Guidance

Promoters of Tax Avoidance Schemes (POTAS)

HM Revenue and Customs (HMRC)

POTAS

This guidance describes the legislation in Part 5 and Schedules 34 to 36 Finance Act 2014.

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POTAS

Chapter 1 Introduction

1.1 Overview

Part 5 contains new rules that apply to POTAS.

The objectives of the regime are to change the behaviour of a small and persistent minority of promoters of avoidance schemes who exhibit certain behaviours, and to aim to deter the development and use of avoidance schemes by influencing the behaviour of promoters, their intermediaries and clients. The regime aims to achieve its objectives by:

- requiring monitored promoters (see below) to disclose details of their products and clients to HMRC
- ensuring monitored promoters tell clients, potential clients and intermediaries that they are a monitored promoter
- minimising the risk of tax loss via avoidance schemes developed by POTAS
- making sure that clients and intermediaries are fully aware of the risks of engaging in avoidance schemes.

The regime builds on the existing regime for the disclosure of tax avoidance schemes (DOTAS), drawing on and reinforcing existing disclosure obligations and sharing many similar definitions. So this guidance frequently refers to the existing DOTAS guidance, which may also be found on the Gov.UK website at https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance.

The regime involves a graduated series of sanctions, which carefully balances the rights of a person against the need to prevent and defeat tax avoidance. There are two key steps:

- a conduct notice – which may be issued by HMRC where a promoter meets a threshold condition (see paragraph 2.1 below)
- a monitoring notice – which can be issued by HMRC where a promoter breaches a requirement in a conduct notice and approval is obtained from the First-tier Tribunal (see paragraph 3.1 below). A promoter that is subject to a monitoring notice is referred to in the legislation and in this guidance as a monitored promoter

The decision that a conduct notice must be given can only be taken by an authorised officer of HMRC. Conduct notices impose conditions about how a promoter must behave. There is no right of appeal against a decision to give a promoter a conduct notice, which can last for up to two years.

If a promoter breaches one or more conditions in a conduct notice an authorised officer of HMRC may ask the First-tier Tribunal for approval to issue a monitoring notice. There is a right of appeal against a decision of the First-tier Tribunal to approve the issue of a monitoring notice. If a monitoring notice is issued the monitored promoter is subject to a more stringent regime that includes:

- publication by HMRC of information about the promoter
- publication by the promoter of its status on the internet and in publications and correspondence
- a duty on the promoter to tell clients that it is a monitored promoter and to provide them with a promoter reference number (PRN)
- a duty on clients to put the PRN on their returns or otherwise to report the PRN to HMRC
- enhanced information powers for HMRC, backed by new penalties
- preventing any attempt by a promoter to impose confidentiality on clients in relation to disclosure to HMRC
- limitations to the defences of reasonable care and reasonable excuse against the imposition of penalties
- extended time limits for assessment on clients who fail to report a PRN to HMRC when required to do so
- a criminal offence of concealing, destroying or disposing of documents

HMRC expects that few promoters will meet threshold conditions and subsequently be issued with conduct notices and hopes the great majority of those will comply with the conditions in the notices. So the much more significant sanctions consequent on a monitoring notice will only be imposed in very few cases and subject to prior approval by the First-tier Tribunal that the issue of the notice is justified. Further, the provisions that would publicly identify a monitored promoter do not apply until the promoter's appeal rights have been exhausted.

The regime is supervised by authorised officers and is subject to strict governance. Only authorised officers can make the decision that a conduct notice must be given to a promoter or that a notice, once given, has not been complied with. While it may be appropriate in suitable circumstances to draw attention to the existence of the regime it is not acceptable to suggest to a customer, agent or promoter that the use of the sanctions in the regime would be appropriate without the authority of an authorised officer. If you feel that Counter-Avoidance should consider the use of the regime in relation to a particular promoter please send a short report setting out your concerns to the Promoter Channel. Particular indicators to look out for include failing to disclose relevant information or attempting to mislead HMRC and preventing clients from disclosing relevant information.

An authorised officer is a person who has been authorised by the Commissioners in accordance with section 283(2) FA 2014. All authorised officers are senior people in the HMRC Counter-Avoidance Directorate.

The rules in Part 5 FA 2014 also apply in relation to promoters of schemes for the avoidance or reduction of liabilities to pay National Insurance contributions (NICs).

The key parts of the legislation in Part 5 that apply to POTAS are listed in paragraph 1.2 below.

There is a flowchart in paragraph 1.3 illustrating the steps leading to the issue of a monitoring notice.

1.2 Overview of the legislation

The legislation in Part 5 and schedules 34 to 36 FA 2014 that applies to POTAS is laid out as follows:

- section 234 to 236 – definitions (paragraph 1.4 onwards)
- sections 237 to 241 – conduct notices (paragraph 2.1 onwards)
- sections 242 to 249 – monitoring notices (paragraph 3.1 onwards)
- sections 250 to 253 – allocation, distribution and use of promoter reference numbers (paragraphs 3.10 to 3.13)
- sections 254 to 273 – information powers (paragraph 4.1 onwards)
- sections 274 to 276 – provisions relating to penalties (5.1 onwards)
- section 277 – extended time limit for assessment (paragraph 6.1 onwards)
- sections 278 to 280 – offences of concealing, destroying or disposing of documents (paragraph 5.10)
- sections 281 to 283 – supplemental and definitions
- schedule 34 – the threshold conditions (paragraph Appendix 1)
- schedule 35 – penalties for failing to comply with obligations of the regime (5.1 onwards)
- schedule 36 – promoters carrying on business in partnership (paragraph 7.1 onwards)

The National Insurance Contributions Act 2015 (NICA 2015) applies Part 5 of FA 2014 to NICs with effect from 12 April 2015.

For Class 4 NICs and for Class 2 NICs collected through Self-Assessment, Part 5 of FA 2014 applies, with necessary modifications, as if those contributions were income tax. This is in accordance with the following provisions in NICA 2015

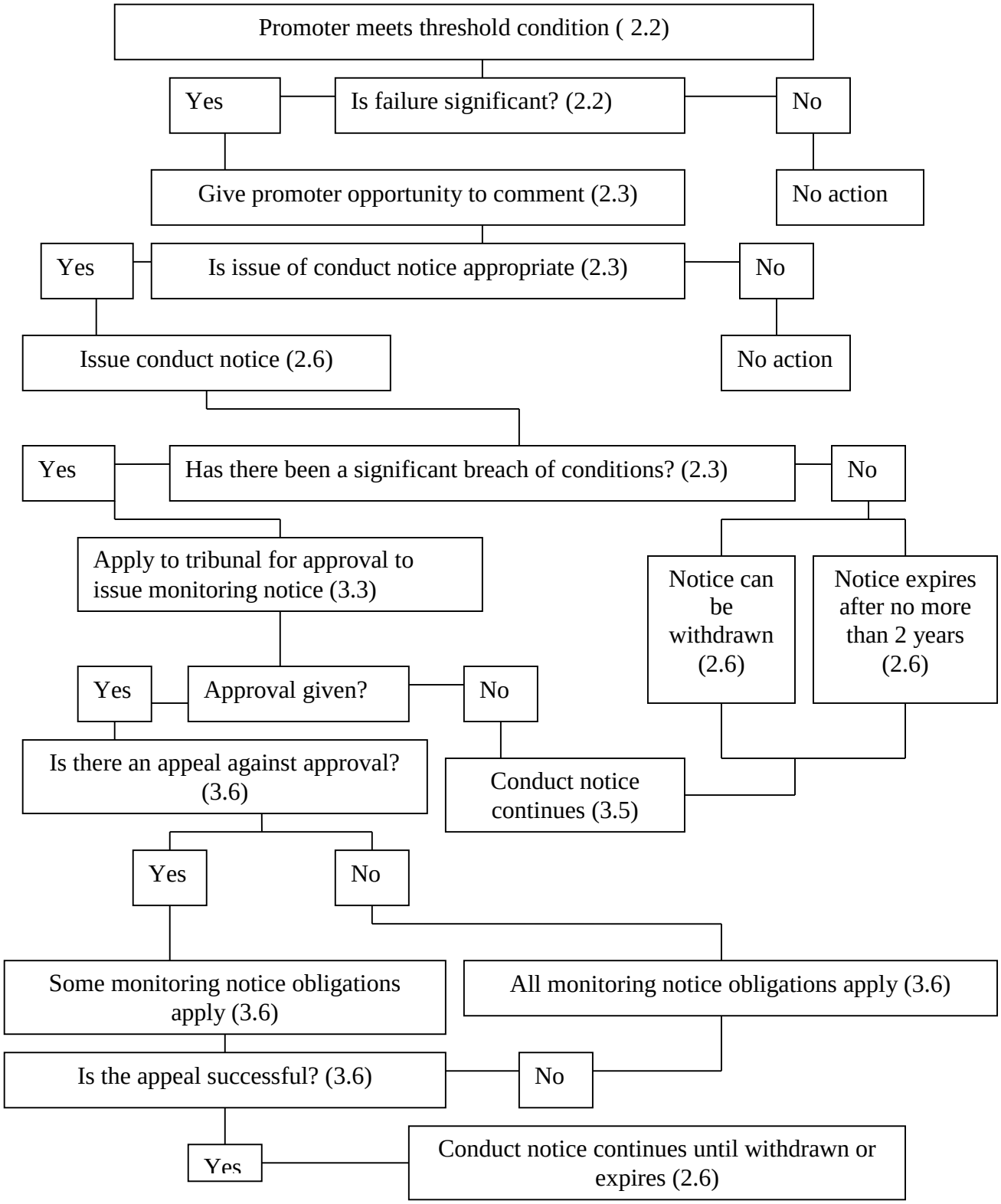
- section 2
- section 4(3)
- Schedule 1 and
- Part 2 of Schedule 2

In this guidance, references to tax include Class 4 NICs and Class 2 NICs collected through Self-Assessment.

For other classes of contributions, that is Class 1, 1A, 1B and Class 2 NICs not collected through Self-Assessment, NICA 2015 gives effect to Part 5 of FA 2014 and makes modifications to that part. This is in accordance with section 4(2) of, and Part 2 of Schedule 2 to, NICA 2015. These classes of

contributions are defined by paragraph 31 of Schedule 2 to Part 5 NICA 2015 as ‘relevant contributions’ (see paragraph 1.5 below). Part 5 of FA 2014 applies to promoters of arrangements that enable, or might be expected to enable, any person to avoid or reduce a liability to relevant contributions.

1.3 How the regime that applies to POTAS works



1.4 Definitions: promoter

A conduct notice can be issued only to a person carrying on a business in the course of which the person is or has been a promoter. The definition of 'promoter' for the purpose of Part 5 is at s235 FA 2014.

A promoter is carrying on a business as a promoter if it carries on a business that includes or has included the design, marketing, implementation, organisation or management of avoidance schemes. The definition is modelled closely on the existing DOTAS definition at s307 FA 2004 (DOTAS guidance, paragraph 3.2).
This guidance uses the terms 'avoidance scheme' and 'scheme' to mean any 'relevant proposal' or 'relevant arrangement' (paragraph 1.5) that a promoter has promoted in the course of its business.

A person is a promoter of a relevant proposal if it

- is responsible to any extent for the design of the proposed arrangements
- makes a 'firm approach' (paragraph 1.6) to a person in order to make that proposal available to that person or anyone else
- makes the proposal available for implementation by anyone

A person is a promoter of relevant arrangements if it

- is a promoter of a relevant proposal that is implemented by the arrangements
- is responsible to any extent for the design, organisation or management of the arrangements

There is always a risk that promoters move offshore to try to undermine the impact of the regime. However, the regime can apply to any promoter, wherever resident. If a non-resident monitored promoter fails to comply with requests for information that information may be sought from any other persons who have been involved in the avoidance scheme (paragraph 4.6). This may include both intermediaries and clients.

The promoter definition is supported by a power to make regulations preventing a person, who would otherwise fall under the definition of 'promoter', from being subject to this legislation in prescribed circumstances. The POTAS (Prescribed Circumstances under Section 235) Regulations 2015 [SI2015/130] have been made using this power.

Under these regulations a person will not be treated as a promoter in relation to an avoidance scheme if their only involvement in the scheme is to have been responsible to some extent for either the design of proposed arrangements or the design, organisation or management of arrangements. Such a person would not be within the scope of the legislation as a promoter of the avoidance scheme if the person

- does not also provide tax advice in connection with the scheme or
- could not reasonably be expected to know that the arrangements in which it is involved are an avoidance scheme

The regulations do not apply to a person who is a promoter in relation to a scheme by virtue of having either made the scheme available for

implementation or made a firm approach to any person with a view to making it available for implementation.

As an example of how these regulations apply, they will prevent a lawyer, whose only involvement in designing and developing an avoidance scheme is to give independent legal advice on a discrete element of the scheme not relating to tax, from being treated as a promoter in relation to that scheme.

In addition, a person whose only involvement in the design and development of a scheme is to offer independent tax advice on a discrete element of the scheme without knowledge of the whole will be excluded from the definition of promoter for the purposes of this legislation.

A promoter, which is a member of a group of companies and has provided services in connection with avoidance schemes only to other members of the group for the past 3 years, is prevented from being treated as a promoter for the purposes of this legislation. However, under the same regulations, if the promoter starts promoting avoidance schemes to persons outside the group, all of its activities may be taken into account when applying the rules in Part 5 FA14, including the services provided to other group members.

This exclusion for a group company from being treated as a promoter in relation to relevant proposals and arrangements for the purposes of this legislation does not apply where a conduct notice or monitoring notice has effect in relation to that company.

This exclusion only applies when the promoter and the person to which services have been provided are members of the same group. Consequently it does not prevent a person from being treated as a promoter for the purposes of this legislation if the person provides services in connection with avoidance schemes to

- an ex-member of the group after it has been sold
- a member of a joint venture, which is not a member of the same group as the person carrying on a business as a promoter

For the purpose of these regulations, companies are members of the same group if one is a 51% subsidiary of the other or both are 51% subsidiaries of a third company.

All of the exclusions from the definition of promoter are treated as having effect from 17 July 2014, which was when the Finance Act 2014 received Royal Assent. This includes retrospective effect for the purposes of determining whether a person has been a ‘promoter’ in the 3 years preceding when an authorised officer becomes aware that a person has met a threshold condition.

1.5 Definitions: relevant proposal and relevant arrangements

The terms ‘relevant proposal’ and ‘relevant arrangements’ are defined at s234 FA 2014 and describe avoidance schemes in order to determine whether a person is a promoter for the purpose of Part 5. The promotion of avoidance schemes is not enough by itself to make a promoter subject to any of the powers or potential sanctions available under the legislation. Those powers and sanctions can only begin to apply when a promoter meets one or more threshold conditions (paragraph 2.2).

A ‘relevant proposal’ is a proposal for arrangements that would be ‘relevant arrangements’ if they were implemented. This is so whether the proposal is made to a particular person or to anyone who might wish to implement it. The definition is drawn from the ‘notifiable proposal’ definition at s306(2) FA 2004 that applies for the purpose of the DOTAS regime.

Arrangements are ‘relevant arrangements’ if

- they might enable any person to obtain a tax advantage
- that tax advantage is the main benefit, or one of the main benefits, that might be expected from the arrangements

This is a familiar test, used for example in broadly similar terms at s306 FA 2004 for DOTAS.

The definition of ‘arrangements’ is at s234(4) and is not intended to be exhaustive. It includes:

- any agreement, scheme, arrangement or understanding of any kind,
- whether or not legally enforceable
- involving a single transaction or more than one transaction

The definition of ‘tax advantage’ is at s234(3) and is very similar to the definition at s318 FA 2004 for DOTAS (DOTAS Guidance, paragraph 6.2.2).

The comments at paragraph 6.3 of the DOTAS guidance discussing when a tax advantage might be one of the main benefits of arrangements are equally relevant here. This is not intended to include cases in which a course of action is chosen to some extent because a client may wish to obtain a tax relief by straightforward transactions that are consistent with the purpose for which the relief exists. For example, it will not apply where a client chooses to invest in an ISA rather than some other savings product.

Any tax advantage must relate to one or more of the following taxes:

- Income Tax
- Capital Gains Tax (CGT)
- Corporation Tax (CT)
- Petroleum Revenue Tax (PRT)
- Inheritance Tax (IHT)
- Stamp Duty Land Tax (SDLT)
- Stamp Duty Reserve Tax (SDRT)
- Annual Tax on Enveloped Dwellings (ATED)

Arrangements are also ‘relevant arrangements’ if

- they might enable any person to avoid or reduce a liability to pay relevant contributions
- the avoidance or reduction of a liability to pay relevant contributions is the main benefit, or one of the main benefits, that might be expected from the arrangements

‘Relevant contributions’ are defined by paragraph 31 schedule 2 to NICA 2015 as meaning Class 1 contributions, Class 1A contributions, Class 1B contributions and Class 2 contributions not collected under Self-Assessment. The different classes of contributions are defined in part 1 of the Social Security contributions and Benefits Act 1992 or Part 1 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992.

1.6 Definitions: firm approach

A person may be a promoter for the purpose of Part 5 if they make a ‘firm approach’ to any person in order to make a ‘relevant proposal’ (paragraph 1.5) available for implementation. The definition of what constitutes the making of a firm approach is at s235(4) and (5) FA 2014.

The purpose of this part of the promoter definition is to ensure that a promoter can be recognised as such by the regime when avoidance schemes are being developed and marketed, even if that is before any schemes are implemented.

A promoter is treated as making a firm approach when it

- communicates information to a person about a scheme that has been ‘substantially designed’
- the communication is made with a view to that person or any other person to enter into transactions to implement the scheme
- the information provided includes an explanation of the intended tax advantage

For this purpose a scheme has been substantially designed when the nature of the transactions involved in implementing the scheme has been developed to the point at which someone who wants to obtain a tax advantage could implement those transactions or similar transactions. This definition draws on the DOTAS definition of the same term at s307(4C) FA 2004. Paragraph 3.6.2 of the DOTAS guidance provides some practical commentary on how the definition is expected to be used.

1.7 Definitions: intermediary

The promoter regime in Part 5 imposes obligations on three classes of person:

- the promoter – who develops and markets avoidance schemes
- the client – typically the user of the avoidance scheme
- the intermediary – who sits between the promoter and the client and typically provides the client with information in relation to the scheme

The term ‘intermediary’ is defined at s236 FA 2014. A person is an intermediary in relation to a relevant proposal (paragraph 1.4) if the person:

- provides information about the proposal to another person in the course of business
- the information is provided with a view to the other person, or anyone else, entering into transactions to implement the proposal
- the person providing the information is not a promoter in relation to that proposal

An intermediary will not have been responsible to any extent for the design, organisation or management of the scheme. A person whose role is restricted to marketing particular arrangements or proposed arrangements to potential users and putting users in touch with the promoter will be an intermediary in relation to those particular arrangements.

An intermediary may have obligations to pass on promoter reference numbers (paragraph 3.12) and may be subject to obligations to provide information (paragraph 4.1 onwards). A promoter who is subject to a conduct notice (paragraph 2.1) may be required to ensure that adequate information (paragraph 2.3) about avoidance schemes is provided to intermediaries.

An intermediary will typically be a tax agent, such as a solicitor or accountant, or a financial adviser, but the definition is not confined to these professions. For example, an estate agent may be an intermediary in relation to an SDLT scheme. An intermediary may also be a person who, although not themselves a promoter, may have a business that involves providing information to potential users about avoidance schemes developed by a promoter. A person who provides information about avoidance schemes to another person privately but not in the course of a business will not be an intermediary

It is possible that an intermediary who does more than provide information to potential users may itself fall within the definition of promoter (paragraph 1.4). This will clearly be the case if the intermediary is to any extent responsible for the design, organisation or management or implementation of an avoidance scheme.

A client (paragraph 1.8) of the promoter may also be an intermediary, for example if it provides information to other potential clients.

1.8 Definitions: client

The promoter regime at Part 5 contains several different definitions of client, each tailored to the purpose for which that term is used in the relevant provision. In each case a client is broadly a person who is the end user of an avoidance scheme developed by the promoter.

The client will typically be the person with which the promoter engages in the course of the promoter’s business. However, in some cases the client will not

be the person to whom the tax advantage intended to flow from the avoidance scheme will apply. For example, the client may be:

- a director of a company, where another associated or group company is intended to benefit from the scheme
- an employer whose employees are intended to benefit from the scheme
- a trustee of a trust or settlement in circumstances in which the beneficiaries are intended to benefit from the scheme

The term 'client' is defined for the following purposes:

- section 239(3) FA 2014 defines client for the purpose of ensuring that a promoter subject to a conduct notice (paragraph 2.1) provides adequate information to its clients (paragraph 2.4)
- section 249(7) defines client for the purpose of determining who a promoter must tell that they are a monitored promoter (paragraph 3.9)
- section 251(3) defines client for the purpose of determining to whom a monitored promoter must notify its promoter reference number (paragraph 3.11)
- section 252(3) defines client for the purpose of imposing a duty on clients who have received a promoter reference number to pass that number on to other clients (paragraph 3.13)
- section 259(5) defines client for the purpose of imposing a duty on monitored promoters to provide information about clients (paragraph 4.7)
- Section 260(5) defines client for the purpose of imposing a duty on intermediaries to provide information about clients (paragraph 4.8)

In each case the guidance on those provisions explains how the term 'client' is defined and used in that context.

1.9 Definitions authorised officer

Authorised officers are all senior officers in the Counter-Avoidance business unit in HMRC.

CHAPTER 2 Conduct notices

2.1 Conduct notices: overview

Only an authorised officer of HMRC may determine that a conduct notice must be issued to a promoter. One of the conditions that must be met before an authorised officer may give a conduct notice is that the promoter has either met one or more of the threshold conditions listed in paragraph 2.2 or is treated as meeting one of those conditions. The conduct notice imposes conditions on the promoter (paragraph 1.4). After an officer determines that the promoter has failed to comply with any of the conditions included in the conduct notice, an authorised officer may subsequently apply to the First-tier Tribunal for approval to issue a monitoring notice (paragraph 3.2). The duration of a conduct notice cannot exceed two years (paragraph 2.6).

HMRC expects that in most circumstances there will be discussions with a promoter that has met a threshold condition, with the aim of understanding why that happened and agreeing on appropriate standards for the future. HMRC will aim to develop a working relationship with promoters and the authorised officer may take into account a range of factors including, for example, the promoter's record of co-operation in connection with enquiries into the schemes it has promoted when determining whether the impact on tax collection would make it inappropriate to issue a conduct notice (paragraph 2.2.4). The authorised officer must give the promoter an opportunity to comment on the proposed terms of the conduct notice before finalising its terms (paragraph 2.3). This opportunity to comment on the notice also gives the authorised officer or officers in the Counter-Avoidance business unit the chance to raise concerns with the promoter and listen to representations before proceeding.

There is no right of appeal against the issue of a conduct notice. If an authorised officer applies to the First-tier Tribunal to approve the issue of a monitoring notice to a promoter, the promoter must have been given a reasonable opportunity to make representations to the Tribunal. There is explicit provision in the legislation for these representations to include contentions that it was not reasonable to impose the condition, with which the authorised officer has determined the promoter has failed to comply. The Tribunal will not agree to the issue of a monitoring notice where it considers that the only condition or conditions in the conduct notice with which the promoter has failed to comply was, or were, unreasonably imposed (paragraph 3.5).

2.2 Conduct notices: the duty to issue a conduct notice

Section 237 FA 2014 governs when an authorised officer must give a conduct notice.

An authorised officer can issue a conduct notice where an authorised officer has become aware that a threshold condition has been met during the period of three years ending when that authorised officer becomes aware of it. The

promoter, or a person with whom the promoter has a sufficient connection (see Appendix 2 for more details) must also have been carrying on business as a promoter at the time the threshold condition was met. The authorised officer who gives the conduct notice does not have to be the same officer who became aware that one or more threshold conditions were met within that period. An authorised officer can, and usually will, become aware that a threshold condition has been met some time before an authorised officer, the same or a different one, makes the decision determining that a conduct notice must be given. The three year period can include time before the legislation was enacted.

2.2.1 Threshold conditions

The threshold conditions are set out in schedule 34 and there is detailed guidance on those conditions at Appendix 1 to this guidance. The conditions are summarised here so that officers are aware of them, but only an authorised officer is able to determine whether or not a threshold condition has been met, that the meeting of the condition is significant and whether or not the extent, to which the activities of a promoter are likely to have an impact on the collection of tax, would make a conduct notice inappropriate.

The threshold conditions are:

1. HMRC publishing information about a person as a deliberate tax defaulter
2. a promoter breaching the Banking Code of Practice in respect of schemes that it promotes
3. a person being given a conduct notice under paragraph 4 of Schedule 38 FA 2012 as a dishonest tax agent
4. a person failing to meet DOTAS obligations
5. a person being charged with a relevant criminal offence
6. arrangements that a promoter has promoted being regarded as unreasonable by the General Anti-Abuse Rule (GAAR) Advisory Panel
7. certain disciplinary action is taken against a person which is a member of a professional body either by or at the instigation of that professional body
8. certain sanctions being imposed by a regulatory authority on a person
9. a person failing to comply with an information notice
10. a promoter imposing certain restrictive contractual terms on clients
11. a promoter continuing to promote arrangements despite being given a stop notice in respect of those arrangements

A conduct notice may be issued to a person carrying on a business as a promoter if an authorised officer becomes aware that the person met a threshold condition within the previous three years and the person was carrying on a business as a promoter at the time the threshold condition was met (s237(1)).

A conduct notice may also be issued to a person carrying on a business as a promoter in a case when an authorised officer becomes aware that another person met a threshold condition within the previous three years, including

where the latter was not carrying on a business as a promoter at the time they met that threshold condition (s237(1A)). In these circumstances the promoter, to whom the authorised officer is considering giving a conduct notice, must have a sufficient connection with the person who met the threshold condition. Appendix 2 describes the details of when a promoter is treated as meeting a threshold condition by virtue of another person actually meeting that condition (paragraphs 13A to 13D of Schedule 34).

Although the legislation imposes a duty on an authorised officer to issue a conduct notice if one or more threshold conditions are met, this is subject to separate safeguards relating to both significance and tax impact.

2.2.2 Significance test

Where the meeting of one or more conditions must be or is considered to be significant, as appropriate, the officer must issue a conduct notice to the promoter unless the officer determines that the likely impact of the promoter's activities as a promoter make it inappropriate to give one.

Meeting Conditions 1, 2, 3, 5 and 6 above are always regarded as significant for the purposes of deciding whether a conduct notice must be given.

- for the other threshold conditions, listed below for convenience, the authorised officer must determine whether or not it is significant that the promoter has met the condition, (or, if more than one is met, whether the conditions in combination are significant) taking into account the purpose of the legislation. failure to meet DOTAS obligations
- disciplinary action against a member of a trade or professional body
- sanctions imposed by a regulatory authority
- failure to comply with an information notice
- imposing restrictive contractual terms on clients
- continuing to promote arrangements despite receiving a stop notice

In considering whether meeting the condition is significant, an authorised officer will be realistic and will take into account that all organisations will make mistakes from time-to-time that will result in isolated or trivial failures to meet obligations. However this would not prevent an authorised officer from concluding that the meeting of one or more threshold conditions repeatedly or as part of a consistent pattern is to be regarded as significant, although each individual failure might not have been determined to be significant if viewed in isolation.

So, for example, an officer may decide that isolated or trivial failures to meet DOTAS obligations, such as being a few days late with a disclosure, are not significant.

Significance examples

DOTAS

Promoter A only makes one or two disclosures a year under DOTAS. The promoter makes a firm approach to a potential customer about a notifiable arrangement on 1 August 2015 and should have disclosed it by 6 August to HMRC. The person who usually makes the DOTAS disclosures is on leave and no-one else can make the disclosure, consequently Promoter A agrees in writing that the disclosure is made a week late on the 13 August. Although a threshold condition has been met this would not be regarded as significant.

Promoter B makes around 15 disclosures under DOTAS each calendar year and has regular contact with the HMRC DOTAS team as well as several people who are able to make disclosures. The promoter makes a firm approach to a potential customer about a notifiable arrangement on 1 August 2015 and should have disclosed it by 6 August to HMRC. The person who usually makes the disclosures is on leave. The disclosure is made by their deputy but the deputy agrees in writing that the disclosure is made a week late on the 13 August. Although a threshold condition has been met this would not be regarded as significant.

Following on from the failure in August, Promoter B agrees in writing that it also misses the deadlines for another four disclosures between August and December 2014. The promoter has met the threshold condition and it is significant. The failures indicate that Promoter B's system for making disclosures is not fit for purpose. The tax impact test will be considered before deciding whether to issue a conduct notice. Any subsequent conduct notice will include a condition focussed on ensuring that the disclosure procedures Promoter B operates work effectively and will also include conditions seeking to address any other behaviours the promoter has exhibited, whether or not during the past three years, which it is permissible to impose as part of a conduct notice (see paragraph 2.3).

Promoter C also makes around 15 disclosures under DOTAS each calendar year and has regular contact with the HMRC DOTAS team as well as several people able to make disclosures. It suffers a disastrous computer failure on 8 March 2015 for two weeks and as a result misses the deadlines for three separate disclosures. The promoter agrees in writing that it submitted the information late when disclosures are eventually made in April. Promoter C does not contact the HMRC DOTAS team to inform them of the computer failure and to make alternative arrangements for making disclosures. If Promoter C had contacted the HMRC DOTAS team about the computer failure alternative methods of making a disclosure could have been agreed and the risk of missing DOTAS deadlines minimised. In the absence of remedial action the promoter has met the threshold condition and it is significant. The tax impact test will be considered before deciding whether to issue a conduct notice. If a conduct notice is given, it will include conditions relating to the DOTAS failure as well as other conditions seeking to address any other behaviours the promoter has exhibited, whether or not

during the past three years, which may be imposed in a conduct notice (see paragraph 2.3).

Through compliance activity HMRC discovers a number of users of a tax avoidance scheme marketed by Promoter D which has not been disclosed. From the evidence available HMRC considers that the scheme should have been disclosed and successfully applies to the tribunal for an order under s314A Finance Act 2004 that the scheme is notifiable. The tribunal at same time agrees to the imposition of penalties under s98C TMA in respect of the failure. The promoter has met the threshold condition and it is significant. The tax impact test will be considered before deciding whether to issue a conduct notice.

If HMRC applies to a tribunal for an order under s306A Finance Act 2004 on the grounds that it suspects that a scheme is notifiable. The tribunal gives the order requiring the scheme to be treated as notifiable. The promoter subsequently agrees in writing that the scheme was notifiable from the time it first made a firm approach to potential customers in connection with the scheme or made the scheme available to them. The promoter has met the threshold condition and it is significant. The tax impact test will be considered before deciding whether to issue a conduct notice.

Promoter E has made its first disclosure and has to provide its first quarterly client list to HMRC. It misjudges the final date for submitting the client list and as a consequence accepts in writing that it submitted the list two days late. Although a threshold condition has been met this would not be regarded as significant.

Promoter F provides its client lists to HMRC every quarter and has done so since April 2012. The client lists are complete when provided to HMRC but Promoter F accepts in writing that it misses the submission deadlines twice in 2012 and three times in 2013. The consistent pattern would be regarded as significant. The tax impact test will be considered before deciding whether to issue a conduct notice.

Information notices

Promoter G is subject to an information notice under Schedule 36 in respect of its own tax position. Promoter G complies with each item on the information notice apart from the requirement to provide its bank statements for 2011. It has approached its bank for duplicate statements but they had not been provided before the time limit for providing the information under the notice has expired. Although a threshold condition has been met this would not be regarded as significant.

Promoter H is subject to a similar information notice and fails to supply the majority of the information before the time limit expires on the information notice and offers no evidence that it is attempting to obtain the information. This would be significant. The tax impact test will be considered before deciding whether to issue a conduct notice.

Where a person is treated as meeting a threshold condition, which was actually met by another person, an authorised officer is not required to give a conduct notice unless they determine that the meeting of the condition should be regarded as significant by reference to both the person who met the condition and the promoter who is treated as meeting that condition.

2.2.3 Tax impact test

The tax impact safeguard is at s237(8). It applies where the promoter's meeting of one or more threshold conditions is significant. An authorised officer is not required to issue a conduct notice where the likely impact of the promoter's activities on the collection of tax makes a conduct notice inappropriate, taking into account the purpose of the legislation. A conduct notice will not be issued if the authorised officer considers that the promoter's activities are unlikely to notably affect the collection of tax.

The extent of the impact of the promoter's activities on the collection of tax will depend on the impact all of the promoter's activities would be likely to have. The authorised officer is not limited to considering the likely tax impact of the promoter's business activities, in the course of which it met one or more threshold conditions. On this basis it is not possible to provide comprehensive examples.

When applying this test, the authorised officer is also obliged to take into account the likely impact of all of the promoter's activities on the collection of relevant contributions (see paragraph 1.5).

Companies and partnerships

Schedule 34 provides for

- a company or partnership controlled by a person to be treated as meeting a threshold condition where that condition was met by the person that controls the company or partnership
- a company or partnership to be treated as meeting a threshold condition where that condition was met by a person, which that company or partnership controls
- a company or partnership controlled by a person to be treated as meeting a threshold condition where that condition was met by another company or partnership, which is controlled by the same person

There are more details in Appendix 2.

2.3 Conduct notices: conditions that may be imposed by a conduct notice

There is no requirement in the legislation for the conditions imposed by a conduct notice to have any connection with the threshold condition or conditions which the promoter has met. Section 238 FA 2014 sets out the purposes for which conditions may be imposed by a conduct notice. These are listed below and are to ensure that the promoter:

- supplies adequate information (paragraph 2.4) to its clients (paragraph 2.4) about schemes that it is promoting
- provides adequate information to intermediaries (paragraph 1.7) about schemes that it is promoting
- meets its obligations under specified disclosure provisions (paragraph 2.4)
- does not discourage others from meeting obligations to disclose information to HMRC of a description specified in the notice
- does not enter into agreements with other persons in relation to a scheme promoted by the promoter that impose restrictive contractual terms of the sort described in paragraphs 11(2) or (3) Schedule 34, or both of the sort described in paragraph 11(4) and the sort described in paragraph 11(5) Schedule 34 (Appendix 1.11)
- does not promote schemes that rely on one or more contrived or abnormal steps to produce either a tax advantage or the avoidance or reduction of a liability to pay NICs
- does not fail to comply with any stop notice that has taken effect in accordance with paragraph 12 Schedule 34 (P Appendix 1.12 – and guidance on follower notices available at https://www.gov.uk/government/publications/follower-notices-and-accelerated-payments)

Section 238 does not specify the actual conditions that can be imposed in a conduct notice. The authorised officer has discretion to specify conditions for any of the purposes listed above as long as they meet the safeguards set out below and the HMRC governance arrangements are followed.

A key requirement of the governance arrangements will be the need for independent internal scrutiny of decisions. To ensure the independent scrutiny of decisions at each stage of the Part 5 legislation there are several instances where approval is required by an authorised officer. These authorised officers have been appointed by the Commissioners of HMRC and are all members of the Senior Civil Service in HMRC's Counter-Avoidance directorate.

The conditions should be chosen to address the poor conduct of a small minority of promoters who may, for example:
- promote schemes that have very little chance of working but without letting clients have an adequate assessment of risk
- misrepresent to clients HMRC's position or the outcome or relevance of court decisions
- rely on failing to disclose relevant information to HMRC to achieve the tax advantage for their clients
- provide misleading descriptions in marketing material

Although there is no appeal against the issue of a conduct notice there are three important safeguards. These are:
- the authorised officer must give the promoter an opportunity to comment on the proposed terms of the conduct notice before finalising its terms. The

officer must then consider fairly any comments made, taking into account the purpose of the legislatio
- the notice may include only conditions that are reasonable and proportionate for the purposes listed above.
- when the First-tier Tribunal is considering an application by an authorised officer to approve the issue of a monitoring notice, the statutory procedures explicitly entitle the promoter to make representations asking the Tribunal to refuse approval on the basis that the condition the promoter has breached was not reasonably imposed in the conduct notice (paragraph 3.5)

The term 'contrived or abnormal steps' is also used in the GAAR legislation at s207(2)(b) FA 2013. The guidance in paragraph C5.8 in the GAAR Guidance and the illustrative examples at Part D of that guidance is also relevant.

Paragraph 2.6 provides guidance on when a conduct notice comes into effect. It also covers the duration of the conduct notice and the powers to amend or withdraw it.

Paragraph 2.5 provides guidance on the information powers that are available to an authorised officer to monitor compliance with a conduct notice for the period during which it is in force.

2.4 Conduct notices: definitions relating to the conditions that may be imposed by a conduct notice

Specific definitions are provided for several of the terms used in s238 FA 2014. These are provided below.

Adequate information s238(3)(a) and (b), s238(4) and s239(2)

Adequate information to be provided to clients or to intermediaries includes:
- adequate description of the proposed scheme
- adequate assessment of the risk that the scheme may fail, for example as a minimum by referring clients to 'Ten things you need to know about tax avoidance'

- not creating a false impression that HMRC has, whether formally or informally, considered, approved or expressed an opinion on the scheme

And adequate for these purposes means what a client or intermediary might reasonably expect. It is not possible to be prescriptive in guidance about what may be adequate to meet the reasonable expectations of a client or intermediary in every circumstance. The information provided must take into account the level of tax understanding of the recipient, so that a more detailed description of the scheme and more focus on clear and prominent explanation of risk may be needed for a recipient with little relevant tax knowledge. This does not mean that the promoter must provide all information a client might request, if the request is completely unreasonable. However, it would be

reasonable to expect a promoter to share the assumptions on which legal opinion is based, for example. Officers in the Promoter Channel will be available to discuss with a promoter what information would be adequate.

The risk that a scheme may fail means the risk that the scheme will not result in the tax advantage that the scheme might have been expected to deliver (s238(6)).

Client s238(3)(a), s239(3) to (5)
A person is a client of a promoter if one or more of the following events takes place during the time in which a conduct notice is in effect (paragraph 2.6). The promoter:

- makes a firm approach (paragraph 1.6) to that person with a view to the promoter making a relevant proposal (paragraph 1.5) available for implementation by that person or anyone else
- makes a relevant proposal available for implementation by that person
- takes part in the organisation or management of relevant arrangements (paragraph 1.5) entered into by that person

Promotes relevant proposal s238(3)(f),
The promoter promotes a relevant proposal if it

- takes part in designing it
- makes a firm approach to a person to make it available for implementation by that person or anyone else
- makes it available to anyone for implementation

The promoter also promotes relevant arrangements if it takes part in designing, organising or managing the arrangements.

Specified disclosure provisions s238(5)
If a conduct notice is to require that the promoter must comply with obligations under specified disclosure provisions it must relate to one or more of the following obligations:

- the DOTAS obligation on a promoter to provide information to HMRC in accordance with s308 FA 2004 (DOTAS Guidance paragraph 14.2)
- the DOTAS obligation on a promoter to provide scheme reference numbers to clients in accordance with s312 FA 2004 (DOTAS Guidance paragraph 17.2)
- the DOTAS obligation on a promoter to provide details of clients to HMRC in accordance with s313ZA and 313ZB FA 2004 (DOTAS Guidance paragraph 16)
- the obligation to provide information and documents to HMRC in accordance with Part 1 Schedule 36 FA 2008 (CH20150 onwards) for the purpose of checking their tax position

There is a power at s238(7) to amend the list of disclosure obligations by regulation.

The disclosure obligations that apply in relation to NICs are set out in the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012 [SI2012/1868). The regulations which correspond with sections 308, 312, 313ZA and 313ZB of FA 2004 are regulations 8, 13, 16 and 16A respectively.

S110ZA of the Social Security Administration Act 1992 and s104ZA of the Social Security Administration (Northern Ireland) Act 1992 (see National Insurance Manual NIM 60400) provides that Part 1 of Schedule 36 also applies for the purpose of checking a person's liability to pay relevant contributions. A conduct notice may therefore include a condition that the promoter, to which the notice is given, complies with an obligation to provide information and documents that are reasonably required for the purpose of checking a person's position as regards relevant contributions.

2.5 Conduct notices: information powers

There is a specific information power at s262 FA 2014 that will be used to help HMRC to check compliance with the conditions imposed in a conduct notice.

The power may be used by an authorised officer or by any other officer with the approval of an authorised officer. That person may issue a notice in writing to the promoter requiring it to

- provide information
- produce documents

That are reasonably required to check that the promoter is complying with the conduct notice.

There is no limit on the number of times or the frequency with which this power can be used, subject to the requirement that the power must be used reasonably. The authorised officer will balance the need for proper oversight of the conditions imposed in the conduct notice in order to ensure the promoter operates within the terms of the notice with the cost and inconvenience to the promoter of complying with requests for information and documents.

An authorised officer may make a request for information and documents in writing but it may often be more convenient for the promoter's compliance with a conduct notice to be discussed at a meeting.

A promoter can appeal against an information notice issued under s262. The appeal can be against the notice itself or against any of the requirements in the notice. Further guidance on appeals against information notices is at paragraph 4.13.

In common with the other information powers available under Part 5 there are provisions that govern the use of these powers. These provisions:

- govern how and where information and documents are to be supplied (s267, see paragraph 4.14)

- permit the notice to be complied with by producing a copy of a document unless the original document is required (s268, see paragraph 4.14)
- provide an exception for certain documents (s269, see paragraph 4.15)
- confirm that a promoter does not need to produce documents that are not in its possession or power, or documents that originated more than six years before the issue of the information notice (s270, see paragraph 4.15)
- confirm that a promoter does not need to disclose any privileged information (s271, see paragraph 4.15)

Schedule 35 imposes penalties for failure to comply with notices under s262. The penalties are:

- an initial penalty of up to a maximum of £5,000 for failure to provide information and documents specified in the notice (paragraph 2, subject to abatement under paragraph 2(4), see paragraph 5.2)
- further penalties of up to a maximum of £600 per day for continuing failure to provide information and documents after an initial penalty has been imposed (paragraph 3(2)(b), see paragraph 5.4)
- a penalty of up to £5,000 if the promoter supplies inaccurate information or a document containing inaccuracies (paragraph 4(8)(c), see paragraph 5.5)

Detailed guidance about the use of the information powers in Part 5 is at paragraph 4.1 onwards.

2.6 Conduct notices: duration, amendment and withdrawal

Section 241 FA 2014 deals with the duration of a conduct notice and s240 provides an authorised officer with powers to amend or withdraw a conduct notice.

A conduct notice will take effect from the date specified as the commencement date in the conduct notice. The date cannot be earlier than the date on which the conduct notice is issued.

The conduct notice will cease to have effect at the earliest of the following dates:

- the date on which it is withdrawn by an authorised officer – see below
- the date on which a monitoring notice takes effect in relation to the same promoter, see paragraph 3.4
- the termination date specified in the conduct notice

All conduct notices must include a termination date, which cannot in any circumstances be later than two years from the date on which the notice takes effect.

An authorised officer may amend a conduct notice at any time during the period in which the conduct notice has effect. An amendment may add conditions to the notice or remove them. If an authorised officer proposes to add conditions to the notice the promoter will be given an opportunity to comment before the amendment is made.

An authorised officer may also withdraw a notice if the officer thinks it is no longer necessary for it to continue. This may be appropriate where the promoter has fully complied with the conditions imposed in the notice and there are no other causes for concern. The promoter is free to ask an authorised officer to withdraw a conduct notice at any time. Such a request should be supported by evidence that the promoter has fully complied with the conditions imposed in the notice and set out how they will demonstrate that it is not necessary for the conduct notice to continue to have effect because the behaviours that led to the issue of the conduct notice and the inclusion of conditions imposed under the notice will not recur. The promoter has no right of appeal against a decision by an authorised officer not to withdraw a conduct notice.

Any decision by an authorised officer either to add or remove conditions to or from a conduct notice or to withdraw a notice will be subject to the same internal governance procedures as apply to the issuing of a conduct notice.

Once a conduct notice has expired or been withdrawn there will be no conditions placed on the conduct of a promoter unless a monitoring notice has effect. However, if the promoter again meets a threshold condition (Appendix 1) an authorised officer will consider whether a new conduct notice should be issued.

Chapter 3 Monitoring notices

3.1 Monitoring notices: overview

In the small number of cases in which a promoter of tax avoidance schemes has failed to comply with one or more conditions in a conduct notice an authorised officer of HMRC will seek approval from the First-tier Tribunal for the issue of a monitoring notice to that promoter. A monitoring notice imposes significant new obligations on the promoter and can only be issued if approval is given by the First-tier Tribunal. A promoter is entitled to make representations to the tribunal and to appeal against any decision by the tribunal to approve the issue of a monitoring notice.

The flowchart in paragraph 1.3 illustrates the processes that relate to the issue of monitoring notices.

A promoter who is subject to a monitoring notice is referred to as a monitored promoter in the legislation (s244(5) FA 2014) and in this guidance. The guidance is organised as follows:

- action to take where there is a failure to comply with conditions in a conduct notice – paragraph 3.2
- approval of First-tier Tribunal to issue of monitoring notice – paragraph 3.3 to paragraph 3.5
- appeal against Tribunal approval – paragraph 3.6
- content and issue of monitoring notice – paragraph 3.4
- publication of information by HMRC about a monitored promoter – paragraph 3.8
- publication of information by a monitored promoter – paragraph 3.9
- allocation and use of promoter reference number –paragraphs 3.10 to 3.13
- information powers that apply to monitored promoters, clients and intermediaries – paragraph 4.1 onwards
- limitation on duty of confidentiality placed by promoter on clients and intermediaries – paragraph 4.17
- extended time limit for assessment on clients of a monitored promoter – paragraph 6.1 onwards
- restrictions on defence of reasonable care for monitored promoters and their clients – paragraph.8
- withdrawal of monitoring notice – paragraphs 3.14 to 3.15
- appeal against refusal to withdraw monitoring notice – paragraph 3.16

3.2 Monitoring notices: failure to meet a condition in a conduct notice

If a promoter fails to meet one or more conditions imposed by a conduct notice an authorised officer of HMRC will consider whether to apply to the First-tier Tribunal for approval to issue a monitoring notice to the promoter.

Once an authorised officer has determined that a promoter has breached the terms of a conduct notice, the authorised officer must apply to the tribunal to consider approving a monitoring notice unless the officer considers that the promoter's failure to comply with the condition or conditions is minor and the conditions with which the promoter has not complied are imposed for the purposes of ensuring

- adequate information is provided to clients (s238(3)(a))
- adequate information is provided to intermediaries (s238(3)(b))
- the promoter does not fail to comply with disclosure obligations (s238(3)(c)) (paragraph 2.3)

The promoter's failure to comply with any conditions imposed by a conduct notice other than those imposed for the three purposes listed above is not to be regarded as minor under any circumstances. Full details about the purposes for which it is or may be reasonable to impose conditions under a conduct notice are described in paragraph 2.3.

When making representations to the tribunal the promoter can ask the tribunal to agree that it was unreasonable to include a condition or conditions in the conduct notice. If the tribunal agrees it will not approve the issue of a monitoring notice for a failure by the promoter to comply with conditions that were not reasonably imposed (paragraph 3.5).

Whether a failure to comply with a condition imposed under s238(3)(a) to (c) is a minor failure is a matter for the discretion of the authorising officer. The officer will take into account whether the failure:

- was deliberate or inadvertent
- was repeated
- was no more than a failure to miss a deadline by a few days
- was unlikely to result in any significant risk of tax loss

It is unlikely that an officer would consider a promoter failing to properly explain to clients or intermediaries that the scheme might fail, or giving a false impression that HMRC has approved a scheme, as a minor matter (paragraph 2.4).

The actions to take if the authorised officer decides to apply to the tribunal for approval to issue a monitoring notice are set out at paragraph 3.3.

3.3 Monitoring notices: applying to the tribunal for approval

An authorised officer who wishes to apply to the First-tier Tribunal for agreement to issue a monitoring notice must carry out the following steps:

- include a copy of the draft monitoring notice with the application to the tribunal (s242(2) FA 2014). Paragraph 3.4 provides guidance on how to draft a monitoring notice
- give notice to the promoter about the application to the tribunal at the time the application is made, stating which conditions the officer considers the promoter has failed to comply with and what reasons the officer has for reaching that conclusion (s242(4) and (5)). In practice this requirement can

be met by sending the promoter a copy of the draft monitoring notice at the time it is sent to the tribunal

3.4 Monitoring notices: the content of a monitoring notice

Section 244 FA 2014 requires that any monitoring notice must include the following

- an explanation of the effect of the monitoring notice (s244(2)(a)). It is important that the promoter is aware of all of the implications of being a monitored promoter
- the date from which the monitoring notice will take effect, which cannot be earlier than the date on which the notice is given to the promoter (s244(2) and (4)). The date should be left blank in any draft notice sent to the tribunal (paragraph 3.3)
- a list of the conditions in the conduct notice that the officer considers have not been met and the reasons for that conclusion (s244(3)(a))
- an explanation of the right to request withdrawal of the monitoring notice (s244(2)(b) and s245) (paragraph 3.14)

The monitoring notice will take effect from the date specified in the notice whether or not there is an appeal against the approval by the tribunal to the issue of the notice. References in this guidance to the date from which the monitoring notice takes effect are always to the date specified in the notice. A draft notice is not relevant for this purpose. For example, a draft notice is given to a promoter in June 2015 before an application is made to the tribunal. In August 2015 the tribunal agrees to the issue of a monitoring notice and a monitoring notice is given to the promoter on 15 September 2015. The notice cannot take effect before 15 September 2015.

Unlike in the case of a conduct notice (paragraph 2.6) there is no requirement to set a termination date for a monitoring notice. It will have effect indefinitely until:

- any appeal against the tribunal approval of the monitoring notice is finally settled in the promoter's favour (paragraph 3.6)
- an authorised officer agrees to a request from the monitored promoter to withdraw the monitoring notice, made at least 12 months after the end of the appeal period [paragraph 3.6]
- an authorised officer withdraws a monitoring notice because the authorised officer thinks it is no longer necessary for it to continue (paragraph 3.14)
- the tribunal directs on an appeal against HMRC refusal to withdraw a monitoring notice that the notice should cease to have effect (paragraph 3.16)

When considering whether the notice remains necessary in a case when the monitored promoter has not asked for it to be withdrawn, an authorised officer must take into account the same matters as when the promoter has asked for it to be withdrawn, that is:

- whether, during the period in which the monitoring notice has had effect, the promoter has engaged in behaviour of a sort that could be

regulated by imposing conditions in a conduct notice (paragraph 2.3) whether or not a threshold condition has been breached
- whether it is likely that the promoter will engage in such behaviour in future
- whether the promoter has complied, or failed to comply, with all of the obligations imposed on it as a monitored promoter since the monitoring notice took effect (s245(5))

The requirements for the issue of a monitoring notice are modified where a monitoring notice is given to a promoter who was formerly a partner in a partnership that was itself a monitored promoter (paragraph 7.5).

All monitoring notices should explain the effects of the notice.

3.5 Monitoring notices: proceedings of the First-tier Tribunal

Once an authorised officer has applied to the First-tier Tribunal to approve the issue of a monitoring notice the tribunal has discretion to determine how that application should be dealt with.

Section 243 FA 2014 requires that:
- the tribunal must be satisfied that the officer would be justified in issuing a monitoring notice (s243(1)(a))
- the promoter must have been given a reasonable opportunity to make representations to the tribunal (s243(1)(b))

The tribunal is entitled to consider all of the circumstances of the case and will need to be satisfied on the balance of the evidence that the issue of a monitoring notice is reasonable, justified and proportionate, taking into account the purpose of the legislation and the behaviour of the promoter.

The tribunal will also consider how the promoter should be permitted to make representations. This could involve a hearing, with each side represented, or merely representations on paper (see ARTG7520). Given the commercial implications for a promoter it may be that some will apply for hearings to be held in private. The tribunal may agree to that request if it considers it appropriate (see ARTG8610).

Section 243(3) explicitly provides for a promoter to make representations to the tribunal that in its view a condition in the conduct notice with which it has not complied ought not to have been imposed in the first place. If the tribunal determines that it was not reasonable to include in the conduct notice any of conditions, with which the promoter has since failed to comply, the tribunal will not approve the issue of a monitoring notice. However, if the tribunal is satisfied that the promoter has failed to comply with more than one condition in the conduct notice, and it was reasonable to impose at least one of the conditions with which the promoter has failed to comply, the tribunal may approve the issue of a monitoring notice.

Example 1: a conduct notice imposes five conditions on a promoter, who fails to comply with only one of them. The tribunal agrees that the condition with which the promoter has failed to comply should not have been imposed. So it refuses to approve the issue of a monitoring notice.

Example 2: a conduct notice imposes 5 conditions on a promoter, who fails to comply with four of them. The tribunal agrees that one of those four should not have been imposed, but having considered all of the circumstances it approves the issue of a monitoring notice because of the failure to comply with the other three conditions.

The tribunal also has authority to amend the draft monitoring notice. If the tribunal has determined that one or more of the conditions in the conduct notice were not reasonably imposed it will amend the monitoring notice to remove those conditions from the list of conditions with which the promoter has failed to comply. This is a significant protection for the promoter because HMRC may publish all of the conditions in the conduct notice with which the promoter has failed to comply and which accordingly the promoter has to notify to its clients (paragraphs 3.8 and 3.9).

If the tribunal does not approve the issue of a monitoring notice the existing conduct notice will continue to have effect until the termination date, or until it is withdrawn (paragraph 2.6). HMRC will not take any action to ensure compliance with any conditions in a conduct notice that the tribunal has decided were not reasonably imposed. If the tribunal considered that none of the conditions in the conduct notice were reasonably imposed HMRC will withdraw it.

A promoter is entitled to appeal against the tribunal's decision to approve the issue of a monitoring notice (paragraph 3.6).

3.6 Monitoring notices: appeal rights

A decision of the First-tier Tribunal in relation to an application for approval to issue a monitoring notice is final unless either the promoter or HMRC:

- asks the tribunal to set aside or remake its decision, or part of its decision, see ARTG8970
- asks the tribunal for permission to appeal against the decision to the Upper-tier Tribunal, see ARTG8990 and ARTG9000

The Upper-tier Tribunal can be approached directly if the tribunal does not grant permission to appeal. Any appeal must be on a point of law. There may in due course be a further appeal against any decision of the Upper-tier Tribunal, see ARTG10010.

If the First-tier Tribunal approves the issue of a monitoring notice an authorised officer will arrange for the notice to be issued without delay (Section 244(1) FA 2014). Many of the obligations imposed on a monitored promoter will come into effect as soon as the monitoring notice takes effect, regardless of whether there is an appeal. Some aspects of the monitored

promoter regime are deferred until the end of the period in which an appeal could be brought or, if there is an appeal, until the appeal is settled. These are the aspects that would lead to a promoter being publicly identified:

- publication of information by HMRC about a monitored promoter (s248(5)) (paragraph 3.8)
- the obligation on a promoter to tell clients that it is a monitored promoter and to publish information about its status (s249(4)) (paragraph 3.9)
- the allocation and use of a promoter reference number (s250(1) and (3)) (paragraphs 3.10 to 3.13)

The period in which an appeal against approval given by the First-tier Tribunal could be brought is referred to as the 'appeal period' and consists of:

- the period of 56 days from the date on which the tribunal provides its reasoned decision, plus
- if permission is refused by the First-tier Tribunal, the period of one month from the date of refusal within which a person may petition the Upper Tribunal directly for permission to appeal, plus
- if the Upper Tribunal grants permission to appeal, the further period of one month from the date on which permission is granted within which a notice of appeal must be filed

So the appeal period may be four months or more where the Upper Tribunal grants permission for an appeal.

There is a possibility that the promoter will be publicly identified in any event unless the tribunal or Court agree to hold hearings in private and to anonymise decisions. That is entirely a matter for the tribunal or Court to consider.

If the promoter's appeal is successful the monitoring notice is treated as never having had effect. The existing conduct notice will continue to have effect until the termination date, or until it is withdrawn (paragraph 2.6). HMRC will not take any action to ensure compliance with any conditions in a conduct notice that the courts have decided were not reasonably imposed. If the courts considered that none of the conditions in the conduct notice were reasonably imposed HMRC will withdraw it.

3.7 Monitoring notices: the regime that applies to monitored promoters

Once a monitoring notice takes effect in relation to a promoter it will have far-reaching implications, which aim to ensure that clients and potential clients are aware of the promoter's status, that HMRC has all of the information and tools it needs to tackle avoidance schemes promoted by the promoter and that the promoter is encouraged to change its behaviour. There are significant financial penalties if the promoter fails to comply with obligations that apply to monitored promoters. Some aspects of the monitored promoter regime do not take effect until the promoter's appeal rights are exhausted (paragraph 3.6).

The key aspects of the monitored promoter regime are:

- publicity and notification
  - publication of information about the promoter by HMRC (paragraph 3.8)
  - publication by the promoter of its status as a monitored promoter (paragraph 3.9)
  - allocation of promoter reference number (PRN) by HMRC to promoter (paragraph 3.10)
  - duty of promoter to pass PRN on to clients (paragraph 3.11)
  - duty of client to pass PRN on to other clients and to provide the PRN to HMRC (paragraph 3.13)
- information powers
  - power to obtain information or documents relating to avoidance schemes from promoter or intermediary (paragraph 4.3)
  - power to obtain information on an ongoing basis from a promoter about avoidance schemes (paragraph 4.5)
  - power to obtain information from intermediaries of non-resident promoters (paragraph 4.6)
  - power to obtain client details from a promoter or intermediary on a regular basis (paragraphs 4.7 and 4.8)
  - power to obtain information about persons who are not clients and who have taken part in avoidance schemes (paragraph 4.9)
  - duty of a promoter to tell HMRC its current address (paragraph 4.10)
  - duty of a client or intermediary to provide information to a monitored promoter (paragraph 4.12)
- tools
  - no duty of confidentiality imposed by a promoter will prevent a client or intermediary from disclosing information to HMRC (paragraph 4.17)
  - restrictions on defence of reasonable excuse and reasonable care (paragraphs 5.7 and 5.8)
  - extended time limit for assessment (paragraph 6.1 onwards)
  - criminal offence of concealing, destroying or disposing of documents (paragraph 5.10)

These powers will typically only apply during the period in which the monitoring notice has effect. When considering whether and when to withdraw a monitoring notice (paragraph 3.14) an authorised officer should take into account whether any of these powers continues to be needed. For example, although a promoter may have ceased promoting avoidance schemes there may be a continuing need for information about clients who have made use of schemes that were promoted during the period in which the monitoring notice has effect (paragraph 4.1).

Schedule 36 modifies the monitoring notice regime for partnerships. Where a monitoring notice has applied to a partnership an authorised officer may issue a monitoring notice to a departing partner without reapplying to the tribunal (paragraph 7.5).

3.8 Monitoring notices: publication by HMRC of information about a monitored promoter

A key principle of the regime that applies to monitored promoters is that clients, potential clients and intermediaries should be aware of the promoter's status. For that reason there are several ways in which information about a monitored promoter may be published. None of these can be used until the promoter's appeal rights against the initial tribunal decision have been exhausted.

Section 248 FA 2014 permits HMRC to publish information about a monitored promoter, which HMRC will do unless there are compelling reasons not to do so.

The information that HMRC may publish is:

- the promoter's name, including any name under which it carries on business, or any previous name under which it has done so
- the promoter's business address, or registered office address if it is a company
- the nature of the promoter's business
- any other information that helps to make clear the promoter's identity
- a statement of the conditions in the conduct notice that the promoter has failed to comply with. This should be clear from the approval given by the First-tier Tribunal (paragraph 3.5)

The manner of publication is left to the discretion of the authorised officer, but as a general rule HMRC will publish the information on its website with due prominence. In considering how the information is published HMRC will take into account the need to make sure that clients and potential clients are able to find out about the promoter's status.

If HMRC publishes information about the nature of a monitored promoter's business it will typically consist of summary information about the types of avoidance schemes that the promoter has been known to promote. Where a decision of the First-tier Tribunal or the higher courts in relation to a scheme promoted by that promoter discloses the promoter's name, HMRC may also make reference to that decision in discussing the nature of the promoter's business.

The power to publish other information about a promoter is limited to what an authorised officer considers it appropriate to publish to make clear the identity of the promoter (s248(2)(d)). There is no power to publish information for any other purpose.

Publication must not take place before the end of the appeal period (paragraph 3.6).

If the monitoring notice is withdrawn (paragraph 3.14) HMRC will publish the fact of withdrawal in the same way and with the same prominence as it published information about the promoter being a monitored promoter.

3.9 Monitoring notices: publication of information by a monitored promoter

A monitored promoter is required by Section 249 FA 2014 to provide certain information to existing and new clients.

The monitored promoter must:

- give notice to existing and new clients that it is a monitored promoter and which conditions in a conduct notice it has failed to meet (s249(1))
- publish the same information on its website and any other websites promoting or providing information about the promoter's activities, together with its promoter reference number (PRN) (paragraph 3.10) (s249(3))
- publish the same information, together with its PRN, in publications and correspondence (s249(10)).

When publishing the required information about the monitoring notice, the terms of the conduct notice that it breached and its reference number on the required websites, the required information must

- appear in a prominent position
- if in writing, be legible
- if in audio-visual format, be both clearly audible and visible
- not be concealed in any way
- be included or referenced in any promotional material and
- not be presented in a way that promotes activity of tax avoidance

The publications and correspondence in which the monitored promoter must include the required information are

- any publication or correspondence containing information about schemes offered or promoted by the promoter (except when promoter is writing to HMRC)
- any publication or correspondence which is shown, given or sent to existing, new or prospective clients or existing, new or prospective intermediaries in relation to any schemes (that is, not only in relation to monitored arrangements and monitored proposals [paragraph 4.2])
- any correspondence concerning any schemes with a professional body (Appendix 1), to which the monitored promoter belongs or used to belong or of which the promoter is a prospective member
- any correspondence with a regulatory authority concerning the promoter's conduct in respect of any schemes (Appendix 1)

The required information in the publications and correspondence listed above must

- be prominently displayed and not in any way concealed
- if in writing, be legible
- if in audio-visual format, be clearly audible and visible
- not be presented in a way that promotes the activity of tax avoidance

The obligations imposed by s249 do not apply until the end of 10 days following the end of the appeal period (paragraph 3.6).

The end of the appeal period is modified where the monitoring notice is a replacement monitoring notice for a monitoring notice that had been issued to a partnership (paragraph 7.5). It will be the later of:

- the end of the appeal period for the original monitoring notice
- the date on which the replacement monitoring notice takes effect (Section 249(12))

The notice to clients is to be given to:

- existing clients – any person who has been a client of the promoter at any time in the period between the date on which the conduct notice took effect and the date on which the monitoring notice takes effect
- new clients – any person who becomes a client of the promoter while the monitoring notice has effect

See below for the definition of 'client' for this purpose.

The obligation to give notice to any person who was a client when the monitoring notice takes effect applies even where that person has ceased to be a client by the end of the appeal period.

In relation to persons who become clients of the promoter during the period in which it is a monitored promoter the obligations must be met within 10 days of the person first becoming a client, if that is later than the deadline for meeting the obligations that would otherwise apply.

> Example 1: The First-tier Tribunal releases its decision to approve the issue of a monitoring notice on 12 July 2016. Any appeal by the promoter against that decision must be made within 56 days of that date, by 6 September 2016 (regulation 39 SI2009/273). No appeal is made. The promoter must meet its obligations to provide information to its existing clients by the end of 16 September 2016. The promoter obtains a new client on 5 November 2016 and must meet its obligations to provide information to that client by 15 November 2016.

The definition of client for this purpose is at s249(7) and (8). A person is a client of a monitored promoter at the time the monitoring notice takes effect if during the period between the date on which the conduct notice took effect and the date on which the monitoring notice took effect the promoter

- made a firm approach (paragraph 1.6) to that person in order to make a relevant proposal (paragraph 1.5) available for implementation by that person or any other person
- made a relevant proposal available for implementation by that person or
- took part in the organisation or management of relevant arrangements (paragraph 1.5) entered into by that person

The conduct notice referred to above is the conduct notice referred to in the monitoring notice. The effect of this definition is that a person may be treated as a client of the promoter at the time the monitoring notice takes effect even though the relevant actions by the promoter took place during the earlier period in which the conduct notice had effect and there was no longer a

business relationship between that person and the promoter at the time the monitoring notice took effect.

> Example 2: A promoter is given a conduct notice that takes effect from 20 July 2014. In January 2015 the promoter makes a firm approach to a person with a view to that person implementing a scheme the promoter has developed. Nothing comes of it and the promoter has no contact with that person after March 2015. In November 2015 the First-tier Tribunal approves the issue of a monitoring notice to that promoter and it is issued by an authorised officer on 25 November 2015 to take effect on that date. The clients of the promoter are treated as including the person to whom it made a firm approach in January 2015.

A person is a new client of the promoter if the promoter takes any of the three relevant actions listed above in relation to that person at any time during the period in which the monitoring notice has effect.

3.10 Monitoring notices: allocation of promoter reference numbers (PRNs)

The promoter reference number (PRN) plays an important role in the controls that are placed on the activities of a monitored promoter. It ensures that HMRC will be made aware that a person has made use of a scheme promoted by the promoter, so that effective counteraction can be taken.

The relevant steps needed to ensure that outcome are set out below.

1. At the end of the appeal period HMRC allocates a unique PRN to each monitored promoter, or to the intermediaries of that promoter if it is not resident in the UK (s250 FA 2014).

2. The promoter must provide the PRN to its clients (s 251) (paragraph 3.11).

3. The clients must provide the PRN to other clients that it knows about and that may not have received the PRN (s 252) (paragraph 3.13).

4. Intermediaries who have received a PRN must provide it to clients (s252) (paragraph 3.12).

5. Clients must provide the PRN to HMRC in their tax returns or as set out in regulations (paragraph 3.13).

Penalties may apply where there is a failure by promoters, intermediaries or clients to meet any of the obligations placed on them in relation to PRNs (paragraph 5.2).

The PRN is not allocated and notified to the promoter until the end of the appeal period (paragraph 3.6).

The end of the appeal period is modified where the monitoring notice is a replacement monitoring notice for a monitoring notice that had been issued to a partnership (paragraph 7.5). It will be the later of:

- the end of the appeal period for the original monitoring notice
- the date on which the replacement monitoring notice takes effect (s250(6))

The rules for issuing PRNs are modified where the monitored promoter is not resident in the UK. Section 250(2)(b) requires the PRN to be provided to any person that HMRC knows is an intermediary (paragraph 1.7) in relation to any relevant proposal (paragraph 1.5) of the promoter. The intermediary is then required to pass the PRN on to clients (paragraph 3.12).

3.11 Monitoring notices: duty of promoter to provide the promoter reference number to intermediaries and clients

Once a monitored promoter receives a promoter reference number (PRN) from HMRC it is obliged by s251 FA 2014 to provide that PRN to its intermediaries and clients.

The PRN must be provided to three classes of clients:

- existing clients (s251(2)(a))
- new clients (s251(2)(b)) and
- some former clients (s251(2)(c))

A person is regarded as an existing client for this purpose if one of the relevant actions listed below takes place during the period between the date on which the monitoring notice takes effect and the date on which the promoter received the PRN. The promoter must provide the PRN to these clients within 30 days of receiving it (s251(6)(a)).

A person is regarded as a new client for this purpose if one of the relevant actions listed below takes place during the period in which the promoter is a monitored promoter, but after the date on which the promoter received the PRN. The promoter must provide the PRN to new clients within 30 days after the date on which the earliest relevant action takes place (s251(6)(b)).

The relevant actions by the promoter in relation to that client are listed in s251(3) and are:

- making a firm approach (paragraph 1.6) to that person in order to make a relevant proposal (paragraph 1.5) available for implementation by that person or any other person
- making a relevant proposal available for implementation by that person and
- taking part in the organisation or management of relevant arrangements (paragraph 1.5) entered into by that person

A person is regarded as a former client for this purpose if the promoter could reasonably be expected to know that they have entered into certain transactions described in s251(4). The transactions:

- must be transactions that form part of relevant arrangements (paragraph 1.5)

- must enable, or be likely to enable, the person to obtain a tax advantage (paragraph 1.5) during the period in which the monitoring notice has effect
- must be relevant arrangements in relation to which the monitored promoter is a promoter, or must implement a relevant proposal (paragraph 1.5) in relation to which the monitored promoter is a promoter

Those transactions must have occurred during the period beginning with the date on which the conduct notice took effect and ending with the date the monitoring notice took effect (because otherwise they would be treated as an existing or new client instead.). The conduct notice here is the conduct notice referred to in the monitoring notice. The promoter must provide the PRN to these clients within 30 days of receiving it, or within 30 days of the date on which the promoter first became aware that the former client has entered into transactions that form part of relevant arrangements, if that is later (s251(6)).

Although the definition of a former client includes events that took place before the promoter became a monitored promoter those events are only relevant if the resulting tax advantage is obtained during the period that the promoter is a monitored promoter. The promoter is not required to provide the PRN to former clients who have implemented schemes that were intended to lead to tax advantages before the period in which the promoter became a monitored promoter.

> Example: a conduct notice is issued to a promoter on 23 July 2014. One of the conditions imposed by the conduct notice is that the promoter must stop promoting particular schemes that rely on contrived or abnormal steps to create a capital loss in circumstances in which there is no commercial loss (paragraph 2.3). The promoter makes one such scheme available to a client, who enters into the transactions necessary to create the loss between 13 and 15 October 2014. The promoter has no subsequent dealings with that client.
>
> As a result of the promoter continuing to promote capital loss schemes the First-tier Tribunal approves the issue of a monitoring notice on 7 November 2014 and an authorised officer issues a monitoring notice to the promoter on 14 November 2014. The appeal period expires on 2 January 2015, 56 days from the date on which the tribunal gave approval (regulation 39 SI2009/273). HMRC provided a PRN to the promoter on 9 January 2015 and the promoter must pass the PRN on to its former client by 8 February 2015.
>
> Although the transaction entered into by that client took place before the promoter became a monitored promoter the intended tax advantage is that the client will be able to use the allowable loss against chargeable gains made in 2014-15 and in later years if the loss is not used in full in that year. The promoter was a monitored promoter during 2014-15 and so the tax advantage arose during a period in which the promoter was a monitored promoter.

The monitored promoter must also pass the PRN to relevant intermediaries (s251(2)(d)). A relevant intermediary is any person that is an intermediary (paragraph 1.7) in relation to a relevant proposal (paragraph 1.5) at any time during the period in which the promoter is a monitored promoter. The monitored promoter must pass the PRN on to any relevant intermediary within 30 days of the later of:

- the date the monitored promoter received the PRN
- the date the monitored promoter first became aware that the person was a relevant intermediary

Where the monitoring notice is a replacement monitoring notice (paragraph 7.5) the promoter is not required to provide the PRN again to former clients.

3.12 Monitoring notices: duties of intermediaries who receive promoter reference numbers

Where a monitoring notice is given to a promoter that is not resident in the United Kingdom any promoter reference number (PRN) is to be given not only to the promoter but also to any intermediary (paragraph 1.7) of the promoter of which HMRC is aware. The intermediary is then obliged by s252 FA 2014 to pass the PRN on to clients of the monitored promoter within thirty days of receiving it.

The obligation placed on an intermediary that has received a PRN extends to three classes of persons. These are:

- persons who the intermediary might reasonably be expected to know have become, or are likely to have become, clients of the monitored promoter during the period in which the monitoring notice has effect (s252(2) and (3))
- persons to whom the intermediary, as part of its business, has provided information about a relevant proposal (paragraph 1.5) of the monitored promoter during the period in which the monitoring notice has effect (s252(4)(a))
- persons who the intermediary might reasonably be expected to know have entered into, or are likely to have entered into, transactions during the period in which the monitoring notice has effect that are part of relevant arrangements (paragraph 1.5) promoted by the monitored promoter (s252(4)(b))

In order to comply with this obligation an intermediary must be able to determine who might be clients of the promoter. For this purpose a person is a client of the monitored promoter if the promoter has done any of the following in relation to that person:

- made a firm approach (paragraph 1.6) to that person in order to make a relevant proposal (paragraph 1.5) available for implementation by that person or any other person
- made a relevant proposal available for implementation by that person
- taken part in the organisation or management of relevant arrangements (paragraph 1.5) entered into by that person (s252(3))

The intermediary does not need to pass on the PRN to any person that it reasonably believes has already been given the PRN by someone else (s252(5)). The intermediary cannot simply assume that another person must have been given the PRN, but must take reasonable steps to establish that fact, for example by seeking verbal or written confirmation.

The intermediary has no ongoing obligations in relation to the PRN. For example it is not required to pass on the PRN to persons that it becomes aware have become new clients of the promoter more than thirty days after the intermediary has received the PRN.

An intermediary may however be required to make quarterly returns to HMRC providing information about clients (paragraph 4.8).

3.13 Monitoring notices: duties of clients who receive promoter reference numbers

Clients of monitored promoters who receive a promoter reference number (PRN) have two responsibilities:

- to pass the PRN on to other clients of the promoter (s252(2) FA 2014)
- to report the PRN to HMRC in their tax returns or in whatever other form and manner is required (s253)

Section 252(2) requires a person who receives a PRN in accordance with s251 (paragraph 3.11) to pass that PRN on within 30 days of receiving it to any other person who they might reasonably be expected to know has become, or is likely to have become, a client of the monitored promoter during the period in which the monitoring notice had effect. The definition of client for this purpose is at s252(3) (paragraph 3.12). Clients have no ongoing responsibility to pass on the PRN, for example to persons who become new clients of the monitored promoter after the 30 day period from receiving the PRN has expired.

Section 253 sets out the duty of clients to notify the PRN to HMRC if the client expects to obtain a tax advantage (paragraph 1.5) from any scheme of the monitored promoter into which the client has entered. This covers the reporting obligations for each of the taxes (paragraph 1.5) in relation to which there may be a tax advantage.

The report to HMRC is to be made in one of three ways:

- in or with a tax return (s253(2)(a))
- in a separate report in a form prescribed by HMRC (s253(2)(b))
- in a claim that is not contained in a tax return (s253(5))

3.13.1 Report of PRN by client who is required to make a tax return

Where the client is required to make one or more of the following tax returns for a period in which a tax advantage arises from a scheme promoted by the monitored promoter the report must be made in that return or returns, or with that return or returns. If the expected tax advantage relates to more than one

tax year, the PRN must be reported for every tax year in which a tax advantage is expected to arise.

The relevant returns are:

- a personal return for income tax and CGT under s8 TMA 1970
- a trustee's return for income tax and CGT under s8A TMA 1970
- a partnership return for income tax and CT under s12AA TMA 1970
- a company tax return under paragraph 3 Schedule 18 FA 1998
- a return for the ATED under Ss159 or 160 FA 2013 (s253(6))
- statutory returns relating to relevant contributions.

Where a client is required to make a tax return, the PRN must be notified in or with that return. There are however exceptions from this general rule for IHT, SDLT, SDRT or PRT, for which the report to HMRC must always be made in a separate report, the AAG4(PRN) - see paragraph 3.13.3.

If the tax return is not made by the filing date, or by any other date by which it is required by law to be submitted, then the PRN must be notified to HMRC in a separate report (s253(3)) no more than five working days after the return was required to be submitted. 'Working days' exclude weekends, Christmas Day, Good Friday and Bank Holidays.

3.13.2 Report of PRN by client other than in a tax return

A separate report of the PRN to HMRC must be made on form AAG4(PRN) in the following circumstances:

- if the client is not required to make a tax return
- if the client has been required to make a tax return but has not done so by the filing date or other statutory deadline
- if the tax advantage relates to one or more of the following taxes:
  - IHT
  - SDLT
  - SDRT
  - PRT (s253(4))

When reporting the PRN to HMRC outside a return, the person must include the following information

- the person's full name and address
- the PRN
- the type of tax in respect of which the person expects to obtain an advantage
- the person's unique identifier (3.13.3)
- the relevant date of the transactions (3.13.4)
- a declaration that the information provided is correct and complete to the best of the knowledge and belief of the person making the report

The report must also be signed, include the full name of the person signing the report and include the date on which the report is made.

The form for making reports outside a return is prescribed in Schedule 1 to The Finance Act 2014 (High Risk Promoters Prescribed Information) Regulations 2015 [SI2015/549]. The document is available at Tax Avoidance Schemes forms

3.13.3 Unique identifier

The unique identifier for an individual making a report is the individual's national insurance number and unique tax reference number.

The unique identifier for a trust or company making a report is its unique tax reference number.

Where the type of tax is IHT, the unique identifier is the unique tax reference number and any IHT reference previously allocated by HMRC to the person making the report.

Where the type of tax is SDRT and there are transactions authorised by different arrangements under regulation 4A of the SDRT Regulations 1986, the unique identifier is the unique transaction reference provided by the reporting system under the authorised arrangements.

For schemes involving ATED, the following information must be provided instead of a unique identifier

- the title number or numbers of the dwelling associated with the relevant arrangements
- the full address of the dwelling including the post code (the information provided must be sufficient to identify the property concerned)

For schemes involving SDLT, the following information must be provided instead of a unique identifier

- the unique transaction reference number (if a return has been submitted at the time the prescribed information is provided)
- the title number or numbers of the land associated with the relevant arrangements
- the full address or situation of the land including, where available, the post code (the information provided must be sufficient that the land can be uniquely identified)

For schemes involving SDRT transactions, the following information must be provided instead of a unique identifier

- a full description of the shares or securities associated with the relevant arrangements including
    - the number of shares or securities
    - the class of shares
    - the name of the company or other body to which the shares relate

- their nominal value
- the consideration paid

3.13.4 Relevant date of the transactions

The relevant date of the transactions in respect of income tax or CGT is the last day of the tax year in which the relevant arrangements enable or seek to enable a tax advantage to be obtained.

The relevant date of the transactions in respect of CT in relation to companies that are partners in a partnership is the last day of the tax year in which the relevant arrangements enable or seek to enable a tax advantage to be obtained.

The relevant date of the transactions in respect of CT in relation to companies that are not members of a partnership and have an accounting period, is the last day of the accounting period in which the relevant arrangements enable or seek to enable a tax advantage to be obtained.

The relevant date of the transactions in respect of CT in relation to companies that are not members of a partnership and do not have an accounting period is the date on which the first transaction forming part of the arrangements took place.

The relevant date of the transactions in respect of ATED is the final day of the chargeable period, in which the relevant arrangements enable or seek to enable a tax advantage to be obtained.

The relevant date of the transactions in respect of IHT is the date of the first transaction forming part of the arrangements.

The relevant date of the transactions in respect of SDLT is the effective date of the land transaction forming part of the arrangements enabling a tax advantage to be obtained.

The relevant date of the transactions in respect of SDRT is the date of the transaction forming part of the arrangements enabling a tax advantage to be obtained.

The relevant date of the transactions in respect of PRT is the final day of a chargeable period within which tax advantage may arise.

3.13.5 Time by when report outside a return must be made

If the report must be made outside a tax return by virtue a return being made after the filing dated, the PRN must be notified to HMRC in a separate report (s253(3)) no more than five working days after the return was required to be submitted. ‘Working days’ exclude weekends, Christmas Day, Good Friday and Bank Holidays.

An individual, partner or trustee must report the PRN to HMRC by the next 31 January following the end of the tax year in which a tax advantage may arise.

A company with an accounting period must report the PRN to HMRC not later than 12 months after the end of each accounting period in which a tax advantage may arise.

A company without an accounting period must report the PRN to HMRC within 24 months of the date of the first transaction forming part of the arrangements and annually thereafter when a tax advantage arises.

For schemes involving ATED, the person must report the PRN to HMRC no more than thirty days from the start of the chargeable period in which the person is or would have been within the charge, for each period in which a tax advantage may arise.

For schemes involving IHT, the person must report the PRN within six months after the end of the month in which the first transaction under the arrangements was entered into.

For schemes involving SDLT, the person must report the PRN within thirty days from the effective date of each land transaction forming part of the relevant arrangements within which a tax advantage may arise.

For schemes involving SDRT transactions under regulation 4 of the SDRT Regulations 1986, the person must report the PRN no later than when the notice of the charge to tax occurred or would have occurred but for the arrangements.

For schemes involving SDRT transactions authorised by different arrangements under regulation 4A of the SDRT Regulations, the person must report the PRN no later than the seventh day after the month in which the charge to tax occurred or would have occurred but for the arrangements.

For schemes involving PRT, the PRN must be submitted no later than seven days from the end of a chargeable period in which a tax advantage may arise.

3.14 Monitoring notices: withdrawal of monitoring notices
At any time more than 12 months after the end of the appeal period a monitored promoter may ask an authorised officer to withdraw the monitoring notice (s245 FA 2014). The promoter is entitled to appeal against any refusal of that request (s247) (paragraph 3.16).

The appeal period ends:
- at the end of the period permitted for an appeal against the decision of the First-tier Tribunal to approve the issue of a monitoring notice, see ARTG8900 onwards
- if there is an appeal, when that appeal is finally disposed of, whether it is determined or withdrawn (s245(2))

Any request to an authorised officer to withdraw a monitoring notice must be made in writing (s245(3)) to the authorised officer. If such a request is received it will be considered by an authorised officer, who must decide whether or not to agree to the request within 30 days from the date on which it was received (s245(4)). The authorised officer who considers the request does not have to be the same officer as the one who issued the monitoring notice.

The authorised officer's response to a request to withdraw a monitoring notice must meet the requirements of s246 (paragraph 3.15).

In deciding whether or not to agree to withdraw the monitoring notice the officer must take the following into account:

- whether, during the period in which the monitoring notice has had effect, the promoter has engaged in behaviour of a sort that could be regulated by imposing conditions in a conduct notice (paragraph 2.3)
- whether it is likely that the promoter will engage in such behaviour in future
- whether the promoter has complied, or failed to comply, with all of the obligations imposed on it as a monitored promoter since the monitoring notice took effect (s245(5))

In deciding whether a monitored promoter may engage in future in behaviour that could be regulated by the issue of a conduct notice an authorised officer must make a reasonable exercise of judgement based on evidence of past behaviour and any undertakings that might be given.

An authorised officer may also decide to withdraw a monitoring notice without having received a request to do so from the promoter (s245(6)) if he or she considers that it is no longer necessary, taking into account the promoter's behaviour and likely future behaviour in the same way.

In considering whether to withdraw a monitoring notice, or in deciding from what date the monitoring notice should be withdrawn, the authorised officer should consider whether there is a continuing need to make use of the powers available in the monitored promoter regime (paragraph 3.7).

If an authorised officer decides to withdraw a monitoring notice, whether on a request from the promoter or otherwise, the officer will consider whether or not to give the promoter a conduct notice (paragraph 2.1). If such a notice is given, it is referred to as a follow-on conduct notice (s245(7) and (8)) and takes effect immediately after the date on which the monitoring notice ceases to have effect. A follow-on conduct notice can include any of the conditions that can be imposed by a conduct notice (paragraph 2.3).

The circumstances in which a request may be made to withdraw a monitoring notice, or to agree to that withdrawal, are modified if the monitoring notice is a replacement monitoring notice (paragraph 7.5). The end of the appeal period will be the later of:

- the end of the appeal period for the original monitoring notice and

- the date on which the replacement monitoring notice takes effect (s245(9)(a))

The period that the authorised officer needs to take into account begins at the time that the original monitoring notice took effect (s245(9)(b)).

3.15 Monitoring notices: how to notify a decision whether or not a monitoring notice is being withdrawn

The response of an authorised officer to a request by a promoter in accordance with s245(1) FA 2014 for the withdrawal of a monitoring notice (paragraph 3.14) must meet certain requirements set out in s246.

If the authorised officer agrees to withdraw the monitoring notice the notice sent to the promoter must:

- specify the date from which the monitoring notice will cease to have effect
- tell the promoter whether or not a follow-on conduct notice will be given (paragraph 3.14) (s246(2))

The date on which the monitoring notice is to cease to have effect is to be as early as is reasonably practicable, taking account whether there is any continuing need to make use of information powers (paragraph 4.1 onwards) before the monitoring notice is withdrawn. Delay in withdrawing a monitoring notice should be exceptional but might be appropriate, for example, where a promoter has agreed to cease behaviours that might need to be regulated by the Part 5 regime but is currently promoting or managing a scheme in relation to which HMRC requires continuing information.

If the authorised officer refuses to withdraw the monitoring notice the notice sent to the promoter must:

- explain to the promoter the reasons why the request has been refused and
- explain the right to appeal under s247 (s246(3)) (paragraph 3.16)

In either case either an authorised officer or another person with the approval of an authorised officer can notify the promoter of the required information. If the response is to be made by a person other than an authorised officer the response and particularly the reasons given for any refusal to withdraw the monitoring notice must be reviewed and approved by an authorised officer before release. Where a person other than an authorised officer notifies the promoter, the notice must include the name of the authorised officer who has made the determination and, if the authorised officer has refused to withdraw the monitoring notice, it must also let the promoter know to what address any appeal should be sent.

3.16 Monitoring notices: appeal against refusal to withdraw a monitoring notice

A promoter has a right to appeal against any refusal by an authorised officer to agree to withdraw a monitoring notice (s247 FA 2014).

The notice of appeal must be in writing and must be given within 30 days of the date on which the notice of refusal was given, to the authorised officer

who made the decision to refuse to agree to withdraw the monitoring notice (s247(2)). This may not be the person who notified the promoter that the request for withdrawal was being refused, but that notification should provide a name and address for the authorised officer to whom any appeal should be sent (paragraph 3.15).

Any appeal must state the grounds on which the appeal is being made (s247(3)).

All of the provisions of Part 5 TMA 1970 apply to these appeals (s247(5)). So, for example, a promoter can ask for a review of the authorised officer's decision, see ARTG2000 onwards. If the promoter does not notify the appeal to the tribunal within the time allowed and subject to the rules relating to late notifications (ARTG8240) the appeal is treated as settled by agreement (ARTG2010).

If an appeal is notified to the First-tier Tribunal the tribunal may either decide that the monitoring notice should cease to have effect or may confirm the refusal of the authorised officer to withdraw the notice. The decision of the tribunal may also be subject to appeal.

Chapter 4 Information powers

4.1 Information powers: overview

Where a monitoring notice has effect in relation to a promoter that promoter is referred to in this guidance as a monitored promoter (paragraph 3.1). Monitored promoters, intermediaries and clients are subject to obligations at Ss254 to 273 FA 2014 to provide information and documents. The aim is to make sure HMRC has all of the information it needs to tackle avoidance schemes promoted by the promoter.

The information powers cover

- information or documents relating to monitored proposals and monitored arrangements (paragraph 4.2) to be provided by the monitored promoter or intermediary (paragraphs 4.3 and 4.4)
- information to be provided on an ongoing basis by a monitored promoter about monitored proposals and monitored arrangements (paragraph 4.5)
- information to be provided by intermediaries and clients of non-resident monitored promoters (paragraph 4.6)
- obtaining client details from a monitored promoter and/ or intermediary on a regular basis (paragraphs 4.7 and 4.8)
- obtaining information from a monitored promoter or intermediary about persons who have taken part in avoidance schemes (paragraph 4.9)
- duty of a monitored promoter to tell HMRC its current address (paragraph 4.10)
- duty of a client to provide information to a monitored promoter (paragraph 4.12)

Where appropriate the information powers cover both the production of documents as well as the provision of information. Penalties may be due where the information or documents are not provided (paragraph 5.2). There is a criminal offence of concealing, destroying or disposing of documents (paragraph 5.10).

The information powers apply on or after the date on which a monitoring notice takes effect and regardless of whether there is an appeal against the decision of the tribunal to approve the issue of the monitoring notice (paragraph 3.6). The information powers cease to apply if the monitoring notice is withdrawn (paragraph 3.14). The promoter may then be subject to other information powers, for example if there is a conduct notice (paragraph 2.5), or under DOTAS.

Most of the information powers apply only to any monitored proposal or to monitored arrangements. These terms are defined in s254 (paragraph 4.2). In broad terms these are avoidance schemes that the promoter begins to promote during the period in which the monitoring notice has effect. Other information powers relate to all of the schemes promoted during that period, or to all clients of the promoter during that period (paragraphs 4.7 and 4.8). And a promoter will continue to be subject to DOTAS requirements.

4.2 Information powers: monitored proposals and monitored arrangements
Section 254 FA 2014 defines the terms ‘monitored proposal’ and ‘monitored arrangements’. The terms are used to limit the application of some of the information powers in Part 5 to avoidance schemes that are promoted by a monitored promoter for the first time during the period in which the monitoring notice has effect or which first give rise to a tax advantage during that period.

Monitored proposal

A relevant proposal (paragraph 1.5) promoted by the monitored promoter is a monitored proposal if one or more of the following events takes place on or after the date on which a monitoring notice takes effect and during the period in which the monitoring notice has effect (s254(1)).

The events are
- the promoter first makes a firm approach (paragraph 1.6) to another person in relation to that relevant proposal
- the promoter first makes the relevant proposal available for implementation by any other person
- the promoter first becomes aware that any person has entered into any transaction that forms part of arrangements that implement a proposal

The limitation to the first such event means that a relevant proposal will not be a monitored proposal if the first time each of these events took place predates the monitoring notice taking effect. Thus a monitored promoter may be continuing to promote relevant proposals which are not monitored proposals.

> Example 1: a promoter markets a scheme to individuals that includes a subscription for shares in a company. The scheme is a relevant proposal. A monitoring notice is issued to the promoter with effect from 2 November 2015. In each of the following examples the proposal will be a monitored proposal.
> - example 1A: on 16 November 2015 the promoter for the first time holds a seminar attended by potential clients, during the course of which the working of the scheme is described and the tax advantages are explained with a view to one or more of those attending entering transactions as part of the proposed arrangements
>
> - example 1B: on 7 December 2015 the promoter for the first time provides an individual with a set of completed scheme documents to sign that will implement the proposal
>
> - example 1C: on 14 December 2015 the promoter hears from an intermediary that a person to whom completed scheme documents were provided in September signed them in October and implemented the scheme. This is the first time the promoter has heard that someone has implemented the scheme. If the promoter had first heard that a person had implemented the scheme before 2 November 2015 this would not be a monitored proposal

Monitored arrangements

Relevant arrangements (paragraph 1.5) promoted by the monitored promoter are monitored arrangements if one or more of the following events takes place on or after the date on which a monitoring notice takes effect and during the period in which the monitoring notice has effect (s254(2)).

The events are drawn from the definition of promoter in relation to relevant arrangements at s235(2) and (3) (paragraph 1.4). If the promoter has made a relevant proposal available for implementation by a person, or has made a firm approach (paragraph 1.6) to a person to make that proposal available for implementation, then the arrangements that implement that proposal will be monitored arrangements if one of the following events takes place on or after the date on which a monitoring notice takes effect and before it is withdrawn:

- the promoter first makes a firm approach to a person in relation to that relevant proposal
- the promoter first makes the relevant proposal available for implementation by any person
- the promoter first becomes aware that a person has entered into any transaction that forms part of arrangements that implement a proposal

If the monitored promoter takes part in the design, organisation or management of the arrangements implemented by a particular person, they will be monitored arrangements if the date on which the monitored promoter first took part in designing, organising or managing the arrangements fell on or after the date on which a monitoring notice took effect.

If the arrangements are intended to result in a tax advantage (paragraph 1.5) for the person entering into the arrangements then the arrangements will also be monitored arrangements if the tax advantage is obtained during the period in which the monitoring notice has effect [s254(2)(c)].

> Example 2: a promoter is issued with a monitoring notice that takes effect on 4 January 2016. During 2015-16 the promoter has developed an avoidance scheme that is intended to provide scheme users with losses that they can set against their other income in 2015-16. The scheme involves the use of a number of limited companies each controlled by a scheme user, but with the support of the promoter to acquire the companies, provide directors, arrange finance and draft documents for signature by scheme users and by third parties who will implement the scheme. The scheme involves a number of transactions, with the intended effect that losses will arise in March 2016. The arrangements made by the promoter will be monitored arrangements because the tax advantage is obtained in March 2016, which is during the period in which the promoter is a monitored promoter. If the first occasion of any of the activities of the promoter described above took place for the first time on or after 4 January 2016 the arrangements would be monitored arrangements regardless of when the tax advantage was intended to be obtained. For example, if the promoter first became

aware on or after that date that a person had entered into transactions that form part of the arrangements then the arrangements would be monitored arrangements.

Example 2A: even if all of the scheme documents were completed for all persons entering into the transactions before the monitoring notice came into effect in January 2016, the arrangements will be monitored arrangements because the tax advantage is obtained in March 2016.

4.3 Information powers: power to obtain information and documents from a monitored promoter or intermediary

Section 255 FA 2014 provides a power to obtain information and documents from a monitored promoter or from certain intermediaries in order to resolve the liabilities of persons who have used avoidance schemes promoted by the promoter. All references to tax and to checking a person's tax position in sections 255 and 256 and in paragraphs 4.3 and 4.4 of this guidance also include relevant contributions and the checking of a person's position as regards relevant contributions respectively.

An information notice will be issued in writing by an authorised officer, or by a person nominated by an authorised officer. The notice should explain as clearly as possible the information or the documents that the promoter or intermediary must produce. A notice given under section 255 requires the promoter or intermediary to provide the information or documents that are reasonably needed for the purposes described below.

The person who receives the notice must provide the information or documents required within 10 days of the date on which the notice was given, unless the notice specifies a longer period. Officers may wish to specify a longer period if the information and documents required are extensive and it can reasonably be assumed that it would take more than 10 days to comply.

In most cases the promoter or intermediary should first be asked informally to provide the information or documents. If the information or document requested relates solely to the person to whom a notice would be issued and this person does not provide the material requested within the time HMRC would expect to have given the person to comply with a formal notice, it will normally be appropriate for HMRC to issue a formal notice. It may however be appropriate not to make an informal request for information or documents where giving that opportunity might prejudice the assessment or collection of tax. In such cases an officer may choose to issue a notice under s255 without advance notice to the monitored promoter, or may apply directly to the tribunal in accordance with s256(5) without giving advance notice (paragraph 4.4).

A notice can be issued to:

- any monitored promoter
- any person who is an intermediary (paragraph 1.7) in relation to a monitored proposal (paragraph 4.2) and has received a promoter reference number (paragraph 3.10) of a person who is a promoter of that proposal

The notice must request information and/or documents relating to monitored proposals or monitored arrangements for one of the following purposes:

- considering the consequences of implementing the scheme for the persons who implement it
- checking the tax position of any person who the officer reasonably believes has entered into transactions to implement the scheme

The two types of notice are intended for different purposes.

When an officer requests information or documents concerning the consequences of implementing the scheme the officer is trying to understand how the scheme is intended to work, so that appropriate counteraction can be put in place. Here the names of the scheme users may not be known, or there may not yet be any scheme users.

An officer who is checking the tax position of a person will be carrying out an investigation or enquiry into that person's tax liability, the nature of which will depend on the tax in question. Paragraph 1.5 of this guidance lists the taxes that may be relevant. Section 255(6) provides a very broad definition of tax position to include:

- past, present and future liability
- penalties and other amounts in connection with tax, such as interest
- any claims, elections, applications and notices in connection with a person's tax liability
- deductions or repayments of tax, or sums representing tax such as PAYE liability
- the withholding of any part of another person's income for the purpose of PAYE (defined at s683 ITEPA 2003)

The notice can relate to a person's tax position at any time or for any period. So, for example, it need not relate to the tax position of a specific person in a particular year.

A notice can be issued to a promoter or intermediary to check the tax position of a company that has ceased to exist. So, for example, the fact that a company that took part in arrangements no longer exists does not prevent the issue of a notice to a promoter for information relating to that company.

A notice can be issued in relation to the tax position of a person who has died, but no notice intended to check the tax position of a person who has died can be issued more than four years after the person's death (s255(8)).

If a notice under s255 is given to a monitored promoter who is not resident in the UK and that promoter fails to comply a notice may instead be given to certain intermediaries or clients (paragraph 4.6).

In some cases approval must be obtained from the First-tier Tribunal before a notice is given to a person (paragraph 4.4).

The use of information powers is subject to:

- a right of appeal in some cases (paragraph 4.13)
- rules covering how information and documents are to be provided (paragraph 4.14)
- exceptions and safeguards (paragraph 4.15)
- restrictions on any attempt by a promoter to impose a duty of confidentiality (paragraph 4.17)
- penalties for failing to comply with an information notice, or for supplying inaccurate information or documents (paragraph 5.1 onwards)

4.4 Information powers: approval of the tribunal is needed in certain cases
In general, information notices can be given under s255 (paragraph 4.3) without approval from the First-Tier tribunal.

S256 FA 2014 provides that prior approval is required from the First-Tier tribunal for the use of the power in s255 where the information or documents specified in the notice do not relate wholly to

- either the person to whom the notice is given, whether this person is a monitored promoter or intermediary
- or any undertaking for which the monitored promoter or intermediary is a parent undertaking

The terms ‘undertaking’ and ‘parent undertaking’ are drawn from the Companies Act 2006 (s256(6)). They will most commonly mean a parent company and its subsidiaries.

In practice this will mean that it should often be possible to issue a notice to obtain information and documents to understand the intended consequences of an avoidance scheme, particularly where the scheme does not yet have any known users, without prior approval from the tribunal. But if the scheme is to be implemented by special purpose vehicles that are not controlled by the monitored promoter or the intermediary, approval will be needed from the tribunal before giving a notice requesting information or documents that relate to some extent to the special purpose vehicles. Approval of the tribunal will always be needed when the notice, which is issued to a monitored promoter or relevant intermediary, requires them to provide information or documents that relate to the tax position of a scheme user because such information does not relate wholly to the person receiving the notice.

An application to the tribunal may be made without giving notice to the monitored promoter or intermediary who is affected by it (s256(2)). The application to the tribunal must be made by an authorised officer or by a person nominated by an authorised officer. In general, the following conditions must be met before the tribunal can approve the giving of the notice

- the person to whom the notice is to be given has been told that the information and documents are required and
- that person has been given a reasonable opportunity to make representations relating to the required information and documents and
- the tribunal has been given a summary of those representations

Where these conditions are met, the tribunal may approve the notice if it is satisfied that in the circumstances the giving of the notice is justified.

In most cases an application to the tribunal will only be made after the monitored promoter or intermediary has been told that the information or documents are required and so will have had an opportunity either to make representations about the required information or documents or alternatively to provide them to HMRC before the authorised officer applies to the tribunal. The requirements to give the monitored promoter or relevant intermediary advance notice and to provide the tribunal with a summary of any representations they have made do not apply if the tribunal is satisfied that to do so might prejudice the assessment or collection of tax. This will be exceptional and might apply where, for example, there is a real risk that a promoter may destroy key documents, liquidate companies, or leave the UK.

If the tribunal approves the giving of an information notice that notice should state that approval has been given.

Any decision by the tribunal to approve the giving of an information notice is final (s256(7)). The giving of approval cannot be challenged on appeal. Nor can the monitored promoter or intermediary appeal against the notice itself (paragraph 4.13).

Any decision by the tribunal to refuse approval is also final. If the tribunal refuses to approve the giving of the notice it will be asked to explain why. A renewed application that meets the tribunal's objections may then be made if appropriate by an authorised officer, or by a person nominated by an authorised officer.

4.5 Information notices: ongoing duty to provide information

Section 257 FA 2014 permits an authorised officer, or an officer nominated by an authorised officer, to issue a notice to a monitored promoter (paragraph 3.1) to provide information and documents on an ongoing basis about schemes that the promoter is promoting.

The information and documents to be provided are specified in regulations [The Finance Act 2014 (High Risk Promoters Prescribed Information) Regulations 2015 [SI2015/549]). The aim will be to ensure that HMRC has all of the information and documents it needs to ensure that it understands how a scheme is intended to work and what tax advantages are expected to flow.

The information and documents required by information notices given under section 257 will relate to all monitored proposals and monitored arrangements (paragraph 4.2) of the monitored promoter:

- at the time of the notice
- after that time but during the period in which the monitoring notice has effect

The notice will specify the time within which the monitored promoter must provide information and documents in relation to schemes being promoted at the time of the notice.

The notice will also specify separately the times by which a monitored promoter must provide information and documents relating to monitored proposals and monitored arrangements in relation to which the monitored promoter becomes a promoter only after the notice has effect. In relation to each monitored proposal or arrangements, this will typically give the promoter a set number of days from the first date on which such a proposal becomes a monitored proposal or the first date on which such arrangements become monitored arrangements within which it must comply with the notice.

A new notice cannot be given after the date on which the monitoring notice is withdrawn (paragraph 3.14). An existing notice will also cease to have effect after that date in relation to any proposals or arrangements in relation to which the promoter first became a promoter after the monitoring notice is withdrawn. The notice will continue to have effect in relation to any information or documents that relate to monitored proposals or monitored arrangements promoted during the period in which the monitoring notice had effect. This is to ensure there is no unintended incentive for a monitored promoter to delay providing information that is the subject of an information notice.

This information power will be used together with the power to obtain ongoing information about clients in s259 (paragraph 4.7). The aim is to ensure that HMRC has information about both the schemes being promoted by the monitored promoter and the clients who are making use of those schemes.

If a notice under s257 is given to a monitored promoter who is not resident in the UK and that promoter fails to comply, a notice may instead be given to certain intermediaries or clients (paragraph 4.6).

The use of information powers is subject to:

- a right of appeal in some cases (paragraph 4.13)
- rules covering how information and documents are to be provided (paragraph 4.14)
- exceptions and safeguards (paragraph 4.15)
- restrictions on any attempt by a monitored promoter to impose a duty of confidentiality (paragraph 4.17)
- penalties for failing to comply with an information notice, or for supplying inaccurate information or documents (paragraph 5.1 onwards)

4.5.1 Ongoing duty to provide information following HMRC notice – prescribed documents and information

The prescribed information that a monitored promoter must give HMRC in relation to monitored arrangements or monitored proposals after the promoter has received a notice under s257 is as follows

a) the name or names used by the monitored promoter for the schemes
b) a summary description of the schemes and of how they are intended to result in a tax advantage
c) a detailed description of each part of the schemes and of how they are intended to result in a tax advantage and a list of all other taxes in respect of which it is expected to obtain a tax advantage
d) the legislation that the monitored promoter claims provide the basis for the tax advantage intended to result from the schemes
e) any DOTAS scheme reference numbers allocated by HMRC
f) if any of the schemes have not been notified to HMRC, an explanation as to why they were not notified
g) the names and addresses of third parties providing any funding or who will provide any funding the arrangements will require, the level of any funding and the date on which they agreed to provide the funding
h) the name and address of any persons consulted, including any legal advisers (this does not include any details of the promoter's employees)
i) the name and address of any other person involved in planning, organising or operating the schemes and detailed information about their involvement and role (again this does not extend to the promoter's employees)
j) a list of each and every fee paid, or to be paid, by clients for the use of or participation in the schemes, including full details of what each fee is or will be charged for

The prescribed documents that a monitored promoter must provide to HMRC in relation to monitored arrangements and monitored proposals after receiving a notice under s257 are documents produced in writing or by electronic means within one of the following descriptions

a) standard letters and templates of documents to be sent to clients regarding the schemes
b) documentation designed or intended to be used in the operation of the schemes
c) copies of all documents used to market, promote or advertise the schemes
d) all correspondence concerning the schemes between the promoter and a client, prospective client or other person involved in the schemes
e) all correspondence between the promoter and any other person which concerns the schemes or matters related to the schemes
f) any agreement signed or otherwise entered into by each client in respect of the schemes

4.5.2 Ongoing duty to provide information following HMRC notice - example

Example:

A promoter is issued with a monitoring notice that takes effect on 2 February 2015. On 2 March 2015 the promoter is issued with an information notice under s257 that requires, among other things, production of copies of all marketing literature or presentation material provided to or used in presentations to clients or intermediaries. The notice requires those documents in relation to current monitored proposals or monitored arrangements (paragraph 4.2) to be provided by 16 March 2015.

At that time the promoter was marketing seven avoidance schemes. One of these was a monitored proposal, because the promoter's first firm approach to a person in respect of that proposal was made on 5 February 2015. Three others are monitored arrangements because at least one of the persons who have entered into the transactions that make up those arrangements expect to obtain a tax advantage by 4 April 2015. The notice would require the promoter to supply the documents specified in the notice for those four schemes by 16 March 2015. There is no obligation to provide information about the other schemes, even though the promoter is still promoting them, because they are not monitored proposals or monitored arrangements.

The notice also requires the monitored promoter to supply copies of marketing literature for future monitored proposals or monitored arrangements within 10 days of that literature being prepared.

The monitoring notice is withdrawn on 7 November 2016. At that time the promoter had been working on the design of a new scheme but had not begun to market it. The promoter is a promoter of that scheme by virtue of being involved in its design (paragraph 1.4). This involvement took place while the monitoring notice had effect, making the proposal a monitored proposal and so the s257 information notice applies to that scheme. The promoter must provide the marketing literature for that scheme within 10 days of it being produced, even though the promoter is not a monitored promoter at that time.

4.6 Information notices: non-resident monitored promoters

Information notices under s255 FA 2014 (paragraph 4.3) or s257 (paragraph 4.5) may be given to a monitored promoter who is not resident in the United Kingdom. If that promoter fails to comply with the notice, or with any part of that notice, s258 permits a notice to be given to certain intermediaries or clients requiring them to provide any information that the monitored promoter has failed to provide.

A notice under s258 may be given by an authorised officer, or by a person nominated by an authorised officer. It can only require the provision of information. There is no power to use a s258 notice to require intermediaries and clients of a non-resident monitored promoter to provide documents to HMRC. The information that can be required is limited to any part of the information required in s255 or s257 notices that has not been provided. The notice will:

- specify or describe the information that the monitored promoter has failed to supply
- require that the information should be provided by the recipient of the notice
- specify the date by which the information must be provided

The information required should be provided within 10 days of the notice being given, unless the officer who has given the notice has specified a longer period (s258(7)). A longer period may be permitted where it would be unduly onerous to provide all of the information requested within 10 days.

The issue of a notice under s258 where information required under s255 has not been provided does not require prior approval by the tribunal. Where necessary, approval to the original notice issued to the monitored promoter will already have been given (paragraph 4.4).

An information notice under s258 should only be given to a person that the officer giving the notice reasonably believes will be able to provide the information required (s258(6)).

If the information required relates to a monitored proposal (paragraph 4.2) an information notice under s258 may be issued to

- any person who is an intermediary in relation to that monitored proposal
- any person to whom the monitored promoter has made a firm approach (paragraph 1.6) in relation to that monitored proposal with a view to it being implemented by another person

if the officer issuing the notice is not aware of any such persons:

- any person who has implemented the proposal

If the information relates to monitored arrangements (paragraph 4.2) an information notice under s258 may be issued to any person who has entered into transactions that form part of the arrangements.

The use of information powers is subject to:

- a right of appeal in some cases (paragraph 4.13)
- rules covering how information is to be provided (paragraph 4.14)
- exceptions and safeguards (paragraph 4.15)
- restrictions on any attempt by a promoter to impose a duty of confidentiality (paragraph 4.17)
- penalties for failing to comply with an information notice, or for supplying inaccurate information (paragraph 5.1 onwards)

The use of the information power in s258 is also restricted in some cases where it relates to advice given by a tax adviser (paragraph 4.16).

A person may be liable to penalties in relation to an information notice under s258 in addition to the monitored promoter being liable to penalties in relation to earlier notices under s255 or s257 in respect of the same information.

4.7 Information notices: ongoing duty of promoter to provide client returns
Section 259 FA 2014 provides for a notice to be given to a monitored promoter requiring specified information about clients to be provided to HMRC on a quarterly basis during the period for which the monitoring notice has effect.

The notice will be given by an authorised officer or by a person nominated by that authorised officer. It is expected that the issue of a notice under s259 will be a routine part of the regime to which a monitored promoter is subject and that it will be issued at the same time as, or soon after, the issue of the monitoring notice.

The information required by the notice must be provided for each relevant period and regulations have been made prescribing that the required information is:

- the name and address of each person who is a client of the monitored promoter during that period
- for clients who are individuals, their national insurance number and unique tax reference number
- for clients which are trusts, partnerships or companies, the unique tax reference number identifying the client
- confirmation whether or not the client has told the monitored promoter that they have neither a national insurance number nor unique tax reference number
- the date or dates on which the monitored promoter
    - made a firm approach to the client
    - made a proposal available for the client to implement and
    - took part in the organisation or management of the arrangements
- the date or dates on which the client entered into transactions forming part of avoidance schemes promoted by the monitored promoter
- the date on which the client informed the monitored promoter of their national insurance number or unique tax reference number or if they had no such number the date on which the client informed the monitored promoter of this fact
- whether the client was a direct client of the monitored promoter or was acting through an intermediary and the name and address of the intermediary, if the client was acting through an intermediary
- fees or commissions paid or payable by the client to the intermediary in respect of the scheme
- where the fees or commissions are contingent on the scheme working, the basis for calculating the fees or commissions

Section 259 can only be used to obtain information from monitored promoters about their clients, but in many cases the person who enters into the transactions will not be the client. For example, the client may be an employer but the employees may be the scheme users. Section 261 provides an additional power to obtain information about any persons other than clients

that an officer suspects have been party to transactions that implement an avoidance scheme (paragraph 4.9).

The relevant period for which client information must be provided under s259 are:

- the calendar quarter during which the s259 notice was issued, but not including any date before the monitoring notice was issued
- if the s259 notice was issued after the end of the calendar quarter during which the monitoring notice took effect, the period beginning with the date the monitoring notice took effect and ending on the day before the start of the calendar quarter in which the s259 notice was issued
- each succeeding calendar quarter after the end of that quarter up to and including the calendar quarter during which the monitoring notice ceases to have effect but not including any days after the notice ceases to have effect (s259(3))

A calendar quarter is a period of three months beginning on 1 January, 1 April, 1 July or 1 October (s283(1)).

Where a monitored promoter is required by a notice under s259 to make client returns those returns must be made

- within thirty days of the end of the relevant period, or if longer
- within thirty days from the giving of the s259 notice (s259(4))

Example 1: a promoter is issued with a monitoring notice on 8 June 2015 and with a s259 notice on 22 June 2015. The relevant periods for which the promoter must make returns and the time limit for making the returns are:

- 8 June 2015 to 30 June 2015, time limit 30 July 2015
- 1 July 2015 to 30 September 2015, time limit 30 October 2015,

and every quarter after that until the monitoring notice is withdrawn

Example 2: a promoter is issued with a monitoring notice on 21 September 2015 and with a s259 notice on 5 October 2015. The relevant periods for which the promoter must make returns and the time limit for making the returns are:

- 21 September 2015 to 30 September 2015, time limit 4 November 2015
- 1 October 2015 to 31 December 2015, time limit 30 January 2016

and every quarter after that until the monitoring notice is withdrawn

In this example the return deadline is extended because the time limit that would otherwise apply for the first relevant period (30 October 2015) is less than 30 days after the date on which the s259 notice was issued.

The definition of client for the purpose of s259 is set out below but it is subject to an important exception. The monitored promoter does not need to report details of any client in a return for a relevant period where:

- the promoter has provided information for that client in a return under s259 for an earlier relevant period
- the information provided remains accurate (s259(8))

Thus, for the most part, returns can be limited to information about new clients. However, HMRC would need to be told where an existing client has changed its name or address, if the monitored promoter has access to that information, or where new information about that client needs to be reported. For example, if the information to be provided includes information about avoidance schemes that the client has implemented, the return for a period will need to include information about new schemes entered into in that period by existing clients.

A person will be a client of a monitored promoter in a relevant period if during the relevant period the promoter:

- made a firm approach (paragraph 1.6) to that person with a view to the promoter making a relevant proposal (paragraph 1.5) available for implementation by that person or any other person
- made the proposal available for implementation by that person
- took part in the organisation or management of relevant arrangements (paragraph 1.5) entered into by that person

A person will also be a client of a monitored promoter during a relevant period if during that relevant period the person enters into transactions that form part of relevant arrangements and those transactions:

- are intended to give rise to a tax advantage, or to the avoidance or reduction of liability to pay relevant contributions (paragraph 1.5), for the person in that period or a later period
- are relevant arrangements of the promoter, or implement a relevant proposal of the promoter

As a result, the information that must be included in returns under s259 is not limited to information in relation to monitored proposals or monitored arrangements (paragraph 4.2). Returns under s259 will relate to all persons who are clients in relation to schemes that have been or are being promoted by the monitored promoter, including where they were promoted by the monitored promoter before the monitoring notice has effect.

Where a monitoring notice is a replacement monitoring notice (paragraph 7.5) the obligation to provide client returns is removed in relation to a client who has taken part in relevant arrangements if the promoter reasonably believes that information about that client in relation to the arrangements has been provided under the original monitoring notice.

The use of information powers is subject to:

- a right of appeal in some cases (paragraph 4.13)
- rules covering how information is to be provided (paragraph 4.14)
- exceptions and safeguards (paragraph 4.15)
- restrictions on any attempt by a promoter to impose a duty of confidentiality (paragraph 4.17)
- penalties for failing to comply with an information notice, or for supplying inaccurate information or documents (paragraph 5.1 onwards)

4.8 Information powers: ongoing duty of intermediary to provide client returns

The obligation on monitored promoters in s259 FA 2014 (paragraph 4.7) to provide quarterly returns providing information about clients is supported by a similar but narrower obligation on intermediaries in s260. An intermediary may be given a notice requiring it to make quarterly returns to HMRC.

The notice will be given by an authorised officer or by a person nominated by that authorised officer. Before issuing a notice under s260 the officer will consider whether adequate information about clients is being obtained under s259.

The notice is to be given to a person who is an intermediary (paragraph 1.7). It can be given only in relation to a monitored proposal (paragraph 4.2) promoted by a monitored promoter.

The information required by the notice must be provided for each relevant period and will be:

- the name and address of each person who is a client of the intermediary during that period
- the national insurance number or unique tax reference identifying the client or both, if the intermediary knows them
- the name and address and PRN for the monitored promoter of monitored proposals specified in the notice
- the name and address of any other intermediary from or to which the client has been referred in relation to monitored proposals specified in the notice
- the date on which
  - the intermediary communicated information in the course of a business to the client about a monitored proposal with a view to the client or any other person entering into transactions forming part of the scheme
- fees or commissions paid by the client to the intermediary

Section 260 can only be used to obtain information about clients of the intermediary, but in many cases the person who enters into the transactions will not be the client. For example, the client may be an employer but the employees may be the scheme users. Section 261 provides an additional power to obtain information about any persons other than clients that an officer suspects have been party to transactions that implement an avoidance scheme (paragraph 4.9).

A relevant period is:

- the calendar quarter during which the s260 notice was issued, but not including any date before the intermediary was given the PRN of the monitored promoter
- if the s260 notice was issued in a later calendar quarter than the one during which the intermediary was given the promoter reference number (PRN) of the monitored promoter (paragraphs 3.10 to 3.12), the period beginning with the date the PRN was received and ending on the day before the start of the calendar quarter in which the s260 notice was issued

- each succeeding calendar quarter after the end of that quarter, up to and including the calendar quarter during which the monitoring notice ceases to have effect, but not including any dates after the notice ceases to have effect (s260(3))

A calendar quarter is a period of three months beginning on 1 January, 1 April, 1 July or 1 October (s283(1)).

Where an intermediary is required by a notice under s260 to make client returns those returns must be made

- within thirty days of the end of the relevant period, or if longer
- within thirty days from the giving of the s260 notice (s260(4))

> Example: an intermediary is issued with a PRN on 21 December 2015 in accordance with s250 because the monitored promoter is not resident in the UK (paragraph 3.10). On 11 January 2016 the intermediary is given a s260 notice. The relevant periods for which the intermediary must make returns and the time limit for making the returns are:
>
> - 21 December 2015 to 31 December 2015, time limit 10 February 2016
> - 1 January 2016 to 31 March 2016, time limit 30 April 2016
>
> and every quarter after that until the monitoring notice is withdrawn.
>
> In this example the return deadline is extended because the time limit that would otherwise apply for the first relevant period (30 January 2016) is less than 30 days after the date on which the s260 notice was issued.

The definition of client for the purpose of s260 is set out below but it is subject to an important exception. The intermediary does not need to report details of any client in a return for a relevant period where:

- the intermediary has provided information for that client in a return for an earlier relevant period
- the information provided remains accurate (s260(6))

Thus, for the most part, returns can be limited to information about new clients. HMRC would also need to be told where an existing client has changed its name or address, if the intermediary has access to that information, or where new information about that client needs to be reported. For example, if the information to be provided includes information about avoidance schemes that the client has implemented, the return for a period will need to include information about new schemes entered into in that period by existing clients.

A person is a client of an intermediary for a relevant period if:

- the intermediary, in the course of its business, has communicated information to that person during the relevant period about a monitored proposal
- the communication was made with a view to that person, or any other person, entering into transactions forming part of the arrangements that implement that proposal

The obligation on an intermediary to provide quarterly client returns is narrower than that applying to monitored promoters. It only applies to the extent that the intermediary is an intermediary of the monitored promoter in relation to monitored proposals (see paragraph 4.2).

The use of information powers is subject to:
- a right of appeal in some cases (paragraph 4.13)
- rules covering how information is to be provided (paragraph 4.14)
- exceptions and safeguards (paragraph 4.15)
- restrictions on any attempt by a promoter to impose a duty of confidentiality (paragraph 4.17)
- penalties for failing to comply with an information notice, or for supplying inaccurate information or documents (paragraph 5.1 onwards)

4.9 Information powers: information about persons who have taken part in avoidance schemes

Section 261 FA 2014 supplements s259 (paragraph 4.7) and s260 (paragraph 4.8). It provides for HMRC to issue information notices to monitored promoters and intermediaries relating to persons for whom information has not yet been provided under those provisions but who have been party to an avoidance scheme promoted by the monitored promoter.

An authorised officer may issue a notice under s261 to:
- a monitored promoter who has provided information under s259
- an intermediary who has provided information under s260

The officer may suspect that there is some other person, about whom information has not been provided, who is likely to be or to have been a party to transactions that implement the avoidance scheme. The usual case in which this will be so is where the client about whom information is provided is not the person who is taking part in the avoidance scheme. For example, the client may be:
- a director of a company that is intended to benefit from the scheme
- an employer whose employees are intended to benefit from the scheme
- a trustee of a trust or settlement in circumstances in which the beneficiaries are intended to benefit from the scheme
- a group company where another group company is intended to benefit from the scheme

In other cases the client may be taking part in the avoidance scheme but there may be other persons who are also involved and who are not clients.

Where an authorised officer suspects the existence of such third parties the officer may issue a notice in writing under s261 to the monitored promoter or intermediary requiring information about:
- any person who is likely to be or to have been a party to the transactions that implement a relevant proposal (paragraph 1.5)

- any person who is party to a transaction that forms part or all of relevant arrangements (s261(2))

Where the s261 notice is issued to a monitored promoter, the promoter is required to provide the same information about parties to the transactions, which it is required to provide about clients when complying with a notice under s259 (paragraph 4.7). The promoter must also explain why this information was not provided when complying with the requirements of the s259 notice.

Where the s261 notice is issued to an intermediary, the intermediary is required to provide the same information about parties to the transactions, which it is required to provide about clients when complying with a notice under s260 (paragraph 4.8) and to explain why this information was not provided when complying with the requirements of the s260 notice. The intermediary must also report the date on which the persons were party to transactions implementing the proposal or forming part of the arrangements.

The notice does not need to specify the persons about whom information is requested. The officer may well not be aware of the existence or names of all of those persons. The notice will apply to all persons that the monitored promoter or intermediary might reasonably be expected to know were party to those transactions.

The recipient of the notice must comply with it within 10 days, or such longer time as the officer permits (s261(4)). A longer time should be permitted where the officer considers that it would be unduly onerous to provide the information requested within 10 days. The recipient does not need to provide information that has already been provided in accordance with s259 or s260.

The use of information powers is subject to:
- a right of appeal in some cases (paragraph 4.13)
- rules covering how information is to be provided (paragraph 4.14)
- exceptions and safeguards (paragraph 4.15)
- restrictions on any attempt by a promoter to impose a duty of confidentiality (paragraph 4.17) and
- penalties for failing to comply with an information notice, or for supplying inaccurate information or documents (paragraph 5.1 onwards).

In principle s261 could be used to require information about a client that has been omitted from a return under s259 or s260. However, where there is a failure to provide client information, or that information is inaccurate, HMRC will usually seek to impose penalties in accordance with Schedule 35.

4.10 Information powers: duty of monitored promoter to provide HMRC with its address

Section 263 FA 2014 requires a monitored promoter to provide its address to an authorised officer within 30 days of the end of each calendar quarter in which the monitoring notice has effect. For a monitored promoter that is a

company or a limited liability partnership this would be the registered office. For any other monitored promoter it would be the business address, or any other address at which the promoter would expect to be contacted.

This obligation applies to all monitored promoters and is not dependent on an authorised officer issuing a notice requiring the promoter to provide the information.

A calendar quarter is a period of three months beginning on 1 January, 1 April, 1 July or 1 October (s283(1)). So, for example, if a monitoring notice has effect in relation to a promoter on 30 June 2016 the promoter has to provide its address to an authorised officer by 30 July 2016. If the notice still has effect on 30 September 2016 the promoter has to provide its address again on 30 October 2016.

4.11 Information powers: application to tribunal for order requiring the production of information or documents

Various sanctions are available where a person fails to comply in full with an information notice given to them in accordance with Part 5. In most cases the appropriate sanction will be to charge penalties in accordance with Schedule 35 FA 2014 (paragraph 5.1 onwards). However, an additional sanction is provided by s264: an application to the First-tier Tribunal to ask the tribunal to make an order requiring the production of information or documents.

The powers in s264 will be used in those cases in which a financial penalty is not considered to be enough by itself to encourage compliance. It may also be used to obtain further evidence where an authorised officer believes that the person has failed to comply with an information notice. The tribunal can make use of additional powers available to the courts to compel the production of the information or documents.

The powers in s264 can be used where any person has been given a notice under one of the provisions below and has provided information or produced documents as required by the notice, but an authorised officer suspects that they have not provided all of the information or documents required. The person concerned could be a monitored promoter, an intermediary or a client.

The provisions are:

- s255 – power to obtain information or documents from a monitored promoter or intermediary (paragraph 4.3)
- s257 – ongoing duty of a monitored promoter to provide information (paragraph 4.5)
- s258 – power to obtain information from an intermediary or client where a non-resident monitored promoter fails to provide information (paragraph 4.6)
- s259 – ongoing duty of monitored promoter to provide client returns (paragraph 4.7)
- s260 – ongoing duty of intermediary to provide client returns (paragraph 4.8)

- s261 – power to obtain information from monitored promoter or intermediary about persons who have taken part in avoidance schemes (paragraph 4.9)
- s262 – power to obtain information and documents from a promoter who is subject to a conduct notice (paragraph 2.5)

In this case an authorised officer, or an officer nominated by an authorised officer, may apply to the First-tier Tribunal for an order requiring the person to:
- provide specified information about its clients
- provide specified information, or information of a specified description, about a monitored proposal or monitored arrangements (paragraph 4.2)
- produce specified documents relating to a monitored proposal or monitored arrangements (s264(2))

> Example: a promoter provides HMRC with a description of a monitored arrangement but does not provide the name of the bank facilitating the arrangement through a loan. HMRC applies to the Tribunal for an order requiring the promoter to supply that specified information.
>
> A promoter provides HMRC with a description of a monitored proposal but not how the proposal is being financed. HMRC applies to the Tribunal requiring the promoter to provide information describing how the arrangement will be financed.

If the tribunal is satisfied that the information or documents are required under the relevant provision, or will help to support or explain information required under the relevant provision, it may make an order requiring their provision. This requirement is treated as being part of the person's existing obligation under the relevant provision.

The information or documents must be provided within 10 days of the date on which the order was given. An authorised officer may direct that a longer period should be given if that seems appropriate. Authorised officers may wish to specify a longer period if the information and documents required are extensive and it can reasonably be assumed that it would take more than 10 days to comply.

4.12 Information notices: duty of client or intermediary to provide information to a monitored promoter

Section 265 FA 2014 requires clients and certain intermediaries to provide information to a monitored promoter. This obligation applies where the client or intermediary has received a promoter reference number (PRN) and must be met within 10 days of receiving the PRN.

This obligation applies to:
- intermediaries of non-resident monitored promoters who have received a PRN from HMRC (paragraph 3.10)
- clients who have received a PRN from a monitored promoter (paragraph 3.11)

- clients who have received a PRN from an intermediary or from another client (paragraphs 3.12 and 3.13)

The information that must be provided by the client or intermediary is:
- their National Insurance number and
- their unique tax reference number provided by HMRC

If the client or intermediary does not have either of those numbers they must tell that to the monitored promoter within 10 days. The numbers do not need to be provided to the promoter where the client or intermediary has already provided them

4.13 Information notices: appeals against information notices
A person who is given notice to produce information or documents may appeal against that notice, or against any requirement in the notice, in accordance with s266 FA 2014. The person concerned could be a monitored promoter, an intermediary or a client.

The right of appeal relates to notices under:
- s255 – power to obtain information or documents from a monitored promoter or intermediary (paragraph 4.3)
- s257 – ongoing duty of a monitored promoter to provide information (paragraph 4.5)
- s258 – power to obtain information from an intermediary or client where a non-resident monitored promoter fails to provide information (paragraph 4.6)
- s259 – ongoing duty of monitored promoter to provide client returns (paragraph 4.7)
- s260 – ongoing duty of intermediary to provide client returns (paragraph 4.8)
- s261 – power to obtain information from monitored promoter or intermediary about persons who have taken part in avoidance schemes (paragraph 4.9)
- s262 – power to obtain information and documents from a promoter who is subject to a conduct notice (paragraph 2.5)

There is no right of appeal against a notice under s255 that has been issued with the approval of the First-tier Tribunal under s256 (paragraph 4.4) (s266(3)(b)).

There is no right of appeal against a notice that requires a person to produce information or documents that are part of statutory records that a person is required to keep under the Taxes Acts or any other tax legislation (s266(3)(a) and (4)) (CH21700). A person is entitled to appeal against a requirement to produce statutory records if the period for which they must be kept has expired ((s266(5)).

A notice of appeal must be in writing and must be sent within 30 days of the date on which the notice was given, to the officer who gave the notice

(s266(6)). It must state the grounds on which the appeal is being made (s266(7)).

All of the provisions of Part 5 TMA 1970 apply to these appeals (s266(11)). So, for example, a person can ask for a review of the officer's decision to issue the notice or to include a particular requirement in a notice, see ARTG2000 onwards. If the person does not notify the appeal to the tribunal within the time allowed and subject to the rules relating to late notifications (ARTG8240) the appeal is treated as settled by agreement (ARTG2010).

If an appeal is notified to the First-tier Tribunal the tribunal may:
- confirm the notice or confirm the disputed requirement
- vary the notice or vary the disputed requirement
- set aside the notice or set aside the disputed requirement (s266(8))

The decision of the tribunal on the appeal is final (s266(10)).

4.14 Information notices: how information and documents are to be provided
Where a person is required to produce a document:
- the Commissioners may specify that the document should be produced for inspection at a place agreed between the person and an officer, or at a place specified by an officer (s267(2))
- subject to certain exceptions, a copy of the document will satisfy the requirement (s268)

In specifying a place at which a document may be produced for inspection the officer must be reasonable and must not specify a place that is used solely as a dwelling.

A copy of the document will not be enough to meet the requirement where:
- regulations require the original document to be provided (s268(1)), or
- the notice requires the person to produce the original document (s268(2)(a))

In other cases, a copy of the document will be enough to meet the requirement on condition that
- the copy must be an exact copy of the original, with no amendments, corrections or deletions (other than redacting information which is subject to legal professional privilege)
- the original document must be retained as required and
- the person required to produce the copy document must not alter the original document or allow it to be altered

Where the copy document is provided in respect of a notice issued under s255 (paragraph 4.3) or s257 (paragraph 4.5), the original must be retained until the monitoring notice or replacement monitoring notice is withdrawn.

Where the copy document is provided in respect of a notice issued under s262 (paragraph 2.5), the original must be retained until the conduct notice or replacement conduct notice is withdrawn or expires.

After having examined the copy document an authorised officer may decide that it is necessary to see the original document. If so, the authorised officer, or an officer nominated by the authorised officer, will make a request for the original in writing to the person who was required to produce the copy. That person must then produce the document at a time and location and within a time limit reasonably required by the officer (s268(3)).

4.15 Information notices: information or documents that do not need to be provided

The information powers in Part 5 are subject to safeguards to ensure that they are proportionate and do not infringe a person's rights. These are similar to the safeguards that apply to the information powers in Schedule 36 FA2008 (CH22100).

A person is not required to produce a document that is not in their possession or power (s270(a) FA 2014). CH22120 explains what these terms mean.

In addition there are restrictions relating to

- old documents (s270(b))
- appeal material (s269(1)(a))
- personal records (s269(1)(c))
- journalistic material (s269(1)(b))
- legally privileged information (s271)
- tax advisers' papers giving advice (s272) (paragraph 4.16)

An old document is a document the whole of which originates more than six years before the date on which a person would otherwise be required to produce it. So, for example, an information notice could be used to obtain a contract that had been first drafted more than six years ago, but then amended within the previous six years.

An information notice cannot be used to obtain information or documents that relate to a pending tax appeal. CH22160 provides guidance on the equivalent restriction in the information powers in Schedule 36.

An information notice cannot be used to obtain personal records as defined in section 12 of the Police and Criminal Evidence Act 1984, or information contained in such records. However, a person can be required to produce such documents with the information that makes the documents personal records removed, or to provide information contained in such records that is not personal information. CH22180 provides guidance on the equivalent restriction in the information powers in Schedule 36 FA 2008.

An information notice cannot be used to obtain journalistic material as defined in section 13 of the Police and Criminal Evidence Act 1984, which consists of material acquired or created for the purpose of journalism. CH22220 provides

guidance on the equivalent restriction in the Schedule 36 FA 2008 information powers.

An information notice cannot be used to obtain information to which a claim to legal professional privilege or, in Scotland, confidentiality of communications, could be maintained. CH22240 provides guidance on the equivalent restriction in the information powers in Schedule 36 FA 2008.

4.16 Information notices: restriction for tax advisers' papers

There is an additional restriction in the information powers in Part 5 for advice given by a tax adviser. This restriction applies solely where a monitored promoter is not resident in the UK and a notice under s258(4) or (5) FA 2014 has been issued to:

- a person who has implemented a monitored proposal (paragraph 4.2), or
- any person who has entered into a transaction that forms part of monitored arrangements (paragraph 4.6)

And that person is a tax adviser. A tax adviser is a person who has been appointed to give tax advice about the tax affairs of another person (whether appointed directly by that person or by another tax adviser of that person) (s272(5)).

The tax adviser is not required to:

- provide information about relevant communications
- produce documents that are the property of the tax adviser and consist of relevant communications (s272(2))

Relevant communications are defined at s272(5) and are described in the guidance on the equivalent provision in Schedule 36 FA2008 at CH22320.

The restriction for relevant communications does not apply to information or documents that the tax adviser has assisted a person in preparing for, or delivering to, HMRC while acting as a tax accountant (s272(3)).

This restriction also does not apply where the notice under s258 has been given to an intermediary.

The restriction will apply for relevant communications that have already been provided to, or produced for, an officer of HMRC, so that these cannot be required under s258.

> Example: a tax adviser has prepared the tax return of their client who has used an arrangement provided by a monitored promoter. In preparing the return the tax adviser and his client prepared a schedule of transactions between his client and the other parties in the monitored arrangement that enabled the tax adviser to identify the impact of the tax advantage on his client's return and advise his client accordingly. This document has not been provided to HMRC as part of the tax return.

The schedule is a relevant communication within s272(2) but it has not been provided to HMRC as part of the client's tax return. The schedule could be subject to an information notice under s258(4) or (5).

4.17 Information notices: restriction on duty of confidentiality

One of the aims of the Part 5 regime in relation to monitored promoters (paragraph 3.1) is to prevent lack of co-operation and unwillingness to provide information being used to frustrate HMRC's attempts to tackle avoidance schemes. Some promoters impose confidentiality requirements on their clients and on intermediaries which could stop or delay HMRC finding out about a monitored promoter and the avoidance schemes that person is promoting. Section 273 FA 2014 ensures that attempts by monitored promoters to impose confidentiality on clients or intermediaries in their dealings with HMRC will not be effective. Clients and intermediaries must be freely able to disclose information and documents to HMRC.

No duty of confidentiality, nor any other restriction on disclosure, prevent the voluntary disclosure of information or documents to HMRC by a client or intermediary about:

- a monitored promoter
- relevant proposals or relevant arrangements (paragraph 1.5) promoted by a monitored promoter (s273(1))

A client is a person in relation to whom the monitored promoter:

- has made a firm approach (paragraph 1.6) with a view to making a relevant proposal available for implementation by that person or any other person
- has made a relevant proposal available for implementation by that person
- has taken part in the organisation or management of relevant arrangements entered into by that person (s273(2))

An intermediary here is a person who is an intermediary (paragraph 1.7) in relation to a relevant proposal of the monitored promoter.

The definitions of client and intermediary here are not specific about when the events that create the relationship with the promoter are to have taken place. The client might have become a client and become subject to an attempt to impose confidentiality before the promoter became a monitored promoter. And the scheme about which the client or intermediary voluntarily discloses information or documents need not be the scheme that has created the relationship with the promoter. So, for example, a client may have received a firm approach from a promoter about one scheme but may wish to make a voluntary disclosure about that and other schemes of the promoter of which the client is aware.

This does not require any person to disclose to HMRC any privileged information (paragraph 4.15).

POTAS

Chapter 5 penalties

5.1 Penalties: overview

Schedule 35 FA 2014 provides for penalties for failure to comply with the requirements of Part 5 or for inaccuracies in information or documents provided. The provisions that are subject to penalties for failure to comply, together with the maximum amount of penalty in each case, are listed at paragraph 5.2. There is a continuing, daily penalty in the event of a continuing failure to comply with an information power (paragraph 5.4). The penalties that apply to inaccuracies in information or documents are described in paragraph 5.5. There is a power to increase the maximum amount of any penalty by regulation (paragraph 5.3). In each case except that of certain daily penalties the amount of a penalty is to be determined by the First-tier Tribunal (paragraph 5.6).

A person will generally not be liable to a penalty under Schedule 35 if they took reasonable care, or had a reasonable excuse, but in some cases the standard for this defence is modified (paragraph 5.8). The defence will also not be available for certain failures in relation to DOTAS and for certain cases in which other penalties are charged for providing inaccurate documents to HMRC.

Paragraphs 6 and 7 Schedule 35 impose penalties for concealing, destroying or disposing of a document that has been or may be required to be produced by certain information notices(paragraph 5.9). Where the documents that have been concealed, destroyed or disposed of are, or are to be, required by a notice under s255 (paragraph 4.3) approved by the tribunal under s256 (paragraph 4.4) there are additional sanctions (paragraph 5.10).

5.2 Penalties: maximum penalties for failure to comply

Schedule 35 paragraph 2 FA 2014 lists the maximum penalties that may be imposed for failure to comply with the provisions of Part 5. These are:

Legislation	Obligation	Maximum penalty
s249(1)	Duty of monitored promoter (paragraph 3.1) to tell clients (paragraph 3.9)	£5,000 (Note 1)
s249(3)	Duty of monitored promoter to publicise monitoring notice (paragraph 3.9)	£1,000,000
s249(10)	Duty of monitored promoter to include information in publications and correspondence (paragraph 3.9)	£1,000,000
s251	Duty of monitored promoter to pass promoter reference number (PRN) to clients and intermediaries (paragraph 3.11)	£5,000 (Note 1)
s252	Duty of intermediaries and clients to pass PRN to other clients (paragraphs 3.12 and 3.13)	£5,000 (Note 1)
s253	Duty of clients to report the PRN to HMRC (paragraph 3.13)	Variable amount – see note 2 below

s255	Duty of monitored promoter or intermediary to provide information and documents (paragraph 4.3)	£1,000,000
s257	Ongoing duty of monitored promoter to provide information and documents (paragraph 4.5)	£1,000,000
s258	Duty of intermediary or client of non-resident promoter to provide information (paragraph 4.6)	£1,000,000
s259	Ongoing duty of monitored promoter to provide information about clients (paragraph 4.7)	£5,000 (Note 1)
s260	Ongoing duty of intermediary of monitored promoter to provide information about clients (paragraph 4.8)	£5,000 (Note 1)
s261	Duty of monitored promoter or intermediary to provide information about persons who have taken part in avoidance schemes (paragraph 4.9)	£10,000
s262	Duty of promoter subject to conduct notice to provide information and documents (paragraph 2.5)	£5,000
s263	Ongoing duty of monitored promoter to provide HMRC with its address (paragraph 4.10)	£5,000
s265	Duty of client or intermediary to provide information to monitored promoter (paragraph 4.12)	£5,000

Notes

1. In each of these cases the maximum penalty that can be imposed is for each person to whom the failure relates (paragraph 2(2) Schedule 35). For example, if a monitored promoter has 500 clients and it fails to meet its obligation under s260 to pass the PRN to its clients, the maximum penalty of £5,000 will be multiplied by the number of clients to whom the promoter has failed to pass the PRN. In this example the maximum penalty could be 500 x £5,000 = £2,500,000.

2. The maximum amount of the penalty that can be imposed on a client that has failed to report the PRN to HMRC depends on how often the client has failed to do so. The maximum is:

   - £10,000 where there have been two or more previous failures in the three year period ending with the date of the latest failure to report
   - £7,500 where there has been one previous failure to report during that period
   - £5,000 where there have been no previous failures to report during that period (paragraph 2(3) Schedule 35)

   Example: a client is a serial user of avoidance schemes, making use of one or more schemes each year. He consistently fails to report PRNs he has received from monitored promoters.

- In 2015-16 he makes use of arrangements intended to result in a tax advantage in that year, but does not include in his return the PRN he has been given. This is the first such failure and he is liable to a penalty up to a maximum of £5,000
- In 2016-17 he again uses the same arrangements, but again does not include in his return the PRN he has been given. This is the second failure within three years and he is liable to a penalty up to a maximum of £7,500
- In 2017-18 he uses the same arrangements for a third time, but again does not include in his return the PRN he has been given. This is the third failure within three years and he is liable to a penalty up to a maximum of £10,000

For:

- changes to the maximum amount of any penalty, see paragraph 5.3
- daily penalties for ongoing failure to comply, see paragraph 5.4
- penalties for inaccurate information or documents, see paragraph 5.5
- the offence of concealing, destroying or disposing of documents, see paragraphs 5.9 and 5.10
- cases in which penalties will not be charged, see paragraph 5.7
- penalty assessments, appeals and interest payments, see paragraph 5.6

5.3 Penalties: changes to the maximum amount of a penalty

Paragraph 5, Schedule 35 FA 2014 provides a power to change the maximum amount of any penalty in Schedule 35 by regulation.

The power can only be used where inflation or deflation has changed the value of the penalty amount either:

- since the legislation was enacted
- since any previous regulations have been made under this power

The amount of the change will be whatever amount seems to be justified by the change in the value of the penalty. This power can be used to increase or to decrease the maximum amounts and it applies to the following penalties:

- failure to comply (paragraph 5.2)
- ongoing daily penalties (paragraph 5.4)
- inaccurate information or documents (paragraph 5.5)

5.4 Penalties: ongoing daily penalties

Paragraph 3 schedule 35 FA 2014 provides for ongoing daily penalties for continuing failure to comply with an information duty after an initial penalty has been imposed in accordance with paragraph 2 (paragraph 5.2).

An information duty is defined by paragraph 1 as an obligation to provide information or produce documents under one of the following provisions:

- for promoters who are subject to a conduct notice (paragraph 2.1)
  - s262 requiring the production of information or documents (paragraph 2.5)
- for monitored promoters (paragraph 3.1)
  - s255 requiring the production of information or documents (paragraph 4.3)
  - s257 requiring ongoing production of information or documents (paragraph 4.5)
  - s259 requiring ongoing provision of information about clients (paragraph 4.7)
  - s261 requiring information about persons who have taken part in avoidance schemes (paragraph 4.9)
  - s263 requiring information about the promoter's address (paragraph 4.10)
- for intermediaries (paragraph 1.7) of monitored promoters
  - s255 requiring the production of information or documents (paragraph 4.3)
  - s258 requiring the production of information that has not been supplied by a non-resident promoter (paragraph 4.6)
  - s260 requiring ongoing provision of information about clients (paragraph 4.8)
  - s261 requiring information about persons who have taken part in avoidance schemes (paragraph 4.9)
  - for clients of monitored promoters
  - s258 requiring the production of information that has not been supplied by a non-resident promoter (paragraph 4.6)

The amount of the ongoing daily penalty is not to exceed the relevant sum for each day on which the failure continued after the day on which the initial penalty was imposed. The relevant sum is:

- £10,000 where the maximum penalty for the initial failure was set at £1,000,000 (paragraph 5.2). This applies to
  - s249(3) - duty of monitored promoter to publicise monitoring notice (paragraph.9)
  - s249(10) - duty of monitored promoter to include information in publications and correspondence (paragraph 3.9)
  - s255 - duty of monitored promoter or intermediary to provide information or documents (paragraph 4.3)
  - s257 - ongoing duty of monitored promoter to provide information or documents (paragraph 4.5)
  - s258 - duty of intermediary or client of non-resident promoter to provide information (paragraph 4.6)
- £600 in any other case

For:

- changes to the maximum amount of any penalty, see paragraph 5.3
- cases in which penalties may not be imposed, see paragraph 5.7
- penalty assessments, appeals and interest payments, see paragraph 5.6

The daily penalty not to exceed £600 is the only penalty within Schedule 35 for which the amount is set by an officer of HMRC rather than by the First-tier Tribunal (paragraph 5.6). The amount that may be set is determined in accordance with s100 TMA as the amount the officer considers to be correct or appropriate.

5.5 Penalties: inaccurate information or documents

Paragraph 4 Schedule 35 FA 2014 provides for a penalty if in complying with an information duty (paragraph 5.4) a person provides inaccurate information or produces a document that contains an inaccuracy.

One of the following conditions must be met before a penalty can be charged:

- the inaccuracy was careless or deliberate
- the person knew about the inaccuracy when the information or document was provided but did not tell HMRC about it at that time
- the person discovered the inaccuracy at some later date but did not take reasonable steps to tell HMRC about it at that time

An inaccuracy is careless if it results from the person failing to take reasonable care. A monitored promoter (paragraph 3.1) cannot rely on taking legal advice as evidence of reasonable care if:

- the advice was not based on a full and accurate description of the facts
- the conclusions in the advice were unreasonable (paragraph 4(4) of Schedule 35)

An intermediary or client of a non-resident promoter cannot rely on legal advice provided or procured by that promoter as evidence of having taken reasonable care in complying with an information notice under s258 (paragraph 4(5) of Schedule 35) (paragraph 4.6 of this guidance).

These limitations to the defence of reasonable care should not be taken to imply that in other circumstances it will be enough to demonstrate that legal advice has been obtained in order to establish a defence of reasonable care. These provisions automatically deny that defence in the circumstances described. In other cases it will still be necessary to demonstrate that obtaining and relying on legal advice was sufficient to establish a defence of reasonable care in the circumstances of that case.

This rule does not prevent the client or intermediary arguing they have a reasonable excuse where they are not relying on legal advice. For example a client may argue that they have a reasonable excuse for not providing a document within the time required under an information notice because they unexpectedly had to be admitted to hospital and complied with the obligation as soon as possible after returning home.

The amount of the penalty for providing inaccurate information or documents containing one or more inaccuracies is not to exceed:

- £1,000,000 in relation to the following information duties:
  - s255 - duty of monitored promoter or intermediary to provide information or documents (paragraph 4.3)
  - s257 - ongoing duty of monitored promoter to provide information or documents (paragraph 4.5)
  - s258 - duty of intermediary or client of non-resident promoter to provide information (paragraph 4.6)
- £10,000 in relation to a duty imposed under s261 (duty of monitored promoter or intermediary to provide information about persons who have taken part in avoidance schemes (paragraph 4.9))
- £5,000 in relation to the following information duties:
  - s259 - ongoing duty of monitored promoter to provide information about clients (paragraph 4.7)
  - s260 - ongoing duty of intermediary of monitored promoter to provide information about clients (paragraph 4.8)
  - s262 - duty of promoter subject to conduct notice to provide information or a document (paragraph 2.5)
  - s263 - ongoing duty of monitored promoter to provide HMRC with its address paragraph 4.10)

The same maximum penalty applies regardless of the number of inaccuracies in the information or a document provided (paragraph 4(9)).

For:

- changes to the maximum amount of any penalty, see paragraph 5.3
- cases in which penalties will not be charged, see paragraph 5.7
- penalty assessments, appeals and interest payments, see paragraph 5.6

5.6 Penalties: assessment, appeal and interest payable

Paragraph 10 Schedule 35 FA 2014 applies the provisions of Part 10 TMA 1970 as machinery for the assessment of penalties. The power given by s100 TMA to an officer of HMRC authorised to impose a penalty and to determine the amount of a penalty is disapplied for penalties under Schedule 35 except for ongoing daily penalties for which the maximum penalty is set at £600 (paragraph 5.4 of this guidance) (paragraph 10(b) of Schedule 35). So in order to charge a penalty under any other part of Schedule 35 an authorised officer must institute proceedings before the First-tier Tribunal in accordance with s100C TMA.

Where an authorised officer has determined the amount of an ongoing daily penalty the amount charged is to be paid within 30 days of the date of issue of the notice of determination (s100A TMA). There is a right of appeal against a penalty determination in accordance with s100B TMA. If the penalty payment is made late interest will be payable as if the penalty payment was a payment of tax (paragraph 11 of Schedule 35).

Where penalty proceedings are instituted before the First-tier Tribunal the tribunal has discretion to determine whether to impose a penalty and to determine the amount of that penalty in any case. When the tribunal is setting the amount of a penalty for failure to comply with the requirements of Part 5 (paragraph 5.2) it must take into account the considerations set out in paragraph 2(4) Schedule 35. These are intended to ensure that the amount of penalty acts as a deterrent to future failures.

The tribunal must take into account:

- that it is desirable to set the penalty at a level that seems likely to deter that person, or other persons, from similar failures to comply in future
- where the failure is
  - a failure under s255 (paragraph 4.3) by a monitored promoter (paragraph 3.1) or intermediary (paragraph 1.7) to provide information or documents
  - a failure under s257 (paragraph 4.5) by a monitored promoter to meet an ongoing obligation to provide information or documents

  The amount of fees received, or likely to have been received by that person in relation to the monitored proposal or arrangements to which the information notice relates
- where the failure is a failure under s258 (paragraph 4.6) by an intermediary or client of a non-resident monitored promoter, the amount of the tax advantage intended to be gained from the arrangements that were implemented

In these cases, subject to the maximum amount of penalty that may be charged (paragraph 5.2), it is expected that the tribunal will determine penalties in a larger amount where:

- there is a very large amount of fee income
- the intended tax advantage is very large

Where the tribunal has determined the amount of a penalty the amount charged is treated as if it is tax that is due and payable (s100C(3) TMA). There is a right of appeal against a penalty determination on a point of law, but also in relation to the amount of the penalty imposed (s100C(4) TMA). The Upper Tribunal then has discretion to confirm the penalty, set it aside, or to increase or decrease the amount (s100C(5) TMA). If the penalty payment is made late interest will be payable as if the penalty payment was a payment of tax (paragraph 11).

For cases in which penalties may not be charged see paragraph 5.7.

5.7 Penalties: cases in which penalties may not be charged

Schedule 35 FA 2014 removes liability to a penalty in some cases. Of these the most important is that no penalty will arise in respect of a failure if there was a reasonable excuse for that failure (paragraph 9) but that defence is limited, see below.

If the failure is a failure to meet a deadline, no penalty will be due if the person has been given a longer deadline by an officer of HMRC and has met that longer deadline (paragraph 8).

No penalty will be due under Schedule 35 where the person concerned has been convicted of an offence in relation to the failure that has given rise to that penalty (paragraph 12). This is to prevent two sanctions applying for the same offence.

Paragraph 13 Schedule 35 prevents a double charge to penalties for the same failure by a client. Section 253 requires a client of a monitored promoter (paragraph 3.1) that has received a promoter reference number (PRN) to provide that PRN to HMRC in a return or in some other form (paragraph 3.13). Paragraph 2 Schedule 35 imposes a penalty on the client if it fails to do so (paragraph 5.2).

If such a penalty is imposed there will not be a penalty under:

- Schedule 24 FA 2007 (penalty for submitting an inaccurate return)
- Part 7 FA 2004 (DOTAS obligation on client to notify HMRC)
- any other penalty regime that is prescribed in regulations for this purpose resulting from the failure to provide the PRN

Otherwise a failure to put the PRN on a return when required to do so would mean that the client has submitted an incorrect return as well as failing to meet the obligation imposed by s253. In some cases in which we receive a return that is incorrect because it is incomplete we may return it for completion. If the return is incomplete because a client has failed to disclose a PRN penalties under Schedule 35 will usually be appropriate.

Although the obligations imposed by DOTAS are not quite the same as those imposed by s253 they are intended to achieve a similar aim; that HMRC is made aware of avoidance schemes that the client has made use of. So it is appropriate that penalties should only be imposed under one regime.

The defence of reasonable excuse is denied in the following circumstances:

- insufficiency of funds is not a reasonable excuse unless it results from events that are outside the person's control
- relying on another person to do something is not a reasonable excuse unless reasonable care has been taken to ensure that the other person did what they were required to do
- if the person had a reasonable excuse, but no longer has it, the failure must be put right without unreasonable delay or the person will be treated as not having a reasonable excuse
- a monitored promoter (paragraph 3.1) may not rely on legal advice for a reasonable excuse if :
  - the advice was not based on a full and accurate description of the facts
  - the conclusions in the advice were unreasonable

- an intermediary or client of a non-resident monitored promoter s258 (paragraph 4.6) cannot rely on legal advice given or procured by the promoter for the defence of reasonable excuse

These limitations to the defence of reasonable excuse should not be taken to imply that in other circumstances it will be enough to demonstrate that legal advice has been obtained in order to establish a defence of reasonable excuse. These provisions automatically deny that defence in the circumstances described. In other cases it will be necessary to demonstrate that obtaining and relying on legal advice was sufficient to establish a defence of reasonable excuse in the circumstances of that case.

5.8 Penalties: limitations to defence of reasonable excuse and reasonable care

There is detailed guidance about what may constitute a reasonable excuse in the Compliance Handbook starting at CH61500. There is also detailed guidance about the meaning of reasonable care starting at CH81120.

Schedule 35 FA 2014 limits the circumstances in which a monitored promoter (paragraph 3.1), or the intermediaries or clients of that promoter, can rely on legal advice as a defence against a charge to penalties, either:

- by arguing that obtaining legal advice demonstrates reasonable care (paragraph 5.4)
- by arguing that relying on legal advice is a reasonable excuse (paragraph 5.7)

The same limitation is extended by s275 and s276 to other penalty regimes. The aim is to modify the defences to penalty charges in three ways.

The first is that when challenging the charging of penalties, monitored promoters will not be permitted to rely on legal advice that is not based on a realistic view of the facts, that reaches unreasonable conclusions, or that is subject to caveats that render it irrelevant.

The second is to prevent monitored promoters from claiming to have relied on legal advice, but refusing to release that advice because of legal professional privilege (paragraph 4.15). These provisions do not require the production of privileged information or documents but when considering whether or not the promoter has a reasonable excuse in any penalty proceedings the Tribunal will need to consider if the legal advice is based on a realistic view of the facts and reaches a reasonable conclusion. Consequently, undisclosed legal advice cannot be used as a defence against penalties.

The third is that, when challenging the charging of penalties, clients and intermediaries of monitored promoters will be prevented from arguing that they have discharged their responsibilities by relying on legal advice provided

by the promoter. Clients should take additional steps to test whether the tax advantages, or the avoidance or reduction of relevant contributions, that the promoter claims will arise from avoidance schemes are realistic.

These limitations to the defence of reasonable care and reasonable excuse should not be taken to imply that in other circumstances it will be enough to demonstrate that legal advice has been obtained in order to establish that defence. These provisions automatically deny that defence in the circumstances described. In other cases it will be necessary to demonstrate that obtaining and relying on legal advice was sufficient to establish a defence of reasonable care or reasonable excuse in the circumstances of that case.

Section 275 extends this limitation to the penalties that apply for failing to notify under the DOTAS regime in part 7 FA 2004. It does this by adding two new provisions to the DOTAS penalty rules at s98C TMA 1970.

The first is s98C(2EA) TMA 1970, which applies where:

- a client of a non-resident monitored promoter fails to notify HMRC in accordance with s309 FA 2004
- any person who has entered into a transaction that is part of arrangements for which there is no promoter under DOTAS, for example because the information that the promoter would disclose is subject to legal professional privilege and that person fails to provide information to HMRC in accordance with s310 FA 2004

Any legal advice given or procured by the monitored promoter is to be ignored in determining whether the person has a reasonable excuse for that failure for the purpose of s118(2) TMA in connection with the charging of penalties in respect of that failure.

The second is s98(2EB) TMA 1970, which prevents a monitored promoter from relying on legal advice as a reasonable excuse for a failure to meet any of the obligations listed in s98C(2) TMA 1970 if:

- the advice was not based on a full and accurate description of the facts
- the conclusions in the advice were unreasonable

Regulations 10A and 10B of the National Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012 [SI 2012/1868] make corresponding provision to sections 98(2EA) and (2EB) TMA 1970 for the purposes of NICs.

Section 276 extends this limitation on the defences of reasonable excuse or reasonable care when challenging the charging of penalties to cases in which a person provides HMRC with a document of a kind listed in paragraph 1 Schedule 24 FA 2007 and there is a liability to a penalty under that schedule because of an inaccuracy in that document. This limitation on the defences of

reasonable excuse or reasonable care also applies when the inaccuracy in the document relates to relevant contributions.

Penalties may be due under Schedule 24 where the inaccuracy is careless or deliberate. An inaccuracy is careless if it is due to a failure to take reasonable care by the person who has provided that document (paragraph 3(1) Schedule 24). For this purpose legal advice given or procured by a monitored promoter and relating to relevant arrangements (paragraph 1.5) of that promoter is to be ignored. The person who has submitted an inaccurate document is not permitted to argue that they relied on legal advice from the promoter and that in doing so they have taken reasonable care.

5.9 Penalties: offence of concealing, destroying or disposing of documents
If a monitored promoter, a promoter subject to a conduct notice or, in certain cases, an intermediary of a monitored promoter, is required to produce a document, or is likely to be required to produce a document, and conceals, destroys or disposes of that document, that person is treated by paragraphs 6 and 7 Schedule 35 FA 2014 as having failed to comply with the obligation to produce the document.

Paragraph 6 applies to the following:

- s255 - where a monitored promoter or an intermediary of that promoter has been required to produce a document (paragraph 4.3)
- s257 – where a monitored promoter has been required to produce documents on an ongoing basis (paragraph 4.5)
- s262 – where a promoter that is subject to a conduct notice has been required to produce documents (paragraph 2.5)

Once any of those duties have been imposed the promoter or intermediary must not:

- conceal, destroy, or otherwise dispose of the document that is to be produced
- arrange for that document to be concealed, destroyed or otherwise disposed of (paragraph 6(1))

If the promoter or intermediary does so they will be treated as having failed to comply with the requirement to produce the document and will be subject to penalties as a result (paragraph 6(4)). An alternative criminal sanction is available if the document was required under s255 and the notice was subject to approval by the First-tier Tribunal (paragraph 5.10).

There are two exceptions. The promoter or intermediary is permitted to conceal, destroy or dispose of such a document if:

- the requirement to produce the document has been complied with, unless an officer of HMRC has told the promoter or intermediary in writing that the document must continue to be available for inspection (paragraph 6(2))

- the promoter or intermediary has produced a copy of the document (paragraph 4.14) and a period of 6 months has passed from the date on which the copy was produced, unless an officer of HMRC has within that period made a request in writing for the original document (paragraph 6(3) of Schedule 35)

If the document concerned was subject to a requirement to produce under more than one of the listed provisions then:

- if one of the provisions was s255 the monitored promoter or intermediary will be treated as only having failed to comply with s255
- if the provisions are s257 and s262 the promoter will be treated as only having failed to comply with s257 (paragraph 6(5) of schedule 35)

The purpose of this priority rule is partly to ensure that a single offence only attracts a single penalty, but also:

- to ensure that when there is a failure to comply with s255 the sanctions under s280 apply, where required, instead of penalties under Schedule 35 (paragraph 5.10)
- to ensure that the penalty imposed is subject to the s257 maximum amount rather than the s262 maximum amount (paragraph 5.2)

Paragraph 6 of Schedule 35 is extended by paragraph 7 to cover the case in which no information notice has been issued but the promoter or intermediary has been informed in writing that they will, or are likely to, receive such a notice that will, or is likely to, require production of that document under one or more of the three information powers referred to above. The promoter or intermediary is not permitted to conceal, destroy or dispose of that document, or to arrange for someone else to do so. If the promoter or intermediary does so they will be treated as having failed to comply with the requirement to produce the document. The same priority order as in paragraph 6 is followed where more than one information power applies.

The ban on the promoter or intermediary concealing, destroying or disposing of such a document expires if 6 months have passed since the person has been told about the likely issue of an information notice and no such notice has been issued (paragraph 7(2)(a)). And paragraph 7 will not apply if a notice is issued under Ss255, 257 or 262, because paragraph 6 will apply instead (paragraph 7(2)(b)). There may, of course, be other reasons why the document should not be destroyed, for example if it is part of statutory records.

5.10 Penalties: offence of concealing, destroying or disposing of documents required under s255 FA 2014 notice approved by tribunal

Where the requirement to produce a document is imposed on a monitored promoter or an intermediary of that promoter under s255 FA 2014 and the information notice has been approved by the tribunal there is an alternative criminal sanction to that imposed by paragraphs 6 and 7 Schedule 35 that is imposed in priority by Ss 278 to 280.

Section 278 applies if:

- a monitored promoter or an intermediary of that monitored promoter has been required to produce a document by a notice under s255 paragraph 4.3)
- the First-tier Tribunal has approved the giving of that notice in accordance with s256 (paragraph 4.4)
- the monitored promoter or intermediary conceals, destroys or disposes or that document, or arranges for someone else to do so

In these circumstances the monitored promoter or intermediary is guilty of an offence that is subject to the sanctions in s280.

Thus if a monitored promoter or intermediary conceals, destroys or disposes of documents they are required to produce under s255 penalties may be charged under Schedule 35 by virtue of paragraph 6 (paragraph 5.9). However, if the giving of the s255 notice was approved by the tribunal the greater sanction of s280 applies instead.

There are two exceptions in which the concealing, destroying or disposing of a document will not be an offence under s280. The monitored promoter or intermediary is permitted to conceal, destroy or dispose of such a document if:

- the requirement to produce the document has been complied with, unless an officer of HMRC has told the promoter or intermediary in writing that the document must continue to be available for inspection (s278(2))
- the promoter or intermediary has produced a copy of the document (paragraph 4.14) and a period of 6 months has passed from the date on which the copy was produced, unless within that period an officer of HMRC has made a request in writing for the original document (s278(3))

The offence described in s278 is extended by s279 to cover the case in which:

- an officer of HMRC has told the monitored promoter or intermediary in writing that a document is, or is likely to be, subject to a notice under s255 and
- the officer is to seek approval for that notice from the First-tier Tribunal and
- the monitored promoter or intermediary then conceals, destroys or disposes of the document or arranges for someone else to do so.

In these circumstances also the monitored promoter or intermediary is guilty of an offence that is subject to the sanctions in s280.

The ban on the promoter or intermediary concealing, destroying or disposing of such a document expires if 6 months have passed since the person has been told about the likely issue of an information notice and no such notice has been issued (s279(2)). There may, of course, be other reasons why the document should not be destroyed, for example if it is part of statutory records.

If a monitored promoter or an intermediary commits an offence under s278 or s279 they may be liable under s280:

- on summary conviction to
  - a fine in England or Wales
  - a fine not exceeding the statutory maximum in Scotland or Northern Ireland
- on conviction on indictment to a term of imprisonment not exceeding two years, or to a fine, or both, see CH27200

The amount of the fine that may be imposed in England or Wales on summary conviction is limited to the statutory maximum in cases in which the offence is committed before s85(1) of the Legal Aid, Sentencing and Punishment or Offenders Act 2012 (LASPO) comes into force. Once that provision comes into force the penalty on summary conviction in England or Wales will be unlimited, but the penalty on summary conviction in Northern Ireland and Scotland will remain at the statutory maximum.

Paragraph 12 Schedule 35 ensures that a person cannot be liable to a penalty under Schedule 35 in respect of any action for which that person has been convicted of an offence. So where a monitored promoter is convicted in accordance with s280 the promoter cannot also be liable for a financial penalty under paragraphs 6 and 7 Schedule 35.

POTAS

Chapter 6 Extended time limit for assessment

6.1 Extended time limit for assessment: overview

Where a client of a monitored promoter (paragraph 3.1) is required by s253 FA 2014 (paragraph 3.13) to provide a promoter reference number (PRN) to HMRC in a return or otherwise, but fails to do so, there is an extended time limit for assessing each of the taxes to which Part 5 applies. The taxes are listed in s283(1) (paragraph 1.5).

The extended time limit provisions for each tax are described as follows:

- income tax and CGT (paragraph 6.2)
- CT, including CT on chargeable gains (paragraph 6.3)
- SDLT (paragraph 6.4)
- SDRT (paragraph 6.5)
- ATED (paragraph 6.6)
- PRT (paragraph 6.7)
- IHT (paragraph 6.8)

6.2 Extended time limit for assessment: income tax and CGT

Section 277(1) FA 2014 extends s36(1A) TMA 1970 by introducing a new category to which the 20 year assessing time limit for income tax and CGT

applies. This is at s36(1A)(d) TMA 1970 and it applies where there is a loss of income tax or CGT attributable to arrangements that are intended to give rise to a tax advantage, in respect of which the person is required to notify a promoter reference number (paragraph 3.13) to HMRC, and the person fails to notify HMRC of that number.

The assessing time limit will be 20 years from the end of the year of assessment to which the loss of tax relates, see CH53600.

6.3 Extended time limit for assessment: CT

Section 277(4) FA 2014 extends paragraph 46 Schedule 18 FA 1998 by introducing a new category to which the 20 year assessing time limit for CT applies. This is at paragraph 46(2A)(d) and it applies where there is a loss of CT, including CT on chargeable gains, attributable to arrangements that are intended to give rise to a tax advantage, in respect of which a person is required to notify a promoter reference number (paragraph 3.13) to HMRC and fails to do so.

The assessing time limit is 20 years from the end of the accounting period to which the loss of tax relates, see CTM95100.

6.4 Extended time limit for assessment: SDLT

Section 277(5) FA 2014 extends paragraph 31 Schedule 10 FA 2003 by introducing a new category to which the 20 year assessing time limit for SDLT applies. This is at paragraph 31(2A)(d) and it applies where there is a loss of SDLT attributable to arrangements that are intended to give rise to a tax advantage, in respect of which a person is required to notify a promoter reference number (paragraph 3.13) to HMRC and fails to do so.

6.5 Extended time limit for assessment: SDRT

The 20 year extended time limit for SDRT will be made by amending the SDRT regulations (SI1711/1986).

6.6 Extended time limit for assessment: ATED

Section 277(6) FA 2014 extends paragraph 25 Schedule 33 FA 2013 by introducing a new category to which the 20 year assessing time limit for the ATED applies. This is at paragraph 25(4)(d) and it applies where there is a loss of tax attributable arrangements that were expected to give rise to a tax advantage, in respect of which a person is required to notify a promoter reference number (paragraph 3.13) to HMRC and fails to do so.

The assessing time limit is 20 years from the end of the chargeable period to which the loss of tax relates.

6.7 Extended time limit for assessment: PRT

Section 277(2) FA 2014 extends paragraph 12B Schedule 2 OTA 1975 by introducing a new category to which the 20 year assessing time limit for PRT applies. This is at paragraph 12B(2A) and it applies where a relevant situation is brought about by arrangements that were expected to give rise to a tax advantage and there is a failure by a participator, or by a person acting on behalf of a participator, to notify a promoter reference number (paragraph 3.13) to HMRC.

An assessment, or an amendment of an assessment, may be made on the participator at any time up to 20 years from the end of the chargeable period to which the tax advantage relates.

6.8 Extended time limit for assessment: IHT

Where an IHT account has been delivered and there is a loss of IHT attributable to arrangements in respect of which a person was obliged to report a promoter reference number to HMRC paragraph 3.13) the time limit in s240 IHTA 1984 for proceedings to recover the underpayment is extended by s277(3) FA 2014 to 20 years from the latest of:

- the date on which the original payment of IHT was made and accepted,
- if the IHT was paid in instalments, the date on which the last instalment was paid and accepted
- the date on which the original payment of IHT, or the last instalment, was due

IHTM30462 provides guidance on time limits for IHT liability.

POTAS

Chapter 7 Partnerships

7.1 Partnerships: overview

The provisions of Part 5 applying to the POTAS are adapted by Schedule 36 to apply to promoters acting in partnership. The additional provisions are needed because a partnership will in some cases not be a person and because the partners of a partnership may change over time.

The key modifications made by Schedule 36 are:

- a partnership is deemed to be a person for the purpose of Part 5 (paragraph 7.2)
- the responsibilities and liability of partners are defined and the roles of representative partner and nominated partner created to meet responsibilities of the partnership (paragraph 7.3)
- a conduct notice (paragraph 2.1) that is given to a partnership will impose requirements on current and future partners (paragraph 7.4)

- where a partnership is subject to a conduct notice that notice will continue to apply to a partner who leaves the partnership and continues as a promoter but no longer in partnership (paragraph 7.4)
- where a partnership is subject to a monitoring notice (paragraph 3.1) that notice will continue to apply to a partner who leaves the partnership but continues as a promoter (paragraph 7.5) but no longer in partnership

Schedule 36 refers to the 'members' of a partnership in describing the persons who are partners. This guidance refers to 'partners' because that is the term used in other HMRC guidance, such as BIM82000 onwards.

7.2 Partnerships: partnership is deemed to be a person

Schedule 36 applies to partnerships. It treats persons who are carrying on business in partnership as a person for the purposes of Part 5 (paragraph 1(1). BIM82001 onwards provide guidance on the meaning of partnership and of carrying on a business in partnership.

Paragraph 1(2) excludes from the definition of partnership and thus from Schedule 36 any body of persons that form a distinct legal person. Thus a limited liability partnership (BIM82100) is not brought within Schedule 36. The rules that treat a partnership as having met threshold conditions (paragraph 7.4) do not apply to limited liability partnerships but, as a limited liability partnership is a body corporate, the rules at paragraph 13 Schedule 34 apply Appendix 1.13).

Similarly, as a Scottish partnership is a legal person (BIM82035) it is not subject to Schedule 36. Nor is a Scottish partnership a body corporate for the purposes of the Schedule.

Paragraph 2 Schedule 36 treats a partnership as the same person despite changes in the partners making up the partnership, as long as at least one person who was a partner before the change remains a partner after the change. For example, A, B and C carry on a business in partnership as A Promoters. B and C leave the partnership and A carries on the business with new partners D, E and F. The partnership is treated for Schedule 36 as the same person throughout.

Because the partnership is treated as the same person, despite changes in partners, it is treated as having:

- done anything that was done in their capacity as partners by the persons who were partners at the time
- failed to do anything that the persons who were partners at the time failed to do in that capacity

This is limited by paragraph 3(3), which only permits action to be taken at a later time in relation to an action or omission by a partner at an earlier time if that partner, or any other person who was a partner at the earlier time, remains a partner at the later time. For example, a partnership meets a

threshold condition because of a criminal offence committed by a partner acting in that capacity (Appendix 1.6). Two years later, when an authorised officer is considering whether to issue a conduct notice (paragraph 2.2), that partner and all of the other persons who were partners at the time the offence was committed, has left the partnership. The partnership is no longer regarded as having met that threshold condition.

In considering whether the actions of a partner are to be attributed to a partnership, for example in considering whether the partnership has met a threshold condition, it is important to consider in what capacity the partner was acting. For example, if inaction by a partner acting on behalf of the partnership results in the partnership failing to comply with DOTAS obligations (Appendix 1.5) the partnership has met a threshold condition. By contrast, if a partner commits a relevant criminal offence (Appendix 1.6), but acting in a private capacity and not as a partner, the partnership has not met a threshold condition by reason of that offence.

Similarly any action or inaction by a person who is an employee of a partnership will only result in the partnership meeting a threshold condition if the person was acting as an employee of the partnership.

7.3 Partnerships: responsibility of partners

Paragraphs 15 to 17 Schedule 36 FA 2014 define the responsibility of partners for the compliance of the partnership with the requirements of Part 5. These are founded upon the principle of joint and several liability (BIM82001) but also permit certain things to be done on behalf of the partnership by a representative or nominated partner.

Where a notice is given to a partnership in accordance with Part 5, for example:

- a conduct notice (paragraph 2.1)
- a monitoring notice (paragraph 3.1)
- an information notice (paragraph 4.1)

It has effect in relation to all of the persons who are partners at the time at which the notice is issued. These partners are referred to as the ‘responsible partners’ (paragraph 15(1)). Anything that is required to be done by the responsible partners is to be done by all of the responsible partners (paragraph 15(3)), unless they put forward a ‘nominated partner’ to act on their behalf, see below.

A person who has ceased to be a partner at the time a notice is given is not a responsible partner for the purpose of that notice, even though the notice may relate to something that happened while that person was a partner (paragraph 15(2)). However, the person who has ceased to be a member of a partnership may still be liable for penalties in respect of things that were done or not done while that person was a responsible partner.

Where Part 5 confers any rights on a person, for example a right of appeal against a decision of the First-tier Tribunal to approve the issue of a monitoring notice (paragraph 3.6), that right is to be exercised by all of the persons who were responsible partners at the time, unless there is a nominated partner (see below). So, for example, if a partnership had six responsible partners when a monitoring notice was issued to the partnership and there is no nominated partner any appeal must be made by all six of those partners acting together, including any partners who have since left the partnership (paragraph 15(4)).

Where the partnership is liable to a penalty under Part 5 and Schedule 35 (paragraph 5.1), or to interest on such a penalty, the persons who were the responsible partners at the time at which the event took place that gave rise to the liability are jointly and severally liable for payment (paragraph 16), including any who have since ceased to be partners. This means that partners:

- are not liable for penalties in relation to acts or omissions that took place before they became a partner, or for any interest on such penalties
- are only liable for ongoing daily penalties (paragraph 5.4), or for interest on such penalties, from the day on which they became a partner

> Example: a partnership that is subject to a monitoring notice receives an information notice under s255 (paragraph 4.3) on 8 February 2016. The partnership is given until 18 February 2016 to comply, but fails to do so. At a hearing on 16 June 2016 the First-tier Tribunal imposes a penalty of £250,000 for the failure. The partnership continues to fail to comply and on 6 October 2016 the tribunal imposes a further penalty of £5,000 per day for each day since 16 June 2016 for the further failure to comply. A new partner who joins the partnership after 18 February 2016 is not liable for the initial penalty of £250,000 but is jointly and severally liable for the ongoing daily penalties, together with any interest.

A majority of the responsible partners may nominate a person to act as the 'nominated partner'. That nominated partner will act as the representative of the partnership for the purpose of Part 5 and so can carry out any obligation that would otherwise be carried out by all of the responsible partners. The nomination takes effect once notice has been given to an authorised officer and it can be revoked by giving notice to an authorised officer (paragraph 18 of Schedule 36).

Instead of giving notices under Part 5 to every partner, an officer of HMRC may serve notice on a representative partner. This could be the nominated partner, or if no-one has been nominated, could be a partner designated by an authorised officer. If an authorised officer wishes to nominate someone as representative partner, or to revoke a nomination, they must do so by notice given to the partnership.

7.4 Partnerships: conduct notices

Schedule 36 FA 2014 modifies how conduct notices (paragraph 2.1) apply in the case of a partnership. This can result in a conduct notice being imposed:

- on a partnership where a controlling partner or managing partner (Appendices 2 and 3) of the partnership has met a threshold condition
- on a person who has left a partnership (that was subject to a conduct notice) and that person is carrying on all or part of the business that was formerly carried on by the partnership
- on a former controlling partner of a partnership (that was subject to a conduct notice) and that partner has left the partnership and is carrying on a new business as a promoter

A conduct notice that is given to a partnership must state that it is a partnership conduct notice (paragraph 5(1)). The conditions imposed by a conduct notice (paragraph 2.3) can apply to any person who is a partner when the conduct notice is issued and to any person who becomes a partner at a later date and during the period in which the conduct notice has effect (paragraph 5(2)). For this reason a promoter that is subject to a conduct notice should inform HMRC whenever new partners join or existing partners leave.

Paragraph 7 provides for a conduct notice to apply to a former partner who is carrying on the promoter business formerly carried on by the partnership. This is extended by paragraph 10, with some modifications, to deal with the case in which a former partner carries on part of the business of the partnership.

Paragraph 7 applies where:

- one or more persons have ceased to be partners in a partnership and
- immediately before they ceased to be partners the partnership was subject to a conduct notice
- immediately after that time a former partner is carrying on the business of the partnership but no longer in partnership (e.g. as a sole trader)

The former partner who is carrying on the business of the partnership on their own automatically continues to be subject to the conduct notice that formerly applied to the partnership. There is no change in the duration of that conduct notice (paragraph 2.6).

> Example 1: A and B are in partnership as Z Promoters. Z Promoters is subject to a conduct notice. B leaves the partnership and A carries on the business of Z Promoters. The conduct notice that had applied to the business as a partnership now applies automatically to the business carried on by A

Paragraph 10 provides for cases in which a former partner carries on part of the former partnership business either as a sole trader or in a different partnership. In this case the original conduct notice is not automatically applied to the new business. Paragraph 10 applies where:

- one or more partners leave a partnership
- immediately before that time the partnership was subject to a conduct notice
- the departing partner or partners continue to carry on part but not the whole of the partnership business either as a sole trader or in a partnership

A part of the business must have some connection with the business that was previously carried on. For example, the partnership business may have been operated through a series of regional branches and the departing partners may take over one or more of those branches. Or the partnership business might have had a number of different elements, such as the design of avoidance schemes, their marketing, management and maintaining client relationships. Departing partners may take over some elements of the business but not others. By contrast, where departing partners only take over fittings or similar assets and begin to carry on a wholly different business they will not have taken on part of the partnership business. Whether or not a conduct notice must be given to the new business will depend on the facts. If the wholly different business is a promoter business paragraph 8 may apply, see below.

An authorised officer may give the departing partners:

- a conduct notice if there is a single partner now carrying on that part of the business (paragraph 10(3)(a))
- a partnership conduct notice if the former partner is now carrying on that part of the business in partnership (paragraph 10(4)(a))

These are referred to as 'replacement conduct notices' (paragraph 11(1)). A replacement conduct notice cannot be given after the date on which the original conduct notice expires (paragraph 10(6)) and, if given earlier, it will expire on that date and the notice must state that it will do so (paragraph 12).

Where a replacement conduct notice is a partnership conduct notice it will cease to have effect if all of the persons who were partners of the former partnership cease to be partners of the new partnership (paragraph 10(5)).

> Example 2: A, B, C and D are in partnership as Z Promoters. Z Promoters is subject to a conduct notice that will expire on 30 November 2016. The business is split on 1 July 2015, with A and B setting up a new partnership to take on the promotion of new schemes, while C and D service users of existing schemes and continue as Z Promoters. A and B take on new partners E and F and trade as Z Promotions. On 8 July 2015 an authorised officer issues a replacement conduct notice to Z Promotions that will expire on 30 November 2016. On 14 September 2016 A and B cease to be partners in Z Promotions. The conduct notice that applies to Z Promotions ceases to have effect on that date. If the partnership left as Z Promoters remains a promoter (paragraph 1.4) the existing conduct notice will continue to apply until it expires or is withdrawn.

Paragraph 8 provides for a different scenario. It applies where a partner leaves a partnership that is subject to a conduct notice but commences to carry on business as a promoter. In this case the promoter business carried on by the former partner is different from the business carried on by the partnership. Paragraph 8 applies where:

- a person, who was a controlling partner of a partnership when a conduct notice was issued, leaves that partnership
- the conduct notice had effect at the time the partner left
- the departing partner is carrying on a business as a promoter

In these circumstances an authorised officer may:

- give the departing partner a conduct notice (paragraph 8(2))
- if the business is being carried on by that person is a partnership and the person is a controlling partner of that partnership, give the partnership a conduct notice (paragraph 8(3))

These are also referred to as replacement conduct notices and will expire in the circumstances described above.

> Example 3: A is the controlling partner of a partnership that runs Z Promoters. Z Promoters is subject to a conduct notice that expires on 31 December 2016. On 1 January 2016 A leaves Z Promoters to set up a business in his own name as a promoter. On 8 January 2016 an authorised officer issues A with a conduct notice in relation to the business carried on in his own name. The conduct notice will expire on 31 December 2016. If the partnership left as Z Promoters remains a promoter (paragraph 1.4) the existing conduct notice will continue to apply until it expires or is withdrawn.

7.5 Partnerships: monitoring notices

Schedule 36 FA 2014 modifies how monitoring notices (paragraph 3.1) apply in the case of a partnership. A monitoring notice that is given to a partnership must state that it is a partnership monitoring notice (paragraph 6 of schedule 36).

Where a monitored promoter is a partnership the information that HMRC can publish in accordance with s248 (paragraph 3.8) is information about the partnership and not information about individual partners (paragraph 14 of Schedule 36). A monitored promoter that is a partnership should tell HMRC whenever a new partner joins or an existing partner leaves.

There are three circumstances in which a monitoring notice can be issued to a partner who is leaving a partnership that has been subject to a monitoring notice. These are:

- where a person has left a partnership and is carrying on the business that was formerly carried on by the partnership (paragraph 7 of Schedule 36)

- where a person has left a partnership and is carrying on part of the business that was formerly carried on by the partnership (paragraph 10)
- where a former controlling partner of a partnership has left the partnership and is carrying on a new business as a promoter (paragraph 9)

Paragraph 7 provides for a monitoring notice to apply to a former partner who is carrying on the promoter business formerly carried on by the partnership. This is extended by paragraph 10, with some modifications, to deal with the case in which a former partner carries on part of the business of the partnership.

The former partner who is carrying on the business of the partnership automatically continues to be subject to the monitoring notice that formerly applied to the partnership.

> Example 1: A and B are in partnership as Z Promoters. Z Promoters is subject to a monitoring notice. B leaves the partnership and A carries on the business of Z Promoters. The monitoring notice that had applied to the business as a partnership now applies automatically to the business carried on by A as Z Promoters.

An authorised officer may give the departing partners:

- a monitoring notice if there is a single partner now carrying on that part of the business (paragraph 10(3)(b))
- a partnership monitoring notice if the former partner is now carrying on that part of the business in a new partnership (paragraph 10(4)(b))

These are referred to as ‘replacement conduct notices’ (paragraph 11(1)).

Where a replacement monitoring notice is a partnership monitoring notice it will cease to have effect if all of the persons who were partners of the former partnership cease to be partners of the new partnership (paragraph 10(5)).

> Example 2: A, B, C and D are in partnership as Z Promoters. Z Promoters is subject to a monitoring notice. The business is split on 1 April 2016, with A and B setting up a new partnership to take on the promotion of new schemes, while C and D service users of existing schemes and continue as Z Promoters. A and B take on new partners E and F and trade as Z Promotions. An authorised officer issues a replacement monitoring notice to Z Promotions on 8 April 2016. On 14 September 2016 A and B cease to be partners in Z Promotions. The monitoring notice that applies to Z Promotions ceases to have effect on that date.

Paragraph 9 provides for a different scenario. It applies where a partner leaves a partnership that is subject to a monitoring notice and carries on business as a promoter. In this case the promoter business carried on by the former partner is different from the business carried on by the partnership.

Paragraph 9 applies where:

- a person, who was a controlling partner (paragraph 7.6) of a partnership when a monitoring notice was issued, leaves that partnership
- the monitoring notice had effect at the time the partner left
- the departing partner is carrying on a business as a promoter

In these circumstances an authorised officer may

- give the departing partner a monitoring notice (paragraph 9(2) of Schedule 36)
- if the business is being carried on by that person in a partnership and the person is a controlling partner of that partnership, give the partnership a monitoring notice (paragraph 9(3))

These are also referred to as 'replacement monitoring notices' (paragraph 11(1)).

Where a replacement monitoring notice is a partnership monitoring notice it will cease to have effect if the person who was a partner of the former partnership ceases to be a partner of the new partnership (paragraph 9(4) of Schedule 36).

> Example 3: A is the controlling partner of a partnership that runs Z Promoters. Z Promoters is subject to a monitoring notice. On 1 January 2016 A leaves Z Promoters to expand a business in his own name as a promoter. On 8 January 2016 an authorised officer issues A with a monitoring notice in relation to the business carried on in his own name.

7.6 Partnerships: controlling member

Paragraph 19 Schedule 36 FA 2014 defines the term 'controlling member' for the purposes of Schedules 34 and 36. The controlling member is referred to in this guidance as a controlling partner.

A controlling member of a partnership is a person who has a right to a share of:

- more than half of the assets of the partnership, or
- more than half of the income of the partnership (paragraph 19(1))

The controlling partner must be a single person. Two or more persons cannot be treated as a single controlling partner by combining their interests.

BIM82058 explains how to determine whether an asset is an asset of the partnership.

In testing whether a person is a controlling partner the following interests are to be attributed to the partner:

- if the partner is an individual, any interests or rights of any connected person
- the interests or rights of any body corporate (CTM00510) that is controlled by the partner (paragraph 19(2))

The following are connected persons of a partner who is an individual:

- the partner's spouse or civil partner
- any relative of the partner, where relative means any brother, sister, ancestor or lineal descendant
- the spouse or civil partner of a relative of the partner
- any relative of the partner's spouse or civil partner
- the spouse or civil partner of any relative of the partner's spouse or civil partner (paragraph 19(3) and (4))

This is usefully illustrated by the diagram that explains the equivalent rule for CGT at CG14580.

The partner, who may be a natural or legal person, controls a body corporate if the partner has power to secure that the affairs of the body corporate are conducted in accordance with the partner's wishes. This power may be secured by:

- the holding of shares in the body corporate or some other body corporate
- the possession of voting power in the body corporate or some other body corporate
- the powers conferred by the articles of association or other document regulating the body corporate or some other body corporate (paragraph 19(5))

The guidance at CTM60200 onwards illustrates how these tests should be applied.

Appendix 1 Conduct notices: the threshold conditions

Appendix 1.1 An authorised officer of HMRC may issue a conduct notice where one or more threshold conditions is met. The threshold conditions are set out in schedule 34 FA 2014.

As a result of the changes made in FA 15, the person who actually meets a threshold condition does not always have to be carrying on a business as a promoter when the condition is met. However, there must have been an associated person (Appendix 2) carrying on a business as a promoter at that time.

Whichever of the threshold conditions is met, a conduct notice will not be given to a person if an authorised officer determines that the extent of the impact that the person's activities as a promoter are likely to have on the collection of tax makes it inappropriate to give a conduct notice. There is further guidance on the issue of conduct notices at paragraph 2.1 onwards.

The threshold conditions

Appendix 1.2 - Deliberate tax defaulters (Schedule 34 paragraph 2)
A person meets this condition if HMRC publishes information about the person as a deliberate tax defaulter in accordance with section 94 FA2009. There is guidance on deliberate tax defaulters at CH190000 onwards.

Meeting this condition is always regarded as significant for the purposes of determining whether a conduct notice must be given.

Appendix 1.3 - Breach of the Banking Code of Practice (Schedule 34 paragraph 3)
Only a person carrying on business as a promoter is capable of meeting this condition. This condition is met if a promoter is named in a report published by HMRC as a person breaching the Code of Practice on Taxation for Banks by promoting arrangements that the promoter cannot reasonably have believed achieved a tax result intended by Parliament. Other breaches of the code are not relevant for this purpose.

Recent guidance on the Code of Practice on Taxation for Banks describes when a bank will be regarded as a promoter for the purpose of the code.

Meeting this condition is always regarded as significant for the purposes of determining whether a conduct notice must be given.

Appendix 1.4 - Dishonest tax agents (Schedule 34 paragraph 4)
A person meets this condition if it has been given a conduct notice as a dishonest tax agent in accordance with paragraph 4 Schedule 38 FA2012. There is guidance on dishonest tax agents at CH180000 and on conduct notices at CH182100. The condition is only met if there is no open appeal

against the conduct notice, either because the time limit for an appeal has expired, or because an appeal has been made and the Tribunal has confirmed the conduct notice.

Meeting this condition is always regarded as significant for the purposes of determining whether a conduct notice must be given.

Appendix 1.5 - Non-compliance with DOTAS obligations (Schedule 34 paragraph 5).

A person may meet this condition if it fails to comply with:

- the obligation imposed by s308 FA04 on promoters to notify to HMRC proposals and arrangements which are notifiable (see DOTAS guidance section 13)
- obligations imposed by s309 FA04 on persons dealing with a promoter outside the UK to notify to HMRC proposals and arrangements which are notifiable (see DOTAS Guidance paragraph 14.4)
- obligations imposed by s310 FA04 on parties to notifiable arrangements for which there is no promoter to notify to HMRC proposal and arrangements which are notifiable (see DOTAS Guidance paragraph 14.5 and 14.6)
- obligations imposed by s313ZA FA04 on promoters to provide details of clients to HMRC (see DOTAS Guidance paragraph 16.2)

A person meets this threshold condition if they have failed to comply with one of these obligations (for whatever reason) and:

- either a tribunal determines that a person has failed to comply with one of the provisions listed above, the determination has not been overturned on appeal, all appeals have been determined, withdrawn or otherwise disposed of and no further appeal is possible
- or a tribunal determines that a person has failed to comply but that the person should not have any penalties imposed on them as a result because they either had a reasonable excuse for not having complied or, after the excuse had ceased they did comply without unreasonable delay after the excuse had ceased
- or the person admits the failure in writing to HMRC

NICs

The threshold condition may also be met where a person fails to comply with:

- the obligation imposed on promoters to notify to HMRC notifiable contribution proposals and notifiable contribution arrangements[1]

[1] Regulation 8 of the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012 [SI2012/1868]

- obligations imposed on persons dealing with a promoter outside the UK to notify to HMRC notifiable contribution proposals and notifiable contribution arrangements[2]
- obligations imposed on parties in respect of notifiable arrangements for which there is no promoter to notify to HMRC notifiable contribution proposals and notifiable contribution arrangements[3]
- obligations imposed on promoters to provide details of clients to HMRC[4]

A person meets this threshold condition if they have failed to comply with one of these obligations in relation to NICs (for whatever reason) and:

- either a tribunal determines that a person has failed to comply and is liable to penalties under regulation 22 of the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, the determination has not been overturned on appeal, all appeals have been determined, withdrawn or otherwise disposed of and no further appeal is possible
- (for Class 4 contributions and Class 2 contributions collected through self-Assessment only) a tribunal determines that a person has failed to comply but that the person should not have any penalties imposed on them as a result because they either had a reasonable excuse for not having complied or, after the excuse had ceased they did comply without unreasonable delay after the excuse had ceased
- the person admits the failure in writing to HMRC

Where a person has met this threshold condition, a conduct notice may not be given by virtue of the condition being met unless an Authorised Officer has determined that the meeting of the condition is significant bearing in mind the purpose of the legislation in Part 5 FA 14.

Appendix 1.6 - Criminal offences (Schedule 34 paragraph 6)
A person meets this condition if it has been charged with a relevant criminal offence. The relevant offences are:

- an offence at common law of cheating in relation to the public revenue
- in Scotland, an offence at common law of fraud or uttering
- false accounting (s17(1) Theft Act 1968 or s17 Theft Act (Northern Ireland) 1969)
- fraudulent evasion of income tax (s106A TMA 1970)
- false statements, Scotland (s107 TMA 1970)
- an offence under any of the following provisions of CEMA 1979:
  - improper importation of goods with intent to defraud or evade duty (s50(2))
  - untrue declarations, etc (s167)
  - counterfeiting documents, etc (s168)

[2] Regulation 10 of SI2012/1868
[3] Regulation 11 of SI2012/1868
[4] Regulation 16 of SI2012/1868

  - fraudulent evasion of duty (s170)
  - taking steps for the fraudulent evasion of duty (s170B)
- an offence under any of the following provisions of VATA 1994
  - being knowingly concerned in the evasion of VAT (s72(1))
  - false statement, etc (s72(3))
  - conduct involving commission of other offence under s72 (s72(8))
- fraud (s1 Fraud Act 2006)
- an offence under any of the following provisions of CRCA 2005:
  - impersonating a Commissioner or officer of Revenue and Customs (s30)
  - obstruction of officer of Revenue and Customs, etc (s31)
  - assault of officer of Revenue and Customs (s32)
- money laundering (regulation 45(1) Money Laundering Regulations 2007 (SI2007/2157))
- possession of articles for use in fraud (s49(1) Criminal Justice and Licensing (Scotland) Act 2010

In each of these cases the fact that a person has been charged with an offence is disregarded if the person has been acquitted, unless that acquittal is under appeal, and is disregarded if the charge has been dismissed or the proceedings discontinued.

Action can be taken in respect of this condition even though the person has not yet been convicted of the offence with which it has been charged.

Where the promoter is a legal person, such as a company or an LLP, it is that legal person that must be charged. If the person charged is a director or employee of a company, or a member of an LLP, it is the individual charged and not the company or LLP that meets the threshold condition. This is modified for partnerships that are deemed to be a person (paragraph 7.2).

Meeting this condition is always regarded as significant for the purposes of determining whether a conduct notice must be given.

Appendix 1.7 - Opinion notice of GAAR Advisory Panel (Schedule 34 paragraph 7)

This condition is met if the GAAR Advisory Panel considers that arrangements in relation to which the person is a promoter are not reasonable. The person who meets the condition in these circumstances is any person who is a promoter in relation to those arrangements (see paragraph 1.4).

Part E of the GAAR Guidance describes the procedures for the application of the GAAR. If a designated officer of HMRC considers that tax arrangements are abusive the officer can refer them to the GAAR Advisory Panel once the taxpayer who has made use of those arrangements has been given an opportunity to make representations (Schedule 43 FA 2013, GAAR Guidance Part E3.4).

The Chair of the GAAR Advisory Panel will then appoint a sub-panel of three members to consider the arrangements. Each of the sub-panel members will

consider the arrangements and either the panel will offer a single collective view, or a single majority view and a minority view, or members will offer individual views, on whether the arrangements are a reasonable course of action in relation to the relevant tax provisions (Part E3.6).

If arrangements promoted by the promoter are referred by a designated officer to the GAAR Advisory Panel and either all of the sub-panel members, or two of the sub-panel members, decide the arrangements are not a reasonable course of action, then this condition has been met.

Meeting this condition is always regarded as significant for the purposes of determining whether a conduct notice must be given.

Appendix 1.8 - Disciplinary action against a person who carries on a trade or profession that is regulated by a professional body (Schedule 34 paragraph 8).

A person meets this condition if it carries on a trade or profession that is regulated by one of the specified professional bodies and is subject to certain disciplinary action. The disciplinary action may be taken by the professional body itself or by an independent body.

There are safeguards that limit the circumstances in which this condition is met. All of the following conditions must have been met:

A. The person is found guilty of misconduct which is relevant to the provision of tax advice or tax related services. Misconduct is defined in regulations as conduct which a professional body describes as misconduct or conduct which is a breach of a rule or condition imposed by a professional body.

B. A professional body takes action resulting in the claim of misconduct being referred to a disciplinary process or a conciliation, arbitration or settlement process (whatever the process is called) to determine how serious the misconduct is and any penalty to be imposed. The body that determines the gravity of the misconduct and the size of any penalty may be the professional body itself or an independent body.

C. The penalty imposed for the misconduct takes the form of

    i. a fine or financial penalty greater than £5,000
    ii. one or more conditions or restrictions on the person in connection with a certificate or licence required to practice under the professional body
    iii. suspension, withdrawal or non-renewal of a certificate or licence required to practice under the professional body or
    iv. suspension, expulsion or exclusion of the person from membership of the professional body either temporarily or permanently. It does not matter how this penalty is

described by the body imposing it. Suspension etc. could for example take the form of removing the person from the membership register or striking them off.

In practice a person being found guilty of misconduct will in most circumstances not lead to the potential consideration of giving a conduct notice unless the misconduct relates to tax avoidance. This follows from the nature and purpose of the legislation.

Only a promoter of tax avoidance schemes may be made subject to a conduct notice. Conduct notices cannot automatically be issued to a person who has been found guilty of misconduct. Authorised officers in HMRC must consider whether the meeting of the condition is 'significant' in the context of the purposes of the legislation in part 5 of FA 14.

Misconduct in matters that relate solely to the person's relationship with the professional body, such as non-payment of membership fees to the body, is to be ignored for this purpose.

The professional bodies to which this condition relates are:

- the Institute of Chartered Accountants in England and Wales
- the Institute of Chartered Accountants of Scotland
- the General Council of the Bar
- the Faculty of Advocates
- the General Council of the Bar of Northern Ireland
- the Law Society
- the Law Society of Scotland
- the Law Society of Northern Ireland
- the Association of Accounting Technicians
- the Association of Chartered Certified Accountants
- the Association of Taxation Technicians
- the Chartered Institute of Taxation
- Chartered Accountants Ireland

HMRC has a power to add to this list by prescribing other bodies with regulatory functions in relation to a trade or profession.

Appendix 1.9 - Disciplinary action by a regulatory authority (Schedule 34 paragraph 9)

A person meets this condition if the Financial Services Authority [FSA] or the Financial Conduct Authority [FCA] publishes or has published a statement of misconduct by that person. A person also meets this condition if the FSA or

FCA imposes or has imposed on the person one or more of the following sanctions:

- A fine or financial penalty
- A suspension of an approval to perform any function to which the approval relates
- The imposition of limitations or other restrictions in relation to the performance of any function to which an approval issued by the regulatory authority relates
- The imposition of any conditions in relation to any such approval

HMRC has a power to add to this list by prescribing other regulatory authorities, but only in relation to authorities that have functions relating to the regulation of financial institutions.

Regulated institutions are not required or expected to tell HMRC when there has been a finding of misconduct or a relevant sanction has been imposed. This is public information and HMRC will learn of misconduct as part of its normal functions. HMRC may want to find out more detail than is available publicly on some occasions but would only seek to do so in accordance with any applicable restrictions on confidentiality. The number of such cases is likely to be small.

In practice disciplinary action taken by a regulatory body will not in most circumstances lead to the potential consideration of giving a conduct notice unless the misconduct relates to tax avoidance. This follows from the nature and purpose of the legislation.

> Example: Promoter A has a sanction imposed for mis-selling PPI insurance. The products concerned are not designed for the purposes of avoiding tax and do not form part of any relevant schemes. Any mis-selling that may have occurred is a matter for the appropriate sector regulators and will not be considered as the meeting of a threshold condition for the purposes of the legislation.

Only a promoter of tax avoidance schemes may be made subject to a conduct notice. Conduct notices cannot automatically be issued to a person which has been found guilty of misconduct. HMRC must consider whether the meeting of the condition is ‘significant’ in the context of the purposes of the legislation.

Misconduct in matters that relate solely to the person’s relationship with the regulatory authority, such as the non-payment of fees, is to be ignored for this purpose.

Where a person has met this threshold condition, a conduct notice may not be given by virtue of the condition being met unless an Authorised Officer has determined that the meeting of the condition is significant bearing in mind the purpose of the legislation in Part 5 FA 14.

Appendix 1.10 - exercise of information powers (Schedule 34 paragraph 10)
A person meets this condition if it fails to comply with an information notice.

The relevant notices are:

- requests for information or documents from a taxpayer (paragraph 1, Schedule 36 FA 2008)
- requests for information or documents from a third party (paragraph 2, Schedule 36 FA 2008)
- requests for information or documents from a third party about persons whose identity is not known to the HMRC officer (paragraph 5, Schedule 36 FA 2008)
- requests for information or documents from a third party about persons whose identity is not known, but where it can be ascertained from information held by the officer (paragraph 5A, Schedule 36 FA 2008)

The notices do not have to be in relation to a person's activities as a promoter. The threshold condition is also met if the notices in question relate to the person's own tax affairs.

There is guidance about information notices at CH23060 onwards.

The time at which the failure to comply occurs, and so at which the threshold condition is met, is the time at which the deadline for complying with the information notice has passed without the recipient of the notice complying with it.

Where a person has met this threshold condition, a conduct notice may not be given by virtue of the condition being met unless an authorised officer has determined that the meeting of the condition is significant bearing in mind the purpose of the legislation in Part 5 FA 14.

Appendix 1.11 - Restrictive contractual terms (Schedule 34 paragraph 11)
Only a person carrying on a business as a promoter can meet this condition. A promoter meets this condition if it imposes certain restrictive contractual terms relating to an avoidance scheme on a client or on any other person.

The restrictive contractual terms are:

- preventing or restricting a person from disclosing to HMRC information relating to the avoidance scheme (paragraph 11(2)); this may be by referring to HMRC specifically, or by referring to a wider class of persons that includes HMRC
- requiring a person to impose an obligation on any tax adviser to whom that person discloses information about the scheme preventing or restricting the tax adviser from disclosing information about the scheme to HMRC (whether or not the obligations refers to HMRC specifically) (paragraph 11(3))

- requiring the person to:

    - meet or contribute to the costs of any proceedings relating to any scheme promoted by the promoter, or take out insurance to insure against the costs of proceedings relating to a scheme promoted by the promoter and implemented by that person
    - obtain the consent of the promoter before entering into an agreement with HMRC in relation to a scheme promoted by the promoter and implemented by that person, or withdrawing or discontinuing any appeal against a decision relating to that scheme

The normal payment of fees by a client to an adviser for the purpose of discussions or correspondence with HMRC to agree the client's tax position is not relevant to this threshold condition. The usual case to which the condition about contributing to costs will apply is where a promoter requires a scheme user to contribute to a fighting fund intended to pay for a lead appeal to be litigated.

The threshold condition is only met for conditions relating to costs and to obtaining consent before reaching agreement with HMRC if the promoter imposes both conditions. If the promoter only requires a person to contribute to a fighting fund or take out insurance, or only requires a person to obtain consent before reaching agreement with HMRC, the threshold condition is not met.

Proceedings includes any process for resolving disputes, not only appeal proceedings, and includes proceedings that have not yet begun.

Where a person has met this threshold condition, a conduct notice may not be given by virtue of the condition being met unless an authorised officer has determined that the meeting of the condition is significant bearing in mind the purpose of the legislation in Part 5 FA 14.

Appendix 1.12 - Continuing to promote certain arrangements (Schedule 34 paragraph 12)
Only a person carrying on a business as a promoter can meet this condition. A promoter meets this condition if it continues to promote an avoidance scheme that is substantially the same as a scheme in relation to which HMRC has issued a stop notice.

An authorised officer may issue a promoter with a stop notice where:

- a person has been given a follower notice in relation to an avoidance scheme under section 204 FA 2014
- the promoter has been a promoter of a proposal that has been implemented in that scheme
- 90 days have passed since the follower notice was given and
- it has not been withdrawn

- if any representations were made about the follower notice it has been confirmed by HMRC

The stop notice must:

- specify the scheme that is subject to the follower notice
- specify the judicial ruling identified in the follower notice
- specify the proposal that has been promoted by the promoter and that was implemented in that scheme
- explain the effect of the stop notice

The authorised officer must also specify the date from which the stop notice will take effect.

Once a stop notice has been given the promoter will meet this threshold condition if after a period of 30 days from the date on which the stop notice is given it:

- makes a firm approach (paragraph 1.6) to a person with a view to making a scheme that is in substance the same as the scheme identified in the stop notice available to be implemented
- makes such a scheme available to be implemented

An authorised officer can by notice in writing to the promoter determine at any time that a stop notice is to cease to have effect.

Where a person has met this threshold condition, a conduct notice may not be given by virtue of the condition being met unless an authorised officer has determined that the meeting of the condition is significant bearing in mind the purpose of the legislation in Part 5 FA 14.

Appendix 2 – promoters treated as meeting a threshold condition – individuals, bodies corporate and partnerships (s237(1A) and paragraphs 13A to 13D Schedule 34)

Appendix 2.1 Definitions for Part 2 of Schedule 34 (paragraph 13A of Schedule 34)

Threshold conditions are defined in Appendix 1.

A person is regarded as controlling a body corporate if they can secure that the body corporate conducts its affairs in accordance that that person's wishes by any or all of the following means:

- the shares or voting power the person has in relation to the body corporate or any other body corporate or partnership
- powers conferred by any document regulating the body corporate or any other body corporate or partnership
- controlling a partnership (see Appendix 3)

Appendix 2.2 Treating persons under another's control as meeting a threshold condition (paragraph 13B of Schedule 34, FA 2014)

This provision applies when a threshold condition is met by a person (C) at a time when either C or a 'relevant body' controlled by C) was carrying on a business as a promoter.

A 'relevant body' cannot be an individual. It can only be a body corporate or partnership.

In order for a relevant body to be treated as if it has met a threshold condition under this rule, that body must be:

- carrying on a business as a promoter and
- controlled by C
-

At the time an authorised officer becomes aware that the threshold condition was met. A decision of the authorised office is subject to assessments of significance and exchequer impact.

This rule is subject to one qualification when the person who controls the body corporate and met the threshold condition is an individual. If this is the case, the provision does not apply unless the condition that is met is a threshold condition under one of the following provisions of Schedule 34:

- paragraph 2 (deliberate tax defaulters)
- paragraph 4 (dishonest tax agents)
- paragraph 6 (criminal offences)

- paragraph 7 (opinion notice of GAAR advisory panel)
- paragraph 8 (disciplinary action against a member of a trade or profession)
- paragraph 9 (disciplinary action by regulatory authority) or
- paragraph 10 (failure to comply with information notice)

The relevant body is treated as meeting the condition even if it was not controlled by the person which met the condition at the time the condition was met, or if it did not exist at that time.

Appendix 2.3 Treating persons in control of others as meeting a threshold condition (paragraph 13C of Schedule 34, FA 2014)

This provision applies when a body corporate or partnership met a threshold condition when it was controlled by another person at a time when it (or another body corporate or a partnership controlled by the same person as who controlled it) carried on a business as a promoter.

In such a case, the person who controlled the body corporate or partnership when the threshold condition was met may be treated as meeting the threshold condition themselves (unless that person is an individual).

A person may be treated as meeting the threshold condition themselves in these circumstances even it no longer controls the body corporate or partnership that met the condition and/or was carrying on a business as a promoter at that time.

It is not necessary for the body corporate which met the threshold condition to continue to exist at the time an authorised officer becomes aware that the threshold condition is met. A decision of the authorised office is subject to assessments of significance and exchequer impact.

Appendix 2.4 Treating a person under common control as meeting a threshold condition (paragraph 13D of Schedule 34, FA 2014)

This provision applies when a relevant body (i.e. a body corporate or partnership) is a promoter of schemes after another relevant body under common control met a threshold condition.

For the provision to apply there must have been a relevant body which was

- controlled by the same person as controls the relevant body that is treated as meeting the threshold condition
- carrying on a business as a promoter
-

At the time the threshold condition was met. The two tests may be satisfied by different relevant bodies. The relevant body carrying on a business as a

promoter at that time may be the relevant body to whom a conduct notice is given under this provision.

In such a case, the relevant body may be treated as meeting the condition, provided it is controlled by the same person at the time the authorised officer becomes aware that the threshold condition was met.

The relevant body may be treated as meeting the threshold condition even if:

- it was not in the same group of companies when the threshold condition was met
- it did not exist at that time
- if any of the commonly controlled persons who met the threshold or who carried on the business as a promoter have ceased to exist

Appendix 3 – promoters treated as meeting a threshold condition – partnerships (s237(1A) and paragraphs 13A to 13D Schedule 34)

Appendix 3.1 Definitions for Part 2 of Schedule 34 (paragraph 13A of Schedule 34)

Threshold conditions are defined in Appendix 1.

A person is regarded as controlling a partnership if a person is a controlling member or the managing partner of the partnership.

A managing partner of a partnership is the member of the partnership who directs or controls on a day-to-day level the management of the business of the partnership.

A controlling member of a partnership is a person who has a right to a share of:

- more than half of the assets of the partnership
- more than half of the income of the partnership (paragraph 19(1))

The controlling partner must be a single person. Two or more persons cannot be treated as a single controlling partner by combining their interests.