a promoter does not disclose.

### General responses

- 4.2 Although the Government received fewer responses to this part of the consultation, the general consensus of those who did respond was that the proposals should achieve the intended policy objective.
- 4.3 Some suggested that the change should extend to make any person who acts as an intermediary of a promoter into a promoter in their own right but acknowledged that such persons may not have access to the material or knowledge of what are often extremely complex arrangements to actually make a disclosure.
- 4.4 Others who responded were concerned that persons currently excluded from the meaning of a promoter for sound reasons could find themselves having to disclose where they have done nothing more than provide advice on a single aspect of proposed arrangements.

Question 9 - To what extent will these changes help ensure that HMRC is able to identify those responsible for making a disclosure where people are seeking to sidestep their obligations?

Question 10 - Do you think this will help ensure there is consistent treatment of users of avoidance schemes and their promoters irrespective of where the scheme was designed?

Question 11 - To what extent would requiring persons working with the offshore promoter to disclose ensure the proposed special rule applies appropriately?

Question 12 - Are there any other steps which could be taken to strengthen DOTAS in this area to ensure that those required to disclose comply with their obligations?

- 4.5 Responses were mixed but the majority were supportive of what the Government is seeking to achieve. The larger accountancy firms agreed that the proposals would help identify those required to disclose, with one firm suggesting that the proposals do not go far enough and that, “*the end user*

*should have a positive obligation to disclose unless that disclosure has been made by another person in the chain”.*

- 4.6 A number of respondents agreed with question 10, in particular with one saying, “*Clearly offshore promoters (and their clients) should comply with their DOTAS obligations, as do the vast majority of promoters. We agree that the proposed measures should assist in improving compliance by them.*”
- 4.7 Some responses considered that the proposals in relation to expanding the population, from whom HMRC can obtain information to identify users of undisclosed schemes, might be too broad. They felt that it would be necessary to ensure that the definition of ‘introducer’ wasn’t drawn too broadly and that it works in relation to legal professional privilege to avoid confusion amongst agents in understanding their roles as ‘introducers’ or ‘promoters’.
- 4.8 Around half of those who responded to question 11 were very supportive of a rule to place a requirement to disclose onto UK resident persons working with an offshore promoter on the basis that such promoters would need a UK intermediary to enable them to sell into the UK. Their suggestion was that this would require any UK contact to disclose, making avoidance using offshore promoters less viable.
- 4.9 A number of respondents shared hesitations over the term ‘working with’, and felt that further clarification would be needed. Others agreed with the principle but had some reservations over whether the proposals will actually enforce compliance, or whether people will find another way to sidestep their obligations.
- 4.10 Responses to question 12 were varied, with some suggesting that no further steps were necessary, and others agreeing that the proposed changes were appropriate: “*we would like to see more responsibility placed on the introducer networks, and therefore we support HMRC’s proposals in this area.*” Others felt that HMRC might already have the necessary powers at its disposal and that HMRC should: “*use the existing powers to force disclosure and penalise promoters who do not meet their obligations.*” One respondent cited the provisions brought in by Part 5 of the Finance Act 2014, particularly with regard to conduct notices and monitored promoters.

### Government Response

- 4.11 The Government welcomes the general view that disclosure should be fair and consistent and that the rules should be adequately drawn to ensure that promoters cannot avoid disclosure of their schemes by moving some or all of their business out of the UK.
- 4.12 The Government acknowledges that this rule needs to be well targeted and, having considered the responses, believes that a combination of the existing definition of a promoter, coupled with targeted changes to the regulations

which exclude certain persons from being treated as a promoter, will enable the objective to be achieved.

- 4.13 The Government also considers that the existing definition of introducer is drawn widely enough and will change the information power which applies to introducers so that HMRC can track the supply chain in both directions. This will enable HMRC to identify both users and promoters of undisclosed schemes.

#### **Penalties for scheme users who fail to correctly report details of a disclosed scheme**

- 4.14 The consultation proposed increasing penalties for scheme users who fail to correctly report their use of a disclosed scheme to HMRC on their tax return. It proposed doing this by aligning them with the penalties applicable to users of avoidance schemes issued with a reference number under the Promoters of Tax Avoidance Schemes legislation introduced by Finance Act 2014.

**Question 13 - Do you agree that aligning penalties in this way is proportionate given the significant financial gains users can obtain through failing to correctly report their use of a disclosed tax avoidance scheme?**

- 4.15 Respondents supported the alignment of penalties, including several representative bodies, seeing no reason why the penalties should not be the same for both regimes. “*We agree that it is appropriate to align the penalties for failing to correctly report the use of a disclosed tax avoidance scheme with those penalties that apply for Promoter Reference Numbers.*”
- 4.16 Some respondents suggested in applying any increased penalties, it would be important to distinguish between those who make an innocent mistake in reporting the information and those who deliberately omit it or attempt to mislead HMRC. Others commented that penalties imposed for promoters and those engaged in deliberate behaviour should be much more severe: “*HMRC don't go far enough in this area.*”

#### **Government Response**

- 4.17 The Government welcomes the consensus that those who do not report their use of a scheme correctly should face tougher penalties. The penalties for users who fail to report their use of a scheme correctly will be increased in line with the proposals in the consultation by amending section 98C of the Taxes Management Act 1970.
- 4.18 HMRC will revise the form which promoters must send to clients to inform them of the scheme reference number issued by HMRC (form AAG6) to make it clearer how the client must report that information on their tax return. The form will also make absolutely clear that failure to do so correctly will render the person liable to the revised level of penalty. HMRC will publish the form in draft for comment.

## Notifying HMRC of employee users of employment schemes

- 4.19 Currently different rules apply to determine who receives the scheme reference number and who must report it to HMRC where an employer implements a scheme involving its employees. The consultation proposed changing these rules so that employees are provided with the reference number and other information so that they are fully informed of their involvement in a tax avoidance scheme. It proposed that the employer would, in future, have to report information about those employees to HMRC.

Question 14 - To what extent will this help ensure employees are fully aware of the fact that they are becoming involved in tax avoidance?

Question 15 - Do you think that the Government's preferred option is the more effective and least burdensome way to achieve this objective?

Question 16 - Are there other ways in which this information could be cost effectively obtained from employers or employees?

- 4.20 Most responses were supportive of, and echoed, the Government's sentiments that employees should be made aware of: the fact that their employer had implemented a scheme which involves them; the risks to which they were therefore exposed; and that they may receive an Accelerated Payment notice. However, a number of responses concluded that employees might still not be made fully aware. One cited an example of where employers might attempt to conceal the information in contractual small print.
- 4.21 The overwhelming majority agreed with the Government's preferred option to place the requirement to report employee details on the employer. While some felt that this would create additional administrative burdens for employers, they agreed that this would be the least burdensome system for all involved, and significantly better than if it were to be incorporated within real time information (RTI) or placed on employees. A few respondents did not agree with this but did not offer alternatives.
- 4.22 In relation to question 16, one or two alternatives were put forward, such as, expanding the existing manual form AAG4, requiring a promoter to provide the information, or putting a tick box on the P35.

## Government Response

- 4.23 The Government is reassured that most respondents agree with its aims to provide both employees and HMRC with improved information and will implement the proposed changes.

## 5. Protecting whistleblowers and good administration

### Background:

- 5.1 The “Strengthening the Tax Avoidance Disclosure Regimes” consultation set out a proposal to introduce protection for people wishing to provide information voluntarily to HMRC about potential breaches of the DOTAS rules. They may become aware of such information through their work or other activities but be prevented from passing this to HMRC because of internal governance or rules around customer confidentiality.
- 5.2 Additionally, and to address concerns raised in the *Tackling Marketed Tax Avoidance consultation*<sup>2</sup>, it set out a proposal to provide greater certainty in relation to Accelerated Payments by extending the period in which HMRC can issue a scheme reference number from 30 days to 90. This will allow time for dialogue between HMRC and the promoter where it is not immediately clear whether a reference number is required and whether the scheme will therefore be subject to the Accelerated Payment rules. The objective is to provide greater certainty for scheme users and to reduce situations where a number has to be issued because the 30-day period is ending, only to be withdrawn later.

### Whistleblowers

- 5.3 The Government received few responses to this proposal, the majority of which welcomed the introduction of a safeguard for whistleblowers.

**Question 17 - To what extent would a provision of this nature provide a suitable safeguard to those wishing to provide information about avoidance to HMRC?**

- 5.4 Those who responded to this question demonstrated clear support for the provision and the need to protect those who provide HMRC with information: “*we believe that the existence of such a provision would be valuable.*”
- 5.5 Some respondents would welcome further clarification in order to understand exactly how a provision would work and law firms were interested to understand how the issue of Legal Professional Privilege would interact with the proposal.
- 5.6 Others were content with the provision as long as it only affects those not complying with DOTAS: “*Provided this is strictly limited to cases where there*

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<sup>2</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/298554/Summary\\_of\\_responses\\_TMTA\\_27032014\\_Final\\_v1.0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/298554/Summary_of_responses_TMTA_27032014_Final_v1.0.pdf)

*is suspected non-compliance with DOTAS then this would be a welcome approach.”*

- 5.7 Among those who were less keen there was a concern that whistleblowing might not be carried out as intended: “*we are concerned that it could lead to inappropriate whistle blowing for malicious reasons.*”

#### Government response

- 5.8 The Government thanks respondents for their comments and remains committed to providing protection for those wishing to provide information or documents to HMRC voluntarily about DOTAS. Finance Act 2004 will be amended to introduce a new section into DOTAS providing protection to a person giving information relating to potential failures to comply with DOTAS legislation.

#### Good Administration

- 5.9 The consultation proposed extending the period in which HMRC can issue a reference number from 30 to 90 days. This will help ensure that, where additional information is needed before deciding whether to issue a reference number, it will not be necessary to issue a number because the 30-day deadline is approaching, only to withdraw later.
- 5.10 However, as set out in the *Tackling Marketed Tax Avoidance* consultation, it is important to ensure that promoters do not use DOTAS as a way of obtaining advance clearance by repeatedly tweaking schemes and resubmitting them to ask if they still need to be disclosed until they get a favourable response.

**Question 18 - To what extent would a threshold condition in the High Risk Promoters rules ensure promoters do not seek to use DOTAS as a test-bed or clearance regime when devising new schemes and what other steps might the Government take to prevent abuse of this sort?**

- 5.11 The majority of those who answered this question agreed in principle that a threshold condition of this sort could be useful: “*We can see the merit in ensuring that promoters do not ‘use’ the regime as a de facto advance clearance regime.*”
- 5.12 However, respondents did not consider that promoters would be interested in engaging with HMRC if their desired objective was to engineer tax planning schemes which remained outside of the DOTAS regime: “*...It seems illogical that such promoters would use DOTAS as a test bed or clearance regime when the intention is to stay outside the regime...*”

## Government Response

- 5.13 The Government was interested in the range of views expressed on this question and noted that the majority agree that promoters should not be allowed to use DOTAS as a test-bed for scheme development. The Government is determined to ensure that DOTAS is not abused by unscrupulous promoters and will look at the best way to ensure this does not happen.

**Question 19 - To what extent would the preferred option deliver a balance between providing greater certainty for the taxpayer while ensuring HMRC can give due consideration to the need to issue a SRN?**

**Question 20 - Are there other ways in which this could be achieved?**

- 5.14 Virtually all respondents agreed with the Government's preferred option of increasing the period within which a reference number can be issued to 90 days. Respondents felt that this would be the best way to provide the promoter and users with the certainty in light of Accelerated Payments.
- 5.15 Some respondents expressed a view that HMRC should not routinely use the full 90 days because this would create uncertainty in relation to genuine commercial transactions which may inadvertently trigger a requirement to disclose. The majority however were content with the extension to 90 days but would welcome a shorter amount of time in the majority of cases.
- 5.16 There were very few responses to question 20, many of which were suggested addendums to the Government's preferred option, including a public commitment to only using the 90 days where absolutely necessary. A number of respondents considered only using the extension to 90 days after agreement from both parties.

## Government response

- 5.17 The Government will increase the period from 30 to 90 days and in doing so understands the views expressed that 90 days should not become the default period.

## 6. Draft Financial Product Hallmark

### Background:

- 6.1 The “Strengthening the Tax Avoidance Disclosure Regimes” consultation exposed draft regulations describing a new Financial Products hallmark for comment. This hallmark was originally proposed in the 2012 *Lifting the Lid* consultation<sup>3</sup> but in the response to that consultation the Government accepted that more work was required to refine the targeting.
- 6.2 The draft hallmark proposes that, where arrangements include at least one of the financial products listed, the arrangements must be disclosed where:
  - the main benefit, or one of the main benefits, of including the financial product(s) is to give rise to a tax advantage; and
  - the financial product contains at least one term which is unlikely to have been entered into by the persons concerned were it not for the tax advantage, or, the arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained.
- 6.3 The draft hallmark includes safeguards such that disclosure is not required if, for example, the only financial product included in the arrangements is an ISA or the promoter is a bank and HMRC has confirmed, or could reasonably be expected to confirm, that the arrangements are acceptable transactions under the Code of Practice on Taxation for Banks.

### General Response

- 6.4 The Government received a number of varied responses. Some respondents questioned why an additional hallmark is needed but most agreed that the new drafting was an improvement on the previous version proposed in *Lifting the Lid* and welcomed the inclusion of the clause relating to banks whose activities are covered by the Code of Practice on the Taxation of Banks.
- 6.5 However, there was a general consensus that the current wording of Conditions 3 and 4, each of which describe the features of the financial product which would cause the arrangements to be disclosed, could require ordinary retail products to be disclosed.

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<sup>3</sup>[http://webarchive.nationalarchives.gov.uk/20120817112111/http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE\\_PROD1\\_032207](http://webarchive.nationalarchives.gov.uk/20120817112111/http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_032207)

## Government Response

- 6.6 The Government would like to thank those who responded to this section of the consultation and accepts that more work is needed to refine the targeting of the draft hallmark provided in Conditions 3 and 4. The responses to the following questions will be considered when ensuring the accurate targeting of the Financial Products Hallmark.

**Question 21 - To what extent does the draft hallmark deliver the policy objective of bringing arrangements involving financial products into the view of DOTAS?**

**Question 22 - Does the approach deliver the safeguards requested by respondents to the previous consultation?**

- 6.7 Respondents felt the draft hallmark was an improvement on its previous iteration and most considered that the hallmark, as proposed, would result in the disclosure of arrangements involving financial products:

*"This draft of the hallmark is, in our view, improved from the earlier draft. We compared it to theoretical transactions that we thought HMRC would consider to be disclosable and, in each case, we concluded the theoretical transaction would be disclosable".*

- 6.8 Others, however, felt that the hallmark was still drawn too widely. Respondents still had reservations with regard to conditions 3 and 4 and there was general agreement that those Conditions need more thinking to ensure the hallmark is targeted accurately:

*"The financial products hallmark needs to be carefully worded to ensure benign arrangements such as share based schemes which might have some unusual features or approved employee share plans are not caught."*

- 6.9 Responses to question 22 were again mixed. Some felt that the safeguards were adequate: *"We agree that the safeguards mentioned in paragraph 5.12 will help limit the scope of the proposed hallmark"* and banks welcomed the exception from the hallmark for transactions that have been agreed, or could expect to be agreed, with HMRC as being compliant with the Banking Code of Practice.

- 6.10 However, several respondents felt that the safeguards might not be as robust as necessary, one respondent proposed: *a further 'filter' be inserted to exclude arrangements which are substantially similar to arrangements giving rise to a tax advantage which are described in the GAAR guidance, in HMRC manuals, or in a reported case in the tax tribunal or in the courts."*

## Government response

- 6.11 The Government remains committed to introducing this hallmark and is grateful for the views expressed and examples provided of the sorts of

arrangements which might inadvertently be caught by the current wording of the draft hallmark.

- 6.12 The Government agrees that the wording of Conditions 3 and 4 need a little more work to ensure they accurately describe the feature for which disclosure is required. A further draft of this hallmark will be published alongside the draft regulations making changes to the other hallmarks described above.
- 6.13 In addition, HMRC will include examples in the DOTAS guidance to help those applying this hallmark understand how the conditions operate.

## 7. VAT Disclosure

### Background:

- 7.1 The “Strengthening the Tax Avoidance Disclosure Regimes” consultation sought views on how to update and improve the VAT Avoidance Disclosure Regime (VADR).
- 7.2 VADR was introduced at the same time as DOTAS but its structure and the way it operates are different as it requires disclosure by the scheme user after implementation rather than by a promoter prior to implementation. The regime includes a list of known schemes which require disclosure rather than relying solely on hallmarks, though it does make use of some hallmarks.
- 7.3 In particular, the consultation sought views on whether simply to bring the existing regime up-to-date to reflect changes and developments in the VAT landscape, or whether it would be better to change the regime to work more like DOTAS or indeed to incorporate VAT into DOTAS itself.

### General Responses

- 7.4 Respondents generally felt that due to the nature of VAT and following the ‘Halifax’ and ‘Debenhams’ cases, appetite for VAT avoidance has diminished, but accepted that the policing effect of a disclosure regime was also an important factor.
- 7.5 Responses tended to be split between those who felt that VADR should remain, either in its current form or with relevant amendments, while others thought a change towards a promoter-based regime or inclusion within DOTAS would be appropriate.

### Question 23 - Which form of VADR (user-based/promoter-based/include in DOTAS) is likely to be the most effective in achieving the policy objectives?

- 7.6 Many respondents felt that the existing user-based regime worked well, though suggested it certainly needs to be updated having seen little change since it was introduced. However, those who considered this as the best option cited only a reduced appetite in the market for VAT avoidance as their reason for retaining the current approach.
- 7.7 Others felt that a change towards a promoter-based regime would be more appropriate: “*...the VADR regime should be promoter-based as a discrete regime adopting many of the design features of the existing DOTAS regime.*” One professional body felt that: “*A promoter based VADR would appear to be best placed to achieve the policy objective*” but did comment on the fact that VADR was originally set-up as a user-based regime to ensure a good fit with the wider European dimension of the tax.

**Question 24 - Which form of VADR would best contribute to achieving consistency and fairness for users and promoters of avoidance schemes across all regimes?**

- 7.8 The Government received very few responses to this question but those who did express a view considered that making VADR promoter-based, or incorporating it within DOTAS, would help achieve consistency and fairness for users and promoters of avoidance across all regimes. One representative body suggested a hybrid regime:

*"We believe it should be a mix of user and promoter. If there is a promoter, then it should be the promoter who discloses, and the user can confirm the scheme. On the other hand if the scheme is not devised by a promoter, then the user should have to disclose." "...Widely marketed generic schemes would be caught by the promoter disclosures while complex individual schemes, often developed in-house by the user, would be disclosable by the user."*

**Question 25 - Which form of VADR would minimise the administrative burden on businesses, other than those who design and promote avoidance and their clients?**

- 7.9 Overall respondents were divided on the question of administrative burden. Some felt that a burden would not exist, others felt that if the regime is changed there would at least be an initial burden due to the need to retrain staff. A number of responses suggested that a shift to a promoter-based regime would be welcome as this would transfer the administrative burden onto those devising schemes rather than placing the obligation onto the users, some of whom may not realise they are using a disclosable VAT scheme.

**Government response**

- 7.10 The Government welcomes the helpful comments and suggestions and the interest of respondents more generally to work with the Government to further develop thinking on this issue. The Government proposes to continue working with interested parties to develop thinking in relation to the three potential options before considering whether and how best to update and improve the regime.

## 8. Further Issues

### Background:

- 8.1 The final chapter of “Strengthening the Tax Avoidance Disclosure Regimes” consultation recognised that the document did not set out to address every eventuality. It highlighted some issues which may need addressing in the future and invited respondents’ views and suggestions on what more could be done to ensure that HMRC receives the information it needs to effectively detect and tackle marketed avoidance. It explained HMRC and the Government’s concerns that scheme users do not always understand the risks involved in tax avoidance. Similarly, the chapter outlined a lack of ‘end-to-end’ visibility of all parties to a tax avoidance scheme.

### General Comments

- 8.2 Not many respondents took the opportunity to comment on this section but some provided helpful and insightful comments regarding how HMRC could further effectively detect and tackle marketed tax avoidance, for which the Government is grateful.

#### Question 26 - What more could be done to ensure that HMRC receives the information it needs to effectively detect and tackle marketed avoidance?

- 8.3 Responses to this question were varied. One suggestion was to consider how greater emphasis could be placed on the consumer protection aspect of marketed tax avoidance. Another was to refocus DOTAS onto only mass marketed schemes and away from bespoke arrangements.
- 8.4 One respondent suggested introducing a process to help to clear existing enquiries by empowering HMRC staff to use discretion and reach pragmatic solutions that may differ from the position required under HMRC’s Litigation and Settlement Strategy.
- 8.5 One respondent suggested including a clear definition of avoidance within DOTAS to help clarify the regime while another suggested using lists of acceptable tax planning arrangements or use of reliefs etc. to help target the hallmarks, as well as ensuring existing powers are targeted and used effectively.
- 8.6 One respondent suggested ensuring closer relationships between promoters and HMRC, while another respondent suggested making everyone in the supply chain, from promoter to end-user, responsible for disclosing the scheme. Another suggestion was to require promoters to share warnings regarding their products with users, as well as the fact that those users could face penalties if the scheme is shown not to work.

- 8.7 More than one person suggested highlighting those who are promoting and using tax avoidance schemes more extensively in the press.

### Government Response

- 8.8 The Government would like to thank those who took the time to consider what more could be done to counter avoidance and will take these suggestions into account when further developing its avoidance policy.
- 8.9 Having considered the responses, the Government has decided to take action in the area of transparency. Finance Bill 2015 will include legislation to allow HMRC to publish summary information about tax avoidance schemes notified under DOTAS and their promoters, with the aim of increasing transparency.
- 8.10 Under the proposed legislation HMRC will be able to publish information obtained from a promoter when a scheme is disclosed, together with other information such as details of any relevant court rulings and the likely position of the scheme in relation to Accelerated Payments. HMRC will also be able to publish other information it considers appropriate for the purposes of identifying the scheme and its promoter. This will not include the names of users.
- 8.11 HMRC will contact promoters before publication to inform them of the intention to publish information about the scheme. Promoters will be given reasonable opportunity to correct factual errors or make representation about why information should not be published. HMRC will consider these before deciding whether to publish.
- 8.12 Some promoters notify a scheme under one name but later change either their own trading identity or the name under which they market the notified scheme. It will be important that HMRC has accurate information when publishing scheme and promoter information and the proposed legislation will require promoters, in future, to notify HMRC of any changes to their trading name or that of a notified scheme.
- 8.13 By providing more information about tax avoidance schemes to potential users, this change will help to ensure that those considering using a disclosed scheme are made more aware of the risks to which they may be exposing themselves.

## 9. Next Steps

- 9.14 The Government intends to take forward the proposals as set out in this response document. Legislation to amend the DOTAS rules in Part 7 of the Finance Act 2004 will be introduced as part of Finance Bill 2015. This will include legislation to introduce a power under which HMRC will be able to publish information about disclosed schemes and their promoters. This legislation will be available for consultation as part of the draft Finance Bill.
- 9.15 Regulations will be drafted to make changes to the hallmarks, including further changes to the draft Financial Products hallmark, and will be published for consultation early next year with a view to bringing the revised hallmarks into effect later in the year.
- 9.16 HMRC will work with interested parties to further develop thinking on how VADR can be updated with a view to issuing a future consultation.

# Annexe A: List of stakeholders consulted

1. Accountancy 4 Growth Ltd.
2. Association of Accounting Technicians
3. Association of British Insurers
4. Association of Certified Chartered Accountants
5. Association of Financial Markets in Europe
6. Association of Independent Professionals and the Self Employed
7. Association of Taxation Technicians
8. AVN Venus Tax Ltd.
9. British Bankers Association
10. British Private Equity and Venture Capital Association
11. British Property Federation
12. Baker Tilly
13. BDO LLP
14. Boodle Hatfield LLP
15. Canada Life – life assurance
16. Chartered Institute of Taxation
17. Clarke Willmott LLP
18. Deloitte
19. Ernst & Young LLP
20. Gabelle LLP
21. Grant Thornton
22. Harcourt Capital LLP
23. Harwood Hutton
24. Institute of Chartered Accountants in England and Wales
25. Institute of Chartered Accountants of Scotland
26. Institute of Financial Accountants
27. KPMG LLP
28. The Law Society
29. The Low Income Tax Group
30. Mazars LLP
31. Old Mutual
32. OneE Consulting Ltd.
33. Pinsent Masons
34. PricewaterhouseCoopers LLP
35. Slaughter & May
36. Standard Life
37. Society of Trust and Estate Practitioners
38. Technical Connection Ltd.
39. The City of London Law Society
40. Travers Smith

## Annex B: Consultation process and statistics

HMRC received 40 responses to the consultation document published by the Financial Secretary, David Gauke, on 31 July 2014.

These came from a range of businesses, representative bodies, trade associations, professional bodies, and firms.

In addition to receiving written responses, HMRC held a number of meetings to discuss the proposals with businesses, representative bodies and professional firms.