HM Revenue & Customs

Penalties for enablers of defeated tax avoidance

This guidance describes the legislation in Clause 65 and Schedule 16 Finance (No. 2) Act 2017.

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Section 1: Introduction

1.1 Overview of this guidance

1.1.1 This guidance relates to penalties for enablers of defeated tax avoidance legislation ('enablers legislation'). The legislation is set out at Schedule 16 to the Finance (No.2) Act 2017 (FA (No.2) 2017) and introduces a penalty for any person who enables the use of abusive tax arrangements, which are later defeated.

1.1.2 This guidance explains the key concepts included in the legislation. It also explains to whom the legislation is intended to apply, and how.

1.1.3 An enabler is any person who is responsible, to any extent, for the design, marketing or otherwise facilitating another person to enter into abusive tax arrangements. When such arrangements are defeated in court or at the tribunal, or are otherwise counteracted, each person who enabled those arrangements may be liable to a penalty. The penalty for each enabler is equal to the amount of consideration either received or receivable by them for enabling those arrangements.

1.1.4 The GAAR Advisory Panel provides an important safeguard for the purpose of applying the legislation. No penalty can be charged unless HM Revenue and Customs (HMRC) has obtained an opinion of the GAAR Advisory Panel in relation to the tax arrangements or equivalent arrangements. Any penalty HMRC charges, having considered the relevant GAAR Advisory Panel opinion, is appealable.

1.1.5 The order in which this guidance is set out, mirrors the order of the legislation.

1.1.6 Throughout this guidance, the use of the word 'implemented' takes its ordinary dictionary definition.

1.2 Purpose of the legislation

1.2.1 The legislation gives HMRC the power to tackle all aspects of the marketed avoidance supply chains, complementing the suite of anti-avoidance measures already in place. The legislation will influence and promote behavioural change in the minority of tax agents, intermediaries and others who benefit financially from designing, marketing or facilitating the use of abusive tax arrangements that are defeated. Throughout this guidance, such arrangements are referred to as 'abusive tax arrangements'.

1.2.2 The legislation will help ensure that enablers of abusive tax arrangements are held accountable for their actions, while providing safeguards for the vast majority of tax professionals who already adhere to professional standards, such as the Professional Conduct in Relation to Taxation and the Code of Practice on Taxation for Banks. Those who provide clients with services in respect of genuine commercial arrangements won't be impacted.

1.2.3 The enablers legislation only applies to a person if they enable abusive tax arrangements that are entered into on or after 16 November 2017, which is the date of Royal Assent to the Finance (No.2) Act 2017. The enabling activity must also have been undertaken on or after this date.

1.2.4 A main aim of the legislation is to deter a person from enabling abusive tax arrangements. A would-be enabler should, at the time of providing advice or carrying out any enabling action,

consider whether they are in fact enabling tax arrangements, which they know are, or are likely to be considered, abusive.

1.2.5 Section 10 of this guidance explains how the information powers at Schedule 36 FA 2008 are modified for the purposes of checking whether a person is liable to a penalty under the enablers legislation. HMRC will make use of these powers to help check or obtain information that will help determine whether a penalty under the enablers legislation is appropriate for a particular person.

1.3 Interaction with other requirements

1.3.1 This guidance sets out how the enablers legislation interacts with:

- the General Anti-Abuse Rule (GAAR), operated by HMRC with external scrutiny provided by the GAAR Advisory Panel
- the Code of Practice on Taxation for Banks (the Code) which is published and operated by HMRC
- Professional Conduct in Relation to Taxation (PCRT)[1], a document produced by 7 leading professional bodies for their members working in tax, setting out the fundamental principles and standards of behaviour expected of their members

1.3.2 This guidance should be read in conjunction with the GAAR guidance current at the time the arrangements are entered into. Parts A – C and part D of the GAAR guidance have been approved by the GAAR Advisory Panel. In particular, part D provides examples of the types of arrangements that may, or may not be, considered abusive in the context of the GAAR. Part E of that guidance sets out the procedure that must be followed before there can be a GAAR counteraction. You may find the GAAR guidance helpful in understanding what types of arrangements are considered abusive for the purposes of the GAAR, which in turn will help you to identify the types of arrangements that would bring a person who has enabled them into scope for a penalty under the enablers legislation.

1.4 Interaction with National Insurance contributions (NICs)

1.4.1 Where the legislation refers to 'tax' this also includes National Insurance contributions (NICs). Throughout this guidance, reference to:

- tax is to those taxes set out at section 13.2.1 which includes NICs
- obtaining a tax advantage, includes obtaining a NICs advantage
- income, includes earnings within the meaning of 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
- assessment, includes a NICs decision

Association of Accounting Technicians (AAT)
Association of Chartered Certified Accountants (ACCA)
Association of Taxation Technicians (ATT)
Chartered Institute of Taxation (CIOT)
Institute of Chartered Accountants in England and Wales (ICAEW)
Institute of Chartered Accountants of Scotland (ICAS)
Society of Trust and Estate Practitioners (STEP)

1.5 Amendment to the promoters of tax avoidance schemes (POTAS) threshold condition

1.5.1 The General Anti-Abuse Rule (GAAR) threshold condition at paragraph 7, Schedule 34 FA 2014, has been amended so that it applies under POTAS for the purposes of the enablers legislation, as well as by reference to the GAAR. The POTAS threshold condition is met if arrangements have been referred to the GAAR Advisory Panel under paragraph 26 of Schedule 16 FA (No.2) 2017 and, for the purposes of the POTAS legislation, the majority opinion of the GAAR sub-panel is that the entering into or carrying out of the tax arrangements isn't a reasonable course of action in relation to the relevant tax provisions.

There is no further consideration of POTAS in this guidance, but more information about the POTAS regime and its threshold conditions can be found in the POTAS guidance.

Section 2: Liability to a penalty

2.1 Commencement

2.1.1 The legislation takes effect from 16 November 2017, which is the date of Royal Assent to the Finance (No.2) Act 2017. The legislation only applies where there are abusive tax arrangements that have been defeated and both of the following apply:

- the tax arrangements are entered into on or after 16 November 2017
- the enabling action is taken on or after 16 November 2017

2.1.2 **Example 1:**

A person designs a proposal for arrangements before 16 November 2017 and instructs a lawyer (also before 16 November 2017) to provide their opinion on the probable success of those arrangements. The lawyer provides their opinion before 16 November 2017, which confirms that the idea has merit but the probability of success would be greater if one or two aspects were changed.

The lawyer's involvement with the design of those arrangements ends 16 November 2017. The lawyer will not be an enabler for those arrangements, as long as they have not taken any other enabling actions for those arrangements on or after 16 November 2017.

2.1.3 **Example 2:**

A person designs and starts to market a proposal for arrangements before 16 November 2017. They continue to market the proposal after 16 November 2017, and a taxpayer then enters into arrangements to implement that proposal. The person who designed and marketed the arrangements accepts that they are an enabler but suggests that the consideration they received, by way of fees, wholly or largely relates to their activities before 16 November 2017.

The person is an enabler by virtue of marketing the proposal after 16 November 2017; they are not an enabler by reference to their activities before 16 November 2017. It will be a question of fact how much of the consideration relates to their marketing activities on or after 16 November 2017, and how much of it relates to what they did before 16 November 2017. The penalty will be equivalent to the consideration for marketing activities after 16 November 2017.

2.2 When a penalty arises

2.2.1 Paragraph 1 of Schedule 16 FA (No.2) 2017 describes when liability to a penalty under the enablers legislation arises.

2.2.2 A penalty only arises where a taxpayer has entered into abusive tax arrangements (see section 3 of this guidance) and those arrangements are subsequently defeated (see section 4 of this guidance). When this happens, each person who enabled those arrangements is liable to a penalty (see section 5 of this guidance).

2.2.3 A penalty can only be assessed (see section 7.3.1) if a designated HMRC officer decides that it should be assessed having considered a GAAR Advisory Panel opinion that is relevant to the arrangements in question, or equivalent arrangements (see section 8).

2.2.4 You can find more information about the interaction with the GAAR and the role of the GAAR Advisory Panel later in this guidance at section 8.

2.2.5 There is a special provision to determine when penalties can be assessed if the same proposal for tax arrangements (typically an avoidance scheme) has been implemented more than once. For example, where more than one user has implemented tax arrangements that are substantially the same as each other. In these circumstances HMRC may not normally assess a penalty on any of the enablers of those arrangements, following the defeat of the relevant arrangements, until HMRC is satisfied that more than 50% of known users of that proposal for arrangements have been defeated. This is explained further at section 7.3.2 of this guidance.

Section 3: Abusive tax arrangements

3.1 Overview

3.1.1 As mentioned at section 2.2 above, a person is only liable for a penalty under the enablers legislation if the defeated tax arrangements they enabled are abusive. The tax arrangements will be considered abusive if one of the following applies:

- there is a GAAR counteraction of the tax advantage or tax advantages arising from the tax arrangements, which becomes final
- the tax advantage or tax advantages arising from the arrangements have been counteracted either by settlement before any counteraction under the GAAR has been taken or under another provision, but could have been counteracted under the GAAR had it not been for the settlement or for that other provision

3.2 Meaning of tax arrangements

3.2.1 See part 3, section C2-C4 of the GAAR guidance for a more detailed explanation of 'arrangements', 'tax arrangements' and 'tax advantage'.

3.2.2 'Arrangements' take the meaning often used in anti-avoidance legislation. Arrangements include any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable). So whilst an arrangement could contain any combination of these things, a single agreement could also amount to an arrangement.

3.2.3 The definition of tax arrangements is in paragraph 3(1) of Schedule 16 FA (No.2) 2017.

3.2.4 Arrangements are tax arrangements for the purposes of this legislation if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements. This is an objective test which requires that all the relevant circumstances are taken into consideration, before determining that at least one of the main purposes of the arrangements was obtaining a tax advantage. The test only considers the main purposes of the arrangements and not the main purpose of any particular person who is party to those arrangements. As mentioned at section 3.2.1 above, more detail can be found in the GAAR guidance.

3.2.5 The meaning of 'tax advantage' is in paragraph 55 of Schedule 16 FA (No.2) 2017 and is based on the definition of tax advantage in the GAAR legislation (s208 FA 2013). See section 13.3 of this guidance for a non-exhaustive list of tax advantages that are included in this definition.

3.2.6 'The main purpose' and 'one of the main purposes' take their ordinary meaning. If the arrangements would not otherwise have been undertaken absent the possibility of gaining a tax advantage, then obtaining a tax advantage would be a main purpose of the arrangements.

3.2.7 Arrangements may be structured to achieve a number of objectives, both from a commercial perspective and in terms of tax. If the arrangements are structured so that achieving a tax advantage is at least one of the main purposes, then they will be tax arrangements. This

might be the case where arrangements include an additional step, without which the commercial objectives could have been achieved, but not the tax advantage.

3.3 Meaning of abusive

3.3.1 The definition of when tax arrangements are 'abusive' is in paragraph 3(2) of Schedule 16 FA (No.2) 2017. This is based on the GAAR 'double reasonableness test'. See part 3, section C5 of the GAAR guidance for a detailed explanation of the meaning of 'abusive' and the 'double reasonableness test'. Section C5 also provides indicators of non-abusive tax arrangements. However in situations where arrangements seek to circumvent complex rules and are defeated on a technical argument rather than under the GAAR, if the arrangements could have been defeated under the GAAR absent the technical argument, they will be treated as abusive for the purposes of the enablers legislation so that enablers of such arrangements will be liable to an enablers penalty.

3.3.2 Tax arrangements are abusive if, having regard to all the circumstances, the entering into or carrying out of the arrangements can't reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions.

3.3.3 There are 2 parts to the 'double reasonableness test'. They are:

- is the entering into or carrying out of the tax arrangements a reasonable course of action in relation to the relevant tax provisions having regard to all the circumstances?
- having regard to all the circumstances, can that action be reasonably regarded as a reasonable course of action in relation to the relevant tax provisions?

3.3.4 The first part of this test looks at the relevant tax provision in its entirety and considers whether the action taken by the taxpayer in relation to the enabled tax arrangements is consistent with the action that would be expected to be taken in order to obtain the tax outcome intended by that relevant tax provision. The GAAR Advisory Panel (see section 8 of this guidance) will be involved and will provide an opinion or opinions on whether the entering into and carrying out of the enabled tax arrangements or equivalent tax arrangements was a reasonable course of action by the relevant taxpayer in relation to the relevant tax provisions.

3.3.5 The second part looks at whether, in light of all the possible views that could be held in relation to the enabled tax arrangements, the view taken is a reasonably held view. For example, even if HMRC or some parts of the professional community were of the view that entering into the tax arrangements was not a reasonable course of action, if a reasonably held view is that it was reasonable, the arrangements would not be regarded as abusive.

3.3.6 Paragraph 3(3) of Schedule 16 FA (No.2) 2017 states that the circumstances which must be taken into account include whether:

- the substantive result, or the intended substantive result of the arrangements, is consistent with any principles on which the relevant tax provisions are based and the policy objectives of those provisions
- the arrangements achieve the outcome by including one or more contrived or abnormal steps
- the arrangements are intended to exploit a loophole in the provisions

3.3.7 Unlike the GAAR, the intended outcomes must also be taken into account, whether or not these are realised in practice. This is to account for the fact that the enablers legislation applies in relation to arrangements that:

- have been counteracted under the GAAR
- could have been counteracted under the GAAR if they hadn't been defeated under any other tax provisions or had they not been settled before GAAR counteraction was taken

This includes whether the actions taken were intended to side-step any particular aspect of the tax provisions, whether or not they succeed in doing so.

3.4 Examples of abusive tax arrangements

3.4.1 See part D of the GAAR guidance for an illustrative set of examples. The examples at D11 (Vaccine Research) and D13 (Working Wheels) in particular show that these cases preceded the GAAR and were defeated without a referral to the GAAR Advisory Panel. However, HMRC would regard such arrangements as potentially abusive and consequently would make a referral to the GAAR Advisory Panel for the purposes of considering whether or not to apply a penalty under the enablers legislation.

Section 4: Defeat in respect of abusive tax arrangements

4.1 Defeat in respect of abusive tax arrangements

4.1.1 A person is liable for a penalty under the enablers legislation when the abusive arrangements they have enabled are defeated. Abusive tax arrangements are defeated when the tax position of the user of those arrangements is final, and on the basis that the arrangements do not provide the anticipated tax advantage, either in part or whole.

4.1.2 Arrangements are defeated where either condition A or condition B in paragraphs 5 and 6 of Schedule 16 FA (No.2) 2017 is met.

4.2 Condition A: Giving HMRC a document

4.2.1 Condition A is at paragraph 5 of Schedule 16 FA (No.2) 2017.

4.2.2 Condition A is met when all of the following apply:

- the taxpayer, or any person on behalf of the taxpayer, has given HMRC a document of a kind listed in the table at Paragraph 1 Schedule 24 FA 2007, such as returns, statements, declarations and accounts (including a document relating to national insurance contributions to which Schedule 24 FA 2007 applies), or has amended such a document after it has been submitted
- the document was submitted on the basis that a tax advantage arose from the arrangements concerned
- part or all of that tax advantage has been counteracted
- the counteraction is final

4.2.3 It doesn't matter whether the taxpayer has submitted the document or whether an accountant or other representative of the taxpayer has done this on the taxpayer's behalf.

4.3 Condition B: HMRC assessment

4.3.1 Condition B is at paragraph 6 of Schedule 16 FA (No.2) 2017.

4.3.2 Condition B is met when all of the following apply:

- HMRC makes an assessment to tax
- that assessment counteracts part or all of a tax advantage that it is reasonable to assume the taxpayer expected to obtain from entering into the arrangements
- that counteraction is final - meaning that it can no longer be varied on appeal or otherwise

4.4 When a tax advantage is counteracted

4.4.1 A tax advantage is counteracted when adjustments are made to the taxpayer's tax position to eliminate or reduce a tax advantage (whether by the taxpayer or HMRC) or HMRC makes an assessment on the basis that the tax advantage does not arise, either in part or whole.

4.5 When a counteraction is final

4.5.1 A counteraction is final when the tax position can no longer be varied on appeal or otherwise.

4.5.2 For condition A, this could be because the taxpayer has accepted the adjustments reflected in a partial or final closure notice (for example, by not appealing against the making of the adjustments), has entered into a contract settlement to settle their tax affairs, or has taken corrective action in response to a follower notice. In the case of an appeal, the counteraction will be final when the appeal has been decided and no further appeal can be made, or if the appeal is withdrawn.

4.5.3 For condition B, a counteraction is final when, in relation to the assessment issued by HMRC, the taxpayer does not appeal that assessment within the time allowed for doing so or has entered into a contract settlement to settle their tax affairs, or any appeal has been decided and no further appeal can be made, or if the appeal is withdrawn.

4.6 Adjustments and making adjustments

4.6.1 The definition of 'adjustments' is in paragraph 5(4) of Schedule 16 FA (No.2) 2017. It includes making or modifying an assessment, modifying a return, amending or disallowing a claim or entering into a contract settlement.

4.6.2 References to 'making' adjustments include securing that adjustments are made by entering into a contract settlement.

4.6.3 **Example 3:**

A taxpayer submits a tax return which includes the use of tax arrangements that give rise to a tax advantage. HMRC enquire into the return and conclude that the whole of the tax advantage should be counteracted. The taxpayer does not agree. HMRC issue a closure notice, making the adjustments that are required to counteract the tax advantage. On further consideration, the taxpayer concedes that the tax advantage does not arise and does not appeal the closure notice. The conclusion in the closure notice becomes final when the time limit for appealing against it expired and the tax advantage has been counteracted.

Section 5: Persons who enabled the arrangements

5.1 Who is an enabler

5.1.1 An enabler is any person who, in the course of a business, enables abusive tax arrangements that are defeated.

5.1.2 Paragraph 7 of Schedule 16 FA (No.2) 2017 defines a person who has enabled abusive tax arrangements as a person who:

- is a designer of arrangements
- is a manager of arrangements
- marketed the arrangements
- is an enabling participant in the arrangements
- is a financial enabler in relation to the arrangements

5.1.3 When considering whether a particular activity or action amounts to enabling, each of the 5 descriptions of enabler activities should be considered in turn. The nature of the activity could mean that the person is a designer of arrangements but is also a manager of the arrangements and has marketed the arrangements. A person just needs to meet one of the 5 descriptions of enabler in relation to any of the actions or activities they have undertaken to be in scope for a penalty under the enablers legislation.

5.1.4 Each of the 5 descriptions of enabler activities is explained further in the rest of this section, which also provides examples of when a person who performs one of these activities is or is not an enabler.

5.1.5 A key requirement of each of the descriptions of enabler activities, other than an enabling participant, is that for a person to be an enabler, the activity must be performed in the course of a business carried on by that person. This means that an employee of a business is excluded from being an enabler in relation to activities that have been performed, as they have been performed as part of that employment, and not in the course of a business carried on by them. The enabler would be the employing business in this case as the employee is acting on behalf of the employer, who is the person carrying on the business and benefits from the income generated.

5.1.6 In the case of a partnership which is the person (or body of persons) carrying on the business, it is the partnership that will be the enabler.

5.1.7 Where HMRC considers a person to be a person who enabled arrangements, HMRC will try to contact that person giving them details of the concern so that both parties can discuss this. For example providing details of the arrangements in question or the role the person is thought to have played. HMRC would expect that in most cases there would be a dialogue about the issue to help the person to understand and respond to HMRC's concern before HMRC proceeds to assess a penalty.

5.1.8 If the person is a lawyer, they can make a declaration in respect of legally privileged communications at any time during this process (see section 11).

5.1.9 A person who performs one of these activities in relation to arrangements, where that person is the taxpayer using the arrangements and seeking to obtain tax advantages from them, is excluded from being an enabler by virtue of paragraph 13 of Schedule 16 FA (No.2) 2017. If such a person is a company within a group of companies, then any company in the same group is also excluded from being an enabler (see section 5.7).

5.2 Designer of arrangements

5.2.1 Designer

5.2.1.1 The definition of a designer of arrangements is at paragraph 8 of Schedule 16 FA (No.2) 2017.

5.2.1.2 A person is a designer of arrangements if, in the course of a business carried on by that person, they are to any extent responsible for the design of either:

- the arrangements
- a proposal for arrangements which is implemented by the arrangements

5.2.1.3 A proposal for arrangements can be implemented by one person entering into the proposed arrangements or it can be implemented more than once by more than one person entering into arrangements.

5.2.1.4 A person is 'to any extent responsible for the design' of the arrangements or proposal for arrangements if they provide advice that is used in that design.

5.2.1.5 Advice, which includes an opinion, is used in a design if it is taken into account in the design of the arrangements or proposal for arrangements.

5.2.2 When a person is not a designer

5.2.2.1 A person who provides advice that is used in the design of arrangements will be a designer of those arrangements by virtue of providing that advice if both of the following conditions are met:

- the advice they give is relevant advice
- the knowledge condition is met

5.2.2.2 Both of these conditions are considered below.

5.2.3 Relevant advice

5.2.3.1 The definition of relevant advice is at paragraph 8(3) of Schedule 16 FA (No.2) 2017.

5.2.3.2 Advice is relevant advice if:

- any part of the advice suggests arrangements, including a proposal for arrangements, or alterations to arrangements or a proposal for arrangements
- it is reasonable to assume that the suggestion was made with a view to the arrangements being designed so that a tax advantage, or a greater tax advantage might be expected to arise from them

5.2.3.3 **Example 4**

A promoter devises a proposal for arrangements (a tax avoidance scheme) involving the establishment of a limited liability partnership 'LLP1'. The promoter approaches leading counsel for advice on whether the arrangements, as proposed, will secure a tax advantage. counsel confirms that the arrangements will achieve the tax advantage but goes on to advise that if some further adjustments are made to the proposed arrangements, a greater tax advantage would arise. The promoter makes the adjustments suggested by counsel.

The promoter is an enabler as it is a designer of the arrangements. The leading counsel is also an enabler as the advice he has provided is relevant advice, so he too is a designer of the arrangements.

5.2.4 When advice is not relevant advice

5.2.4.1 Paragraph 8(5) of Schedule 16 FA (No.2) 2017 provides that advice won't be taken to suggest anything which is put forward by the advice for consideration, but the advice can reasonably be read as recommending against implementing that suggestion. Accordingly, if no other suggestion of the type referred to in section 5.2.3.2 is contained in the advice it will not be relevant advice and the adviser will not be a designer of the arrangements as a result of giving that advice.

5.2.4.2 For example, most types of professional adviser are required to provide clients with 'best advice' and the 'cab rank rule' in the main requires barristers to advise any person who approaches them for advice. Such advice may therefore come within the meaning of relevant advice even though the adviser is not intending to be a designer of abusive arrangements. Paragraph 8(5) of Schedule 16 FA (No.2) 2017 seeks to address this.

5.2.4.3 An adviser who merely gives a client a second opinion on abusive arrangements as proposed in the request for advice, where that opinion contains no suggestion for any alteration of those proposed arrangements, is not an enabler by virtue of having given that second opinion. This is because the adviser is not, to any extent, responsible for the design of the proposal or arrangements. However, where they suggest changes for consideration, they would be an enabler unless their advice goes on to set out the risks associated with implementing those suggestions, such that the advice as a whole can reasonably be read as recommending against anything that advice or opinion puts forward for consideration.

5.2.4.4 An adviser could do this by including a paragraph which makes it clear that the adviser considers that the resulting arrangements are likely to be regarded as abusive tax arrangements, or that the probability or percentage risk of a GAAR counteraction is significantly above 50%, and so on. Suggesting that there is a 51% possibility of a GAAR challenge on its own would not 'reasonably be read as recommending against'. It's also not sufficient to add a passing comment of this nature if the advice, when viewed as a whole (including any oral advice), is a recommendation in favour of the arrangements.

5.2.4.5 **Example 5**

A barrister considers a request for advice about a client's proposed tax arrangements and how best to seek the commercial outcome desired. In the barrister's opinion, the proposed arrangements do not work, but if various changes are made and/or additional steps inserted, the barrister can identify 2 alternatives that could deliver the client's intended outcome. However, the barrister considers that both alternatives may result in tax

arrangements that are abusive and there is a considerable risk they could be counteracted under the GAAR, to the extent that they could not be counteracted under another tax provision.

If the barrister's advice goes no further than setting out the 2 alternatives and how they would need to be structured, then the advice is relevant advice and the barrister would be an enabler. However, if the barrister's advice goes on to express the view that, although either alternative could deliver the client's intended outcome, it is likely that any tax advantages arising under each could be successfully counteracted by HMRC under the GAAR (if not by using a Targeted Anti-Avoidance Rule), the barrister is setting out the risks of undertaking either alternative in his advice. Provided that the advice on the whole can reasonably be read as recommending against incorporating either of the 2 alternatives so that the advice is not relevant advice, the barrister is not an enabler.

5.2.4.6 If the promoter goes on to market arrangements or a taxpayer implements arrangements that are different to those on which advice was given, the adviser would not be an enabler of those different arrangements.

5.2.5 The knowledge condition

5.2.5.1 The knowledge condition is at paragraph 8(4) of Schedule 16 FA (No.2) 2017.

5.2.5.2 The knowledge condition is met if, at the time the advice is provided, the person providing the advice knew, or could reasonably be expected to have known, that the advice would be, or was likely to be, used in the design of abusive tax arrangements or a proposal for abusive arrangements. This will be a question of fact and will take into consideration such things as the adviser's existing tax and professional knowledge at the time the advice was provided.

5.2.5.3 A person who would otherwise be a designer because they provided advice which is relevant advice, is not within the meaning of an enabler if, at the time they provided the advice, they did not know, or could not reasonably be expected to have known, that the advice would be used in the design of abusive tax arrangements.

5.2.5.4 **Example 6**

A company decides to implement a tax avoidance scheme. Its tax advisors set out the steps of the transactions, including the anticipated accounting entries required for the arrangements to work. The company approaches its auditors, a firm independent of the tax advisors, in advance of implementing the arrangements to confirm whether those proposed entries are technically correct. Given the facts and substance of the transaction, the audit firm confirms that the entries are correct and doesn't foresee issues in the future audit of those entries.

The audit firm is not an enabler as they have done no more than provide an opinion on arrangements designed by others.

Equally, if the audit firm disagreed with the technical analysis and went on to explain that accounting standards require the transactions to be accounted for differently, setting out the particular aspect of the arrangements, and the specific accounting requirement which caused them to reach their conclusion, the firm is not an enabler because, again, they have done no more than provide an opinion on arrangements designed by others. The company or its advisors may change the design of the arrangements as a result of this opinion, or they

may conclude that the proposed arrangements simply wouldn't work and abandon the idea but neither decision would impact on the question of whether the audit firm is an enabler.

If however the audit firm went beyond this and provided advice to the extent that changing certain aspects of the overall arrangements would enable the company to secure a specific accounting treatment, while also not changing the overall efficacy of what they appear to be trying to achieve, the audit firm could bring itself within scope for a penalty as a designer. They are now acting beyond their auditor capacity, doing more than forming an independent view on the financial statements, and providing advice that is relevant advice, because it suggests arrangements or an alteration of proposed arrangements. It will then be a question of fact whether the knowledge condition is also met, but we envisage certain cases where it would be.

5.2.5.5 Example 6 is intended to bring out the typical role of an auditor and how they might cross over into the design of abusive tax arrangements. In general an auditor does no more than perform an independent audit of statutory accounts, though as noted they may in practice provide an initial view on whether accounting aspects of proposed arrangements are in accordance with accounting standards. They would therefore not normally fall within any of the descriptions of enabler primarily as they won't to any extent be responsible for the design of the arrangements or the proposal implemented by the arrangements, but nor would they fall within any of the other definitions. However, if an auditor goes further than exercising their audit function, and provides advice which they know will be taken into account in a design or re-design of abusive tax arrangements, they will be an enabler by virtue of being a designer. The same reasoning would apply to any other non-tax professional who acts in accordance with their professional responsibilities.

5.2.5.6 **Example 7**

A lawyer who specialises in aspects of company law is approached by a person who, unbeknown to that lawyer, is designing abusive tax arrangements. The person asks the lawyer some specific questions about the impact of company law on a proposed transaction and the lawyer has no reason to consider any issues beyond the question being asked. The lawyer provides their advice which is reflected in the final design of the tax arrangements.

Although the advice is relevant advice because it features in the design of arrangements, the lawyer is not an enabler as they could not reasonably be expected to have known that their advice would form part of the design of abusive tax arrangements.

5.2.5.7 In example 7, there would be no expectation on the lawyer to insert additional checks or ask further questions to establish whether there is or isn't a tax advantage and ensure they are not providing advice in relation to abusive tax arrangements, provided they're taking the necessary care and attention that is required of them in the performance of their duties and in accordance with their professional conduct requirements. For example, taking the relevant action if fraud or money laundering is suspected.

5.3 Manager of arrangements

5.3.1 Manager

5.3.1.1 A manager of the arrangements is defined at paragraph 9 of Schedule 16 FA (No.2) 2017.

5.3.1.2 A person is a manager of arrangements if, in the course of a business carried on by them, they're to any extent responsible for the organisation or management of those arrangements, and at that time knew or could reasonably be expected to have known that the arrangements were abusive tax arrangements.

5.3.1.3 Both of the terms 'organisation' and 'management' take their ordinary meaning.

5.3.1.4 Organisation and management could involve ensuring the required paperwork is in place to set up and implement the arrangements, or facilitating transactions forming part of the arrangements.

5.3.1.5 However, simply performing a statutory function or a service, such as preparing board minutes, completing or filing a return, making filings at Companies House or Land Registry, or auditing statutory accounts etc., even where these reflect a tax advantage from abusive tax arrangements, will not be managing or organising those arrangements provided that is all that has been done.

5.3.1.6 **Example 8**

A client has entered into tax arrangements that may be abusive. The client's tax adviser has taken no part in helping their client implement or enter into the arrangements. The adviser's first involvement with the arrangements is in relation to the completion of the client's Self-Assessment tax return.

Provided the tax agent adheres to their professional requirements (if they're a member of a professional body signed up to PCRT, this means PCRT (see section 5.9)) when deciding how and/or whether to include the tax arrangements giving rise to the tax advantage on the tax return, the tax agent should not expect to be an enabler, because they did not have any involvement in organising or managing the arrangements.

5.3.2 Persons who facilitate a withdrawal from abusive tax arrangements

5.3.2.1 Paragraph 9(2) of Schedule 16 FA (No.2) 2017 provides a safeguard for those whose connection with abusive tax arrangements is solely to help a user to withdraw from them, in a way which doesn't still seek to obtain the intended, or another, tax advantage.

5.3.2.2 After entering into abusive tax arrangements, a person may decide that they no longer want to be involved with them and seek professional advice on how to unwind the arrangements. For instance, a person may become aware of a potential GAAR counteraction, or be expecting to receive a follower notice as a result of a judicial ruling in relation to another person's tax arrangements. The adviser in such circumstances may have to manage the taxpayer out of the abusive arrangements. As they would be doing this in the full knowledge that the arrangements in question are (or are likely to be) abusive, there would be a risk that the adviser could come within the meaning of manager of arrangements.

5.3.2.3 Paragraph 9(2) of Schedule 16 FA (No.2) 2017 provides a safeguard, provided both of the following circumstances apply:

- the adviser is facilitating their client's withdrawal from the arrangements that is they are not simply managing the client's continued implementation of them
- it is reasonable to assume that the obtaining of a tax advantage isn't one of their client's purposes in withdrawing from the arrangements, such that they are not

enabling their client to enter an exit strategy which, of itself, is seeking to obtain a tax advantage

5.3.2.4 **Example 9**

A taxpayer entered into tax arrangements but now wants to exit the arrangements because HMRC considers the arrangements to be abusive and GAAR is being considered. The taxpayer seeks assistance from a dispute resolution specialist to help steer them out of the arrangements. The specialist negotiates an exit from the arrangements, which results in a reduction in the tax advantage that would have been obtained had the taxpayer not withdrawn from the arrangements, but some tax advantage still arises.

The specialist is not an enabler by virtue of managing arrangements, because their role is to facilitate the exit from the arrangements and although the agreed position was that part of the originally intended tax advantage remains, the taxpayer's purpose in exiting the arrangements was not to seek a tax advantage.

However if to secure the same or a different tax advantage, the specialist instead devised 'exit arrangements' that were abusive, the specialist would be an enabler by virtue of managing the existing arrangements. If those exit arrangements were themselves defeated, the specialist would also be an enabler by virtue of designing the abusive exit arrangements

5.4 Marketer of arrangements

5.4.1 Marketer

5.4.1.1 Paragraph 10 of Schedule 16 FA (No.2) 2017 sets out when a person is an enabler by virtue of marketing abusive tax arrangements.

5.4.1.2 A person is a marketer of arrangements (marketer) if, in the course of a business carried on by them, they undertake either of the following actions. They:

- make a proposal for arrangements available for implementation by a user of those arrangements, and those arrangements are subsequently implemented in relation to that user
- communicate information about a proposal for those arrangements to a user of the arrangements or to another person, with a view to the user entering into those arrangements or transactions forming part of those arrangements

5.4.1.3 This definition of a marketer does not include a 'knowledge condition' because anyone marketing abusive tax arrangements should be well aware that that is what they are doing.

5.4.1.4 **Example 10**

A financial adviser markets a proposal for arrangements (a tax avoidance scheme) for the scheme's promoter. The financial adviser will receive consideration, by way of a fee, for every person who implements the scheme as a result of their recommendation. 5 of the financial adviser's clients implement the scheme and are defeated on the basis that they are abusive.

The financial adviser is an enabler because they marketed the arrangements, which have been implemented. The financial adviser will be liable to a penalty in respect of the fees they received for each of the 5 clients.

5.4.1.5 **Example 11**

The promoter in example 4, markets the scheme in an information memorandum, which refers to an opinion obtained from leading counsel that the scheme should enable the members of LLP1 to secure a tax advantage and has a good prospect of success.

Both the promoter and leading counsel also fall within the description of marketers of the proposed arrangements as they're communicating information about the proposal with a view to other persons entering into arrangements to implement that proposal. The promoter does this by providing the information memorandum to potential users, and counsel by including reference to, or consenting to the inclusion of his favourable opinion in the material.

5.4.1.6 If the arrangements a person actually enters into are, as a matter of fact, different to those proposed to them, the person who communicated the proposal will not be a marketing enabler. This is because the arrangements entered into differ from those proposed, even though they may have been inspired by that proposal. This will be a question of fact.

5.5 Enabling participant of arrangements

5.5.1 Enabling participant

5.5.1.1 The definition of an enabling participant is at paragraph 11 of Schedule 16 FA (No.2) 2017.

5.5.1.2 A person is an enabling participant in a taxpayer's arrangements, if all of the following apply:

- they enter into those arrangements or a transaction that forms part of those arrangements
- those arrangements could not have been expected to result in a tax advantage for the taxpayer without that person's involvement, or the involvement of another person acting in the same capacity
- the knowledge condition is met

5.5.1.3 The knowledge condition is met if, when the person entered into the taxpayer's arrangements or transactions, they knew, or could reasonably be expected to have known, that they were entering into abusive tax arrangements or transactions forming part of abusive tax arrangements.

5.5.1.4 **Example 12**

An adviser devises a proposal for arrangements under which a company is created to become the employer of persons that are currently contractors or freelancers. The employees then receive money in the form of loans. When the arrangements are implemented, the adviser pays the employer company a fee for each contractor or freelancer that signs up to the arrangements and who becomes an employee of the company.

The company is an enabling participant, notwithstanding that it may, or may not, obtain a tax advantage in its own right through its participation in the arrangements.

5.6 Financial enabler of arrangements

5.6.1 Financial enabler

5.6.1.1 The definition of financial enabler is at paragraph 12 of Schedule 16 FA (No.2) 2017.

5.6.1.2 A person is a financial enabler in relation to arrangements if, at the time the financial product is provided they knew, or could reasonably be expected to have known, that at least one of the purposes of obtaining the financial product was to participate in abusive tax arrangements and both of the following conditions are met:

- during the course of a business carried on by the person, they either directly or indirectly provided a financial product to a relevant party
- it is reasonable to assume that at least one purpose of the relevant party in obtaining the financial product was to participate in the arrangements

5.6.1.3 The inclusion of 'directly or indirectly' means that a person can be a financial enabler if the financial product is provided through a third party.

5.6.1.4 Example 13

A bank that isn't signed up to the Banking Code is approached for an overnight loan facility. Whilst going through the terms of the loan, the bank becomes aware that the loan will be used to participate in abusive tax arrangements, but proceeds to provide the loan facility anyway.

The bank is a financial enabler in relation to the arrangements.

5.6.2 Relevant party

5.6.2.1 The definition of relevant party is at paragraph 12(2) of Schedule 16 FA (No.2) 2017. A relevant party is either the user of arrangements or a person within the meaning of 'enabling participant' as defined in paragraph 11 of Schedule 16 FA (No.2) 2017 (section 5.5 above).

5.6.3 What is a financial product

5.6.3.1 A non-exhaustive list of financial products is provided by paragraph 12(3) of Schedule 16 FA (No.2) 2017. The types of financial products a person could provide to a relevant party that could make them a financial enabler include the following:

- a loan
- a share
- a derivative contract within the meaning of s577 of CTA 2009
- a repo in respect of securities within the meaning of s263A(A1) of TCGA 1992
- a creditor or debtor repo or quasi repo within the meaning of s543, s544, s548 and s549 of CTA 2008
- a stock lending arrangement within the meaning of s263B(1) of TCGA 1992
- alternative finance arrangements within the meaning of Chapter 6 of CTA 2009 or Part 10A of ITA 2007
- a contract or contracts which, in accordance with generally accepted accounting practice, is required to be treated as a loan, deposit or other financial asset or obligation, or would be so treated if the person was a company to which the Companies Act 2006 applies

5.6.3.2 Depending on the context and the particular financial product, 'provides' should also be taken to mean 'supplies', 'transfers', 'issues' or 'enters into'.

5.6.3.3 Should it prove necessary, the list of financial products can be amended by regulations.

5.7 Excluded persons

5.7.1 The user of the arrangements or, where the user is a company, a company in the same group as the user of the arrangements, is excluded from being an enabler. This is to ensure that the user of the arrangements, or in a group situation, the group as a whole, isn't penalised twice in relation to the abusive arrangements being defeated.

5.7.2 The meaning of group is at paragraph 56 of Schedule 16 FA (No.2) 2017.

5.7.3 Two companies are part of the same group if, at the time the enabling action is undertaken, one is a 75% subsidiary of the other or both are 75% subsidiaries of a third company. The meaning of 75% subsidiary is taken from section 1154 of CTA 2010, with section 151(4) CTA 2010 applying the requirements relating to beneficial entitlement of equity holders to profits or assets in a winding up.

5.7.3.1 **Example 14**

ABC group implements a proposal for arrangements with a view to obtaining a tax advantage. Company X provides management services to ABC group which include managing the tax avoidance arrangements. As company X is responsible for organising and managing the tax avoidance arrangements, company X will be in scope for a penalty under the enablers legislation if the arrangements are defeated on the basis they are abusive.

ABC group undergoes a reorganisation, and decides to bring management services in-house; it proceeds to purchase 100% of company X's share capital so that company X is now part of ABC group. Company X continues to provide management services in relation to further arrangements ABC group enters into.

Company X will not be an excluded person under the enablers legislation in relation to the enabling activities provided to ABC group prior to joining the group, and will remain in scope for a penalty. However, it will be an excluded person in relation to any subsequent enabling activities provided to ABC group after joining the group.

5.8 Interaction with the Code of Practice on Taxation for Banks (the Code)

5.8.1 The Code is a voluntary code introduced in 2009 to change the attitudes and behaviours of banks towards tax avoidance. It is a key part of the government's anti-avoidance strategy because banks are in a unique position as potential users, promoters and facilitators of tax avoidance.

5.8.2 If a bank is found to have breached its obligations under the Code, it can be named in an annual report published by HMRC. This won't prevent the bank being subject to a penalty under the enablers legislation. Likewise there is no specific exemption from a penalty under the enablers legislation for a bank which adopts and complies with the Code. This means a bank could be an enabler under any of the 5 categories.

5.8.3 There are similarities between the Code and the way that the enablers legislation applies to banks. Abusive tax arrangements will typically produce a tax result that is contrary to the intentions of Parliament.

5.8.4 Banks that adopt the Code are required to comply with the spirit, as well as the letter, of tax law by discerning and following the intentions of Parliament. These banks shouldn't promote arrangements to other parties unless the bank reasonably believes the tax result for the other parties isn't contrary to the intentions of Parliament. Therefore Code-compliant banks should not be marketers, designers or managers of abusive tax arrangements.

5.8.5 However, a Code-compliant bank could be subject to a penalty under the enablers legislation where it facilitates abusive tax avoidance arrangements even though, for example, it doesn't itself charge a premium fee linked to the client's tax advantage from those arrangements. The published Code guidance says this type of transaction will only be contrary to the Code where the lending facilities or other banking services are not provided on standard market terms. A Code-compliant bank providing credit facilities or other services on standard market terms could never the less be a financial enabler or an enabling participant but only if it knows, or could reasonably be expected to know that the provision of those services enabled abusive tax arrangements.

5.8.6 A bank is an enabling participant in a customer's abusive tax arrangements, if all of the following apply:

- it enters into those arrangements or into a transaction that forms part of those arrangements
- those arrangements couldn't have been expected to result in a tax advantage for the customer or another person without the bank's involvement, or the involvement of another person acting in the same capacity
- when that bank entered into the arrangements or transaction, it knew or could reasonably be expected to have known, that what was being entered into was abusive tax arrangements or a transaction forming part of such arrangements

5.8.7 In some situations opening a bank account or making a payment using the banking system could be a part of abusive tax arrangements. In those cases, the bank opening the account or making the payment could be an enabling participant, but only if the knowledge condition is met at the time the bank makes its decision. This is considered further below.

5.8.8 A bank is a financial enabler if at the time the financial product is provided it knew, or could reasonably be expected to have known, that at least one of the purposes of obtaining the financial product was to participate in abusive tax arrangements. Financial products are typically those listed in paragraph 12(3) of schedule 16 FA 2017.

5.8.9 This means it is possible for a bank complying with the Code to be liable to a penalty under the enablers legislation if it enters into arrangements or transactions as an enabling participant or provides a financial product on standard market terms and it knows, or could reasonably be expected to have known, that at least one of the purposes for obtaining the product or other banking service was to participate in abusive tax arrangements.

5.8.10 If a bank knew, or could reasonably have been expected to know, that a product or service would form part of abusive tax arrangements, and those arrangements are defeated, a penalty under the enablers legislation will apply. But HMRC won't usually argue that a bank could reasonably have been expected to know if in complying with its existing commercial, regulatory, tax and Code requirements it did not need to, and did not, perform any tax analysis of the transaction.

5.8.11 The knowledge condition will only be met if the bank knew or could reasonably have been expected to know that it was facilitating abusive tax arrangements at the time it provided the financial product or entered into the arrangement.

5.8.12 A bank that has and follows adequate processes to comply with the Code and its existing tax, regulatory and other legal obligations would not be expected to seek more information from potential and existing customers, unless the existing processes necessitate this.

5.8.13 The bank isn't expected to review tax information it receives unless it's required to do a tax analysis as part of its existing commercial, regulatory, tax and Code requirements. Where the bank does need to review the tax information as part of these requirements, it should also consider whether it could be facilitating abusive tax arrangements. Section 3 provides guidance on what are abusive tax arrangements.

5.8.14 However, there would be no expectation on the bank to insert additional checks or ask further questions to establish whether the purposes for which a relevant product or service is being obtained include its use in abusive tax arrangements, provided, as mentioned, they do have in place and follow adequate processes, taking the necessary care and attention that is required in the performance of their duties.

5.8.15 Example 15

Banks generally require customers to provide documentation to support a credit application, for example to prove their identity and that their income is sufficient to meet payments of interest and repayment of principal. Banks do not always need to consider all the information provided to make a commercial decision or to comply with existing legal requirements. As a result, a bank will not automatically become a financial enabler just because it has received documentation that references a tax benefit that they didn't need to review before providing the credit applied for.

If the bank's staff review the tax information before providing the credit, the bank could be a financial enabler if they identified a potential abusive tax avoidance purpose, but did not act on this. However the bank would not usually be a financial enabler if, having taken account of that information and its knowledge of the client, it still did not know and could not reasonably be expected to have known that at least one of the purposes for obtaining the financial product was to participate in abusive tax arrangements.

5.8.16 More information is available about the Banking Code.

5.9 Interaction with Professional Conduct in Relation to Taxation (PCRT)

5.9.1 The Professional Conduct in Relation to Taxation (PCRT)[1], is produced by 7 leading professional bodies for their members working in tax, and sets out the fundamental principles and behaviour expected of their members.

5.9.2 Section 2 of the PCRT sets out the fundamental principles and standards of behaviour that members are expected to adhere to in their day-to-day professional dealings. Section 4 relates specifically to the provision of tax advice.

5.9.3 On 19 March 2015, HM Treasury and HMRC published a paper Tackling tax evasion and avoidance which laid down a challenge to:

'the regulatory bodies who police professional standards to take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance to protect the reputation of the tax and accountancy profession and to act for the greater public good.'

5.9.4 The PCRT was revised with effect from 1 March 2017. In this latest revision, the signatories have sought to address this particular challenge and clarify the behaviours and standards expected of members when working in tax. In particular, the standards for tax planning arrangements at paragraph 2.29 require that members:

'must not create, encourage or promote tax planning arrangements or structures that i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation'

5.9.5 HMRC will disclose information in relevant cases to the professional regulator under section 20 Part 3 of the Commissioners for Revenue and Customs Act 2005 (CRCA) where it suspects misconduct, including breach of the PCRT, to enable the professional regulator to take the appropriate enforcement action against their member.

~~5.9.6~~ Although the enablers legislation does not exempt a person from being an enabler if they conduct their business in accordance with the PCRT and act wholly within the spirit of the standards for tax planning, it is unlikely that such a person will come within scope of the enablers legislation. Specifically, such persons will already be taking care and consideration to ensure their conduct complies with the PCRT and so should not be advising on, or otherwise facilitating, abusive arrangements.

5.9.7 For instance, the enablers legislation makes provision for circumstances where a person may be required to suggest changes to arrangements on which they are asked to advise (see section 5.2.4), or where they provided advice but could not reasonably be expected to have known that their advice would be used to enable abusive tax arrangements (see section 5.2.5).

5.9.8 More information about the PCRT can be found through the links provided in the footnote to section 1.3.1 of this guidance.

5.10 Power to add categories of enabler and provide exception

5.10.1 Paragraph 14 of Schedule 16 FA (No.2) 2017 enables the Treasury, by regulations, to add to the categories of persons who may be enablers of abusive tax arrangements.

5.10.2 In addition, the Treasury may by regulations provide that a person that would otherwise be an enabler of abusive tax arrangements, is not regarded as an enabler where the conditions that may be prescribed by the regulations are met.

5.10.3 Regulations under paragraph 14 of Schedule 16 FA (No.2) 2017 may:

- amend part 4 of the Schedule
- make supplementary, incidental and consequential provision, amending any other part of the Schedule as appropriate
- make transitional provision

Section 6: Penalty: Amount

6.1 Amount of penalty

6.1.1 Penalty based on relevant consideration

6.1.1.1 A penalty is payable by each person who is an enabler of the abusive tax arrangements that have been defeated. The amount of the penalty in each case is the total amount, or value, of all the relevant consideration, which has either been received by the enabler or is receivable by them.

6.1.1.2 This means the full amount of the consideration received or receivable is included in the calculation of the penalty, with no deduction for any costs incurred by the enabler. However, any VAT that may have been charged by the enabler isn't consideration for these purposes and won't be taken into account in the calculation of the penalty.

6.1.1.3 Example 16

Promoter A contacts a specialist for advice in connection with the design of a proposal for tax arrangements that are later defeated and found to be abusive. Promoter A marketed the arrangements and received consideration totalling £250,000, by way of fees from users of the arrangements. Promoter A paid the specialist adviser a one-off fee of £100,000 for designing the arrangements.

The amount of promoter A's penalty in relation to the defeat of all users is equivalent to the full £250,000 received from those users of the arrangements.

The specialist adviser's penalty is equivalent to the £100,000 fee they received.

6.1.2 Meaning of consideration

6.1.2.1 Consideration isn't separately defined and takes its ordinary meaning. It includes such things as fees, commissions, bonuses or anything else of value that has been received, or is receivable, by the enabler for enabling the defeated tax arrangements.

6.1.2.2 Consideration is receivable even if it has been intentionally or unintentionally deferred or is under an agreement to be paid at a future date. This includes amounts that are contingent on the arrangements ultimately obtaining the intended tax advantage, for example 'no win, no fee'. As the arrangements in question must be defeated before an enabler penalty is determined it will be a question of fact to what extent fees contingent on future events will form part of the consideration received or receivable by an enabler.

6.1.2.3 Consideration is also receivable if it is received by another person, either on behalf of or in place of the enabler. This is explained further at section 6.2.1 of this guidance.

6.1.3 Meaning of relevant consideration

6.1.3.1 Consideration is relevant consideration if both of the following apply:

- the consideration has been received, or is receivable, for enabling abusive tax arrangements
- the same consideration hasn't already been taken into account in the calculation of any other penalty against that person for enabling those defeated abusive tax arrangements

6.1.3.2 **Example 17**

A financial adviser is engaged to market the proposed arrangements in example 16. 50 individuals enter into arrangements to implement the proposal. The financial adviser receives £1,000 for each person that enters into arrangements to implement the proposal.

The specialist adviser doesn't receive any further payment.

The tax arrangements for all 50 users have been defeated by a combination of litigation and follower notices.

The financial adviser is liable to a penalty of £50,000; £1,000 for each person to whom they marketed the proposal.

The specialist hasn't received any further consideration, so is liable only to the penalty already mentioned in the previous example, £100,000.

6.2 Consideration

6.2.1 Paid to another person

6.2.1.1 Paragraph 16 of Schedule 16 FA (No.2) 2017 explains that if consideration for enabling abusive tax arrangements which are defeated is paid or payable to another person under an arrangement with the enabler, it is treated as received or receivable by the enabler for the purposes of calculating the amount of the penalty.

6.2.1.2 **Example 18**

Fees of £250,000 are payable to Promoter A in relation to promoting abusive tax arrangements which are defeated. Promoter A enters into an arrangement with an associate who resides outside the UK, whereby the associate will receive £200,000 of those fees.

The amount of penalty payable by Promoter A in relation to all of the defeated arrangements is £250,000, not just the £50,000 that they received directly.

6.2.2 Apportioned on a just and reasonable basis

6.2.2.1 It may not always be possible to clearly identify the fee element that relates specifically to enabling the abusive tax arrangements. This might be the case where an enabler receives one fee that covers various transactions. Paragraph 16(4) of Schedule 16 FA (No.2) 2017 provides that in such circumstances, consideration is apportioned on a just and reasonable basis.

6.2.2.2 **Example 19**

Adviser 1 is engaged by a company to advise it in relation to an internal group reorganisation. In addition, the adviser is asked to give advice on how it can minimise a charge to Annual Tax on Enveloped Dwellings (ATED) in relation to a UK residential property it owns. Adviser 1 does the following:

(a) provides advice in relation to the group reorganisation
(b) designs arrangements to avoid or mitigate the ATED as part of the overall reorganisation. Those arrangements are later found to be abusive tax arrangements and are defeated

Adviser 1 receives a fee of £1m in respect of its engagement. This fee will need to be apportioned on a just and reasonable basis between the advice at (a) and the enabling at (b).

6.2.2.3 Similarly, paragraph 16(5) of Schedule 16 FA (No.2) 2017 applies if a person has, in substance, provided services which enable abusive tax arrangements which are defeated, but claims a variety of matters in addition to the enabling activities, for example, drafting documentation or providing company formation services. The fees received or receivable for the services relating to enabling the defeated arrangements are taken into account when calculating the penalty. This is the case even if the fee is received over a series of transactions.

6.3 Interaction with other penalties

6.3.1 Paragraph 17 of Schedule 16 FA (No.2) 2017 provides that a penalty under the enablers legislation is to be reduced by the amount of any other penalty incurred by the enabler in relation to the same activity that gives rise to a penalty under the enablers legislation. For instance, it is possible for a person to be an enabler of abusive tax arrangements that were defeated, and for the defeat of those arrangements to be within scope of the 'penalties for enablers of offshore evasion or non-compliance' legislation in Schedule 20 FA 2016. In such circumstances, paragraph 17 would apply.

6.3.2 However, for paragraph 17 of Schedule 16 FA (No.2) 2017 to apply, the other penalty mustn't be a penalty under the enablers legislation at Schedule 16, and must have been assessed, even if not yet payable or paid.

6.3.3 Similarly, paragraph 52 Schedule 16 FA (No.2) 2017 states that a person won't be liable to a penalty under the enablers legislation if they have already been convicted of an offence in relation to the same activity.

6.4 Mitigation of penalty

6.4.1 Paragraph 18 of Schedule 16 FA (No.2) 2017 allows HMRC to apply its discretion to reduce a penalty under the enablers legislation, which includes being able to entirely remit the penalty, or to stay or agree a compromise in relation to proceedings for the recovery of that penalty. HMRC will only consider applying its discretion to reduce a penalty in exceptional circumstances.

Section 7: Penalty: Assessment

7.1 Assessment of penalty

7.1.1 Overview

7.1.1.1 Paragraph 19(1) of Schedule 16 FA (No.2) 2017 sets out the procedure for assessing a penalty under the enablers legislation.

7.1.1.2 Once a person's use of abusive tax arrangements has been defeated and the other procedural requirements of the enablers legislation have been met, HMRC must assess each enabler that is liable for a penalty under the enablers legislation and notify them that a penalty has been assessed.

7.1.2 Limitations on when the penalty may be assessed

7.1.2.1 A penalty can't be assessed if either of the following circumstances apply:

- an opinion of the GAAR Advisory Panel hasn't been obtained in respect of the defeated arrangements or arrangements equivalent to the defeated arrangements which were enabled (see section 8)
- HMRC is out of time to assess the penalty (see section 7.3)

7.1.2.2 There is a special provision for determining when penalties can be assessed if a proposal for tax arrangements, or a scheme, has been implemented more than once so that there are multiple users of that scheme. See section 7.2 below.

7.1.3 When HMRC may assess the penalty on the basis of a reasonable estimate

7.1.3.1 If, having taken all reasonable steps to obtain information, HMRC is unable to determine the amount or value of the consideration received or receivable, HMRC may assess a penalty under the enablers legislation on the basis of a reasonable estimate of that consideration.

7.1.4 Payment date

7.1.4.1 Once a penalty under the enablers legislation has been assessed, it must be paid within 30 days beginning with the day on which the notification of the penalty is issued, unless the enabler appeals the penalty (see section 9.2 below).

7.1.4.2 An assessment to a penalty under the enablers legislation is treated in the same way as an assessment to tax for procedural purposes and therefore can be enforced as if it were an assessment to tax.

7.2 Penalty assessment where there are multiple users

7.2.1 If there are multiple users of a proposal for a particular arrangement, a special provision applies for the assessment of a penalty under the enablers legislation.

7.2.2 Paragraph 21 of Schedule 16 FA (No.2) 2017 sets out that where a proposal for arrangements is implemented more than once, by a number of tax arrangements which are related arrangements, HMRC mustn't assess a penalty on any enabler in respect of a defeat of any of those related arrangements until the required percentage of relevant defeats has been reached.

7.2.3 'Related arrangements' are arrangements that are substantially the same as each other and which implement the same proposal for arrangements.

7.2.4 The meaning of defeat is explained at section 4 above.

7.2.5 The 'required percentage of relevant defeats' is reached when HMRC reasonably believes that more than 50% of the users of the related arrangements known to HMRC at the time the required percentage is reached, have been defeated.

7.2.6 However, an enabler who is liable to a penalty can request that the penalty is assessed before the required 50% is reached.

7.2.7 **Example 20**

A promoter designed a proposal for arrangements. A number of Financial Advisers marketed the proposal for the promoter, which has been sold to, and implemented by, a total of 100 individuals. Although each user's arrangements are unique to their circumstances, they're all substantially the same because they implement the same proposal for arrangements. They are therefore related arrangements (scheme).

HMRC has defeated 25 of the 100 who implemented the proposal and obtained a GAAR Advisory Panel opinion that they don't consider the carrying out of the tax arrangements or equivalent tax arrangements was a reasonable course of action in relation to the relevant tax provisions. The remaining 75 users have appealed and the Upper Tribunal is due to hear the lead case.

Although HMRC is yet to defeat more than 50% of the known users of the related arrangements, one of the Financial Advisers, who sold the scheme to 10 people, all of whom are in the current 25 defeats, concedes that he has enabled abusive tax arrangements and that he is liable for penalties under the enablers legislation in relation to the 10 people he enabled. He requests that HMRC assess him on the 10 penalties to enable him to finalise his involvement with those defeated arrangements.

HMRC can assess those penalties but only as the request came from the enabler. Otherwise HMRC wouldn't be able to assess the 10 penalties on that enabler until at least 51 users of the scheme had been defeated.

7.3 Time limit for assessing penalty

7.3.1 Normal time limit: GAAR Advisory Panel opinion

7.3.1.1 Before a penalty under the enablers legislation can be assessed, a designated HMRC officer must obtain an opinion of the GAAR Advisory Panel in respect of the defeated arrangements or equivalent arrangements (see section 8) after which the penalty must be assessed within the relevant time.

7.3.1.2 The relevant time is the end of the 12 months beginning with the date as set out in the following circumstances:

- where a GAAR Advisory Panel opinion or opinions have already been obtained under the GAAR legislation, and a final decision notice within the meaning of paragraph 24(1) of Schedule 16 FA (No.2) 2017 has been given to the user in relation to the arrangements to which the penalty relates (see section 8.1.2.3), the date on which the user of the arrangements is defeated

- where a notice under paragraph 25 of Schedule 16 FA (No.2) 2017(see section 8.3.4.1) has been given by HMRC to the enabler advising that the defeated arrangements they enabled are equivalent to arrangements in respect of which a GAAR Advisory Panel opinion has been obtained under the GAAR legislation , the end of the time allowed for making representations in respect of that notice (see section 8.3.4.1)
- where there has been a referral to the GAAR Advisory Panel under paragraph 26 of Schedule 16 FA (No.2) 2017 (see section 8.6.1) in relation to the defeated arrangements which the enabler enabled but a notice under paragraph 35 of Schedule 16 FA (No.2) 2017 (see section 8.5.1), has not been given to the enabler in relation to those arrangements, the date on which the GAAR Advisory Panel Opinion is given in relation to the enabled arrangements
- where there has been a referral to the GAAR Advisory Panel under paragraph 26 of Schedule 16 FA (No.2) 2017 of either of the following:
    - the enabled tax arrangements, but the enabler has not received a notice under paragraph 28 of Schedule 16 FA (No.2) 2017 (see section 8.7)
    - tax arrangements which are equivalent to the enabled arrangements

  and a notice has been issued to the enabler of the enabled arrangements under paragraph 35 of Schedule 16 FA (No.2) 2017, the end of the time allowed for making representations in respect of that notice (see section 8.5.2)

7.3.2 Change to normal time limit: multiple users of the same proposal

7.3.2.1 Where the same proposal for abusive tax arrangements is implemented more than once (multiple users of related arrangements) HMRC mustn't assess any enabler penalty until more than 50% of the known users of that proposal have been defeated. In such circumstances the relevant time for assessing a penalty on any enabler is the later of the:

- relevant time as set out at paragraph 22(2) of Schedule 16 FA (No.2) 2017 (see section7.3.1 above)
- end of the 12 months beginning with the date on which the required percentage is reached (see section 7.2)

7.3.2.2 However, if an enabler requests that their penalty is assessed before the required percentage is reached, the relevant time is the later of the:

- relevant time as set out at paragraph 22(2) of Schedule 16 FA (No.2) 2017 (see section7.3.1 above)
- end of the 12 months beginning with the date on which the request is made

7.3.3 Change to normal time limits: incorrect declaration under paragraph 44 of Schedule 16 FA (No.2) 2017

7.3.3.1 Section 11 of this guidance explains the circumstances in which a relevant lawyer can make a declaration under paragraph 44 of Schedule 16 FA (No.2) 2017 that the person in relation to whom the declaration is being made is not an enabler and therefore not in scope for a penalty under the enablers legislation.

7.3.3.2 If, following the making of such a declaration, facts come to light that in the Commissioners' opinion are sufficient to indicate that the declaration contained a material inaccuracy, the relevant time for assessing a penalty on the person under the enablers legislation, in respect

of any defeated arrangements in relation to which the incorrect declaration was made, is the later of the:

- relevant time as set out at either paragraphs 22(2),(3) or(4) of Schedule 16 FA (No.2) 2017 (see section 7.3.1 and section 7.3.2 above)
- end of the 12 months beginning with the date on which the facts indicating that an incorrect declaration was made came to the Commissioners' knowledge.

Section 8: Referral to GAAR Advisory Panel

8.1 Overview

8.1.1 Background to the GAAR and the GAAR Advisory Panel

8.1.1.1 The GAAR was introduced by Finance Act 2013 and applies to arrangements entered into on or after 17 July 2013. For NICs, the GAAR applies to arrangements entered into on or after 13 March 2014. The GAAR broadly follows the recommendations of Graham Aaronson QC's study group. An important recommendation was the use of an independent GAAR Advisory Panel to provide independent opinions on all cases before any counteraction could be made by HMRC under the GAAR.

8.1.1.2 The GAAR Advisory Panel is a committee established by the Commissioners for the purposes of the GAAR and is led by a Chair, also appointed by the Commissioners. All Panel members are completely independent of HMRC and so also provide an independent view.

8.1.1.3 This section of the guidance should be read in conjunction with parts A – C, part D and part E of the GAAR guidance current at the time the arrangements are entered into. The GAAR guidance provides detailed information about the GAAR, the GAAR Advisory Panel and the GAAR Advisory Panel procedure. Parts A – D of the GAAR guidance have been approved by the GAAR Advisory Panel.

8.1.2 Meaning of key terms used in this section

8.1.2.1 Paragraph 56(1) of Schedule 16 FA (No.2) 2017 provides the meaning of a designated HMRC officer (abbreviated in section 8 of this guidance to designated officer) as an officer of Revenue and Customs who has been designated by the Commissioners for the purposes of Schedule 16 FA (No.2) 2017.

8.1.2.2 HMRC mustn't assess a penalty under the enablers legislation unless a designated officer has considered the relevant GAAR Advisory Panel opinion and has decided to assess a penalty.

8.1.2.3 Paragraph 24(1) of Schedule 16 FA (No.2) 2017 provides the meaning of a GAAR final decision notice as a notice given to the user of tax arrangements under:

- paragraph 12 of Schedule 43 FA 2013 – notice of final decision (see section E3.14 of the GAAR guidance), after considering the opinion of the GAAR Advisory Panel on a referral to the Panel under Schedule 43 FA 2013
- paragraph 8 or 9 of Schedule 43A FA 2013 – notice of final decision where a pooling notice or notice of binding has been given (see section E3.20 of the GAAR guidance), after considering the opinion of the GAAR Advisory Panel in relation to tax arrangements in the pool referred to the Panel under Schedule 43A FA 2013
- paragraph 8 of Schedule 43B FA 2013 – notice of final decision in respect of tax arrangements (see section E3.23 of the GAAR guidance), after considering the opinion of the GAAR Advisory Panel on a generic referral to the Panel of pooled tax arrangements under Schedule 43B FA 2013

8.1.2.4 Paragraph 24(3) of Schedule 16 FA (No.2) 2017 explains when arrangements are equivalent**.** Arrangements are equivalent to other arrangements if they're substantially the same as each other having regard to all of the following:

- their substantive results or intended substantive results

- the means of achieving those results
- the characteristics on the basis of which it could reasonably be argued, in each case, that the arrangements are abusive tax arrangements

8.1.2.5 'Relevant arrangements' means arrangements in relation to which a penalty under the enablers legislation could apply.

8.1.2.6 In this section, reference to 'a report prepared by HMRC of the GAAR Advisory Panel's opinion…' means either the published anonymised version of the opinion itself, or, exceptionally, where the opinion isn't published, a sub-panel approved anonymised report of the opinion. Such a report would include all the salient points of the opinion.

8.1.3 Role of the GAAR Advisory Panel

8.1.3.1 One of the main roles of the GAAR Advisory Panel is to provide an independent view of tax arrangements that are referred to them by HMRC. They do this by providing an opinion, or opinions, on the question of whether the entering into and carrying out of the tax arrangements is a reasonable course of action in relation to the relevant tax provisions having regard to all the circumstances.

8.1.3.2 When a case is referred to the GAAR Advisory Panel, the Chair will select a suitably experienced 3 member Panel to form a sub-panel to provide an opinion or opinions. The sub-panel can produce one joint opinion, or, if the 3 members can't agree, it can provide 2 or 3 different opinions. In this guidance, any reference to a GAAR Advisory Panel 'opinion' includes GAAR Advisory Panel opinions.

8.1.3.3 The GAAR Advisory Panel will also provide this role in relation to a penalty under the enablers legislation. If a GAAR Advisory Panel opinion has already been obtained under Schedules 43 or 43B FA 2013 in relation to the tax arrangements or equivalent arrangements which have now been defeated, then no further referral is needed to the Panel for the purposes of the penalty under the enablers legislation.

8.1.3.4 If no such opinion has been obtained then a referral of particular defeated arrangements must be made to the GAAR Advisory Panel in accordance with paragraph 26 of Schedule 16 FA (No.2) 2017. The resulting GAAR Advisory Panel opinion isn't binding on HMRC or the enabler, but must be taken into account in determining whether those arrangements or any equivalent tax arrangements are abusive for the purposes of the enablers legislation. As is the case for the GAAR, a referral under the enablers legislation requires the Panel to opine on whether the entering into and carrying out of the tax arrangements is a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances.

8.1.3.5 An important point to note is that, as with the GAAR, the GAAR Advisory Panel doesn't perform a judicial function and their process does not involve formal hearings where cases will be presented and heard. The Panel deliver an opinion, not a judicial decision. There is no right of appeal against the Panel's opinion.

8.1.3.6 However, if an enabler disagrees with HMRC's decision to assess a penalty under the enablers legislation, they may appeal (see section 9).

8.1.3.7 In the event of an appeal against a penalty, the GAAR Advisory Panel's opinion isn't binding on the tribunal or courts, although paragraph 36 of Schedule 16 FA (No.2) 2017 requires them to take the opinion into account during the penalty proceedings. This is explained further at section 8.13 below.

8.2 Requirement for opinion of GAAR Advisory Panel

8.2.1 Before HMRC is able to assess a penalty under the enablers legislation they must obtain and consider an opinion from the GAAR Advisory Panel in relation to the defeated arrangements, or arrangements that are equivalent to the defeated arrangements. A GAAR Advisory Panel opinion may be obtained for these purposes through a referral under either Schedule 43 or 43B FA 2013 in relation to a taxpayer's use of the arrangements, or Part 7 of Schedule 16 FA (No.2) 2017.

8.2.2 Part 7 explains the circumstances in which a referral under the enablers legislation is required and also outlines the procedure that must be followed when HMRC intends to either:

- rely on an opinion of the GAAR Advisory Panel that has been obtained under either Schedule 43 or 43B of FA 2013 in relation to the defeated arrangements or arrangements which are equivalent to the defeated arrangements
- under Part 7 of Schedule 16 FA (No.2) 2017, apply an opinion of the GAAR Advisory Panel that has already been obtained to the defeated arrangements. Such an opinion must be in relation to arrangements which are equivalent to the defeated arrangements

8.2.3 Part 7 of Schedule 16 FA (No.2) 2017 recognises that arrangements that have been defeated by HMRC will have first been subject to a tax enquiry in respect of the arrangements entered into by the taxpayer. Where a GAAR Advisory Panel opinion that relates to the defeated arrangements – or arrangements equivalent to the defeated arrangements – has already been obtained under Schedule 43 or 43B FA 2013, there is no need for another referral to the GAAR Advisory Panel to be made for the purposes of a penalty under the enablers legislation. This is because the GAAR Advisory Panel will already have considered whether the arrangements (or equivalent arrangements) are a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances.

8.2.4 If a GAAR Advisory Panel opinion has been obtained under the GAAR legislation in relation to the defeated arrangements or equivalent arrangements, then HMRC may have issued a GAAR final decision notice (see section 8.3.1) to the user of the arrangements which were referred to the Panel and may also have issued a GAAR final notice to users of equivalent tax arrangements.

8.2.5 Where a GAAR final decision notice (see section 8.3.1) has been given after considering an opinion of the GAAR Advisory Panel obtained under the GAAR legislation in relation to the defeated arrangements or equivalent arrangements (see section 8.3.2 and 8.3.3), the enablers legislation states that:

- in the case of defeated arrangements - the GAAR Advisory Panel opinion to which the notice relates must be taken into consideration by the designated officer for the purposes of deciding whether to assess a penalty under the enablers legislation

- in the case of arrangements equivalent to the defeated arrangements - a notice under paragraph 25 of Schedule 16 FA (No.2) 2017 (see section 8.3.4.1) must have been given to the enabler before a penalty under the enablers legislation can be assessed and the enabler given an opportunity to make representations which, where made, must have been taken into account by the designated officer before the penalty can be assessed

8.3 Opinion given by GAAR Advisory Panel under GAAR legislation in relation to the relevant or equivalent arrangements

8.3.1 GAAR final decision notice

8.3.1.1 The arrangements to which a penalty under the enablers legislation relates are referred to as 'relevant arrangements'.

8.3.1.2 Paragraph 23(2) of Schedule 16 FA (No.2) 2017 states that a penalty under the enablers legislation may be assessed if a GAAR final decision notice has been given under Schedule 43, 43A or 43B FA 2013 in relation to either:

- the relevant arrangements
- arrangements that are equivalent (see section 8.1.2.3) to the relevant arrangements

8.3.2 GAAR opinion given in relation to the relevant arrangements

8.3.2.1 Where a GAAR final decision notice has been given in relation to the relevant arrangements, a designated officer must consider the GAAR Advisory Panel opinion in respect of which the decision notice was given before deciding whether to assess a penalty under the enablers legislation on any enabler of the relevant arrangements.

8.3.2.2 If a designated officer decides to assess penalties on any enabler of the relevant arrangements then, under paragraph 23(4) of Schedule 16 FA (No.2) 2017, the notification of the penalty must be accompanied by a report prepared by HMRC of the GAAR Advisory Panel's opinion in respect of the relevant arrangements.

8.3.3 GAAR opinion given in relation to arrangements that are equivalent to relevant arrangements

8.3.3.1 Where a GAAR final decision notice has been given in relation to arrangements that are equivalent to the relevant arrangements, the designated officer must take account of the opinion in relation to the equivalent arrangements before deciding whether to assess a penalty under the enablers legislation.

8.3.3.2 If the designated officer decides to assess penalties on any enabler of the relevant arrangements, the enabler will have an opportunity to make representations, which the designated officer must consider before deciding whether to assess the penalty, and must then notify the enabler, whether or not the penalty will still be assessed in light of the representations.

8.3.4 Notice where GAAR Advisory Panel opinion obtained in relation to equivalent arrangements but no GAAR final decision notice given

8.3.4.1 Paragraph 25 of Schedule 16 FA (No.2) 2017 sets out the procedure that must be followed before a penalty under the enablers legislation can be assessed for arrangements that have not been given a GAAR final decision notice, but an opinion of the GAAR Advisory Panel has been obtained in relation to arrangements equivalent to the defeated arrangements. If, after considering such an opinion in relation to the relevant arrangements, the designated officer is of the view that:

- a person is liable to a penalty in relation to the relevant arrangements
- no GAAR final decision notice has been given in relation to the relevant arrangements
- the relevant arrangements are equivalent to arrangements in respect of which a GAAR Advisory Panel opinion has been obtained
- that opinion can apply to the relevant arrangements

then a designated officer must give that person a notice in writing that:

- explains that the designated officer is of the view that paragraph 25 applies
- specifies the relevant arrangements
- describes the material characteristics of the equivalent arrangements in relation to which the opinion of the GAAR Advisory Panel was obtained
- includes a report prepared by HMRC of the GAAR Advisory Panel's opinion, in relation to the equivalent arrangements
- explains that a person who has been given the notice has 30 days, beginning with the day on which the notice is given, to send any written representations to the designated officer as to why the relevant arrangements are not equivalent to the arrangements in respect of which the opinion of the GAAR Advisory Panel was obtained
- explains that a designated officer may extend the period in which that person can make representations, if the person who has been given a notice makes a written request for an extension. An extension will only be granted in exceptional circumstances for a period the designated officer considers is appropriate in the circumstances

8.4 Referral of relevant arrangements or equivalent arrangements to the GAAR Advisory Panel under the enablers legislation

8.4.1 Paragraph 23(3) of Schedule 16 FA (No.2) 2017 explains that a GAAR Advisory Panel opinion that has been obtained under Paragraph 26 of Schedule 16 FA (No.2) 2017 (see section 8.6.1) can be applied to the relevant arrangements where either of the following apply:

- the opinion is in relation to the relevant arrangements
- the opinion is in relation to arrangements that are equivalent to the relevant arrangements, and the conditions of paragraph 35 of Schedule 16 FA (no. 2) 2017 have been met

8.4.2 Again, if the designated officer decides to assess penalties on any enabler of the relevant arrangements, the enabler will have an opportunity to make representations, which the designated officer must consider before deciding whether to assess the penalty, and must

then notify the enabler, whether or not the penalty will still be assessed in light of the representations.

8.5 Notice where GAAR Advisory Panel opinion under the enablers legislation is in relation to arrangements which are equivalent to the relevant arrangements

8.5.1 Paragraph 35 of Schedule 16 FA (No.2) 2017 applies where:

- an opinion of the GAAR Advisory Panel has been given on a referral under paragraph 26 of Schedule 16 FA (No.2) 2017 (see section 8.6)
- a designated officer is of the view that a person is liable to a penalty in relation to relevant arrangements that are equivalent to the arrangements to which the opinion of the GAAR Advisory Panel applies
- that person isn't a person who has been given a notice under paragraph 28 of Schedule 16 FA (No.2) 2017 in connection with the referral. This means that the person who must receive a notice under paragraph 35 is either:
    - an enabler of defeated tax arrangements that are equivalent to arrangements referred to the GAAR Advisory Panel
    - an enabler in relation to the arrangements referred, but HMRC did not become aware of the fact that the person was an enabler until after the referral had been made and who therefore did not receive a notice under paragraph 28 of Schedule 16 FA (No.2) 2017

8.5.2 Before a designated officer can assess a penalty under the enablers legislation on any such person the designated officer must give that person a written notice under paragraph 35 of Schedule 16 FA (No.2) 2017 that covers all of the following:

- explains that the officer is of the view that paragraph 35 applies
- specifies the defeated tax arrangements enabled by that person
- provides a report prepared by HMRC setting out the relevant opinion of the GAAR Advisory Panel
- explains that the person has 30 days, beginning with the day on which the notice is given, to send the designated officer any written representations as to why the arrangements to which opinion relates are not equivalent to the arrangements concerned
- a designated officer may extend the period in which that person can make representations, if the person who has been given a notice makes a written request for an extension. An extension will only be granted in exceptional circumstances for a period the designated officer considers is appropriate in the circumstances

8.6 Referral to GAAR Advisory Panel under the enablers legislation

8.6.1 A referral to the GAAR Advisory Panel of particular defeated tax arrangements can be made under paragraph 26 of Schedule 16 FA (No.2) 2017 if all the following conditions are satisfied:

- a designated officer considers that a person is liable to a penalty under the enablers legislation in respect of those defeated tax arrangements
- no opinion of the GAAR Advisory Panel has been obtained under the GAAR legislation in relation to those arrangements or arrangements that are equivalent to those arrangements

- the procedures in paragraph 28 of Schedule 16 FA (No.2) 2017 have been complied with (see section 8.7.3)

8.6.2 A referral to the GAAR Advisory Panel can only be made by a designated officer. The referral is made on the question of whether the entering into and carrying out of the tax arrangements described in the referral statement (see section 8.6.3) is a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances.

8.6.3 The referral statement must include a general statement of the material characteristics of the arrangements in question and meet all of the following requirements:

- contain a factual description of the arrangements in question
- set out HMRC's view as to whether those arrangements are in accordance with the established practice at the time those arrangements were entered into
- explain why the designated officer is of the view that a tax advantage described in the statement and arising from tax arrangements with the characteristics described in the statement would be a tax advantage arising from abusive tax arrangements for the purposes of Schedule 16 FA (No.2) 2017
- set out any matters the designated officer is aware of which may suggest any view of HMRC or the designated officer expressed in the statement isn't correct
- set out any other matters which the designated officer considers are required so that the GAAR Advisory Panel's functions can be carried out under paragraphs 33 and 34 of Schedule 16 FA (No.2) 2017 (see section 8.12)

The referral statement will also have regard to the information the GAAR Advisory Panel has indicated that they will require from HMRC, as set out in the GAAR Advisory Panel's procedures for dealing with referred cases.

8.7 Notice before decision whether to refer

8.7.1 A referral of the arrangements in question to the GAAR Advisory Panel must not be made under paragraph 26 of Schedule 16 FA (No.2) 2017 unless all of the following apply:

- a designated officer has given each relevant person a notice under paragraph 28 of Schedule 16 FA (No.2) 2017
- for each relevant person, the time for making representations has expired
- before deciding to make a referral, a designated officer has considered all representations that have been made by relevant persons within the time allowed and remains of the view that a referral should be made

8.7.2 A relevant person is any person who, at the time of the referral, a designated officer considers is liable to a penalty under the enablers legislation in relation to the arrangements in question. Where defeated arrangements have been enabled by more than one person, HMRC will notify each enabler of those defeated arrangements that they are aware of at the time of making the referral.

8.7.3 A notice given to a person under paragraph 28 of Schedule 16 FA (No.2) 2017 must be in writing and explain all of the following:

- that the designated officer considers that the person is liable to a penalty under the enablers legislation in relation to the arrangements in question

- why the designated officer considers those arrangements to be abusive tax arrangements for the purposes of Schedule 16 FA (No.2) 2017
- that HMRC is proposing to make a referral under paragraph 26 of Schedule 16 FA (No.2) 2017 on the question of whether the entering into and carrying out of tax arrangements that have the characteristics of the arrangements in question is a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances
- that that person has 45 days, beginning with the day on which the notice is given to that person, to send written representations to the designated officer in response to the notice
- that a designated officer may extend the period in which that person can make representations, if the person who has been given a notice makes a written request for an extension. An extension will only be granted in exceptional circumstances for a period the designated officer considers is appropriate in the circumstances

8.8 Notice of decision whether to refer

8.8.1 If a designated officer decides to make a referral under paragraph 26 of Schedule 16 FA (No.2) 2017, paragraph 29 of Schedule 16 FA (No.2) 2017 requires the designated officer, as soon as reasonably practicable, to give written notice of that decision to each person who was given a notice under paragraph 28 of Schedule 16 FA (No.2) 2017. This will be each enabler that enabled the defeated arrangements that HMRC is aware of at the time of the referral.

8.9 Information to accompany referral

8.9.1 A referral under paragraph 26 of Schedule 16 FA (No.2) 2017 must be accompanied by the referral statement under paragraph 27 of Schedule 16 FA (No.2) 2017 (see section 8.6.3) and all of the following:

- a declaration that as far as HMRC is aware, nothing material to the GAAR Advisory Panel's consideration has been omitted from that statement
- a copy of each notice that has been given by HMRC in relation to the referral to a relevant person, under paragraph 28 of Schedule 16 FA (No.2) 2017
- a copy of any representations received under paragraph 28 of Schedule 16 FA (No.2) 2017 together with any comments HMRC has in respect of those representations
- a copy of each notice given on the making of a referral under paragraph 31 of Schedule 16 FA (No.2) 2017 (see section 8.10)

8.10 Notice on making of referral

8.10.1 At the same time as making a referral under paragraph 26 of Schedule 16 FA (No.2) 2017, a designated officer must give each relevant person a notice in writing which:

- notifies that person of the referral
- is accompanied by a copy of the referral statement
- is accompanied by a copy of any comments provided to the GAAR Advisory Panel in respect of representations made by that person only under paragraph 28 of Schedule 16 FA (No.2) 2017
- notifies that person of the period for making representations to the GAAR Advisory Panel under paragraph 32 of Schedule 16 FA (No.2) 2017 (see section 8.11 below)

- notifies that person of the requirement to send a copy of any representations made by that person to the GAAR Advisory Panel, to the designated officer

8.11 Right to make representations to GAAR Advisory Panel

8.11.1 This is explained in section E3.12, part E of the GAAR guidance.

8.11.2 Once a referral has been made to the GAAR Advisory Panel under paragraph 26 of Schedule 16 FA (No.2) 2017, a person who has received a notice of the referral under paragraph 31 of Schedule 16 FA (No.2) 2017 can send the GAAR Advisory Panel written representations. A person has 21 days, beginning with the day on which that notice is given, to make representations. The representations can be about the notice given to the person under paragraph 28 of Schedule 16 FA (No.2) 2017 or about any comments provided to the GAAR Advisory Panel by HMRC under paragraph 30 of Schedule 16 FA (No.2) 2017 in respect of the representations made by that person.

8.11.3 The GAAR Advisory Panel may extend the period in which a person can make representations, if the person makes a written request for an extension.

8.11.4 A copy of any representations that a relevant person sends to the GAAR Advisory Panel must be sent to the designated officer at the same time.

8.11.5 If a relevant person sends representations to the GAAR Advisory Panel under paragraph 32 of Schedule 16 FA (No.2) 2017 but did not make any representations to HMRC under paragraph 28 of Schedule 16 FA (No.2) 2017, a designated officer may provide the GAAR Advisory Panel with comments on those representations, providing a copy of any such comments to that person at the same time.

8.12 Opinion of GAAR Advisory Panel and opinion notices

8.12.1 This is explained in section E3.13, part E of the GAAR guidance

8.12.2 When a referral is made to the GAAR Advisory Panel under paragraph 26 of Schedule 16 FA (No.2) 2017, the Chair of the Panel must arrange for a sub-panel consisting of 3 members (one of whom may be the Chair) to consider the referral.

8.12.3 The sub-panel may invite both the designated officer and any relevant person who was given a notice under paragraph 28 of Schedule 16 FA (No.2) 2017 to supply further information to the sub-panel within the period the sub-panel specifies in the invitation. There is no obligation on either any relevant person or the designated officer to supply any further information, although it will help inform the sub-panel's opinion if it is provided.

8.12.4 An invitation to a person to provide information to the sub-panel must explain that if the person provides information to the sub-panel, they must provide it to the designated officer at the same time.

8.12.5 Equally, an invitation to the designated officer must explain that if the designated officer provides information to the sub-panel, the designated officer must provide this information to each person who has been given a notice under paragraph 28 of Schedule 16 FA (No.2) 2017 at the same time.

8.12.6 After the sub-panel has considered the referral, they must produce an opinion notice stating the joint opinion of all the members of the sub-panel. Alternatively, they can produce 2 or 3 opinion notices which taken together state the opinions of all the members.

8.12.7 A copy of the opinion notice or notices must then be given to the designated officer.

8.12.8 It is expected that in most cases, shortly after each opinion is given, an anonymised version of the opinion which has been approved by the sub-panel will be published by HMRC. HMRC will give very careful consideration to the form in which opinions are published to ensure that confidentiality is protected; and it may be necessary to withhold publication in some instances if it isn't possible to publish the opinion in a form that ensures that confidentiality is maintained.

8.12.9 An opinion notice is a notice which states the opinion of either all or one or more of the members of the sub-panel, and the reason for that opinion. The opinion could be any of the following:

- the entering into and carrying out of the tax arrangements described in the referral statement is a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances
- the entering into or carrying out of such tax arrangements isn't a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances
- on the information available, it isn't possible to reach a view on the matter

8.12.10 Before forming their opinion, members of the sub-panel must have regard to all the matters set out in the referral statement and to the matters in paragraphs 3(3)(a) to (c) and 3(4) of Schedule 16 FA (No.2) 2017. They must also take account of paragraphs 3(5) to (7) of Schedule 16 FA (No.2) 2017 (see section 3 above).

8.12.11 For the purposes of giving an opinion under paragraph 34 of Schedule 16 FA (No.2) 2017, the arrangements are assumed to be tax arrangements.

8.12.12 An opinion of the GAAR Advisory Panel on a referral under paragraph 26 of Schedule 16 FA (No.2) 2017 is to be treated as having been given when an opinion notice or notices has been given under paragraph 34 of Schedule 16 FA (No.2) 2017 in respect of the referral.

8.12.13 Any requirement to consider the opinion of the GAAR Advisory Panel given on a referral under paragraph 26 of Schedule 16 FA (No.2) 2017 is a requirement to consider the contents of the opinion notice or, if more than one, all the opinion notices, given on the referral.

8.13 Requirement for court or tribunal to take the GAAR Advisory Panel opinion into account

8.13.1 When a court or tribunal is hearing proceedings in relation to a penalty under the enablers legislation and is considering whether the tax arrangements in question are abusive, they must take account of the relevant Panel opinion. The relevant Panel opinion is the opinion of the GAAR Advisory Panel that the designated officer was required to consider before deciding whether or not to assess the penalty.

8.13.2 The court or tribunal may also take account of any guidance, statements, or other material in the public domain at the time the arrangements were entered into and evidence of established practice at that time in determining whether the enabled defeated tax arrangements were abusive. It may do so whether or not such material would be admissible in court proceedings under the normal rules of evidence. Such material would cover anything relevant that was in the public domain at the time the arrangements were entered into.

8.13.3 There is no limit to the nature of this material, provided only that it is relevant. Accordingly it may be official (for example HMRC, ministerial or Parliamentary) or non-official (for example text books, articles in professional journals, correspondence with representative bodies of the various professions etc.).

8.13.4 The tribunal or court can decide what weight, if any, to give to such material.

Section 9: Appeals

9.1 Grounds for appeal

9.1.1 Paragraphs 37 to 39 of Schedule 16 FA (No.2) 2017 set out the right of appeal against an assessment of a penalty under the enablers legislation.

9.1.2 There are 2 grounds for appeal. A person may appeal against a decision of HMRC on either or both of the following grounds:

- a penalty isn't payable by that person
- the amount of the penalty specified in the assessment is incorrect

9.1.3 An appeal against the assessment of a penalty under the enablers legislation is treated in the same way as an appeal against an assessment to the underlying tax in relation to which the abusive tax arrangements that have been defeated sought to obtain an advantage. This means that where appropriate, the person can bring the appeal by notice to HMRC, ask HMRC for a review of its decision to assess the penalty and request that the appeal is determined by the First-tier or Upper Tribunal.

9.2 Penalty not payable until appeal is determined

9.2.1 If a person appeals against the assessment of a penalty under the enablers legislation, they are not required to pay the penalty until the appeal is finally determined.

9.3 Notification to Tribunal

9.3.1 A person can request that their appeal is determined by the Tribunal.

9.3.2 If the person notifies the Tribunal of an appeal against HMRC's decision that a penalty under the enablers legislation is payable, the Tribunal may affirm or cancel HMRC's decision.

9.3.3 If the person notifies the Tribunal of an appeal against HMRC's decision about the amount of a penalty under the enablers legislation, the Tribunal may affirm HMRC's decision or make another decision that HMRC had the power to make. This includes applying the discretion HMRC has to reduce the penalty under paragraph 18 of Schedule 16 FA (No.2) 2017.

9.4 HMRC mitigation available to Tribunal

9.4.1 The Tribunal may rely on paragraph 18 of Schedule 16 FA (No.2) 2017 (HMRC's discretion to mitigate a penalty) to mitigate the penalty in the same way that HMRC can.

9.4.2 This means the Tribunal may apply the same percentage reduction as HMRC has applied to a different starting point. The Tribunal may also rely on paragraph 18 to a different extent but only in circumstances where it thinks HMRC's decision in relation to the application of paragraph 18 is flawed when considered in light of the principles that apply in proceedings for judicial review.

Section 10: Information

10.1 Application of Schedule 36 FA 2008

10.1.1 Paragraph 40 of Schedule 16 FA (No.2) 2017 applies Schedule 36 FA 2008 for the purposes of checking whether a person is liable to a penalty under the enablers legislation in the same way it would apply to check a person's tax position, subject to the modifications set out below.

10.1.2 A relevant person is any person an officer of HMRC has reason to suspect is or may be liable to a penalty under the enablers legislation.

10.1.3 More information about the application of Schedule 36 in general can be found in the HMRC Compliance Handbook.

10.1.4 Example 21

A tax enquiry has been concluded into a person who has entered into tax arrangements which have been referred to the GAAR Advisory Panel and which HMRC concludes are abusive. Information provided to HMRC during the course of the enquiry identifies the name of the promoter and the fact that other persons potentially fall within the meaning of enabling participant and financial enabler. However, the information available to the taxpayer does not identify the names of these potential enablers. The modification of schedule 36 FA 2008 by paragraph 40 of Schedule 16 FA (No.2) 2017 allows HMRC to request information from the promoter to identify those potential enablers and the nature of their involvement with the arrangements in question.

10.1.5 The information powers can be used at any time during the course of gathering information to establish whether a person is an enabler or to calculate the amount of any enabler penalty. This could be during the course of an enquiry into the person that entered into the arrangements or once those arrangements are defeated.

10.2 General modifications

10.2.1 The general modifications to the application of Schedule 36 are provided at paragraph 41 of Schedule 16 FA (No.2) 2017. These are:

- any provisions that will not apply in the case of a penalty under the enablers legislation are omitted
- references to 'the' or 'a' taxpayer are references to 'the' or 'a' relevant person whose position in relation to a liability for a penalty under the enablers legislation needs to be checked
- references to a person's tax position are references to a relevant person's position in relation to liability for a penalty under the enablers legislation
- references to prejudice to the assessment or collection of tax include prejudice to the investigation of the relevant person's position in relation to a liability for a penalty under the enablers legislation
- references to a pending appeal relating to tax are to a pending appeal relating to an assessment of liability for a penalty under the enablers legislation

10.3 Specific modifications

10.3.1 The specific modifications to Schedule 36 FA 2008 are provided at paragraph 42 of Schedule 16 FA (No.2) 2017 as follows:

- The power to inspect business premises of involved third parties at paragraph 10A of Schedule 36 FA 2008 applies as if references to the position of a person or classes of person in regards to a relevant tax were reference to the position of a relevant person in relation to liability for a penalty under the enablers legislation
- The right to appeal against penalties under paragraph 47 of Schedule 36 FA 2008 applies only insofar as it does not give a right of appeal against the amount of an increased daily penalty by virtue of paragraph 49A of Schedule 36 FA 2008 (see next bullet point)
- The increased daily default penalty at paragraph 49A of Schedule 36 FA 2008 is modified as follows:
    - in sub-paragraphs (1)(c) and (2) 'assessable' is substituted for 'imposed'
    - sub-paragraph (3) is substituted by a new sub-paragraph (3) which provides the tribunal must determine the day from which the increased penalty applies and the new maximum amount of that penalty and that in paragraph 40 of Schedule 36 FA 2008 for £60 there is substituted the new maximum amount
    - the existing sub-paragraph (4) is substituted by a new sub-paragraph (4) in which the new maximum amount may not be more than £1,000
    - the 'amount' in sub-paragraph (5) is substituted by the 'new maximum amount'
- the notification of increased daily default penalty at paragraph 49B of Schedule 36 FA 2008 is modified to have the effect that:
    - sub- paragraph (1) reads 'the tribunal makes a determination' instead of 'a person becomes liable to a penalty'
    - sub-paragraph (2) specifies 'the new maximum amount and the day from which it applies' instead of 'the day from which the increased penalty is to apply'
    - Sub-paragraph (3) is omitted
- Paragraph 49C of Schedule 36 FA 2008 is treated as omitted and Paragraphs 50 and 51 of Schedule 36 FA 2008 are excluded from application

Section 11: Declarations about legally privileged communications

11.1 Overview

11.1.1 Communications made by a lawyer may bring:

- the lawyer, where the lawyer is a sole practitioner
- their firm in the case of a partnership or company

within any of the definitions of a person who is an enabler (paragraphs 8 to 12 of Schedule 16 FA (No.2) 2017) and therefore within scope of a penalty under paragraph 1 of Schedule 16 FA (No.2) 2017. Alternatively, such communications may demonstrate that the person isn't within any of those definitions and therefore not within scope for a penalty.

11.1.2 If those communications are legally privileged (see paragraph 11.6 below), the person, whether an individual, partnership or company, suspected by HMRC of being an enabler will not be able to provide those communications to HMRC, the Tribunal or the Court to demonstrate that they are not an enabler and therefore not liable to a penalty.

11.1.3 The declaration under paragraph 44 of Schedule 16 FA (No.2) 2017 is designed to deal with this situation in a way that does not breach privilege.

11.1.4 Paragraph 44(4) of Schedule 16 FA (No.2) 2017 provides that the Treasury may, by regulations, impose requirements as to the form and content of a declaration. These regulations are known as 'The Penalties for Enablers of Defeated Tax Avoidance (Legally Privileged Communications Declaration) Regulations 2017' and are in SI1245/2017.

11.1.5 **Example 22**

A client instructs a tax lawyer at a large law firm to advise on a proposed transaction. The lawyer concludes that the proposed arrangements will not achieve the desired outcome, but will do if certain changes are made. However, the lawyer identifies that there is then a material GAAR risk. The lawyer advises the client of this risk. If the lawyer's advice can reasonably be read as recommending against the transaction but the client nevertheless proceeds with the transaction, the lawyer will not be an enabler as they have not provided relevant advice. However, the lawyer is a relevant lawyer and communications with the client are subject to legal professional privilege. A declaration can be made in support of this conclusion by that lawyer or another lawyer at the firm after making due enquiry and if the lawyer is satisfied that the advice or action taken does not fall into any of the definitions of a person who is an enabler.

11.2 When a declaration can be made

11.2.1 As mentioned at section 5.1.7, where HMRC considers a person has enabled arrangements, HMRC will try to contact that person.

11.2.2 The person that carries on the business in question must consider all information available to them and decide whether they are an enabler or not in relation to the abusive tax arrangements. The information that could demonstrate this might be a combination of legally privileged and other communications or information. If there is non-privileged information that would establish that the person is not an enabler, the person should rely on that information.

11.2.3 If non-privileged information exists and demonstrates that the person in question is an enabler, the relevant lawyer can't make a declaration that the person is not an enabler by reference only to legally privileged communications, which, in isolation, could suggest that the person is not an enabler. Ultimately it is a question of fact whether a person is an enabler.

11.2.4 **Example 23**

A client instructs a tax lawyer at a large law firm to advise on a proposed transaction. The lawyer assesses the proposal and writes to the client explaining that the proposed arrangements will not achieve the desired outcome unless a number of further steps are taken; on the basis of the factual assumptions he advises there is no GAAR risk. Before the transaction is implemented (with the assistance of another firm of lawyers), the lawyer learns that one of the factual assumptions is wrong, which does give rise to a GAAR risk, and he writes to the client to warn of the risk. The transaction proceeds and is defeated. In the course of those proceedings, the client waives privilege in the first letter but not the second. The combination of the 2 letters can reasonably be read as recommending against the transaction but the first letter alone can't. The lawyer is a relevant lawyer whose communications are subject to legal privilege. Just because the client has waived privilege in respect of the first letter does not mean privilege in both has been waived. A declaration can be made by the lawyer or another lawyer at the firm after making due enquiry, even if that declaration needs to rely on a combination of the (no longer privileged) first letter and the second letter.

11.2.5 If the person considers they are not an enabler of the abusive tax arrangements and the only information that would demonstrate that is one or more legally privileged communications made by one or more relevant lawyers, then a relevant lawyer (see section 11.5) can make a declaration.

11.2.6 A relevant lawyer can make a declaration at any time, either before or after the tax arrangements in question are defeated. However, a declaration is more likely to be made in response to HMRC informing a person that HMRC suspects them to be a person who enabled abusive tax arrangements that have been defeated.

11.2.7 It may be the case that different businesses are approached to provide advice in relation to particular arrangements, either jointly or separately. Where advice that is legally privileged is provided by different businesses, each business that could be an enabler with respect to the advice it provided would need to make a declaration based on what it did. A declaration can't be made by one business on behalf of all the businesses that jointly or separately provided advice in relation to particular arrangements.

11.2.8 **Example 24**

A client of a law firm instructs the firm to advise on and assist with a transaction. The transaction is commercially driven but the firm are aware that tax structuring is part of the rationale for the transaction, and they are told that tax advice is being provided by another adviser whom they believe to be reputable. In order that they can advise on the corporate law aspects, and implementation, of the proposal the firm are provided with a copy of a steps paper produced by the third party tax adviser which sets out the steps and some tax commentary. The firm are instructed by the client to comment on the corporate law aspects of the steps and to recommend any necessary changes so that they can be carried out in

accordance with corporate law requirements. The firm isn't instructed to review the tax analysis of the steps, and it isn't readily apparent to them, as non-tax specialists, that the arrangements were abusive. The firm look at the proposal and advise that it can't be completed as proposed owing to corporate law difficulties, but suggest a modification to overcome these. The modification is accepted and the firm produce documents and assist with implementing the transaction. It later transpires that the transaction is an abusive tax arrangement which is defeated. The lawyers at the firm are relevant lawyers and their communications with the client are subject to legal professional privilege. If the facts show that the firm did not make suggestions with a view specifically to a tax advantage being derived (as opposed to with a view to facilitating the overall implementation of the transaction) and did not know that the arrangements were abusive arrangements, a declaration can be made by one of those lawyers or another lawyer at the firm after making due enquiry and if the lawyer is satisfied that the advice or action taken does not fall into any of the descriptions of a person who is an enabler.

11.2.9 A lawyer is likely to provide advice based on specific instructions from their client. If those instructions did not contain information that could have led the lawyer to have known, or reasonably be expected to have known, that the purpose of obtaining the advice was to participate in abusive tax arrangements (see the knowledge condition at section 5.2.5), the lawyer should take that into account when making a declaration.

11.2.10 The way in which the advice is structured and delivered must be viewed in context when considering whether the knowledge condition is, or is not, met.

11.2.11 Any person named in a declaration may have to pay financial penalties as set out in paragraphs 1 and 45 of Schedule 16 FA (No.2) 2017. The person who makes the incorrect declaration may also be liable to a penalty under paragraph 45 of Schedule 16 FA (No.2) 2017 (see section 11.7).

11.2.12 Any relevant lawyer named in it may face prosecution for providing false information should that declaration prove to be incorrect (see section 11.7).

11.3 Effect of a declaration

11.3.1 HMRC, or a court or tribunal in any proceedings before the court or tribunal in connection with a penalty under the enablers legislation, must treat a declaration made by a relevant lawyer in relation to that penalty as conclusive evidence of the things stated in it. However, this will not be the case if HMRC or a court or tribunal are satisfied that the declaration contains incorrect information, based, for example on evidence that may have come to light during the taxpayer enquiry.

11.4 Contents of a declaration

11.4.1 Paragraph 44(2) of Schedule 16 FA (No.2) 2017 sets out what constitutes a declaration.

11.4.2 A declaration:

- is made by a relevant lawyer as defined in paragraph 44(6) of Schedule 16 FA (No.2) 2017
- relates to one or more communications made by the same or a different relevant lawyer that are legally privileged and for that reason can't be relied on to

demonstrate that a person mentioned in paragraph 1 of Schedule 16 FA (No.2) 2017 is not a person that enabled the abusive tax arrangements.
- meets the requirements regarding the content set out in regulations

11.4.3 The declaration is structured to ensure that it does not require legal professional privilege to be breached.

11.4.4 To be a valid declaration a relevant lawyer must provide information and confirmations to satisfy Conditions A, B and C of the Regulations.

11.4.5 Condition A requires that a declaration must identify all of the following:

- the person who would otherwise be liable to a penalty under the enablers legislation
- the relevant lawyer making the declaration
- the relevant lawyer or lawyers whose privileged communications would otherwise be relied upon
- the arrangements, or where appropriate the proposal implemented by the arrangements, to which the declaration relates

11.4.6 Condition B requires that the relevant lawyer making the declaration must provide the confirmations described in regulations 6 to 10. They do not need to be more specific than providing confirmation to ensure legal professional privilege isn't breached by making the declaration. Condition B confirms that at least one of the relevant sub-paragraphs in each of regulations 6 to 10 applies so that, when viewed as a whole, the person in relation to whom the declaration is made does not fall within any of the definitions of an enabler and is therefore not liable for a penalty under paragraph 1 of Schedule 16 FA (No.2) 2017.

11.4.7 Condition C requires the relevant lawyer making the declaration to certify that the information being provided is correct to the best of their knowledge and belief. It also informs the relevant lawyer making the declaration that any of the persons named in Condition A may have to pay a financial penalty and that any relevant lawyer named in the declaration may face prosecution (see section 11.7) for providing false information should the declaration prove to be incorrect. The financial penalties are those mentioned in paragraphs 1 and 45 of Schedule 16 FA (No.2) 2017.

11.4.8 Where the same proposal for arrangements (a scheme) has been implemented more than once by arrangements that are substantially similar, a declaration may contain a statement that this is the case and that the involvement of the person in relation to whom it is made was such that all the things stated in the declaration are equally true in relation to those other arrangements. This avoids the need for a person to make multiple, identical, declarations in such circumstances.

11.4.9 **Example 25**

In example 5, a barrister considers a request for advice about a client's proposed tax arrangements. In the barrister's opinion, the proposed arrangements do not work but if various changes are made and/or additional steps inserted, the barrister can identify 2 alternatives that would deliver the client's intended outcome. However, both alternatives would result in abusive tax arrangements and would almost certainly be counteracted under GAAR, or another tax provision.

The barrister's advice sets out that although either alternative could deliver the client's intended outcome, it is likely that each would be successfully counteracted by HMRC under GAAR or using another tax provision.

If the barrister's advice can reasonably be read as recommending against taking either of the alternative suggestions forward, their advice will not be relevant advice. If the client went against the barrister's conclusions and used the advice to enable them to implement abusive tax arrangements without further input or advice from the barrister, then the knowledge condition would not be met.

The barrister is a relevant lawyer whose communications are subject to legal professional privilege. In the circumstances described above they could make a declaration that they do not come within the meaning of an enabler in any of paragraphs 8 to 12 of Schedule 16 FA (No.2) 2017.

The declaration can be made at any time, before or after a penalty is assessed and any appeal lodged.

The outcome would be the same if, instead of a barrister, a lawyer in a large law firm provided the advice to the client. The person potentially liable to a penalty under the enablers legislation would be the law firm and the declaration could be made by the lawyer whose advice is privileged, or by another relevant lawyer on behalf of the firm.

If the above proposal was implemented 10 times, the relevant lawyer making the declaration could include the statement mentioned in section 11.4.8.

11.5 Meaning of relevant lawyer

11.5.1 A relevant lawyer is a barrister, advocate, solicitor or other legal representative, with whom communications may be subject to a claim to legal professional privilege. In Scotland, this will be communications protected from disclosure in legal proceedings on the grounds of confidentiality of communication.

11.6 When a communication is legally privileged

11.6.1 A communication is 'legally privileged' if, during legal proceedings, a claim of legal professional privilege or, in Scotland, to confidentiality of communication between a client and a professional legal adviser, could be maintained in respect of that communication.

11.7 Making an incorrect declaration

11.7.1 A relevant lawyer who carelessly or deliberately gives any incorrect information in a declaration is liable to a penalty of up to £5,000 (incorrect declaration penalty). This includes the relevant lawyer making the declaration and any relevant lawyer mentioned in it. The person in relation to whom the declaration is made, e.g. a large law firm, will be liable for a penalty under paragraph 1 of Schedule 16 FA (No.2) 2017.

11.7.2 If the relevant lawyer who gave the incorrect information in a declaration has taken reasonable care, the incorrect information isn't treated as given carelessly.

11.7.3 The consequences of making an incorrect declaration may include HMRC undertaking any or all of the following actions:

- considering charging a penalty under paragraph 45 of Schedule 16 FA (No.2) 2017

- charging a penalty on a person now shown to have enabled the abusive tax arrangements under paragraph 1 of Schedule 16 FA (No.2) 2017
- considering informing the relevant regulatory body in accordance with our normal Commissioners for Revenue and Customs Act (CRCA) procedures, for them to consider appropriate sanctions
- considering criminal proceedings and prosecution in accordance with the HMRC Criminal Investigation policy

11.7.4 For example, HMRC may consider criminal proceedings and prosecution is appropriate where:

- an individual holds a position of trust or responsibility
- materially false statements are made or materially false documents are provided in the course of a civil investigation
- pursuing an avoidance scheme, reliance is placed on a false or altered document or such reliance or material facts are misrepresented to enhance the credibility of a scheme

11.7.5 Before deciding how to proceed in relation to a declaration that is found to be incorrect, HMRC will engage with the person who made the incorrect declaration (or the person who provided misleading or false information resulting in the incorrect declaration if appropriate) to establish the facts and circumstances leading to the incorrect declaration being made.

11.7.6 To enable HMRC to assess a penalty for an incorrect declaration and to deal with any appeal against that penalty the relevant assessment, time limit and appeal procedural paragraphs are modified to refer to paragraph 45, rather than paragraph 1.

11.7.7 The time limits for assessing that enabler penalty are extended by virtue of paragraph 22(5) and (6) of Schedule 16 FA (No.2) 2017 by up to 12 months from the date the inaccuracy in the declaration was identified.

11.7.8 The following paragraphs of Schedule 16 FA (No.2) 2017 apply for the purposes of an incorrect declaration penalty as they do for a penalty under the enablers legislation:

- Paragraph 19(1) – HMRC must assess the penalty and notify the person that the penalty has been assessed
- Paragraph 20 – the penalty must be paid within 30 days from the day on which it was notified
- Paragraph 22(1) is modified so that the penalty must be assessed within the relevant time, where the 'relevant time' can't be earlier than the 'end of 12 months beginning with the date on which the facts sufficient to indicate that the person is liable to the penalty came to the Commissioners' knowledge
- Paragraph 37 – a person can appeal against HMRC's decision that a penalty is payable or the amount of the penalty that is payable
- Paragraph 38 – an appeal is treated in the same way as the assessment to the underlying tax to which the arrangements relate and the penalty isn't payable until the penalty is determined. However sub-paragraph (3) is modified so that it has effect as if the reference to the 'arrangements to which the penalty relates' is to the 'arrangements to which the declaration under paragraph 44 Schedule 16 FA (No.2) 2017 relates'

- Paragraph 39(1) – the tribunal can affirm or cancel HMRC's decision that a penalty is payable
- Paragraph 39(2) – the tribunal can affirm HMRC's decision on the amount of the penalty that is payable, or substitute for it another amount that HMRC had power to decide
- Paragraph 39(5) tribunal means the First-tier Tribunal or the Upper Tribunal

11.7.9 In addition, a declaration under paragraph 44 Schedule 16 FA (No.2) 2017 can be made for the purposes of demonstrating that an incorrect declaration penalty isn't due under paragraph 45 Schedule 16 FA (No.2) 2017 , in the same way it can be used for the purposes of a penalty under paragraph 1 Schedule 16 FA (No.2) 2017.

Section 12: Publishing details of persons who have incurred penalties

12.1 When details may be published

12.1.1 Part 10 of Schedule 16 FA (No.2) 2017 provides that the Commissioners may publish information about an enabler that has incurred a penalty under the enablers legislation. It sets out when information may be published and the restrictions in place.

12.1.2 The Commissioners may publish information about an enabler that has incurred a penalty that is final (see section 12.6.4) where either of the following naming conditions is met over a period of 12 months:

- 50 or more other penalties which are reckonable penalties (see section 12.6.1) have been incurred by the enabler at the time when the particular penalty becomes final
- the amount of the penalty, either individually or in combination with other penalties which are reckonable penalties incurred by the enabler, is more than £25,000

12.2 Information that may be published

12.2.1 The Commissioners may publish any of the following information in a format they consider appropriate:

- the enabler's name, which can include any pseudonym, trading or previous name
- the enabler's address or registered office address
- the nature of the enabler's business
- the total number of penalties and reckonable penalties incurred by the enabler
- the total amount of the penalties and reckonable penalties
- any other information the Commissioners consider appropriate in order to make the enabler's identity clear

12.3 Penalties to be disregarded when considering whether naming conditions are met

12.3.1 For the purpose of determining whether the naming conditions are met certain penalties incurred by the enabler are disregarded.

12.3.2 Paragraph 48 of Schedule 16 FA (No.2) 2017 specifies the penalties that are disregarded. These are as follows:

- a penalty which has been reduced to nil or stayed
- a penalty by reference to which information has already been published
- a penalty where the arrangements concerned are related to other arrangements and HMRC reasonably believes that at least one of the related arrangements has not been defeated, or the penalty for enabling the arrangements concerned or at least one of the related arrangements isn't final
- a penalty where the arrangements concerned are related to other arrangements by reference to which a penalty is final and information about the enabler has already been published

12.4 Time limits for publishing information

12.4.1 Where an enabler has incurred one or more penalties that are final and the naming conditions are met, information can't be published after the relevant time.

12.4.2 The relevant time is the end of the period of 12 months beginning with the date on which the penalty became final. If there is more than one penalty, the relevant time is the latest day on which any of those penalties become final.

12.4.3 The information can continue to be published or be re-published as the case may be, until the end of 12 months beginning with the date on which it was first published.

12.4.4 **Example 26**

A penalty becomes final on	1 January 2018
Information must be published by	31 December 2018
Information is published on	1 December 2018
Information can continue to be published or republished until	30 November 2019

12.4.5 In the above example, the information isn't prevented from continuing to be published, or being re-published, just because the relevant time by which the information must first be published has passed. Provided the information has been published by that date, it can continue to be published until 12 months after the date on which it was first published.

12.4.6 Disregarded enabler penalties (see section 12.3) are not taken into consideration in deciding whether the naming conditions are met.

12.5 Right to make representations

12.5.1 Before publishing information the Commissioners must inform the enabler that they are considering publishing information about them, and give them an opportunity to make representations to advise if there are any exceptional reasons why their information should not be published.

12.5.2 The process here will follow the same approach as for publishing details of deliberate tax defaulters (PDDD) (see CH191040). The person will generally have 30 days in which to make such representations. The Commissioners will consider all representations carefully before deciding whether or not to publish the information.

12.6 Meanings of key terms used within Part 10 of Schedule 16 FA (No.2) 2017

12.6.1 Another penalty is a reckonable penalty if:

- it is a penalty under the enablers legislation incurred by that enabler which has become final either before or at the same time as the penalty in question
- the entry date of that other penalty isn't more than 12 months from the entry date of the penalty in question.
- the penalty isn't of a kind that should be disregarded under paragraph 48 of Schedule 16 FA (No.2) 2017 (see section 12.3)

12.6.2 The entry date of a penalty is the date, or latest date as the case may be, on which the arrangements concerned or any agreement or transaction forming part of those arrangements was entered into by the user of the arrangements.

12.6.3 The entry date of a penalty isn't more than 12 months apart from the entry date of another penalty if the entry date of the penalties is the same, or the period between whichever of

the entry dates is earlier and ending with whichever of the entry dates is later, is 12 months or less.

12.6.4 A penalty under the enablers legislation becomes final in the following circumstances:

- if the penalty has been assessed and a contract settlement has not been made in relation to it, at the time when the period for any appeal has expired or when the final appeal relating to it is finally determined
- if a contract settlement has been made in relation to the penalty, at the time when the contract is made

12.6.5 For these purposes, a contract settlement is a contract between the Commissioners and the enabler, such that the Commissioners agree not to assess the penalty or take proceedings to recover it if it has been assessed.

12.6.6 For the purposes of this section:

- 'the arrangements concerned' means the arrangements to which a penalty under the enablers legislation relates.
- 'related arrangements' are arrangements that are related to the arrangements concerned.
- Arrangements are 'related to' each other if they implement the same proposal for arrangements and are substantially the same as each other

Section 13: Appendix

13.1 Application of provisions of TMA 1970

13.1.1 Unless otherwise specified, the following provisions of TMA 1970 apply in the same way for the enablers legislation as they apply for the purposes of the Taxes Act:

- Section 108 – the responsibility of company officers
- Section 114 – Want of Form or errors not to invalidate assessments etc.
- Section 115 – Delivery and service of documents

13.2 Meaning of Tax

13.2.1 'Tax' includes any of the following:

- Income Tax
- Corporation Tax, including any amount chargeable as if it were Corporation Tax or treated as if it were Corporation Tax
- Capital Gains Tax
- Petroleum Revenue Tax
- Diverted Profits Tax
- Apprenticeship Levy
- Inheritance Tax
- Stamp Duty Land Tax
- Annual Tax on Enveloped Dwellings
- National Insurance contributions

13.2.2 The Treasury may, by regulations, add to or remove a tax from this list. It may also make supplementary, incidental and consequential provisions and make any transitional provisions.

13.3 Meaning of tax advantage

13.3.1 'Tax advantage' includes:

- relief or increased relief from tax
- repayment or increased repayment of tax
- receipt, or advancement of a receipt, of a tax credit,
- avoidance or reduction of a charge to tax, an assessment of tax or a liability to pay tax
- avoidance of a possible assessment to tax or liability to pay tax
- deferral of a payment of tax or advancement of a repayment of tax
- avoidance of an obligation to deduct or account for tax.

13.3.2 'Assessment of tax' includes a determination in relation to inheritance tax and a NICs decision relating to a person's liability for any relevant national insurance contributions (Class 1, 1A and 1B contributions and in certain cases class 2 contributions).

13.3.3 Any tax advantage must relate to one or more of the taxes listed at section 12.1.1 above.

13.4 Key terms and definitions

13.4.1 For the purposes of the enablers legislation, the following words and terms have the following meanings:

- 'arrangements' includes any agreement, understanding, scheme, transaction or series of transactions, whether or not legally enforceable (see section 3)
- 'business' includes any trade or profession
- 'the Commissioners' means the Commissioners for Her Majesty's Revenue & Customs
- 'company' takes the meaning provided at section 1121 CTA 2010
- 'contract settlement' means an agreement in connection with a person's liability to make a payment to the Commissioners under or by virtue of an enactment. However this definition does not apply in the case of paragraph 46(6) of Schedule 16 FA (No.2) 2017, where a contract settlement means an agreement under which the Commissioners undertake not to assess a penalty or to pursue a penalty already assessed (see section 4)
- 'a defeat' in relation to arrangements, is to be read in accordance with paragraph 4 of Schedule 16 FA (No.2) 2017 (see section 4)
- a 'designated HMRC officer' means an officer of Revenue and Customs who has been designated by the Commissioners for the purposes of the enablers legislation
- 'the GAAR Advisory Panel' has the meaning given by paragraph 1 of Schedule 43 of FA 2013, as the panel of persons established by the Commissioners for the purposes of the general anti-abuse rule
- 'group' is to be read in accordance with paragraph 56(2) of Schedule 16 FA (No.2) 2017 (see section 5.7.3)
- 'HMRC' means Her Majesty's Revenue and Customs
- 'National Insurance contributions' means contributions under Part 1 of the Social Security Contributions and Benefits Act 1992 or Part 1 the Social Security Contributions and Benefits (Northern Ireland) Act 1992
- a 'NICs decision' means a decision under section 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 or Article 7 of the Social Security Contributions (Transfer of Functions, etc.) (Northern Ireland) Order 1999 (SI 1999/671) relating to a person's liability for relevant contributions
- 'relevant contributions' means NICs:
    - Class 1 contributions

- Class 1A contributions
- Class 1B contributions
- Class 2 contributions which must be paid but in relation to which section 11A of the Act in question (application of certain provisions of the Income Tax Acts) does not apply, under 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

- 'tax' should be read in accordance with paragraph 54 of Schedule 16 FA (No.2) 2017 (see section 13.2 above)
- 'tax advantage' should be read in accordance with paragraph 55 of Schedule 16 FA (No.2) 2017 (see section 13.3 above)

13.4.2 References to an assessment to tax, in relation to Inheritance tax and petroleum revenue tax include a determination and in relation to relevant contributions, include a NICs decision (see section 13.3.2).