February 2010

(With effect from 1st April 2010)

GUIDANCE

DISCLOSURE OF TAX AVOIDANCE SCHEMES

Income Tax, Corporation Tax, Capital Gains Tax, National Insurance contributions and Stamp Duty Land Tax

HM Revenue & Customs

DOTAS Guidance April 2010
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1. Introduction

1.1 What is this guidance about?

This guidance is about what to do if you promote or use arrangements (including any scheme, transaction or series of transactions) that will or are intended to provide the user with a tax and/or National Insurance contribution advantage when compared to adopting a different course of action. It is divided into **sections** (e.g. 1, 2, 3) and **paragraphs** (e.g. 1.5, 1.5.1, 1.5.2) and includes advice on:

- deciding if arrangements relating to income tax, corporation tax, capital gains tax, National Insurance contributions and stamp duty land tax are required to be disclosed to HMRC;
- how to make a disclosure (section 11);
- the systems we expect users of tax arrangements to have in place to monitor for arrangements that they, rather than the promoter, may need to disclose to HMRC (see paragraphs 3.7 to 3.9 and 10.4 to 10.7); and
- how to notify HMRC that you are using a disclosed arrangement (sections 12 and 13).

It does not include advice on revoked, repealed or superseded legislation.

Guidance on the rules for disclosing arrangements relating to VAT can be found in VAT Notice 700/8 Disclosure of VAT avoidance schemes available on HMRC's internet site at: http://www.hmrc.gov.uk/

1.2 The status of this guidance

The parts of this guidance (detailed in paragraph 1.5.3 below) that specify the form and manner for providing specified information have the force of law.
The remainder of this guidance is not a substitute for the relevant legislation. Whilst you can rely on this guidance as an accurate explanation of how HMRC will apply the legislation, it does not cover every possible issue that may arise.

1.3 Effective date and superseded guidance

This guidance replaces and supersedes all previous guidance with effect from 1 April 2010, including:

- "Disclosure of tax avoidance schemes (Income Tax, Corporation Tax, Capital Gains Tax and Stamp Duty Land Tax)" dated June 2006 (including Update 1 of July 2006);
- "Disclosure of National Insurance avoidance schemes" dated March 2007;

- “Revenue & Customs Brief 57/07 – Disclosure of avoidance schemes: New Information powers”;

- “Disclosure of Tax and National Insurance Avoidance Schemes (Income Tax, Corporation Tax, Stamp Duty Land Tax and National Insurance Contributions” (November 2008);

- “Disclosure of Tax Avoidance Schemes, Income Tax, Corporation Tax and Capital Gains Tax, National Insurance Contributions and Stamp Duty Land Tax” (Update August 2009 (effective 1 September 2009)) – Pensions Tax Relief;

- Disclosure of Tax and National Insurance Avoidance Schemes (Income Tax, Corporation Tax, Stamp Duty Lane Tax and National Insurance Contributions) (Update 1 - March 2009) – for changes to the Scheme Reference Number (SRN) procedures to come into effect on 1 April 2009 (Non-consolidated)

1.4 What’s changed?

This notice has been rewritten to reflect changes in legislation and to clarify those areas where previous advice may have been unclear.

The main changes in content are as detailed below:

- Commentary on revised rules for stamp duty land tax which take effect from 1 April 2010 extending disclosure to schemes related to residential property over £1 million and requiring the provision of Scheme Reference Numbers by promoters etc to users.

- Commentary on revised rules, which took effect from 1 September 2009, on a new hallmark for pensions tax relief (consolidated from separate guidance)

- Commentary on revised rules, which take effect from 1 April 2009, on how scheme reference numbers and associated information is reported (consolidated from separate guidance).

1.5 What law does this guidance cover?

The main legislation covered by this guidance is detailed below.

1.5.1 Primary legislation

- The Finance Act 2004, Part 7 (s.306 to s.319) (as amended by FA2007, s.108 and FA2008, s.116 and Sch.38);

- The Social Security Administration Act 1992, s.132A; and

- The Taxes Management Act 1970, s.98C.

1.5.2 Secondary legislation

- The Tax Avoidance Schemes (Information) Regulations 2004 (SI 2004/1864, as amended by SI 2004/2613, SI 2005/1869, SI 2006/1544, SI 2007/2153, SI 2007/3103, SI 2008/1947 and SI 2009/611);

- The Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004 (SI 2004/1865, as amended by SI 2004/2613);

- The Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868);

- The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543, as amended by SI 2007/2484);

- The National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 (SI 2007/785, as amended by SI 2008/2678, SI 2009/612 and SI 2009/2033)

- The Tax Avoidance Schemes (Penalty) Regulations 2007 (SI 2007/3104).

- The Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) (Amendment) Regulations 2010 (SI 2010/407).

- Stamp Duty Land Tax The Tax Avoidance Schemes (Information) (Amendment) Regulations 2010 (SI 2010/410).

1.5.3 Tertiary legislation (FA 2004, s.316; and SI 2007/785, reg.13)

The Commissioners for Her Majesty's Revenue and Customs hereby specify that the information required under the provisions described below (including, for National Insurance purposes, the appropriate corresponding provision (see paragraph 1.6)) must be provided in the following form and manner:

- Finance Act 2004, section 308(1) and (3) – on forms AAG 1 and AAG 5

- Finance Act 2004, section 309(1) – on forms AAG 2 and AAG 5

- Finance Act 2004, section 310 – on forms AAG 3 and AAG 5

- Finance Act 2004, section 312(2) – on form AAG 6

- Finance Act 2004, section 312A(2) – on form AAG 6

- Finance Act 2004, section 313(1) and (3)(a) – in the boxes provided for this purpose on the return

- Finance Act 2004, section 313(1) and (3)(b) – on forms AAG 4 and AAG 4 (SDLT)

The address for, and means of, delivering forms AAG 1 to AAG 3 and AAG 5 is that detailed at paragraph 11.2.

The address for, and means of, delivering form AAG 4 is that detailed at paragraph 12.5.

The address for, and means of, delivering form AAG 4 (SDLT) is that detailed at paragraph 13.5.

Warning: The above specified form and manner for providing required information has the force of law and there are penalties for not complying with this – see section 15.

1.6 Use of legal references

Selected legal references and extracts from the legislation are provided in the headings to, and reproduced in the text of, this guidance to act as a quick reference and to aid understanding.

The National Insurance related provisions are, in the main, not referred to or reproduced as they are intended to mirror, with some minor differences explained at the relevant paragraphs of this guidance, those found in the Finance Act 2004 and other legislation. The table below, however, details the main corresponding or modifying provisions:

Tax provision	Corresponding or modifying provision
TMA 1970, section 98C	SI 2007/785, regulations 14 and 15
FA 2004, section 306	SI 2007/785, regulation 5
FA 2004, section 306A	SI 2007/785, regulation 5A
FA 2004, section 307	SI 2007/785, regulation 6
FA 2004, section 308	SI 2007/785, regulation 7
FA 2004, section 308A	SI 2007/785, regulation 7A
FA 2004, section 309	SI 2007/785, regulation 8
FA 2004, section 310	SI 2007/785, regulation 9
FA 2004, section 311	SI 2007/785, regulation 10
FA 2004, section 312	SI 2007/785, regulation 11
FA 2004, section 312A	SI 2007/785, regulation 11A
FA 2004, section 313	SI 2007/785, regulation 12
FA 2004, section 313A	SI 2007/785, regulation 12A
FA 2004, section 313B	SI 2007/785, regulation 12B
FA 2004, section 314	SSA 1992, section 132A(6)
FA 2004, section 314A	SI 2007/785, regulation 12C
FA 2004, section 316	SI 2007/785, regulation 13
SI 2004/1864	SI 2007/785, regulation 17
SI 2004/1865	SI 2007/785, regulation 18
SI 2006/1543	SI 2007/785, regulation 16
SI 2007/3104	SI 2007/785, regulation 19

1.7 Terminology

Arrangement: This includes any scheme, transaction or series of transactions.

Disclosable: The requirement to provide prescribed information to HMRC.

Hallmarks: The descriptions prescribed for the purpose of FA 2004, s.306(1)(a) and (b); or SI 2007/785, regulation 4(1) as appropriate.

Hallmarked NI contribution scheme: An arrangement in relation to National Insurance contributions that meets all of the tests at section 5.

Hallmarked scheme: A “tax arrangement” in relation to income tax, corporation tax or capital gains tax that meets all of the tests at section 4.

Scheme: With the exception of paragraph 6.2.1 (where the normal meaning applies), the term “scheme” is used in subsequent sections as an alternative to or shorthand for “arrangement”, “tax arrangement”, “hallmarked scheme”, “hallmarked NI contribution scheme” or “stamp duty land tax scheme” as context dictates.

Stamp duty land tax scheme: A “tax arrangement” (q.v.) in relation to stamp duty land tax that meets all of the tests at section 8.

Tax arrangement: Any arrangement that will, or is expected to, provide the user with a tax advantage when compared with adopting a different course of action.

1.8 Help and advice

If you are concerned about any arrangement being marketed to you, or you would like to discuss any aspect of these guidance notes, you can contact us by post at the following address:

Anti-Avoidance Group (Intelligence)
HM Revenue & Customs
1st Floor, 22 Kingsway
London
WC2B 6NR
Alternatively you can:

- telephone us on 020 7438 6733, or
- email us at aag@hmrc.gov.uk

2. An overview of the disclosure rules

2.1 Objectives

The objectives of the disclosure rules are to obtain:

- early information about tax arrangements and how they work; and
- information about who has used them.

2.2 The effect of disclosure

On its own the disclosure of a tax arrangement has no effect on the tax position of any person who uses it. However, a disclosed tax arrangement may be rendered ineffective by Parliament, possibly with retrospective effect.

2.3 Scope and summary of the disclosure rules

2.3.1 Scope

Currently, disclosure covers certain tax arrangements relating to:

- income tax, corporation tax and capital gains tax – the detailed rules are in sections 4, 6 and 7;
- National Insurance contributions – the detailed rules are in sections 5 to 7; and
- stamp duty land tax – the detailed rules are in sections 8 and 9.

2.3.2 Summary: Income tax, corporation tax and capital gains tax

The rules described in this guidance apply to the whole of income tax, corporation tax and capital gains tax.

Under the rules, a tax arrangement may need to be disclosed that HMRC is already aware of or is not considered to be avoidance. In order to keep the burden to a minimum, a tax arrangement is only to be disclosed where:

- it will, or might be expected to, enable any person to obtain a tax advantage (see paragraph 6.2);
- that tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement (see paragraph 6.3); and
- it is a hallmarked scheme by being a tax arrangement that falls within any description (the “hallmarks”) prescribed in the relevant regulations – see section 7.

In most situations where disclosure is required it must be made by the scheme "promoter" within 5 days of it being made available. However, the scheme user may need to make the disclosure where:

- the promoter is based outside the UK;
- the promoter is a lawyer and legal professional privilege prevents him from providing all or part of the prescribed information to HMRC; or
- there is no promoter, such as when a person designs and implements their own scheme. (In such cases disclosure must be made within 30 days of the scheme being implemented – see section 10.6.)

There is more guidance on who discloses in section 3 and the time limits for doing so in section 10.

Upon disclosure, HMRC issue the person who has made disclosure (and any co-promoters notified to HMRC at the same time) with a scheme reference number for the disclosed scheme. This number must then be passed to the scheme user, who in turn must report their use of the scheme to HMRC by including the number on their tax return or form AAG 4. There is more on this in section 12, including what to do when a promoter's client is not the person expected to obtain an advantage from the scheme.

2.3.3 Summary: National Insurance contributions

The rules for disclosing hallmarked NI contribution schemes mirror those that apply to income tax hallmarked schemes with some minor differences explained at the relevant paragraphs of this guidance. Where there is both an NI contribution advantage and a tax advantage only one disclosure need be made but it must identify both advantages.

2.3.4 Summary: Stamp duty land tax

From 1 April 2010 the rules for stamp duty land tax became more closely aligned with the rules for the main regime. From that date stamp duty land tax uses a system of Scheme Reference Numbers which have to be passed on by promoters to users in the same way as those for the main regime including the rules for co-promoters and intermediaries.

The disclosure regime includes tax arrangements relating to stamp duty land tax where the subject matter of the arrangements is non-residential property with a market value of at least £5 million, residential property with a market value of at least £1 million, or mixed property with a total market value of at least £5 million or which includes residential property with a market value of at least £1 million (see sections 8 and 9).

The main differences compared to the disclosure regime for income tax, corporation tax and capital gains tax are:

- the hallmarks are not applied to limit what is required to be disclosed, however there is a 'white list' of arrangements that are not required to be disclosed (paragraph 9.7.1),

- disclosure is not required if the arrangements are the same or substantially the same as arrangements first made available for implementation before 1 April 2010, and

- some minor differences in the time limits for making disclosure.

3. Who discloses?

3.1 General

The duty to disclose normally falls on the scheme promoter, however special rules apply when:

- a non-UK based promoter does not disclose a scheme – here the client of the promoter is required to disclose the scheme (see paragraph 3.7).

- the promoter is a lawyer and legal professional privilege prevents him from providing all or part of the prescribed information to HMRC – here the lawyer's client must disclose the scheme (see paragraph 3.8).

- there is no promoter (i.e. the scheme is devised 'in-house' for use within that entity or a corporate group to which it belongs) – here the scheme is disclosed by the scheme user (see paragraph 3.9).

Warning: Penalties can apply if a scheme is not disclosed accurately and at the right time (see section 15).

The Anti-Avoidance Group in HMRC works closely with compliance teams to ensure that schemes discovered by them have been disclosed properly. Anyone likely to have a liability to disclose a scheme should ensure that effective identification and reporting arrangements exist.

3.2 Who is a promoter? (FA 2004, s.307)

You may be a promoter if, in the course of providing services relating to taxation (or, where applicable, National Insurance contributions), or if you are a bank or securities house, you:

- are to any extent responsible for the design of a scheme;

- make a scheme available for implementation by others; or

- organise or manage the implementation of a scheme.

Both UK and non-UK based promoters are subject to the disclosure rules but they only apply to the extent that the scheme enables or is expected to enable a UK tax advantage to be obtained.

3.3 Scheme designers

A person who is only involved in the design of a scheme, and does not make the scheme available for implementation by others or organise or manage it, is not a promoter if any one of three tests is passed. These are:

- the benign test (see paragraph 3.3.1);

- the non-advisor test (see paragraph 3.3.2); and
- the ignorance test (see paragraph 3.3.3).

3.3.1 The benign test (SI 2004/1865, reg. 4(1) and (2))

The benign test applies where, in the course of providing tax (or National Insurance contributions) advice, the person is not responsible for the design of any element of the arrangement or proposal (including the way in which it is structured). For example, a promoter marketing or designing a scheme may consult a second firm to provide advice in relation to a particular element of it. This second firm will not be a promoter, despite being involved in the design of the overall scheme, so long as any tax (or National Insurance contributions) advice does not contribute to the tax (or National Insurance contributions) advantage element of it.

For example, a promoter may seek advice from an accounting or law firm on whether two companies are "connected" for any purpose of the Taxes Acts. Provided the advice goes no further than explaining the interpretation of words used in tax legislation, it would be benign; as would advice on general compliance requirements and so on.

On the other hand, if the advice given seeks to highlight opportunities to exploit the relevant provisions then it is not benign advice.

Where the advice recommends some alteration to "a taxpayer's affairs", then whether the advice is benign will depend on the expected tax outcomes of any transactions entered into as a result of the advice.

3.3.2 The non-adviser test (SI 2004/1865, reg. 4(1) and (3))

The non-adviser test applies where a person who, although involved in the design of a scheme, does not contribute any tax advice. This test does not apply to a bank or securities house.

This might typically happen where:

- a promoter consults a law firm (which has a business that includes giving tax advice) in relation to company law. The law firm will not become a promoter as long as it provides no tax advice (other than benign advice) in the course of carrying out its responsibilities; or
- a promoter consults an accounting firm in relation to accounting aspects of a scheme. The firm is not a promoter so long as it provides no tax advice in the course of carrying out its responsibilities.

3.3.3 The ignorance test (SI 2004/1865, reg. 4(1) and (4))

The ignorance test applies when a person could not reasonably be expected to have either:

- sufficient information to enable them to know whether or not the arrangements are disclosable schemes; or

- sufficient information so as to enable that person to comply.

This test might apply where, for example, a person has insufficient knowledge of the overall arrangements to know whether the “benign” or “non-adviser” tests are failed; or has only a partial understanding of the scheme so that they would be unable to comply with the disclosure requirements.

Where having the relevant “information” depends not merely upon factual knowledge, but upon the application of some particular expertise, persons will not normally be expected to have such an expertise if it falls outside their own area of professional expertise (unless the matters in question can reasonably be said to be common knowledge amongst business and professional persons generally).

3.4 Who makes a scheme available for implementation by others?

A scheme can be made available by more than one person such as by the scheme designer or those who provide the scheme under a licensing agreement with the designer. Each such person may be a promoter for disclosure purposes and have obligations as described in this guidance. Paragraphs 10.2.2 and 10.2.3 describe when a co-promoter is exempt from making disclosure, however co-promoters are not exempt from other obligations, such as providing their client with the relevant scheme reference number (see paragraph 12.2).

A person who acts solely as an introducer or intermediary between the scheme provider and potential scheme user is not regarded as making the scheme available for implementation by others for disclosure purposes and so is not a promoter under this test. For stamp duty land tax schemes, a person providing the usual services of a conveyancer will typically be either an introducer or an intermediary.

Paragraph 10.3 provides information on when a scheme is ‘made available for implementation by others’.

3.5 Scheme organisers and managers (SI 2004/1865, reg. 5)

A person who organises or manages a scheme that they did not design or make available for implementation is not regarded as a promoter if he is unconnected with a person who has marketed or designed it or similar schemes.

If the person who organises or manages the scheme is connected with a person who has designed or made it or similar schemes available for implementation, the need for both persons to make a disclosure will not arise when the co-promoter rule applies (see paragraph 10.2.2 and 10.2.3).

Section 839 of ICTA 1988 applies to determine whether a person is connected with another.

3.6 Corporate groups (SI 2004/1865, reg. 2)

A group company that provides tax services to other companies within the same group is not a promoter. This ensures that disclosable schemes devised within a group for its own use are disclosed in the same way as those devised by a single company "in-house" for its own use – see paragraph 3.9.

For the purpose of these rules a company is a group company where it is a member of a group under any of the existing provisions of the Taxes Acts, for example group relief and/or capital gains, but as modified by SI 2004/7865, reg. 2.

3.7 Schemes marketed by offshore promoters (FA 2004, s.309)

The obligations on promoters to disclose schemes they market and/or design apply to both UK and non-UK based promoters. Where a non-UK based promoter fails to disclose a scheme when required to do so, the user must make the disclosure. The time limits are explained at paragraph 10.4.

A non-UK based promoter who has disclosed a scheme will be able to provide his or her clients with the 8-digit reference number issued by the Anti-Avoidance Group in HMRC.

If you are a user of such a scheme please contact the Anti-Avoidance Group for advice if you are unsure whether these rules apply to you – see paragraph 1.8.

3.8 Schemes promoted by lawyers (FA 2004, s.310 and SI 2004/1865, reg. 6)

Schemes promoted by lawyers are within the scope of the disclosure rules in the same way as for other promoters.

However, where an adviser who would ordinarily be a promoter is prevented by reason of legal professional privilege from providing any of the information needed to make a full disclosure, that adviser has no obligation to make a disclosure. Unless there is another promoter who has an obligation to disclose the scheme, it must be disclosed by any person in the UK who enters into any transaction forming part of it. But the client of the lawyer has the option of waiving any right to legal privilege. If legal privilege is waived the lawyer is required to disclose.

The following important points should be noted in relation to waiver of legal privilege:

- any waiver must be made within sufficient time to enable the lawyer to disclose within 5 days of the scheme being made available (see paragraph 10.2), otherwise the client must make the disclosure within 5 or 30 days, as applicable, of the first transaction (see paragraph 10.5); and

- any waiver can be limited by the client so as to apply only to the extent necessary to enable the lawyer to comply with the disclosure obligation and to have no relevance for any other purpose.

Your lawyer or tax adviser will be able to help you but you can also contact the Anti-Avoidance Group in HMRC if you are in doubt – see paragraph 1.8.

Where a lawyer is "marketing" a scheme, as described at paragraph 10.3.2, the lawyer cannot assert legal privilege. This means that such marketing is subject to the disclosure obligation and the lawyer should disclose the scheme (providing the other conditions are met) to the Anti-Avoidance Group in the normal way.

3.9 Schemes with no promoter, including "in-house" schemes (FA 2004, s.310)

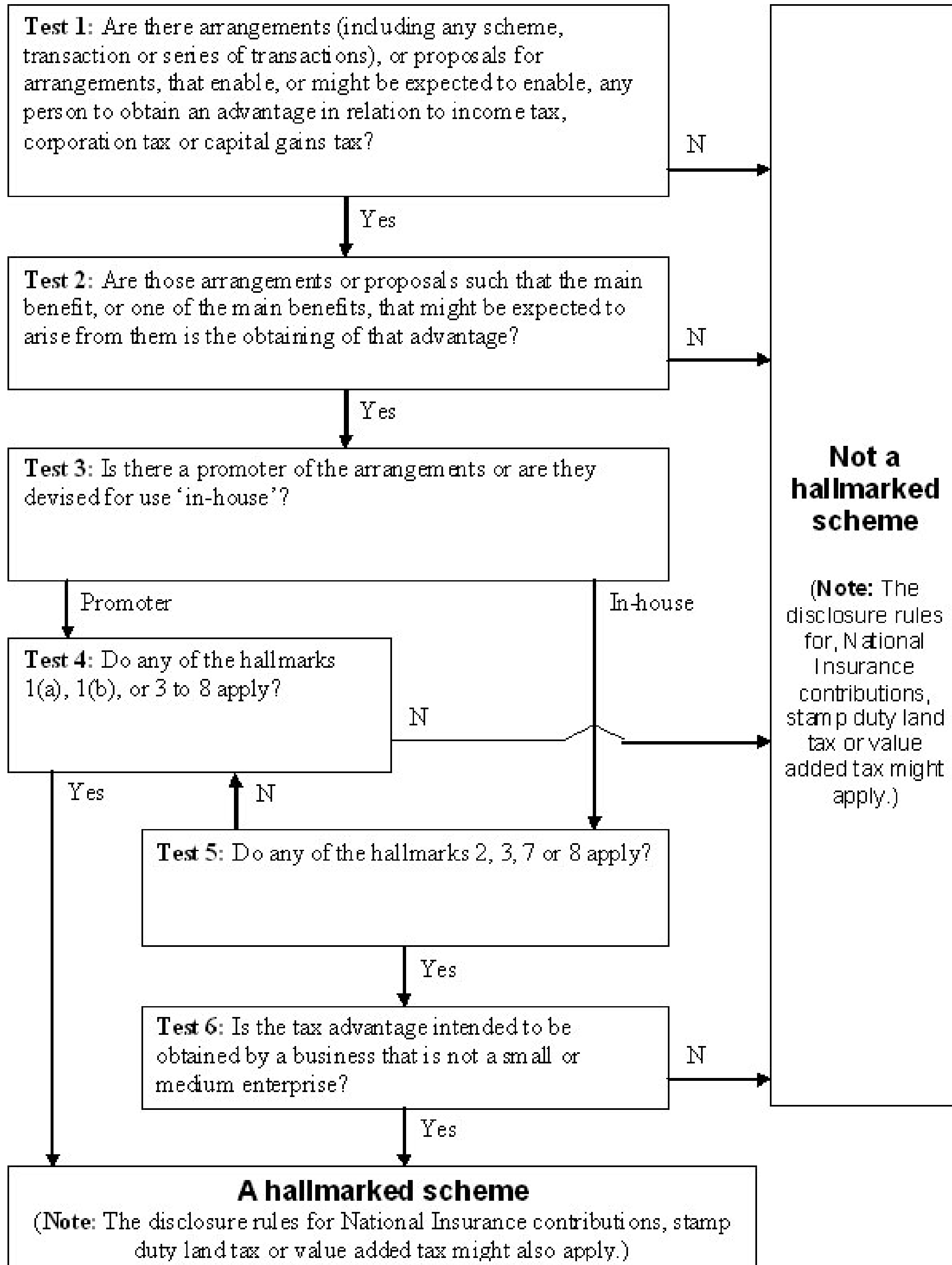
Where there is no person who is a "promoter" in respect of a scheme, it must be disclosed by any person in the UK who enters into any transaction forming part of it. Whilst these rules can apply to an individual, partnership, trust or company, we expect them to be of most relevance to those companies with their own in-house tax departments.

Hallmarked schemes and hallmarked NI contribution schemes with no promoter are only required to be disclosed where the advantage is intended to be obtained by a business that is not a small or medium enterprise (see paragraph 6.6).

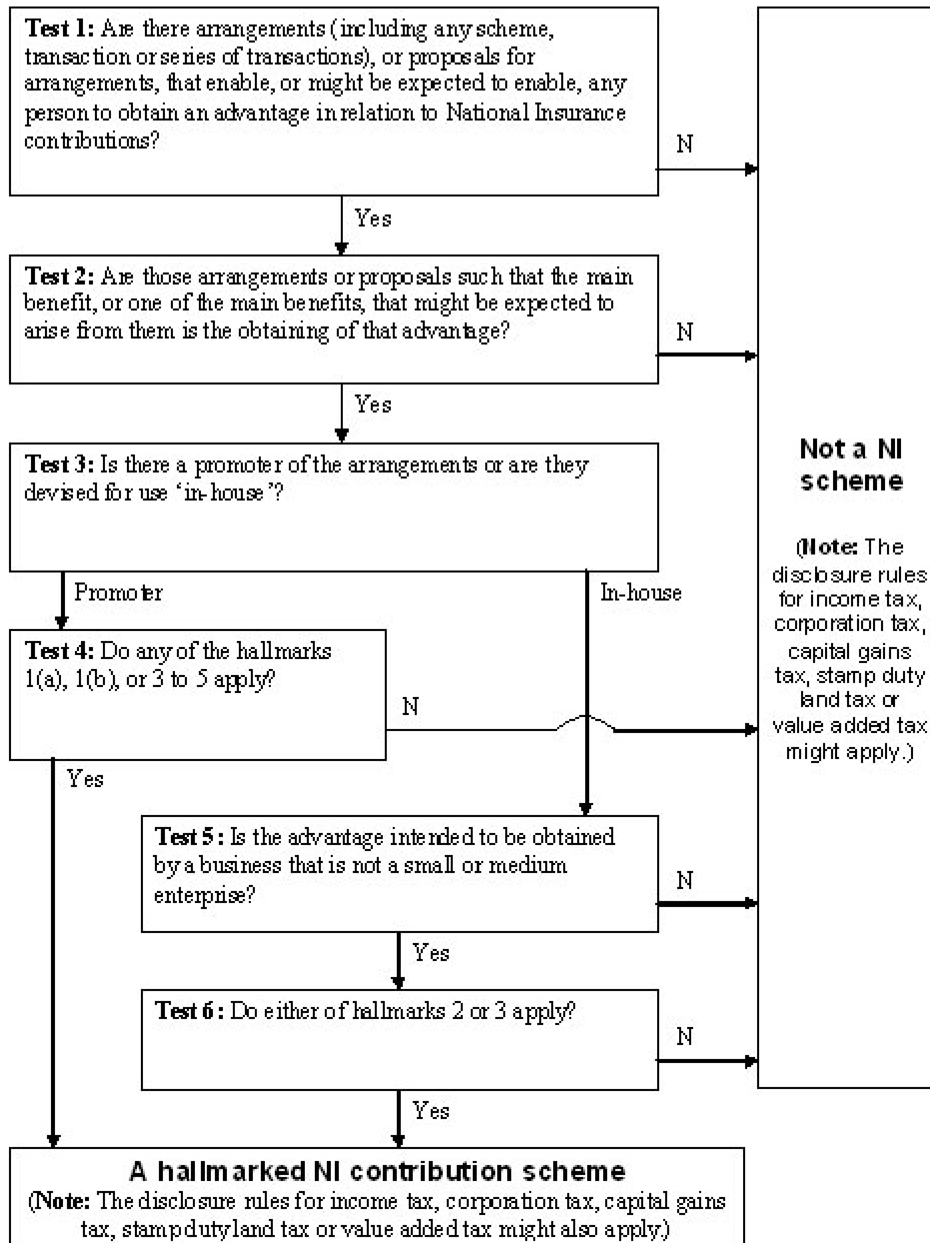
For stamp duty land tax schemes, any in-house user has to disclose but only if the scheme is in relation to residential property with a market value of at least £1 million, non-residential property with a market value of at least £5 million, or mixed property with a total market value of at least £5 million or which includes residential property with a market value of at least £1 million (see sections 8 and 9).

In both cases, disclosure only applies to schemes that have been implemented; there is no requirement to disclose mere plans and ideas.

Section 4 Determining a hallmarked scheme – Flow chart



Section 5 Determining a hallmarked NI contribution scheme – Flow chart



6. Determining a hallmarked, or hallmarked NI contribution, scheme – The tests

6.1 Application of this section to National Insurance contributions arrangements

For the purposes of determining a hallmarked NI contribution scheme, any references in this section to tax should be construed as a reference to National Insurance contributions.

The table at paragraph 1.6 details the main corresponding or modifying legislative provisions.

6.2 Test 1: Are there arrangements that enable an IT, CT or CGT tax advantage be obtained? (FA 2004, s.306(1)(a) and (b))

6.2.1 Meaning of "arrangements" (FA 2004, s.318)

The meaning of "arrangements" is not exhaustively defined in the primary legislation but includes any scheme, transaction or series of transactions.

6.2.2 Meaning of "tax advantage" (FA 2004, s.318)

The definition of "tax advantage" is drawn from the definition of tax advantage in ICTA 1988, s.709. Unlike s.709, the definition makes specific reference to the deferral of tax and the avoidance of an obligation to deduct tax (for example under PAYE). It should not be inferred from this that ICTA 1988, s.709 does not extend to deferral or avoiding an obligation to deduct tax.

In the context of ICTA 1988, s.703 the Courts have considered ICTA 1988, s.709 on a number of occasions. We expect the existing body of case law to apply equally for disclosure purposes. From these cases some general points can be made:

- The definition of tax advantage in ICTA 1988, s.709 is very widely drawn and consequently we expect that FA 2004, s.318 will also be construed widely. It includes the avoidance or reduction of a charge to tax, a relief from tax, repayment of tax and as mentioned the deferral of tax or the avoidance of an obligation to deduct tax.

- Where the scheme is expected to result in tax being avoided or reduced then the long-standing judgement of Lord Wilberforce in CIR v Parker (1966 AC 141) applies and the existence of a tax advantage is tested on a comparative basis.

- In a more recent case Sema Group Pension Fund (2003 STC 95) Lord Justice Parker said that "what the draftsman was manifestly trying to do when defining 'tax advantage' in S709(1) was to cover every situation in which the position of the taxpayer vis-à-vis the Revenue is improved in consequence of the particular transaction or transactions". This has been regarded by some outside commentators as widening the definition still further. However, in our view Sema is consistent with earlier cases.

- A relief or exemption from tax, for example taper relief, substantial shareholdings, loss relief, group relief, etc will give rise to a tax advantage as defined.

In deciding whether the necessary comparison can be made it should be noted that the very wide range of possible ways in which tax arrangements might be structured made it impossible to outline in regulations the range of schemes likely to come within the disclosure rules. Such schemes may involve for example, income being received in capital form or rewards for remuneration being structured to fall outside the provisions of ITEPA or an imbalance between the economic cost of the tax advantage and the value of that advantage to the taxpayer.

For National Insurance contributions purposes, the definition potentially applies to all classes of National Insurance.

6.3 Test 2: Is the advantage a main benefit of the arrangements? (FA 2004, s.306(1)(c))

The following general points can be made as to when a tax advantage will be regarded as one of the main benefits:

- In our experience those who plan tax arrangements fully understand the tax advantage such schemes are intended to achieve. Therefore we expect it will be obvious (with or without detailed explanation) to any potential client what the relationship is between the tax advantage and any other financial benefits of the product they are buying.

- The test is objective and considers the value of the expected tax advantage compared to the value of any other benefits likely to be enjoyed.

6.4 Test 3: Is there a promoter of the arrangements? (SI 2006/1543, reg. 5(3))

The purpose of this test is to distinguish between arrangements that are promoted and those that are designed 'in-house' for use by the business that devised it. The distinction is important for two reasons:

- different hallmarks apply to promoted and 'in-house' schemes; and

- 'in-house' schemes are only required to be disclosed when the tax advantage is intended to be obtained by a business that is not a small or medium enterprise.

A scheme is a promoted scheme even where the user is required to disclose the details of it to HMRC as a result of the promoter being either:

- offshore and failing to disclose the scheme to HMRC – see paragraph 3.7; or

- a lawyer who is prevented by legal and professional privilege from providing all of the prescribed information to HMRC – see paragraph 3.8.

6.5 Test 4: The hallmarks for arrangements where there is a promoter

When there is a promoter of the arrangement, it is a hallmarked scheme when any one of the following hallmarks applies:

- Hallmark 1(a): Confidentiality from other promoters – see paragraph 7.3.2

- Hallmark 1(b): Confidentiality from HMRC – see paragraphs 7.3.3 to 7.3.6

- Hallmark 3: Premium fee – see paragraph 7.5

- Hallmark 4: Off-market terms 7.6

- Hallmark 5: Standardised tax products – see paragraph 7.7

- Hallmark 6: Loss schemes – see paragraph 7.8

- Hallmark 7: Leasing arrangements – see paragraph 7.9

- Hallmark 8: Pensions – see paragraph 7.10

Hallmarks 6 and 7 do not apply when determining a hallmarked NI contribution scheme.

6.6 Test 5: The hallmarks for ‘in-house’ arrangements

When the arrangement is designed ‘in-house’, it is a hallmarked scheme when any one of the following hallmarks applies. The hallmarks only apply when the person receiving the tax advantage is not a small or medium enterprise (see paragraph 6.7 below):

- Hallmark 1(b): Confidentiality from HMRC – see paragraphs 7.3.3 to 7.3.6

- Hallmark 3: Premium fee – see paragraph 7.5

- Hallmark 7: Leasing arrangements – see paragraph 7.9

- Hallmark 8 Pensions – see paragraph 7.10

Hallmark 7 does not apply when determining a hallmarked NI contribution scheme.

6.7 Test 6: Is the person intended to obtain the advantage a large business? (SI 2006/1543, regs. 3 and 4)

If you devise a tax arrangement for use ‘in-house’, you need only consider if it is a hallmarked scheme (and disclose it to HMRC) if the person intended to obtain the tax advantage is a business that is not a small or medium enterprise.

“Businesses” are:

- companies;

- partnerships; and

- any other person whose profits are charged to income tax as trading or property income.

Guidance on whether a business is a small or medium enterprise for the purposes of the 2003 EC Recommendation tests is at CIRD91400. See in particular the flow chart at CIRD92850.

7. The hallmarks (not applicable to stamp duty land tax)

7.1 About the hallmarks

The legislation sets out a number of descriptions of arrangements that are referred to as 'hallmarks' in this guidance.

Some of these are designed to capture new and innovative arrangements. Others are designed to capture areas of specific concern. These may include schemes that are well known or commonly used.

The hallmarks are not mutually exclusive – an arrangement may be a hallmarked scheme, or hallmarked NI contribution scheme, by virtue of one or more of the hallmarks.

It is expected that the range of hallmarks will change over time, such as to test perceived changes in the avoidance market place or the effectiveness of an anti-avoidance measure.

The absence of a hallmark should not be regarded as an indicator that arrangements not caught constitute practices that are acceptable to HMRC.

Similarly, we do not regard all arrangements that include or meet a hallmark description as practices that are unacceptable to us – whilst we have tried to keep burdens to a minimum, you may have to tell us about schemes that may not be considered to be avoidance.

7.2 Application of this section to National Insurance contribution schemes

For the purposes of determining a hallmarked NI contribution scheme, any references in this section to tax should be construed as a reference to National Insurance contributions. The table at paragraph 1.6 details the main corresponding or modifying legislative provisions.

Hallmarks 6 (loss schemes) and 7 (leasing arrangements) do not apply when determining a hallmarked NI contribution scheme.

7.3 Hallmarks 1(a) and (b): Confidentiality where promoter involved

7.3.1 The legislation

Hallmarks 1(a) and (b) are prescribed by regulation 6 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

Regulation 6

(1) Arrangements are prescribed if they satisfy—

(a) Conditions 1 and 2; or

(b) Conditions 1 and 3.

(2) The Conditions are as follows.

Condition 1

Any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements.

Condition 2

It might reasonably be expected that a promoter would wish the way in which that element of those arrangements secures a tax advantage to be kept confidential from any other promoter at any time in the period beginning with the opening date and ending with the appropriate date.

Condition 3
The promoter would, but for the requirements of these Regulations, wish to keep the way in which that element secures that advantage confidential from Her Majesty's Revenue and Customs for some or all of the period beginning with the opening date and ending with the appropriate date, and a reason for doing so is to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

(3) In a case where—

(a) by virtue of regulation 6 of the Promoters Regulations, no person is to be treated as the promoter in relation to the arrangements, or

(b) by virtue of section 309(1) of FA 2004 (duty of person dealing with promoter outside United Kingdom), a user of the arrangement has a duty to provide prescribed information,
paragraph (2) shall have effect as if for Condition 3 there were substituted

> *"Condition 3*
> *The user of the arrangements wishes to keep confidential from Her Majesty's Revenue and Customs the way that element secures that advantage for some or all of the period beginning with the opening date and ending with the appropriate date.".*

(4) In this regulation—

"the appropriate date" has the meaning given in regulation 8(1) of the Information Regulations, and the provisions of regulation 8 of those Regulations (prescribed information under section 313 of FA 2004: timing and manner of delivery) apply for the purposes of determining that date; and

"the opening date" means the date of the first transaction forming part of the arrangements.

7.3.2 Hallmark 1(a): Confidentiality from competitors

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4).

The test requires the person with a prima facie duty to disclose the arrangements to ask themselves the hypothetical question:

- "Might it reasonably be expected that any promoter of the arrangements would wish the way in which any element of those arrangements (including the way in which they are structured) gives rise to and secures the expected tax advantage to be kept confidential from any other promoter, …

- … at any time between the date of the first transaction forming part of the arrangements and the date (if the arrangements were notified) by which users of it would be required to notify HMRC of the reference number?" (see paragraph 7.3.5)

The test would be answered in the affirmative if an element of the scheme were sufficiently new and innovative that a promoter would want the details to remain secret in order to maintain their competitive advantage and ability to earn fees.

The test is unrelated to:

- any general rule or agreement by a client that they keep advice confidential; or

- whether any fees charged would be at a premium level.

The use of an explicit confidentiality agreement before revealing full details of the scheme to a client by advisers who do not normally use such agreements may indicate that the test is met.

However, even if certain sectors promoting the scheme would routinely insist on an explicit confidentiality agreement from their clients, HMRC would accept the test is not met if the scheme is reasonably well known in the tax community. This can be evidenced from, for example, articles in the tax press, textbooks or case law.

7.3.3 Hallmark 1(b): Confidentiality from HMRC

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4).

Normally the person that must apply this hallmark is a promoter, when he must ask himself the questions:

- "Do I wish to keep confidential from HMRC the way any element of the arrangements (including the way they are structured) gives rise to and secures the expected tax advantage … (see paragraph 7.3.4);

- … at any time between the date of the first transaction forming part of the scheme and the date (if the scheme were disclosed) by which users of it would be required to notify HMRC of the scheme reference number?" (see paragraph 7.3.5);

- "Is a reason for doing so to facilitate the repeated or continued use of that element, or substantially the same element, in the future?" (This may be, for example, in order to secure fee income in the future. There is more on "repeated and continued use" at paragraph 7.3.6.).

However, where the person with a duty to disclose the arrangements is the scheme user, he must ask himself the question:

- “Do I wish to keep confidential from HMRC the way any element of the arrangements (including the way they are structured) gives rise to and secures the expected tax advantage … (see paragraph 7.3.4);

- … at any time between the date of the first transaction forming part of the scheme and the date (if the scheme were disclosed) by which I would be required to notify HMRC of the scheme reference number?” (see paragraph 7.3.5).

In either case the relevant question(s) must be consciously answered at the time the relevant trigger for disclosure arises. (Note: Where the relevant question is asked at a time other than when the scheme is implemented, such as when the scheme is made available, the time frame part of the test remains by reference to the date of implementation – see also paragraph 7.3.5.)

Promoters will answer the relevant questions in one of the following ways:

- “I wish to keep an element of the scheme confidential from HMRC in order to facilitate repeated or continued use of that element, or substantially the same element, in future”;

- “I do not wish to keep any element of the scheme confidential in order to facilitate repeated or continued use of that element, or substantially the same element, in the future but, and disregarding any obligation of confidentiality, I nevertheless wish to keep it confidential from HMRC for other reasons”; or

- “I do not wish to keep any element of the scheme confidential from HMRC.”

A promoter is not required to make disclosure under this hallmark where the answer falls within the second or third bullet.

Similarly, a scheme user is not required to make disclosure under this hallmark where they do not wish to keep any element of the scheme confidential from HMRC.

For both promoters and scheme users, the relevant questions to be asked are not hypothetical questions. They do not ask what another promoter may do; what HMRC knows; or how HMRC, the Treasury or Parliament may react if they knew about the scheme (although this may be in the promoter or user’s mind when he forms his decision).

HMRC will expect promoters and users to answer the test fairly and act in accordance with the decision they make.

HMRC will not:

- assume that because a scheme was not disclosed that the promoter wanted to keep it confidential from HMRC (likewise, a promoter is not required to disclose everything just to prove there was nothing to disclose); or

- carry out “fishing expeditions” to determine what schemes have not been disclosed under this hallmark.

If HMRC discover a scheme that has not been disclosed we will, when considering whether the test has been applied correctly, examine all the evidence and form a balanced view as to why it was not disclosed. Indicative factors include:

- How new, innovative and aggressive the scheme is. Schemes that promoters know to be known to HMRC are not caught by the hallmark. These can be evidenced from, for example, technical guidance notes, case law, or past correspondence with a case officer in HMRC where the detail of how the scheme works has been made clear.

- Whether a promoter imposes an obligation upon potential clients, whether in writing or verbally, to keep the details of the scheme confidential from third parties including HMRC. This factor would not be considered if the agreement is a general agreement.

- Whether confidentially agreements, general or specific, between a promoter and client allow the client to disclose information to HMRC without referral to the promoter.

- The use of explicit warnings in marketing material or other communications to a client to the effect that the scheme may have a limited "shelf life" because Parliament may act to close it once it became known.

- The degree of co-operation to requests for information from HMRC concerning a specific scheme and the reasons for not providing information.

7.3.4 Hallmark 1(b): "Any element" of the arrangements

The hallmark asks whether the promoter or scheme user (as applicable) wants to keep any element of the arrangements confidential from HMRC. This could include part of a bespoke arrangement where the totality of the scheme will not be repeated.

7.3.5 Hallmark 1(b): Confidential "at any time"

The hallmark asks whether the promoter or scheme user (as applicable) wants to keep an element of the scheme (including the way it is structured) confidential from HMRC at any point in time between the date on which it is implemented and the date by which users would be required to notify HMRC of the scheme reference number (normally the filing date for the affected tax return – see paragraph 12.4.1).

It is not relevant if it is wished that the scheme be kept confidential before or after this time frame. Equally, it is not relevant whether it is wished that it be kept confidential during the whole of the time frame, only at some point during it.

7.3.6 Hallmark 1(b): Repeated and continued use of the element

The hallmark asks, where applicable, whether the promoter wants to keep an element of the scheme (including the way it is structured) confidential from HMRC in order to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

"Repeated use" – the test examines whether the key element that achieves the tax advantage is being kept confidential in order to insert it into further schemes used by either other clients or the same client. It could apply, for example, where the totality

of the scheme is expected to be repeatable in its generic form time and again, or where the key element was conceived as part of a bespoke scheme and then recorded on a register for use in other schemes in the future.

"Continued use" – the test examines whether the element that achieves the tax advantage is being kept confidential in order to allow the tax advantage to accrue over time or the scheme to run its course.

7.4 Hallmark 2: Confidentiality where no promoter involved

7.4.1 The legislation

Hallmark 2 is prescribed by regulation 7 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

Regulation 7
Arrangements are prescribed if—

(a) no person is a promoter in relation to them;

(b) the intended user of the arrangements is a business which is not a small or medium-sized enterprise;

(c) any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements;

(d) the user of those arrangements wishes the way in which that element is expected to secure a tax advantage to be kept confidential from Her Majesty's Revenue and Customs for some or all of the period—

beginning with the day on which he enters into the first transaction forming part of the notifiable arrangements, and

(i) ending with the latest time at which he would first have had to provide Her Majesty's Revenue and Customs with information under section 313 of FA 2004 in accordance with regulation 8 of the Information Regulations or otherwise include information about the arrangements in a return; and

(ii) a reason for the user's wishing to keep that element confidential from Her Majesty's Revenue and Customs is to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

7.4.2 Confidentiality from HMRC

This hallmark only applies to schemes devised for use 'in-house'. It does not apply where the person intended to obtain the tax advantage is a small or medium enterprise.

It is similar to hallmark 1(b) in that the in-house person has to consider their own circumstances and not those of hypothetical third party promoters. So the tests for a person using an in-house scheme are, having entered into a transaction forming part of the arrangements:

- "Do I wish to keep confidential from HMRC the way any element of the arrangements (including the way they are structured) gives rise to and secures the expected tax advantage … (see paragraph 7.3.4);

- … at any time between the date of the first transaction forming part of the scheme and the date (if the scheme were disclosed) by which I would be required to notify HMRC of the reference number?" (see paragraph 7.3.5);

- "Is a reason for doing so to facilitate the repeated or continued use of that element, in the future?" (The guidance on "repeated and continued use" at paragraph 7.3.6, when read in the context of a scheme user, applies to this hallmark in the same way as it applies to hallmark 1(b).)

Again the test is not circular in that it does not mean that all undisclosed schemes are, by default, schemes that a taxpayer wishes to keep confidential and so should have been disclosed. The guidance on this at paragraph 7.3.3 applies equally here.

As for hallmark 1(b), if HMRC discover a scheme that has not been disclosed we will, when considering whether the test has been applied correctly, examine all the evidence and form a balanced view as to why it was not disclosed. Indicative factors include:

- How new, innovative and aggressive the scheme is. Schemes that taxpayers are aware to be known to HMRC are not caught by the hallmark. These can be evidenced from, for example, technical guidance notes, case law, or past correspondence with a case officer in HMRC where the detail of how the scheme works has been made clear.

- The degree of co-operation with requests for information from HMRC concerning a specific scheme and the reasons for not providing that information.

- Whether a taxpayer imposes an obligation upon other parties to the scheme, whether in writing or verbally, to keep the details of the scheme confidential from HMRC.

7.4.3 The timing rule

The timing rule is by reference to the date on which the arrangements are implemented and the due date for filing an affected return.

The key issue is whether there is a wish to keep the details confidential at any point during this time frame, rather than the whole time frame or for periods outside of it. It is also irrelevant whether the details would be would be disclosed on a return.

7.5 Hallmark 3: Premium fee

7.5.1 The legislation

Hallmark 3 is prescribed by regulation 8 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

Regulation 8

(1) Arrangements are prescribed if they are such that it might reasonably be expected that a promoter or a person connected with a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements to disclose information under these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

But arrangements are not prescribed by this regulation if—

(a) no person is a promoter in relation to them; and

(b) the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.

(2) For the purposes of paragraph (1), and in relation to any arrangements, a "premium fee" is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises; and which is—

(a) to a significant extent attributable to that tax advantage, or

(b) to any extent contingent upon the obtaining of that tax advantage.

7.5.2 Applying the hallmark

This hallmark applies to both promoted and 'in-house' arrangements. For 'in-house' arrangements, it does not apply where the person intended to obtain the tax advantage is a small or medium enterprise.

The hallmark contains a hypothetical test that does not depend on a premium fee actually being received. The question is whether it might reasonably be expected that a promoter could charge a premium fee if he wished to do so. That a promoter does not charge a premium fee is not conclusive, though the hallmark would be met if he does.

The test should be applied from the perspective of a client who is experienced in receiving tax advice or other services of the type being provided. Our assumption is that where a client regards the advice as valuable and not generally available he would be prepared to pay a premium for it. Equally, by contrast, if similar advice was available elsewhere the client would be unwilling to pay more than a normal fee for it.

We know that the size of fee charged is not the only reason why a client may choose a particular accounting or law firm. So the hallmark is no more than a broad attempt to identify tax advice that is innovative and valuable and which the promoter can use to obtain premium fees from a client who is experienced in receiving services of the type being provided.

7.5.3 Is the fee significantly attributable to, or contingent on, the advantage?

It is recognised that almost any fee obtained in relation to tax planning can to some extent be said to be attributable to obtaining a tax advantage. So a "premium fee" for

this purpose is a fee that is to a significant extent attributable to the tax advantage or is contingent upon a tax advantage being obtained.

In other words the hallmark works on the assumption that where a promoter is able to market a tax arrangement that is innovative then not all promoters will be in a similar position and potential users will be prepared to pay more to the promoter for that scheme.

When applying the hallmark you need to consider whether a fee could be charged in respect of any element of the tax arrangement such that it would to a significant extent be attributable to, or contingent upon, the expected tax advantage. So a fee is not a premium fee solely on account of factors such as:

- The adviser's location – e.g. fees could be expected to be higher in London
- The urgency of the advice – a fee that is higher due to the adviser having to give the advice urgently is not a premium fee for that reason alone
- The size of the transaction – if a large amount is at stake on a deal, the tax adviser may wish to increase his fee to reflect the greater level of exposure
- The skill or reputation of the adviser – some advisers normally charge more for advice than others to reflect the perceived higher quality of advice they offer
- The scarcity of appropriately skilled staff – some areas of tax advice are more complex and fees may be higher to reflect this.

7.6 Hallmark 4: Off market terms

7.6.1 The legislation

Hallmark 4 is prescribed by regulation 9 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543, as amended by SI 2007/2484):

Regulation 9

(1) Arrangements are prescribed if—

(a) the tax advantage expected to be obtained under the arrangements arises, to more than an incidental degree, from the inclusion in those arrangements of one or more financial products;

(b) a promoter, or a person connected with the promoter, becomes party to one or more of those financial products; and

(c) the price of the financial product or products differs significantly from that which might reasonably be expected to apply in the open market upon its being, or their being, made available to the other party when compared with a product that is, or products that are, the same as, or substantially similar to, the product or products in question.

(2) For the purpose of paragraph (1) a financial product is—

*(a)	a loan;*

*(b)	a contract which—*

*(i)	is a derivative contract for the purposes of Schedule 26 to the Finance Act 2002;*
*(ii)	would be such a derivative contract if paragraph 4 of that Schedule (contracts which are excluded by virtue of their underlying subject matter) were omitted; or*

*(iii)	would be a derivative contract falling within sub-paragraph (i) or (ii) if it were a contract of a company;*

*(c)	an agreement for the sale and repurchase of securities of the kind described in paragraphs (a) to (c) of subsection (1) of section 730A of ICTA 1988;*

*(ca)	an arrangement which is a debtor repo, a debtor quasi-repo, a creditor repo or a creditor quasi-repo (within the meanings given by Schedule 13 to the Finance Act 2007);*

*(d)	a stock lending arrangement within the meaning given by section 263B(1) of the Taxation of Chargeable Gains Act 1992;*

*(e)	a share; or*

*(f)	a contract, not being one of the above, which, whether alone or in combination with one or more other contracts (including any of the above), in substance represents the making of a loan, or the advancing or depositing of money, whatever its form and falls to be accounted for on that basis.*

This paragraph is subject to the following qualifications.

*(3)	This regulation does not apply if the only financial products involved in the arrangements are assets held within an account which satisfies the conditions in the Individual Savings Accounts Regulations 1998.*

*(4)	For the purposes of this regulation a contract, or a combination of contracts, falls to be accounted for as a loan, or as the advancing or depositing of money, if the person entering into the arrangements—*

*(a)	is, in accordance with generally accepted accounting practice, required to treat the contract, or the combination of contracts, as a loan, deposit or other financial asset or obligation, or*

*(b)	would be so required if the person were a company to which the Companies Act 1985 applied.*

This is subject to the following qualification.

*(5)	Anything which is a finance lease for the purposes of generally accepted accounting practice does not fall to be accounted for as a loan for the purposes of this regulation.*

(6) In this regulation "generally accepted accounting practice" has the meaning given by section 50 of the Finance Act 2004.

7.6.2 About the hallmark

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4).

It is intended to catch promoters that provide financial products, such as banks and other financial institutions, who escape being caught by the premium fee hallmark (paragraph 7.5) by building what would otherwise be a premium fee into the price of the product. An example could be charging only a small fee for a scheme whilst building in a premium through higher interest charges on loans and so on.

The hallmark is met when the four tests below are met.

7.6.3 Test 1 – Is a financial product included in the tax arrangements?

Financial products are:

- loans, including all forms of borrowing and lending and all securities e.g. a "QCB";
- derivatives contracts – i.e. anything within the definition of derivative in FA 2002, Sch. 26, whether or not the user of the scheme is liable to corporation tax;
- repos – i.e. any agreement for the sale and repurchase of securities of the kind described in paragraphs (a) to (c) of subsection (1) of section 730A of the Income and Corporation Taxes Act 1988, or an arrangement which is a debtor repo, a debtor quasi-repo, a creditor repo or a creditor quasi-repo (within the meanings given by Schedule 13 to the Finance Act 2007);
- stock lending agreements within the meaning of section 263B(1) of the Taxation of Chargeable Gains Act 1992;
- shares, including a share; and
- anything which in accordance with UK accounting practice is in substance a loan or lending of money.

Specifically excluded are ISAs and finance leasing. (Note: Hallmark 7 may apply – see paragraph 7.9.)

Where more than one valid accounting treatment is possible, the finance leasing exclusion applies by reference to the accounting treatment which will actually be adopted. For example, a product which will not be accounted for as a finance lease under International Financial Reporting Standards is not covered by this exclusion, notwithstanding that it might have been accounted for as a finance lease if domestic Accounting Standards had been applied.

7.6.4 Test 2 – Does the tax advantage arise to "more than an incidental degree" from the inclusion of a financial product in the tax arrangements?

The hallmark does not apply when the financial products included in the tax arrangements either do not contribute to the tax advantage or are incidental to how the advantage arises.

It is, however, important to recognise that the test is whether the tax advantage is expected to arise from the arrangements and not simply from the financial product – only rarely would a tax advantage derive directly from the financial product itself; more typically the effect of the financial product would be to alter the balance between the economic cost of obtaining the tax advantage and the tax value itself. For example a scheme might involve the artificial depreciation of an asset (which is not a financial product) to secure an income tax loss. The acquisition of the asset might be funded from cash resources or by borrowing. Where the asset was acquired by borrowing, the loan would be a financial product within the rules even though the apparent value of the tax advantage was no different from what would be obtained had no loan been used.

It might be argued that any tax advantage does not arise to more than an incidental degree from the inclusion of the loan within the arrangements. We believe that this would be too narrow a view. Even a loan on normal terms is in our view a disclosable financial product (subject to all the other tests) where it alters the overall economic analysis of the scheme for example, by changing the economic value of the expected tax advantage. Also in many cases using loans may be the only way in which the taxpayer is able to enter the transaction at all.

Where shares, repos and so on are concerned we expect in most situations the significance or otherwise of the financial product will be clear. We would not expect the disclosure of arrangements concerning the disposal of real property where the only possible financial product was a short-term loan arrangement between the vendor and purchaser. Likewise merely because a purchaser borrowed the funds necessary to complete the purchase would not bring the vendors arrangements within the rules.

7.6.5 Test 3 – Is the promoter or a person connected with him party to the financial products?

The hallmark only applies when the promoter or a person connected with him is party to one or more of the financial products that help give rise to the advantage. This might include, for example, a bank that is party to a loan, derivative or other financial product it has designed or made available. It also applies to any promoter who is party to the scheme.

7.6.6 Test 4 – Does the price differ from what might reasonably be expected?

In a normal competitive market a promoter who has an innovative tax arrangement idea from which he wishes to generate a profit has an advantage over others. That promoter would then be able, if he chose, to price financial products at a rate that differs from that which the customer would be offered if he invited other banks to quote for an equivalent kind of financial product that lacked the tax innovation. So this test is met where any of the terms of a financial product differ significantly from the terms that could be obtained in the open market for a similar financial product.

7.7 Hallmark 5: Standardised tax products

7.7.1 The legislation

Hallmark 5 is prescribed by regulations 10 and 11 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

Regulation 10

(1) Arrangements are prescribed if the arrangements are a standardised tax product.

But arrangements are excepted from being prescribed under this regulation if they are specified in regulation 11.

(2) For the purposes of paragraph (1) arrangements are a product if—

> *(a) the arrangements have standardised, or substantially standardised, documentation -*
>
> > *(i) the purpose of which is to enable the implementation, by the client, of the arrangements; and*
> >
> > *(ii) the form of which is determined by the promoter, and not tailored, to any material extent, to reflect the circumstances of the client;*
>
> *(b) a client must enter into a specific transaction or series of transactions, and*
>
> *(c) that transaction or that series of transactions are standardised, or substantially standardised in form.*

(3) For the purpose of paragraph (1) arrangements are a tax product if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage.

(4) For the purpose of paragraph (1) arrangements are standardised if a promoter makes the arrangements available for implementation by more than one other person.

Regulation 11: Arrangements excepted from [hallmark] 5

(1) The arrangements specified in this regulation are—

> *(a) those described in paragraph (2); and*
>
> *(b) those which are of the same, or substantially the same, description as arrangements which were first made available for implementation before 1st August 2006.*

(2) The arrangements referred to in paragraph (1)(a) are—

(a) arrangements which consist solely of one or more plant or machinery leases (see regulation 14);

(b) an enterprise investment scheme (Chapter 3 of Part 7 of ICTA 1988 and Schedules 5B and 5BA to TCGA 1992);

(c) arrangements using a venture capital trust (see section 842AA of, and Schedule 15B to, ICTA 1988 and Schedule 5C to TCGA 1992);

(d) arrangements qualifying under the corporate venturing scheme (see Schedule 15 to the Finance Act 2000);

(e) arrangements qualifying for community investment tax relief (see Schedules 16 and 17 to the Finance Act 2002);

(f) an account which satisfies the conditions in the Individual Savings Account Regulations 1998;

(g) an approved share incentive plan (see Chapter 6 of Part 7 of, and Schedule 2 to, ITEPA 2003);

(h) an approved share option scheme (see Chapter 7 of Part 7 of, and Schedule 3 to, ITEPA 2003);

(i) an approved CSOP scheme (see Chapter 8 of Part 7 of, and Schedule 4 to, ITEPA 2003);

(j) the grant of one or more qualifying options which meet the requirements of Schedule 5 to ITEPA 2003 (enterprise management incentives)—

> *(i) together only with such other steps as are reasonably necessary in all the circumstances for the purposes of facilitating it, or*
>
> *(ii) which fall to be notified to the Board in accordance with Part 7 of that Schedule;*

(k) a registered pension scheme (see section 150(2) of FA 2004);

(l) an overseas pension scheme in respect of which tax relief is granted in the United Kingdom under section 615 of ICTA 1988 (exemption from tax for superannuation payments in respect of persons not resident in the United Kingdom or in respect of trades carried on wholly or partly outside the United Kingdom);

(m) a pension scheme which is a relevant non-UK pension scheme within the meaning given by paragraph 1(5) of Schedule 34 to FA 2004;

(n) a scheme to which section 731 of ITTOIA 2005 applies (periodical payments of personal injury damages).

7.7.2 <u>About the hallmark</u>

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4) and, other than some exceptions, is intended to capture what are often referred to as "mass marketed schemes".

The fundamental characteristic of such schemes is their ease of replication rather than the volume of take-up or how they are made available – the number of clients, or potential clients, can vary enormously; as can the way in which they are "marketed". Schemes with this replication characteristic have variously been described to us as "shrink-wrapped" or "plug and play" schemes. Essentially, all the client purchases is a prepared tax product that requires little, if any, modification to suit his circumstances. To adopt it would not require him to receive significant additional professional advice or services.

The hallmark is met when the five tests below are met and the product does not fall within one of the exceptions.

7.7.3 <u>Test 1 – Are the arrangements a product?</u>

This test is intended to limit disclosure to those arrangements that are offered to potential clients as a finished "product", rather than a package of proposed arrangements and additional services.

To be a "product" the arrangements will have standardised, or substantially standardised, documentation the form of which has been determined by the promoter, do not require tailoring to the client's circumstances to any material extent, and which enable the client to implement the arrangements. As a minimum this will mean that standardised contracts, agreements or other written understandings between the parties to the arrangements are provided to the client. Instructions on how to implement the scheme might, typically, also be included, as may a copy of Counsel's Opinion.

To be a "product" the arrangements will also commit the client to enter either a specific standardised (or substantially standardised) transaction, or more usually a number of specific standardised (or substantially standardised) transactions, comprising the scheme. For example, a client who enters into the scheme may be required to join a specific partnership, take out a specific loan from a specific provider, buy a specific financial instrument etc.

7.7.4 <u>Test 2 – Is the product a tax product?</u>

This test is intended to limit disclosure to those arrangements that are tax driven – i.e. absent the tax advantage, it is highly unlikely that the product would exist, or if it did that any client would buy it.

The test asks whether it would be reasonable for an informed observer to conclude, having studied the arrangements, that **the**, not a, main purpose of the product is to enable the person entering into it to obtain a tax advantage. An informed observer is a person who is independent and has knowledge of the Taxes Act, such as the Tribunal. He need not necessarily be a tax practitioner.

7.7.5 Test 3 – Is the tax product made available generally?

As mentioned earlier, the manner in which schemes caught by this hallmark are promoted can vary enormously. At one end of the spectrum the scheme promoter could enter into a proactive campaign or aggressive marketing strategy. At the other (especially for established schemes) he could simply react to a casual enquiry for "ideas" from a potential client or offer him a product having identified a potential need, such as whilst carrying out consultancy work. Consequently, this test is not based on how or why a scheme is promoted but how available it is to potential users – i.e. whether or not it is bespoke.

Subject to the other tests and exceptions, the hallmark will apply to any "tax product" that a promoter makes available for implementation to two or more potential clients.

7.7.6 Test 4 – Was the tax arrangement first made available on or after 1st August 2006?

If the arrangements, or substantially the same arrangements (see paragraph 10.2.5 for guidance on "substantially the same"), forming the tax product were made available before 1st August 2006 ("grandfathered"), then they are not disclosable by virtue of this hallmark. It is irrelevant whether a given legal entity made them available prior to 1st August 2006; what is important is whether any person made them available prior to this date.

It is a matter of fact whether an arrangement is "grandfathered". Evidence would include, for example, the existence and substance of the arrangement being clearly described in tax manuals or publications; or a practitioner's own record as to when they made, or learnt that competitors were making, it available.

7.7.7 Test 5 – Is the tax product not within an exception?

There are a number of tax products that are excepted from disclosure. The list of exceptions is found at regulation 11 to the relevant legislation – reproduced at paragraph 7.7.1 above.

7.7.8 Packaged solutions

Accountants and other promoters of tax arrangements often maintain a "solutions register" that enables them to offer the same or similar solution to more than one client. The 'solution' will often require transactions of a specific nature to be carried out, possibly in a pre-ordained sequence; clauses to be inserted into contracts; etc. It will be a matter of scale and degree as to whether schemes on these registers fall within this hallmark.

In general, we would not expect such schemes to be caught where, before they can be implemented, the relevant transactions and/or documentation require significant tailoring to suit the client's circumstances; or there are other circumstances where the input from a professional goes substantially beyond rudimentary oversight and checking.

7.8 Hallmark 6: Loss schemes

7.8.1 The legislation

Hallmark 6 is prescribed by regulation 12 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

Regulation 12

Arrangements are prescribed if—

> (a) the promoter expects more than one individual to implement the same, or substantially the same, arrangements; and
>
> (b) the arrangements are such that an informed observer (having studied them) could reasonably conclude—
>
> > (i) that the main benefit of those arrangements which could be expected to accrue to some or all of the individuals participating in them is the provision of losses, and
> >
> > (ii) that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax.

7.8.2 About the hallmark

This hallmark only applies where there is a promoter of the arrangements (see paragraph 6.4) and is intended to capture various loss creation schemes that are typically used by wealthy individuals.

The schemes vary considerably in detail but are normally designed so that they generate trading losses for wealthy individuals that can then be offset against income tax and capital gains tax liabilities or generate a repayment.

The hallmark is met when the two tests below are met.

7.8.3 Test 1 – Is more than one individual expected to implement the tax arrangements?

This test is met if the promoter expects that there will be more than one individual client for each set of arrangements having the same, or substantially the same, form.

7.8.4 Test 2 – Is the main benefit of the arrangements an expected loss for use against IT or CGT liabilities?

The test is whether an informed observer would reasonably conclude, having studied the details, that the, not a, main benefit of the arrangements is to provide all or some of the individual participants with losses that will be used to reduce their income tax or capital gains tax liabilities or generate a repayment. An informed observer is a person who is independent and has knowledge of the Taxes Act, such as the Tribunal. He need not necessarily be a tax practitioner.

This will normally be the case where it would be reasonable to expect that the tax relief expected by the "investors" is greater than the total amount of the investment which represents real personal risk. For example, the amount an individual invests in

the scheme may geared up by a non-recourse loan or limited recourse loan from sources connected with the scheme and the arrangements such that however little income the scheme generates the tax relief will be greater than the amount the individual has, in economic substance, contributed.

This test does not catch genuine business start-ups where any losses are an unintended, albeit possibly predictable, consequence.

7.9 Hallmark 7: Leasing arrangements

7.9.1 <u>The legislation</u>

Hallmark 7 is prescribed by regulations 13 to 17 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

Regulation 13

(1) Arrangements are prescribed if—

(a) the arrangements include a plant or machinery lease (see regulation 14);

(b) one of the additional conditions is met (see regulation 15);

(c) the relevant value condition is met (see regulation 16); and

(d) the lease is not a short-term lease (see regulation 17).

(2) But arrangements are not prescribed by this regulation if—

(a) no person is a promoter in relation to them; and

(b) the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.

Regulation 14: Meaning of "plant or machinery lease"

(1) A "plant or machinery lease" is any of the following—

(a) any agreement or arrangement to which paragraph (2) applies,

(b) any other agreement or arrangement to the extent that paragraph (3) applies to it,

(c) where plant or machinery is the subject of a sale and finance leaseback, as defined in section 221 of CAA 2001, the finance lease mentioned in subsection (1)(c) of that section;

and in these Regulations "lease", "lessor" and "lessee" are to be construed accordingly.

(2) This paragraph applies to an agreement or arrangement—

(a) under which a person (the lessor) grants to another person (the lessee) the right to use plant or machinery for a period, and

(b) which, in accordance with generally accepted accounting practice, falls (or would fall) to be treated as a lease.

(3) This paragraph applies to an agreement or arrangement to the extent that—

(a) in accordance with generally accepted accounting practice, it falls (or would fall) to be treated as a lease, and

(b) it meets the conditions in paragraph (4).

(4) The conditions are that, for the purposes of generally accepted accounting practice,—

(a) the agreement or arrangement conveys, or falls (or would fall) to be regarded as conveying, the right to use an asset, and

(b) the asset is plant or machinery.

(5) In the case of an agreement or arrangement that falls (or would fall) within paragraph (2) or (3) immediately after the commencement of the term of the lease, the condition in paragraph (2)(b) or (3)(a) (as the case may be) is to be taken to be met as respects any time in the pre-commencement period.

(6) For the purposes of paragraph (5), the "pre-commencement period" is the period that—

(a) begins with the inception of the lease, and

(b) ends with the commencement of the term of the lease.

(7) In paragraph (6)(a), "inception", in relation to a plant or machinery lease, means the earliest date on which all of the following conditions are met—

(a) there is a contract in writing for the lease between the lessor and the lessee;

(b) the contract is unconditional, or (if the contract is conditional) the conditions have been met; and

(c) no terms remain to be agreed.

Regulation 15: The additional conditions

(1) The first additional condition is that the arrangements are designed in such a way that one or more of the plant or machinery leases, comprised in the arrangements, are or would be entered into by—

(a) one party who has or would have a right or entitlement to claim capital allowances under Part 2 of CAA 2001 (plant and machinery allowances) in respect of the expenditure incurred on the plant or machinery, and

(b) another party who is not, or would not be, within the charge to corporation tax.

(2) A lease satisfies this condition if sub-paragraphs (a) and (b) of paragraph (1) are met, regardless of whether there are or would be (in addition to the parties mentioned in those sub-paragraphs) other parties to the lease who satisfy neither of those conditions.

(3) A party who acts merely as a guarantor under the lease is to be disregarded for the purposes of paragraph (1)(b).

(4) The second additional condition is that the arrangements include provision designed to—

> *(a) remove from the lessor the whole, or the greater part, of any risk, which would otherwise fall directly or indirectly upon the lessor, of sustaining a loss if payments due under the lease are not made in accordance with its terms, and*
>
> *(b) do so by the provision of money or a money debt.*

For the purposes of this paragraph "money" and "money debt" have the same meanings as they have in section 702(6) of ITEPA 2003.

(5) The third additional condition is that the arrangements are designed to consist of, or include—

> *(a) a sale and finance leaseback arrangement (within the meaning of section 221 of CAA 2001), or*
>
> *(b) a lease and finance leaseback (within the meaning of section 228F(5) of CAA 2001).*

The third additional condition is subject to the following paragraphs of this regulation.

(6) In a case falling within paragraph (5)(a) the third additional condition does not apply if the arrangements are designed in such a way that—

> *(a) the assets leased or to be leased under the sale and finance leaseback are or will be unused and not second-hand at the time when the assets are acquired or created; and*
>
> *(b) the interval between the acquisition or creation of the asset and the sale of the asset under the sale and finance leaseback arrangement is not more than four months.*

(7) The third additional condition does not apply if plant or machinery which is, or which the promoter expects to become, a fixture, is leased with relevant land, unless the plant or machinery is used for storage or production.

Here "used for storage or production" means used for the purposes of—

> *(a) storing, moving or displaying goods to be sold in the course of a trade;*
>
> *(b) manufacturing goods or materials;*
>
> *(c) subjecting goods or materials to a process;*

(d) storing goods or materials—

(i) which are to be used in the manufacture of other goods or materials;

(ii) which are to be subjected to a process in the course of a trade;

(iii) which having been subjected in the course of a trade to process, manufactured or produced, have not yet been delivered to a purchaser; or

(iv) upon their arrival in the United Kingdom from a place outside it.

(8) But paragraph (7) does not apply (so that, accordingly, the third additional condition is met) if the arrangements are designed in such a way that—

(a) the qualifying expenditure incurred on the fixture referred to in paragraph (7) amounts or will amount to more than 50% of the aggregate value of the assets subject to the lease, and

(b) the rent payable under the lease is directly or indirectly dependent on the availability of capital allowances under Part 2 of CAA 2001 in respect of expenditure on any plant or machinery comprised in the lease.

(9) In determining the value of the assets comprised in the lease the following rules apply.

Rule 1

The value of the land subject to the lease is the market value of the lessor's interest.

Rule 2

The value of the plant or machinery subject to the lease is to be determined in the same manner as for the purposes of regulation 16(1).

(10) In this regulation—

"fixture" has the meaning given by section 173(1) of CAA 2001;

"relevant land" has the meaning given by section 173(2) of CAA 2001.

Regulation 16: The relevant value condition

(1) The relevant value condition is met if—

(a) the lower of the cost to the lessor, or the market value, of any one asset forming part of the plant and machinery leased or to be leased under the arrangements is at least £10,000,000; or

(b) the aggregate of the lower of the costs to the lessor, or the market values, of all of the assets forming part of the plant and machinery leased or to be leased under the arrangements is at least £25,000,000.

(2) For the purposes of paragraph (1) the market value of plant or machinery leased or to be leased under arrangements is to be determined on the assumption of a disposal—

(a) by an absolute owner;

(b) free from all encumbrances; and

(c) in the open market.

(3) "Absolute owner" in the application of paragraph (2)(a) to Scotland, means the owner.

Regulation 17: Short-term leases

(1) For the purposes of regulation 13(1)(d) a lease whose term is 2 years or less is a short-term lease.

But a lease is not a short-term lease if any of the following Conditions apply.

In those Conditions "L" is the lessee.

(2) Condition A is that the lease contains an option exercisable by L to extend the term so that the total term exceeds 2 years.

(3) Condition B is that at the time of the inception of the lease, other arrangements have been entered into which contemplate the extension of the lease to L which, if carried out, would extend the term of the lease so that it exceeds 2 years.

(4) Condition C is that—

(a) a person leases an asset to L under a lease that would, apart from this paragraph, be a short-term lease,

(b) the inception of that lease is on or after the date on which these Regulations come into force,

(c) at or about the time of the inception of that lease, arrangements are entered into for the asset to be leased to one or more other persons under one or more other leases, and

(d) in the aggregate, the term of the lease to L and the terms of the leases to such of those other persons as are connected with L exceed 2 years.

7.9.2 About the hallmark

This hallmark applies both to promoted and 'in-house' arrangements, but for in-house arrangements it does not apply where the person intended to obtain the tax advantage is a small or medium enterprise. It is met when both:

- all of tests 1 to 3 described below are met; and
- any one of the three additional conditions is met.

7.9.3 Test 1 – Does the arrangement include a plant or machinery lease?

The hallmark only applies if the arrangement includes a plant or machinery lease. In brief, this is:

- any agreement or arrangement under which a person grants to another person the right to use plant or machinery for a period and which in accordance with generally accepted accounting practice falls, or would fall, to be treated as a lease;

- any other agreement or arrangement to the extent that, in accordance with generally accepted accounting practice falls (or would fall) to be treated as a lease, the agreement conveys (or falls or would fall to be regarded as conveying) the right to use an asset, and the asset is plant or machinery; or

- the finance lease where plant or machinery is the subject of a sale and finance leaseback as defined in section 221 of the Capital Allowances Act 2001.

7.9.4 Test 2 – Is the lease of high value?

The hallmark only applies to high value plant or machinery leases. It is a high value lease when, of the assets forming part of the plant and machinery leased or to be leased under it,

- the cost to the lessor of any one asset or its market value (whichever is lower) is at least £10m, or

- the cost to the lessor of all the assets or their market value (whichever is lower) is at least £25m.

Facilities to lease assets with an individual value of £10m or to the aggregate value of at least £25m are caught by this test even if there is no guarantee that the £25m threshold will be reached and should be disclosed when the facilities are made available.

Where a succession of leases are made to the same parties, or persons connected with them, and they are negotiated at the same time or as part of the same series of negotiations (that is, as part of the "arrangements"), the value of the plant or machinery to be leased under all the leases should be aggregated.

The acquisition of assets with an aggregate value of more than £25m (and no individual asset is at least £10m) does not have to be disclosed if the assets are to be leased to a variety of clients and no individual lease meets the £10m or £25m threshold, as appropriate.

7.9.5 Test 3 – Is the lease a long lease?

The hallmark only applies where the lease is not a short-term lease.

The meaning of "short-term lease" is different from that of "short lease" in section 70I of CAA 2001. A short-term lease is one whose term is 2 years or less but does not include leases that:

- contain an option allowing the lessee to extend the lease beyond 2 years;
- at the time of inception, other arrangements have been entered into that contemplate an extension beyond 2 years; or
- are incepted on or after 1st August 2006 with the intention that the assets be leased under it to one or more other persons such that the aggregate term exceeds 2 years.

7.9.6 Additional condition 1 – Does the lease involve a party outside the charge to corporation tax?

This additional condition applies where the arrangement includes one or more plant or machinery lease entered, or to be entered, into by:

- a party who is entitled to claim capital allowances (on plant and machinery) in relation to the leased asset; and
- a party who is not, or would not be, within the charge to corporation tax.

It does not matter how many parties there are to the lease. Where there are more than two parties involved the arrangement is a hallmarked scheme if there are, or would be, parties to the lease meeting each of the above bullets.

A manufacturer may, of course, be a lessor and so a party to the lease. But a manufacturer of leased equipment is not a party to the lease merely by virtue of being a supplier to the lessor.

A party that acts solely as a guarantor is not taken into account in considering whether this condition is met. However you need to consider whether the guarantee provided is such that the second additional condition is met.

7.9.7 Additional condition 2 – Does the arrangement involve the removal of risk from the lessor?

This additional condition applies where the arrangement includes provision that:

- removes the whole, or the greater part, of the risk that would otherwise fall directly or indirectly upon the lessor if payments due under the lease were not made in accordance with its terms; and
- does so by the provision of money or a money debt.

"Money" includes money expressed in a currency other than sterling.

"Money debt" means any obligation that falls to be, or may be, settled by the payment of money, or the transfer of a right to settlement under an obligation which is itself a money debt. It covers all trade debts, as well as other money debts, such as debentures.

7.9.8 Additional condition 3 – Does the arrangement involve a finance leaseback?

This additional condition applies where the arrangements consist of, or include:

- a sale and finance leaseback arrangement, or
- a lease and finance leaseback.

However, there are two exceptions to this general rule.

First, this additional condition does not apply where the arrangements consist of, or include a sale and finance leaseback arrangement and, at the time the sale and finance leaseback is entered into, the assets leased, or to be leased, are new. By this it is meant that the assets:

- at the time they are acquired or created by the seller, are unused and not second-hand; and
- were acquired or created by the seller not more than 4 months before the sale part of the sale and finance leaseback arrangement.

Second, it is recognised that many property transactions consist of sale or lease and finance leaseback; and most property includes plant or machinery such as central heating and air conditioning. It is not intended that the simple sale and leaseback of plant or machinery within a typical building such as an office block fall within this additional condition.

The hallmark does not attempt to define the type of plant or machinery that is excluded when leased with land. Instead it takes the approach that the arrangements do not need to be disclosed where–

- the plant or machinery is, or is expected to become, a fixture that is part of the leased land,
- the plant or machinery does not exceed half the value of the leased assets, and
- the rent payable under the lease is not directly or indirectly dependent on the availability of capital allowances.

However, leases involving plant and machinery used for storage or production do not fall within this exemption – see the definition at regulation 15(7) reproduced at paragraph 7.9.1 above.

So, for example, if a factory is sold and leased back where the production line plant in the factory has a value of over £25m (or contains equipment with an individual value of over £10m) it will need to be disclosed.

But the sale and leaseback of an office block costing £100m with £35m of plant or machinery that does not meet the definition of “plant used for storage or production” will not need to be disclosed under this condition.

7.10 Hallmark 8: Pensions

7.10.1 The legislation

Regulation 17A

Arrangements are prescribed if-

> *(a) they involve the accrual or expected accrual of benefits in a pension scheme (within the meaning of section 150 of the Finance act 2004) to or in respect of a person; and*
>
> *(b) the main benefit of those arrangements is that-*
>
> > *(i) the person would not be subject to the special annual allowance charge provided under Schedule 35 to the Finance Act 2009; or*
> >
> > *(ii) the person incurs the special annual allowance charge but at a lesser amount than would have been incurred if the arrangements had not been entered into.*

7.10.2 About the hallmark – purpose

This hallmark applies is intended to capture and provide early warning of any schemes that seek to avoid the special annual allowance charge (SAAC).

7.10.3 About the SAAC

The legislation providing for the SAAC is Section 72 and Schedule 35 of Finance Act 2009.

The purpose of the SAAC is to prevent high income individuals from obtaining tax relief on increases to their pension contributions or accrued benefits made to forestall the restriction of pensions tax relief to the basic rate with effect from 6 April 2011. The SAAC will apply only where the contributions:

- exceed certain monetary limits; and
- are not consistent with the individual's normal pattern of regular savings.

The SAAC is an income tax charge for certain individuals on certain pension contributions and benefits accrued ("pension savings"). The charge applies to pension savings accrued in excess of a special annual allowance for individuals:

- whose relevant income is £130,000 or more (£150,000 from 22 April 2009 to 8 December 2009);
- who change their normal ongoing regular pensions savings; and
- whose total pensions savings in a tax year exceed £20,000 (or the lower of £30,000 and average contributions over the past three years if contributions are less regular than quarterly).

The amount of the special annual allowance is normally £20,000 (£30,000 for those whose normal pattern of savings is irregular).

The tax charge is intended to restrict relief on the excess to basic rate. It will therefore apply at a rate of 20% in the 2009-2010 tax year. From 6 April 2010 the special annual allowance charge will be set at the 'appropriate rate'. The 'appropriate rate' is determined by the rate of tax relief given on the amount of pension savings which exceeds the special annual allowance and will restrict tax relief on that excess to the basic rate of income tax.

The SAAC will not apply in respect of an individual's normal pattern of regular pension savings, or the normal way in which their benefits are accrued before 22 April 2009. The legislation also enables a high income individual to ask their scheme to refund pension contributions that they have paid in the 2009-10 or 2010-11 tax year, which may otherwise create a liability to the SAAC. Such repayments are subject to a 40% income tax charge in 2009-2010 rising to 50% from 6 April 2010, in effect a claw back of the tax relief.

Guidance about the SAAC

7.10.4 About the hallmark – tests

The hallmark is expressed largely in terms of the effect the arrangements seek to achieve rather than the way they seek to achieve that effect.

The first leg of the hallmark in effect asks if the arrangements involve an individual making contributions to a pensions scheme or otherwise accruing, or expecting to accrue, benefits in a pension scheme.

The second leg of the hallmark asks whether the main benefit of those arrangements is that the individual either does not incur the SAAC or incurs a lower SAAC than they would have done had they not entered into the arrangements.

The types of arrangements that would fall within the hallmark include those where:

- The individual's relevant income is in excess of £150,000 (£130,000 from 09/12/09) and the effect of the arrangements is to reduce it, in form only, below the income threshold in such a way that the SAAC does not apply;

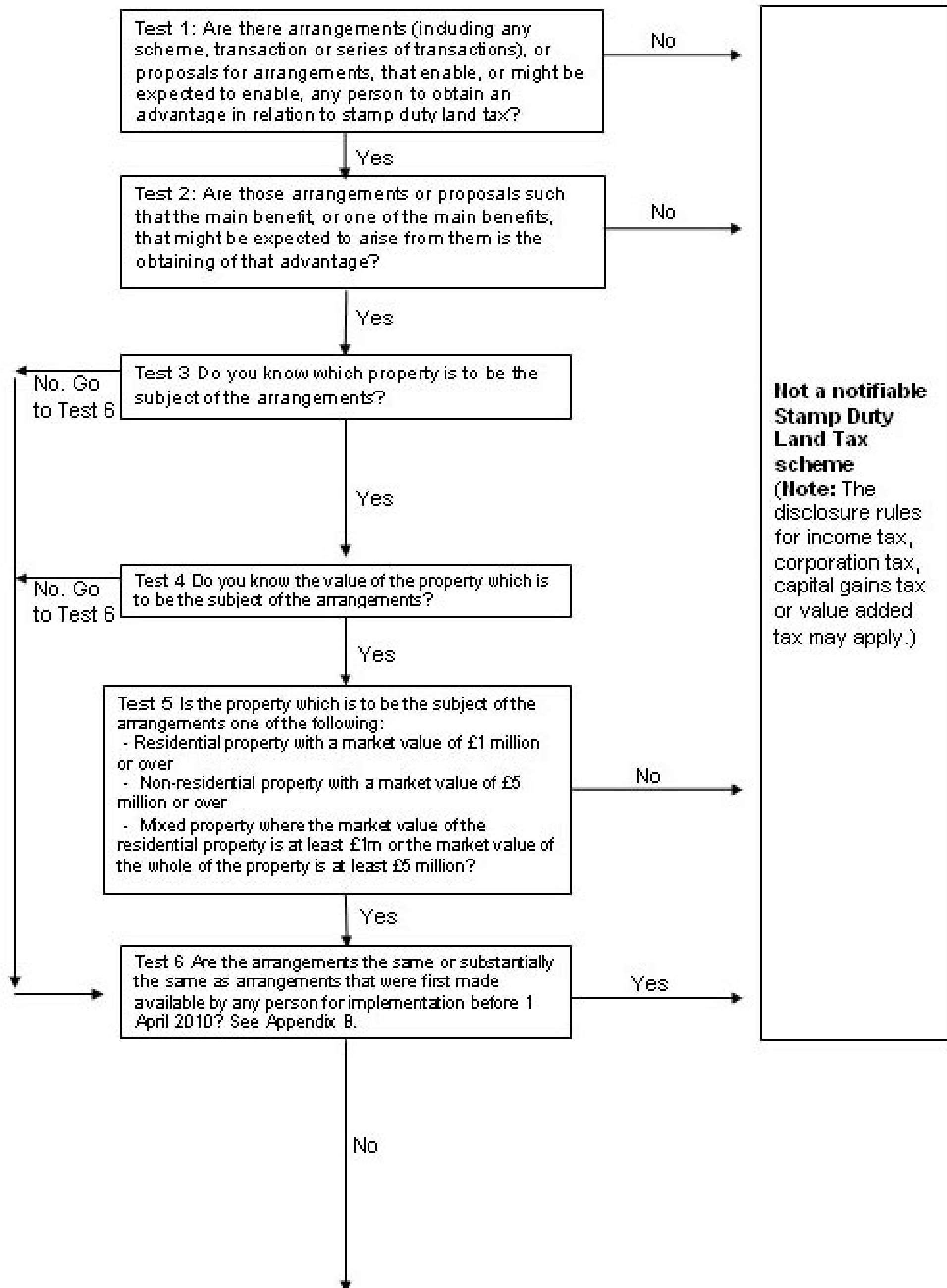
- The individual makes substantive pension savings of more than the special annual allowance (£20,000 or £30,000 as the case may be) and the effect of the arrangements is to reduce those savings, in form only for the purposes of determining liability to the SAAC, below those amounts; and

- The individual's regular pattern of savings is less than £20,000 a year and the effect of the arrangements is that the individual will be able to make savings greater than that amount without incurring the SAAC.

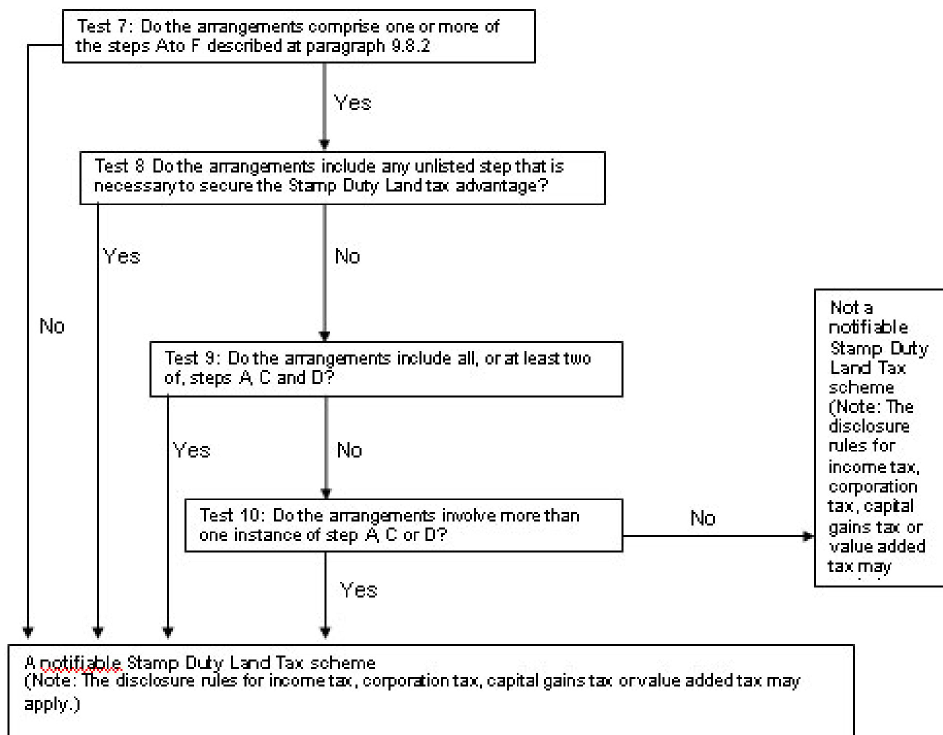
The first bullet will not apply to those whose relevant income (as defined for SAAC purposes) is reduced below the income threshold by; for example, a reduction in hours worked or bonuses received. A salary reduction in itself is unlikely to fall within the definition of "arrangements" (see 6.2.1 above) and even if it does, it would not amount to a 'tax advantage' within the definition in s.318(1)(a) FA 2007 (see 6.2.2 above). Such 'arrangements' are not notifiable.

Nor will the first bullet apply to arrangements that reduce an individual's taxable income without reducing their 'relevant income' for the purposes of determining a SAAC. For example, where taxable employment income is sacrificed in return for higher employer pension contributions under an agreement made on or after 9 December 2009, the sacrificed income is added back into the calculation of the £130,000 relevant income. Such arrangements would not have the effect of avoiding or reducing the SAAC and are not notifiable."

Section 8 Determining a Stamp Duty Land Tax Scheme – Flow Chart



- 55 -


Test 7: Do the arrangements comprise one or more of the steps A to F described at paragraph 9.8.2
Yes
No
Test 8 Do the arrangements include any unlisted step that is necessary to secure the Stamp Duty Land tax advantage?
Yes
No
Test 9: Do the arrangements include all, or at least two of, steps A, C and D?
Yes
No
Test 10: Do the arrangements involve more than one instance of step A, C or D?
No
Yes
Not a notifiable Stamp Duty Land Tax scheme (Note: The disclosure rules for income tax, corporation tax, capital gains tax or value added tax may
A notifiable Stamp Duty Land Tax scheme
(Note: The disclosure rules for income tax, corporation tax, capital gains tax or value added tax may apply.)

9. Determining a stamp duty land tax scheme – The tests

9.1 General

The hallmarks at section 7, including the “confidentiality”, “premium fee” and “off market test” hallmarks, do not apply to this section.

9.2 Test 1: Are there arrangements that enable an SDLT advantage to be obtained? (FA 2004, s.306(1)(a) and (b) and s.318)

The guidance at paragraph 6.2 applies to this section in the same way as it does for section 6.

Note: The definition of “arrangements” used for disclosure purposes is wider than the concept of “linked transactions” used for stamp duty land tax purposes (FA 2003, s.108).

9.3 Test 2: Is the advantage a main benefit of the arrangements? (FA 2004, s.306(1)(c))

The guidance at paragraph 6.3 applies to this section in the same way as it does for section 6.

9.4 Tests 3, 4 and 5 Nature and market value of property – Overview

Disclosure is not required If the total market value of the chargeable interests in each property for which the arrangement is to be used is below certain thresholds. This threshold differs according to whether the arrangement is to be used for residential or non-residential property.

- Where the arrangement is to be used wholly for residential property disclosure is **not** required if the total market value is below £1 million.

- Where the arrangement is to be used wholly for non-residential property disclosure is **not** required if the total market value is below £5 million.

- Where the arrangement is to be used partly for residential and partly for non-residential property disclosure **is** required if either threshold is met or exceeded, i.e. the market value of the residential part is £1 million or greater, and/or the market value of the whole of the property is £5 million or greater.

- Where the market value or the type of property to be used in the arrangement is not known then the arrangement **must be disclosed**.

9.5 Tests 3, 4 and 5 How to determine the nature and market value of the property

9.5.1 Nature of property

“Residential property” has the meaning used for stamp duty land tax purposes and is defined at FA 2003, s.116. You will find guidance on this in the Stamp Duty Land Tax Manual at SDLTM20070.

"Non-residential property" is any property which is not residential property as defined above.

9.5.2 Market Value

"Market value" has the meaning used for stamp duty land tax purposes, which is determined as for the purposes of the Taxation of Chargeable Gains Act 1992. For the purposes of ascertaining the market value, you must take account of all chargeable interests held by all connected persons in the property. "Chargeable interest" is defined in FA 2003, s.48 and you will find guidance in the Manual at SDLTM00280. "Connected persons" are those falling within the description in the Income and Corporation Taxes Act 1988, s.839.

The relevant time for determining the market value is obtained by assuming that the £1 million or £5 million threshold has been reached and using the rules on when to disclose a scheme detailed at section 10 below.

9.6 Tests 3, 4 and 5: Nature or market value of property unknown or uncertain

A common question asked by professional advisers is "how will I know what the arrangement is to be used for and what its market value is? I won't know if the property will be residential, non-residential or a combination of the two and I won't know what its market value will be as any arrangement could theoretically be used for property of any description or value?" The rule of thumb is that if the nature or type of property is not known then the arrangement must be disclosed but more detail as to how to determine this is given below.

The starting point is that the tests apply at the time of the event that triggers the potential requirement to disclose a scheme. There are two possible "triggers", depending upon the type of scheme.

9.6.1 Marketed arrangements

For marketed arrangements the trigger is making proposals available for implementation by any person – see paragraph 10.3.2. We expect that in most cases the scheme will be made available to specific users. In that case, the promoter should apply the test:

- Will the arrangements be used, at least in part, for residential property with a value of £1million or more or for any property with a value of £5 million or more in respect of the persons to whom the scheme has been made available?

If the answer is "I don't know", the promoter must notify the scheme.

In some cases, the scheme may be made available at a time when no specific users have been identified. For example, the promoter may communicate proposals at arms length via a distributor (see paragraph 10.3.5). In such cases, the promoter cannot know the details of the property for which the arrangements are to be used and must notify the scheme.

9.6.2 Bespoke arrangements

For bespoke arrangements, the trigger is that the promoter becomes aware that a transaction forming part of the arrangements has taken place – see paragraph 10.3.3. In such cases the promoter should apply the test:

- Will the arrangements be used, at least in part, for residential property with a value of £1 million or more or for any property with a value of £5 million or more to the property which is the subject of the transactions that have triggered the potential disclosure?

If the answer to either test is "I don't know", the promoter must notify the scheme.

9.6.3 In-house arrangements

Where users are required to disclose an arrangement, we expect that they will always know the details, including the market value, of the property for which the scheme is to be used. Consequently we expect they will know, at the time that disclosure would normally be required, whether or not the transaction(s) forming part of the arrangements that trigger the disclosure requirement relates, at least in part, to residential property with a value of £1 million or more, or to any property with a value of £5 million or more. If it does – or if the user does not know the answer – the user must notify the scheme.

9.6.4 Using the same arrangements with future unknown properties

In the circumstances described in paragraphs 9.6.1 and 9.6.2 there will usually be a theoretical possibility that the same arrangements could be used in the future for other properties and the value of those properties is inevitably unknown. This situation alone does not require the arrangements to be notified. If and when either proposals are made available to further clients, or the promoter becomes aware of further transactions involving different clients or property, then the promoter should apply the tests again in relation to the new circumstances.

9.7 Test 6: Grandfathering

One of the aims of the extension of the disclosure rules for stamp duty land tax is to restrict disclosure to those schemes which are new or innovative. This is achieved by exempting from disclosure those schemes which are the same or substantially the same as arrangements made available by any person before 1st April 2010. This is known as "grandfathering".

See paragraph 10.2.5 below for the meaning of "substantially the same". It is irrelevant whether a given legal entity made the arrangements available prior to 1st April 2010; what is important is whether any person made them available prior to this date.

It is a matter of fact whether an arrangement is "grandfathered". Evidence of grandfathering would include:

- the existence and substance of the arrangement being clearly described in tax manuals or publications;

- a practitioner's own record as to when they made, or learnt that competitors were making, an arrangement available.

"Makes available for implementation" takes the meaning at S308(2) Finance Act 2004 and detailed guidance as to its meaning is given at paragraph 10.3 below.

9.7.1 List of grandfathered schemes

A list of schemes which HMRC regards as being "grandfathered" may be found below. This list is purely illustrative and should not be regarded as being exhaustive. If there is any doubt as to whether a scheme ought to be disclosed then a disclosure should be made. The use of the six steps in Tests 7 to 10 below will also remove the need to notify HMRC of schemes of which it is already aware.

The fact that any particular scheme is exempted from disclosure by the application of test 6 should not be taken as an indication that HMRC either finds the scheme acceptable, or that we accept that it works under current law. It merely signifies that we are already aware of it.

> 1(a) those that satisfy the requirements at Steps 7-10 as described in Section 9.8 of the DOTAS Guidance April 2010, and
>
> (b) those which are of the same, or substantially the same, description as arrangements which were first made available for implementation before 1st April 2010.
>
> (2) The arrangements referred to in paragraph (1)(b) include (although this is not an exhaustive list) —
>
> (a) arrangements which rely on the completion of the original contract being disregarded under S45 FA 2003;
>
> (b) arrangements that rely upon the interaction between the definition of a connected person at S993 ITA 2007 and the computational rules for partnerships at Schedule 15 FA 2003.

9.8 Tests 7 to 10: Introduction to steps A to F

9.8.1 General

As a further aid to restricting disclosed schemes to those which are new or innovative, the Schedule to the regulations contains a list of six "steps" (A to F). You are not required to notify schemes that comprise one or more of those steps (test 7). However, this is subject to:

- an overarching rule that any arrangement that contains an unlisted step – where that unlisted step is necessary for securing the stamp duty land tax advantage – is not exempted from disclosure (test 8); and
- certain restrictions on using combinations of steps or multiples of the same step (tests 9 and 10 – see paragraph 9.10 below).

The purpose of tests 7 to 10 is to remove the need to notify certain tax arrangements that HMRC is already fully aware of (in terms of content and extent), so that

disclosure would serve no purpose. This is in addition to the grandfathering rule at Test 6 and paragraph 9.7 above.

The steps A to F have been described to us as “existing toolkit”. We believe a better term would be “existing building blocks”. For stamp duty land tax purposes, we are not interested in the existing building blocks in themselves. But we are interested in the ways in which the building blocks are put together to form more complex products. Hence the limits on the ways in which steps A to F can be used in combination.

The fact that any particular scheme is exempted from disclosure by the application of tests 7 to 10 should not be taken as an indication that HMRC either finds the scheme acceptable, or that we accept that it works under current law. It merely signifies that we already know about it.

9.8.2 The six steps – A summary

The six listed steps are:

- Step A – The acquisition of a chargeable interest in land by a special purpose vehicle (SPV);
- Step B – Claims to certain reliefs (see paragraph 9.8.3 below)
- Step C – The sale of shares in a SPV which holds chargeable interests in land, to a person who is not connected to either the SPV or the vendor;
- Step D – Not electing to waive the exemption from VAT (i.e. not “opting to tax”);
- Step E – Structuring a transaction as the transfer of a going concern for VAT purposes; and
- Step F – The creation of a partnership to which a property subject to a land transaction is to be transferred.

9.8.3 The six steps – The legislation

The six steps are listed in the Schedule to The Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868): The steps are as follows:

Step A: Acquisition of a chargeable interest by special purpose vehicle

The acquisition of a chargeable interest in land by a company created for that purpose (“a special purpose vehicle”).

Step B: Claims to relief

Making—
(a) a single claim to relief under any of the following provisions of the Finance Act 2003—
i) section 57A (sale and leaseback arrangements);
ii) section 60 (compulsory purchase facilitating development);

iii) section 61 (compliance with planning obligation);
iv) section 64 (demutualisation of building society);
v) section 64A (initial transfer of assets to trustees of unit trust scheme);
vi) section 65 (incorporation of limited liability partnership);
vii) section 66 (transfers involving public bodies);
viii) section 67 (transfer in consequence of reorganisation of parliamentary constituencies);
ix) section 69 (acquisition by bodies established for national purposes);
x) section 71 (certain acquisitions by registered social landlords);
xi) section 74 (collective enfranchisement by leaseholders);
xii) section 75 (crofting community right to buy);
xiii) Schedule 6 (disadvantaged areas relief);
xiv) Schedule 6A (relief for certain acquisitions of residential property);
xv) Schedule 7 (group relief and reconstruction acquisition reliefs);
xvi) Schedule 8 (charities relief); or
xvii) Schedule 9 (right to buy, shared ownership leases etc.);

(b) one or more claims to relief under any one of the following provisions of the Finance Act 2003—

i) section 71A (alternative property finance: land sold to financial institution and leased to individual);
ii) section 72 (alternative property finance in Scotland: land sold to financial institution and leased to individual);
iii) section 72A (alternative property finance in Scotland: land sold to financial institution and individual in common); or
iv) section 73 (alternative property finance: land sold to financial institution and resold to individual).

Step C: Sale of shares in special purpose vehicle

The sale of shares in a special purpose vehicle, which holds a chargeable interest in land, to a person with whom neither the special purpose vehicle, nor the vendor, is connected.

Step D: Not exercising election to waive exemption from VAT

No election is made to waive exemption from value added tax contained in paragraph 2 of Schedule 10 to the Value Added Tax Act (treatment of buildings and land for value added tax purposes).

Step E: Transfer of a business as a going concern

Arranging the transfer of a business, connected with the land which is the subject of the arrangements, in such a way that it is treated for the purposes of value added tax as the transfer of a going concern.

Step F: Undertaking a joint venture

The creation of a partnership (within the meaning of paragraph 1 of Schedule 15 to the Finance Act 2003) to which the property subject to a land transaction is to be transferred.

9.9 Approach to tests 7 to 10

The way to approach the steps is as follows:

- Identify all the single listed steps comprised in the arrangement. Paragraph 9.9.1 provides guidance on what constitutes a single step B;

- Identify any unlisted steps in the arrangement that are necessary to secure the expected stamp duty land tax advantage (if there are any such steps, the scheme is not exempted from disclosure – see paragraph 9.8.1 above);

- If the arrangement involves a combination of steps, or more than one instance of the same step, refer to tests 9 to 10 (paragraph 9.10 below) to see if that combination or multiple falls within the arrangements exempted from disclosure.

9.9.1 Single step B

A single instance of step B consists of either:

- a single claim to one of the reliefs listed under step B(a)(i) to (a)(xvii) in the Schedule (see paragraph 9.8.3); or

- one or more claims to one the reliefs listed under step B(b)(i) to (b)(iv) in the Schedule (see paragraph 9.8.3).

Note: For this purpose a claim can still be a 'single claim' even if it is one of a number of identical claims being made in respect of separate and distinct properties. So, for example, where two properties are transferred from group company A to group company B, each of the two claims to group relief is a 'single claim' for this purpose. Examples of single step B:

- a single claim to charities relief is one step B (single use of a relief in group (a)); and

- two claims to alternative property finance: land sold to a financial institution and leased to an individual constitutes one step B (multiple use of a relief in group (b)).

We will accept that a single step B(a)(xv) includes actions taken or not taken with the intention of ensuring that, within the context of the withdrawal of group, reconstruction or acquisition relief:

- the purchaser ceases to a member of the same group as the vendor; or

- control of the acquiring company changes; or

- arrangements for either of the above events are entered into

on or after the end of the period of three years beginning with the effective date of the relief, rather than before the end of that period.

A “single claim" to a relief means step B does not include any arrangement that comprises more than one claim to the same listed relief within group (a) of the Schedule. Nor do such schemes constitute multiples of step B. They are not within step B at all. For example:

- two claims to group relief fall outside step B (two claims to the same listed relief); and

- a claim to group relief and a claim to reconstruction relief also fall outside step B (two claims to the same listed relief – although these are separate reliefs, they are listed together in group (a)(xv)).

Any such arrangement is not excepted from disclosure.

An arrangement that comprises the use of two or more different listed reliefs will amount to two or more separate instances of step B. For example:

- a claim to charities relief and a claim to group relief constitute two separate steps B (use of two separately listed reliefs);

- a claim to group relief and a claim to alternative property finance: land sold to financial institution and leased to individual constitute two separate steps B (use of two separately listed reliefs).

In such cases, you should refer to paragraph 9.9 to see whether the combination is excepted from disclosure.

9.10 Tests 9 and 10: Combination steps

Rules 1 and 2 of the schedule to The Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868) specify which combinations of steps, or multiples of the same step, can be used as part of the excepted arrangements. These two rules are separate (i.e. they are not two legs of a single rule in which Rule 2 is merely an extension of Rule 1). It is necessary to consider Rule 2 even where Rule 1 is not in point.

9.10.1 SI 2005/1868: Rule 1 to the schedule

This rule merely confirms that arrangements exempted from disclosure can include any combination of steps B, D, E and F, including multiple uses of the same step.

9.10.2 Tests 7 and 8 (SI 2005/1868, Rule 2 to the schedule)

These tests provide that arrangements are not excluded from disclosure if they:

- include any combination of steps A, C and D; or

- involve a multiple use of any of steps A, C or D.

9.10.3 Examples of arrangements exempted from disclosure

Examples of arrangements exempted from disclosure include schemes that consist of:

- two steps B;

- two steps B and a single step A; and

- two Steps B and two steps F.

9.10.4 Examples of arrangements not exempted from disclosure

Examples of arrangements that are not exempted from disclosure include schemes that consist of:

- two claims to group relief (double use of the same relief does not fall within step B at all – see paragraph 9.8.1 above);
- two steps A only;
- two steps B and single steps A and D; and
- two steps B and two steps A.

10. When to disclose a scheme

10.1 General

Section 3 explains who is required to disclose a notifiable scheme. In general, it is the scheme promoter who has to disclose. However, the user may have to disclose where an offshore promoter or lawyer markets the scheme, or it is devised for use ‘in house’.

A scheme may have been first made available to clients before an obligation to disclose it arises, such as prior to the introduction of the disclosure rules. In such cases the scheme is to be disclosed once it has been made available on or after the obligation to disclose has arisen.

10.2 Schemes where the promoter must disclose

10.2.1 Time limits (FA 2004, s.308(1) and (3), and SI 2004/1864, reg. 4(2), (3) and (6))

Where a promoter is required to disclose he must do so within 5 days of the earlier of the date on which he:

- makes the scheme available for implementation by another person – see paragraph 10.3; or
- becomes aware of a transaction forming part of the scheme.

For marketed schemes, the first of these tests is likely to be met before the second. So the time for disclosure would normally be by reference to that earlier date.

However, where the activity of the promoter is restricted to the creation of bespoke schemes, the disclosure requirement arises only when he becomes aware that a transaction forming part of the scheme has taken place (see also paragraph 10.3.3). This ensures that where the bespoke planning goes through a number of iterations each of the iterations need not be disclosed.

In practice, there may only be a minimal timing difference between the time a bespoke scheme is disclosed compared to a marketed scheme.

Weekends, Bank Holidays, Good Friday and Christmas Day are ignored for the purposes of determining the due date.

10.2.2 Exemption for co-promoters – hallmarked tax and NI contribution schemes (FA 2004, s.308(4) to (4C))

Where two or more persons are promoters in respect of the same, or substantially the same, scheme, whether or not it is made available to the same person, the following rules can be used to enable only a single disclosure to be made, rather than a disclosure by each promoter. Use of these exemption rules is optional with the normal rules applying to those promoters who choose not, or are unable, to follow them.

The first rule ((a) below) is intended to apply when there is a co-promoter at the time of disclosure, whereas the second (b) is intended to apply when a person becomes a co-promoter some time afterwards.

(a) A promoter (P2) is exempt from making a disclosure when:

- another promoter (P1) discloses the scheme information described at paragraph 11.3;
- P2 holds that information (normally, we would expect P1 to pass a copy of his disclosure to P2); and
- P1 provides the identity and address of P2 to HMRC (normally, this would happen at the time P1 makes his disclosure of the scheme (see also paragraph 11.4)).

(b) A promoter (P2) is exempt from making a disclosure when:

- another promoter (P1) has made a disclosure of the scheme information described at paragraph 11.3 to HMRC and been provided by HMRC with a scheme reference number; and
- P2 holds that information and the scheme reference number (normally, we would expect P1 to pass a copy of his disclosure along with the number allocated by HMRC to P2).

In applying the above rules to National Insurance contributions, the promoter P2 is exempt from disclosing the National Insurance contribution element of a scheme if the information provided to him is only in respect of any income tax advantage element. However, the promoter P1 continues to have a duty to disclose both elements.

In the first rule, if, as a result of promoter P1's disclosure, a scheme reference number is allocated, HMRC will issue this to P2 as well as P1.

There is more on scheme reference numbers, and what you should do if you are provided with one, in Section 12.

10.2.3 <u>Stamp Duty Land Tax schemes – Co-promoter rule</u>

From 1 April 2010 the co-promoter rule at paragraph 10.2.2 applies equally to Stamp Duty Land Tax schemes as it does to Income Tax, Corporation Tax, Capital Gains Tax and National Insurance Contributions schemes.

10.2.4 <u>Stamp Duty Land Tax schemes – Legal, professional privilege</u>

Where disclosure has to be made by a client or purchaser in respect of a stamp duty land tax scheme because the promoter is subject to legal, professional privilege the time limit for disclosure is within 5 days of the date on which he enters into the first transaction becoming part of the notifiable arrangements.

10.2.5 <u>Exemption for substantially the same scheme (FA 2004, s.308(5))</u>

A promoter is required to disclose the same scheme only once. Minor changes, for example to suit the requirements of different clients, need not be separately disclosed providing the revised proposal remains substantially the same.

What constitutes a change in a scheme or arrangement so that it is no longer substantially the same is a matter which will need to be considered on each occasion.

In our view a scheme is no longer substantially the same if the effect of any change would be to make any previous disclosure misleading in relation to the second (or subsequent) client.

In general provided the tax analysis is substantially the same we will regard schemes as "substantially the same" where the only change is a different client including a different company in the same group.

We will not regard schemes as substantially the same where there are changes to deal with changes in the law or accounting treatment, changes in the tax attributes e.g. schemes creating income losses instead of capital losses or other legal and commercial issues.

However, special care must be taken where an existing tax product is used as part of an otherwise bespoke scheme. This has been described to us as "the use of existing toolkit".

Where a piece of "existing toolkit" is used as part of a separate scheme for the same or different client then it may be that the resulting scheme is so different from the earlier planning idea that the disclosure position needs to be considered afresh. In some situations this might involve the client being given two or more numbers, for example where the scheme involves a combination of ideas that were themselves disclosed and allocated a number.

10.2.6 Timing when clearance application made (SI 2004/1864, para 5)

There are special rules to avoid duplication of information where the arrangement includes transactions for which a statutory clearance exists. In practice, to date these rules have been used very little.

They apply for the purposes of:

- ICTA 1988, s.215 (Purchase of own shares by an unquoted company)
- ICTA 1988, s.225 (Company demergers)
- ICTA 1988, s.444A (Transfer of business)
- ICTA 1988, s.707 (Transactions in securities)
- TCGA 1992, s.138, 139, 140B or 140D (Reconstruction of company or trade).

Where a company or other person able to apply for statutory clearance has a reasonable intention of submitting a clearance application in respect of a transaction that forms part of a scheme made available for implementation by a promoter, both the promoter disclosure and the clearance application can be made at the same time.

Where the user of the scheme decides not to make a clearance request then the promoter must make the disclosure no later than 5 working days following the day on

which reasonable expectation to make a clearance application ceased or the normal "relevant date" if this is later.

In any case where a transaction occurs prior to the submission of a clearance application then the disclosure must be made within 5 working days of any transaction that is part of the scheme occurring.

Clearance applications will be considered in the usual way and clearance will not be refused merely on the grounds that some part of the proposed transaction involves a disclosable scheme.

Disclosures made in this way should be sent with the clearance application.

It should be noted that combining the clearance with disclosure is optional and promoters can if they wish disclose in the usual way. However any clearance given may be void if the existence of a scheme within the transaction for which clearance is requested is not mentioned in the application. For example, where a number has been issued by the Anti-Avoidance Group this information should be included as part of the clearance application.

10.3 The "made available for implementation by another person" test

10.3.1 General

A scheme is regarded as being made available for implementation by another person when it:

(a) has been developed to such a stage that the promoter has a high degree of confidence in the tax analysis applying to it; and
(b) is communicated to a potential user in sufficient detail that he could be expected to:

- understand the expected tax advantages; and
- decide whether or not to enter into it.

10.3.2 Marketed schemes

By marketed schemes we mean schemes planned with no specific client in mind or possibly marketed to a class of user, for example wealthy individuals, large companies or employers. The promoter may actively seek the potential user or make the product available in response to a general request for tax efficient ideas.

Such products may require some alteration to suit specific clients but the way in which the tax advantage is expected to be achieved remains as originally planned or pre-packaged and can be applied almost irrespective of the characteristics of the user.

A marketed scheme will typically be "made available for implementation by another person" when the promoter:

- communicates what is essentially a fully formed proposal to existing or potential clients, or

- provides an existing proposal to a client in respect of arrangements that would otherwise comprise a bespoke scheme (see below).

That a marketed scheme is tailored to the particular user does not affect the time limit for making disclosure. Similarly the proposal need not be marketed to the user or potential user in written form but could be by way of oral presentation of the proposal.

Where two or more schemes are made available to a client or potential client who later chooses to proceed with only one of them, both of the schemes must be disclosed.

10.3.3 Bespoke schemes

By bespoke schemes we mean a tax arrangement designed in response to a client's specific tax management issue.

A promoter who designs such a scheme is not normally regarded as "making it available for implementation by another person", with the relevant date being determined only by reference to when the first scheme transaction takes place – see paragraph 10.2.1.

10.3.4 Internal approval processes

Most promoters have internal approval processes for new products. Schemes are accepted as being "made available for implementation by another person" when they are first put to a client after receiving approval.

This will not apply in any situation where the user has entered into any part of the scheme before the promoter's approval process has been completed.

10.3.5 Communications to non-users

Where the promoter communicates a scheme to a second person that acts as a distributor to potential users we will regard both parties as making the scheme available for implementation. However, the co-promoter rule allows that only one of the parties need make a disclosure (see paragraphs 10.2.2 and 10.2.3). Regardless of who makes the disclosure, we would expect the scheme reference number to be provided to the scheme user.

However, where a promoter communicates an idea to another person for incorporation into their own scheme, only the second party is regarded as making a scheme available for implementation. The resulting scheme will need to be disclosed in the normal way unless it is substantially the same as one that they have previously disclosed – see paragraph 10.2.5.

10.4 Schemes marketed by offshore promoters (FA 2004, s.309 and SI 2004/1864, reg. 4(4) and (6))

Where a non-UK based promoter fails to comply with any disclosure obligation, the user must disclose (see paragraph 3.7). He must do so within 5 days of entering into the first transaction forming part of the scheme (see paragraph 10.7). Weekends, Bank Holidays, Good Friday and Christmas Day are ignored for the purposes of determining the due date.

We will not seek to penalise users who have relied upon written assurances given to them by non-UK based promoters that either the disclosure obligation has been complied with or does not arise, providing it was reasonable in the circumstances to rely upon the assurance given. Where disclosure has been made, the scheme reference number allocated to it by the Anti-Avoidance Group in HMRC should be provided to the user. The Anti-Avoidance Group can confirm whether a genuine reference number has been provided. Contact details are at paragraph 1.8.

10.5 Schemes marketed by lawyers (FA 2004, s.310 and SI 2004/1864, regs. 4(5), (5ZA), (5A) and (6))

Where a promoter is a lawyer and legal professional privilege prevents him from providing all or part of the prescribed information to HMRC the user must disclose (see paragraph 3.8). Disclosure must normally be made within 5 days of entering into the first transaction forming part of the scheme (see paragraph 10.7). Weekends, bank holidays, Good Friday and Christmas Day are ignored for the purposes of determining the due date.

10.6 Schemes with no promoter, including “in-house” schemes (FA 2004, s.310 and SI 2004/1864, reg. 4(5), (5ZA) and (6))

Where there is no promoter the user must disclose (see paragraphs 3.6 and 3.9). He must do so within 30 days of entering into the first transaction forming part of the scheme (see paragraph 10.7). Weekends, Bank Holidays, Good Friday and Christmas Day are ignored for the purposes of determining the due date.

10.7 The “first transaction” test

The due date for making a disclosure, where the user is required to make the disclosure, is by reference to the first transaction forming part of the scheme.

In the majority of cases where disclosure is required, it is likely that the tax department or individual is fully aware that the scheme is to be implemented and can monitor as to when the first transaction takes place.

In other cases, especially in larger organisations, systems should be put in place to identify and report disclosable schemes within the relevant time limit. What those systems are depends on individual circumstances. However they should be reasonable and proportionate to the risk.

In general, we expect the adopted system to involve the people who have the ability and authority to purchase, design or implement the sorts of schemes that are disclosable. These will normally be people within the tax department itself. Such people should be identified and be made sufficiently aware of the adopted system in order that disclosure can be made on time. The system should be reviewed periodically, at least once a year.

It is, however, accepted that there may be exceptional circumstances where a disclosable scheme is not captured by the adopted system in sufficient time for the disclosure to be made within the relevant time limit. In some cases the scheme may not be discovered until the end of year audit and tax computation. Concerns have arisen, in particular, over a UK tax advantage arising as a main benefit following:

- a controlled foreign company entering into local tax planning arrangements;

- unusual accountancy treatment;

- commercial transactions being carried out by non-tax specialists without the knowledge of the tax department; or

- the size of the tax benefit being too small for the tax department to be aware of it.

You should make disclosure of the scheme as soon as you are aware that it is late with an explanation as to why. If you have a reasonable excuse for not disclosing earlier you will not be liable to a penalty (see section 15).

10.8 Arrangements that provide both a NI contribution advantage and an income tax advantage

Where a single arrangement provides both a NI contribution advantage and an income tax advantage, each advantage is subject to its own disclosure considerations.

Where both advantages are required to be disclosed, the timing rules will always require them to be disclosed at the same time. For administrative ease, combined disclosures can be made. This is explained further at paragraph 11.5

10.9 Transitional reporting requirements for schemes notifiable under the pensions hallmark

A new hallmark for pension schemes was introduced with effect from 1 September 2009 as described in paragraph 7.10 above.

For schemes where the event that triggers a disclosure falls on or after 1 September 2009 the time limits for notifying the scheme are the normal time limits described above.

The event that triggers a disclosure is:

- For schemes which a promoter must notify under s.308(1) FA 2004, the date that the scheme is made available for implementation (see 10.2.1 above);

- For schemes which a promoter must notify under s.308(3), the date that the promoter first becomes aware of a transaction implementing the arrangements (10.2.1 above);

- For schemes where the promoter is offshore and a client is required by s.309 to disclose, the date that the client enters into the first transaction forming part of the arrangements (10.4 above); and

- For schemes where the promoter is a lawyer and because part of the information is privileged the client is required by s.310 to disclose the scheme; the date that the client enters into the first transaction forming part of the scheme (10.5 above).

11. How to make a disclosure

11.1 The forms to complete (s.316)

There are four different forms available for use in the following circumstances:

- AAG 1 – Notification of scheme by promoter;
- AAG 2 – Notification by scheme user where offshore promoter does not notify;
- AAG 3 – Notification by scheme user where no promoter, or promoted by lawyer unable to make full notification;
- AAG 5 – Continuation sheet

Use of these forms is a legal requirement (see paragraphs 1.2 and 1.5.3).

11.2 How to obtain and submit the forms

You can make an online disclosure by clicking the relevant links on the Anti-Avoidance Group website at http://www.hmrc.gov.uk/aiu/index.htm

You can obtain PDF and WORD versions of the forms by clicking the relevant links on the same web page, or by contacting the Anti-Avoidance Group (Intelligence) within HMRC at the address shown at paragraph 1.8. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should then be sent by either post or e-mail to the Anti-Avoidance Group (Intelligence) at the address shown at paragraph 1.8.

11.3 The information to be provided

11.3.1 General (SI 2004/1864, reg. 3)

Briefly, the regulations prescribe that the following information must be provided:

- Your name and address if you are a promoter making the disclosure, a client making a disclosure where the promoter is a lawyer, or making an 'in-house' disclosure where there is no promoter.
- Your and the promoter's name and address if you are disclosing as the client of an off-shore promoter.
- Details of the provision, in the Prescribed Descriptions of Arrangements Regulations that makes the scheme disclosable – see paragraph 11.3.3.
- A summary of the proposal/arrangements and the name by which it/they are known – see paragraph 11.3.4.
- Information explaining the elements and how the expected tax advantage arises – see paragraph 11.3.4.
- The statutory provisions on which that tax advantage is based – see paragraph 11.3.4.

11.3.2 Legal advice (FA 2004, s.314)

Legal professional privilege may apply to certain advice given by lawyers to their clients. Such information need not be disclosed.

11.3.3 The prescribed arrangement(s)

The relevant forms have a list of the relevant provisions.

For hallmarked schemes, the relevant hallmark (see section 7) should be indicated. For some schemes, more than one hallmark may apply. Here you need only indicate one hallmark. However, in order to allow HMRC to monitor the value of the hallmarks, we would prefer you to indicate the main applicable hallmark.

For stamp duty land tax schemes there are three options to indicate the type and market value of the property for which the arrangement is to be used. One box only should be ticked. Further guidance to help you determine the appropriate property type and market value is provided at paragraphs 9.4 to 9.6 above.

11.3.4 Explaining the scheme

Sufficient information is required to be provided such that an Officer of the Board of HMRC is able to understand how the expected tax advantage is intended to arise. The explanation should be in straightforward terms and should identify the steps involved and the relevant UK tax law. Common technical or legal terms and concepts need not be explained in depth.

If the scheme is complex then copies of any prospectus or scheme diagrams will help us understand what is proposed but even where you send such documents you must still use form AAG 1. Where such documents are supplied there is no objection to these documents excluding information that would identify a client.

11.4 Notification of co-promoters (s.308(4A)(a) and (4C)(a))

When you make your disclosure, you may also provide HMRC with details of any other promoter of the same or substantially the same scheme. You are not required to provide their details to HMRC but if you do so and provide the promoter with the information at 11.3 above he will be exempt from making his own disclosure of the scheme (see paragraph 10.2.3).

The details to be provided are the co-promoter's name and address. Where the co-promoter is a company, it is the company's name and address that is to be provided not that of an individual.

The details should be sent to the mail, or email, address at paragraph 1.8 and accompany the disclosure.

If you have already made a disclosure of the scheme and hold the scheme reference number allocated by HMRC, and your co-promoter seeks exemption from making his own disclosure, his details need not be provided to HMRC if rule (b) at paragraph 10.2.3 is followed.

11.5 Arrangements that provide both a NI contribution advantage and an income tax advantage

A single arrangement may provide both a NI contribution advantage and an income tax advantage, each of which is subject to its own disclosure considerations. Where both advantages are required to be disclosed, the arrangements need only be disclosed on one form. However, the scheme description must make it clear that there is both a NI contribution and a tax advantage and explain how each of those advantages arises.

The effect of the above on scheme reference numbers is explained at paragraph 12.8.

12. What to do if you receive a scheme reference number relating to a tax or NI contribution scheme

12.1 Outline of the scheme reference number system

The scheme reference number system is a means of identifying the users of disclosed schemes, allowing HMRC to prioritise and co-ordinate enquiries into users' returns.

It works by scheme users reporting an 8-digit scheme reference number to HMRC. This is normally done on the relevant tax return, but in some circumstances it has to be reported separately on a specified HMRC form.

This reference number is allocated by HMRC at the time the scheme is disclosed and is given to the person who disclosed the scheme and, from 1 November 2008, any co-promoters notified in the disclosure. They then in turn pass it to the scheme user, sometimes via a third party client, in accordance with the rules explained below. Where a scheme user is the person required to disclose the scheme, HMRC will provide the number directly to him, who nevertheless must report the number on his return or the specified form.

The allocation or notification of a scheme reference number does not indicate that HMRC accept that the scheme achieves or is capable of achieving any purported tax advantage.

Warning: You may incur a penalty if you fail to comply with the rules outlined in this section (see section 15).

12.2 Promoters must provide scheme reference number to clients (FA 2004, s.312 and SI 2004/1864, reg. 7)

As a promoter you may have been provided with a reference number by HMRC because you disclosed a hallmarked scheme, or because you were named as a co-promoter by another promoter at the time they disclosed the scheme (see paragraph 10.2.2 at (a)). Alternatively, you may have been provided with a scheme reference number by another promoter as a result of becoming a co-promoter some time after the main promoter made their disclosure (see paragraph 10.2.2 at (b)).

However you come to be in receipt of a scheme reference number you **must**:

- provide it to any other person (your "client") to whom you provide, or have provided, services in connection with the disclosed scheme or any scheme that is substantially the same. Your client may be the person who is intended to obtain the tax advantage or he may be a third party (i.e. a person who does not himself enter into the scheme and/or expect to obtain a tax advantage);

- do so using form AAG 6 available by clicking the relevant links on the Anti-Avoidance Group website at http://www.hmrc.gov.uk/aiu/index.htm; and

- do so within 30 days of either being provided with the scheme reference number or becoming aware of any transaction that forms part of the scheme, whichever is later.

While there is no obligation to do so, you may find it more convenient to provide the number to a client when you make the scheme available rather than wait until it has been implemented. If, but only if, you do so using the form AAG 6, you need not re-notify the number to your client when you become aware of a transaction forming part of the scheme.

If you have been provided with more than one scheme reference number in relation to any given scheme, you only need provide one of those numbers to your client.

12.3 Clients must provide scheme reference number to parties to the scheme (FA 2004, s.312A and SI 2004/1864, regs. 7 to 7B)

As explained at paragraph 12.2 above, if a promoter provides, or has provided, you with services in connection with a disclosable scheme, he may also provide you with a scheme reference number. From 1 November 2008 this should be given to you on an HMRC form AAG 6 containing guidance about when and how to report the reference number to HMRC or provide it to other parties. Prior to then it will have been passed to you in some other way.

When you have been provided with a scheme reference number, by whatever route, you **must**:

- provide it to any other person who you might reasonably expect to be a party to, and whom might reasonably be expected to gain a tax advantage from, the scheme;

- do so using form AAG 6 available by clicking the relevant links on the Anti-Avoidance Group website at http://www.hmrc.gov.uk/aiu/index.htm; and

- do so within 30 days of either being provided with the scheme reference number by the promoter or becoming aware of any transaction that forms part of the scheme, whichever is the later.

If you are an employer and your employee receives or expects to receive an income or capital gains tax advantage or NI contributions advantage as a result of the scheme, there is no requirement to pass the number to him.

12.3.1 Reasonable expectation

Your obligation, as the client of a promoter, to pass a scheme reference number to third parties only applies when you have sufficient commercial connection with that party to have a reasonable expectation that they will gain a tax advantage from the scheme. As examples:

- You are a company which is not subject to UK corporation tax but seek to reduce costs on equipment. You buy a disclosable leasing scheme from a promoter (thereby becoming their 'client') that involves you purchasing equipment and then entering into a sale and leaseback arrangement with a UK finance house – the finance house not you, obtains the tax advantage, as defined, but you seek to share in the capital allowances the finance house can claim. The promoter is required to provide you with the scheme reference number. As you can reasonably be expected to know that the finance house is a party to, and expects to gain a tax advantage from, the scheme, you must provide them with the scheme reference number.

- You are a parent company which purchases a scheme and makes it available for subsidiary companies to use but without yourself becoming a party to the arrangements that make up the scheme. You must provide the scheme reference number to those subsidiaries that are expected to gain a tax advantage from the scheme.

You are not required to provide a number to a person simply because, for example, you learn about their use of a scheme through hearsay, reading about it in the press or a Special Commissioners' decision, etc.

12.4 Parties to a scheme must include the scheme reference number on a return, etc. (FA 2004, s.313)

As explained at paragraphs 12.2 and 12.3, if you are a party to a scheme, the promoter or his client may provide you with a scheme reference number. Since 1 November 2008 this should be provided to you on form AAG 6. In some cases you may receive the number direct from HMRC as a result of disclosing the scheme yourself (see paragraphs 3.7 to 3.9).

If you expect to obtain a tax advantage as a result of being a party to the scheme; or are an employer of an employee, by reason of whose employment a tax or NI contribution advantage is expected to arise to any person as a result of the scheme; you **must:**

- include the scheme reference number on your tax return or form AAG 4 – see paragraph 12.4.1; and

- state the last day of the year of assessment, tax year, accounting period or earnings period (as the case may be) in which, or the date on which, you expect the advantage to be obtained – see paragraph 12.4.3.

If you are a partnership which expects a tax or NI contributions advantage to arise in respect of a partner’s share of partnership profits or gains, the information is to be entered on both your partnership return and the relevant individual, company, or trust & estate return (as the case may be) for the partner in question.

Warning: You may incur penalties if you fail to notify prescribed information within the prescribed time limits (see section 15).

12.4.1 When to enter information on tax return or form AAG 4

The information (at paragraph 12.4) must be entered on the return that relates to the year of assessment, tax year, accounting period or earnings period (as the case may be) in which you first enter into a transaction forming part of the scheme, unless one of the following applies when you must use form AAG 4:

- you are an employer of an employee, by reason of whose employment a tax or NI contribution advantage is expected to arise;

- you expect to obtain a tax or NI contribution advantage but do not have a return on which you would otherwise be required to enter the information. (If you are a partnership which expects a tax or NI contributions advantage to arise in respect of a partner’s share of partnership profits or gains, and do not

- you are late submitting the return for the relevant period such that it will not be submitted to HMRC before the statutory filing date;

- you have submitted the return for the relevant period but have not included the information at paragraph 12.4 in it;

- you need to notify more scheme reference numbers than there are spaces on the return (you should use form AAG 4 to notify only those numbers that will not fit on the return); or

- the scheme gives rise to a claim to relief made separately from your return under section 261B of TCGA1992 (treating trade loss etc as CGT loss) or any of the various loss relief provisions within Part 4 of ITA2007.

You must continue to do this for every subsequent year or period until the advantage ceases to apply. For example, if losses created by a scheme are expected to be used in a future year, you should enter the information at paragraph 12.4 in the year you first enter into a transaction forming part of the scheme and each subsequent year, including those where the losses are not used, until the losses have been used up.

Where you use a scheme that involves an in-year claim not covered by the last bullet above, for example a coding adjustment, reduction in any payment on account or quarterly payment, there is no statutory requirement to disclose the scheme reference number as part of the claim. However, it will be helpful if you show the number on any such claims and you must include it in your return or on form AAG 4 as appropriate.

12.4.2 Where to send form AAG 4

Other than for in-year claims (see below), form AAG 4 must be sent to

Anti-Avoidance Group (Intelligence)
HM Revenue & Customs
1st Floor, 22 Kingsway
London
WC2B 6NR

in sufficient time for it to be received by the date appropriate to the entity receiving the tax advantage as detailed at paragraph 12.4.3 below.

12.4.3 Date for submission of form AAG4 to Anti-Avoidance Group (Intelligence).

- For partnerships, or partners in respect of whom the partnership expects the tax or NI contributions advantage to arise the form must reach AAG by 31st October following the end of the year of assessment, tax year, accounting period or earnings period in which the tax advantage arises.

- If you are an individual, or trustee the form must reach AAG by 31st January following the end of the year of assessment, tax year, accounting period or earnings period in which the tax advantage arises.

- If you are a corporate body the form must reach AAG within 12 months of the end of the accounting period in which the tax advantage arises unless one of the following applies –

    - 19th May following the relevant tax year where a PAYE tax advantage is expected to arise (note: the scheme reference number is reported by the employer rather than individual employees – see paragraph 12.7);

    - 19th May following the relevant tax year where a NI contribution advantage is expected to arise; and

    - 6th July following the relevant tax year where a NI contribution advantage is expected to arise, it only relates to Class 1A contributions and it does not give rise to a tax advantage.

For in-year claims, form AAG 4 must be sent to your HMRC office with the claim and not to Anti-Avoidance Group (Intelligence)

12.4.4 Expectation of obtaining a tax advantage

You are required to state the last day of the year of assessment, tax year, accounting period or earnings period (as the case may be) in which, or the date on which, you expect the advantage to be obtained. You must continue to do this for every subsequent year or period until the advantage ceases to apply.

In the majority of cases the date will be the same as the period in which you first enter into a transaction forming part of the scheme. However, this is not always the case. For example, where the implementation of a scheme spans the end of a period, with the advantage expected to arise in a subsequent period, you should quote the subsequent period in respect of which the advantage is expected to arise.

For loss schemes, if you use the loss or part of the loss in the period for which a return is being, or would otherwise be, completed, you should quote the last day of that period. If you do not use any of the loss in that period you should quote the last day of the next period in respect of which you it expect it to be used.

12.5 How to obtain and submit form AAG 4

You can obtain and submit form AAG 4 online by clicking the relevant links on the Anti-Avoidance Group website at http://www.hmrc.gov.uk/aiu/index.htm

You can obtain PDF and WORD versions of the forms by clicking the relevant links on the same web page, or by contacting the Anti-Avoidance Group (Intelligence) within HMRC at the address shown at paragraph 1.8. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should be sent by either post or e-mail to the Anti-Avoidance Group (Intelligence) at the address shown at paragraph 1.8.

12.6 Is an individual or a small and medium enterprise (SME) exempt from notifying reference numbers?

No, the available exemption for individuals who are not in business (e.g. employees) and SMEs is from the requirement to determine (and disclose) if they use in-house hallmarked schemes (see paragraph 6.7).

However, they are required to declare on their tax return or form AAG 4 any scheme reference numbers issued or provided to them that relate to schemes they use.

12.7 Employers using schemes

This paragraph applies where a scheme is expected to result in a PAYE tax advantage and involves one or more directors or employees or persons connected to directors or employees or the employer.

Where a promoter has disclosed the scheme to HMRC it will be given a reference number and the promoter is obliged to notify this number to the client in the usual way.

The employer must notify the use of the arrangement on form AAG 4 directly to HMRC no later than 19th May following either the end of the tax year in which the scheme reference number is received, or the expected tax advantage arises, whichever is the earlier.

However, the employer is not required to pass the scheme reference number to his employees, who in turn are not required to include a number on their returns.

Employers do not need to include the reference number on their personal SA return or CTSA return (where the employer is a company).

12.8 Arrangements that provide both a NI contribution advantage and an income tax advantage

A single arrangement may provide both a NI contribution advantage and an income tax advantage, each of which is subject to its own disclosure considerations.

Where both advantages are required to be disclosed, HMRC will issue a single scheme reference number that will apply to both advantages. You need only make one entry on your return or form AAG 4

12.9 Withdrawal of scheme reference numbers

HMRC has discretion to withdraw scheme reference numbers – i.e. specify that with effect from a given date the scheme reference number:

- need no longer be passed from a promoter to their client (paragraph 12.2), or from their clients to parties to the scheme (paragraph 12.3); or

- reported to HMRC by the parties to the scheme.

The withdrawal of a scheme reference number will be notified to the person who originally made the disclosure and any co-promoters whose details had been provided to HMRC by the person who made the original disclosure. Details of withdrawn numbers and the effective date from when they have been withdrawn will also be posted on the Anti-Avoidance Group website at http://www.hmrc.gov.uk/aiu/index.htm

The withdrawal of a scheme reference number does not relieve any obligation that may have existed prior to the date of withdrawal.

If, after a notice of withdrawal is made, a party to a scheme reports a withdrawn number, it will have no impact on HMRC's interventions.

13. What to do if you receive a scheme reference number relating to a stamp duty land tax scheme

13.1 Outline of the scheme reference number system

The scheme reference number system is a means of identifying the users of disclosed schemes, allowing HMRC to prioritise and co-ordinate enquiries into users' returns. The scheme reference number system applies to stamp duty land tax schemes and arrangements which became notifiable on or after 1 April 2010. Prior to 1 April 2010 numbers relating to notifiable schemes and arrangements were given to promoters etc but these were not Scheme Reference Numbers within the meaning of the legislation and there was no obligation either to pass the number to users etc or for the users to notify the number to HMRC. The remainder of the guidance in section 13 relates solely to stamp duty land tax schemes and arrangements which became notifiable on or after 1 April 2010. If you are in doubt as to whether a reference number you have received should be passed on or notified to HMRC you should contact Anti-Avoidance group using the contact details at paragraph 1.8.

The scheme reference number system works by scheme users reporting an 8-digit scheme reference number to HMRC. For stamp duty land tax schemes the scheme reference number has to be reported on a specified HMRC form.

This reference number is allocated by HMRC at the time the scheme is disclosed and is given to the person or persons who disclosed the scheme. They then in turn pass it to the scheme user, sometimes via a third party client, in accordance with the rules explained below. Where a scheme user is the person required to disclose the scheme, HMRC will provide the number directly to him, who nevertheless must report the number on the specified form.

The allocation or notification of a scheme reference number does not indicate that HMRC accept that the scheme achieves or is capable of achieving any purported tax advantage.

Warning: You may incur a penalty if you fail to comply with the rules outlined in this section (see section 15).

13.2 Promoters must provide scheme reference number to clients

As the promoter of a stamp duty land tax you will have been provided with a reference number by HMRC because you disclosed a stamp duty land tax scheme. You **must**:

- provide it to any other person (your "client") to whom you provide, or have provided, services in connection with the disclosed scheme or any scheme that is substantially the same. Your client may be the person who is intended to obtain the tax advantage or he may be a third party (i.e. a person who does not himself enter into the scheme and/or expect to obtain a tax advantage);

- do so using form AAG 6 available by clicking the relevant links on the Anti-Avoidance Group website at http://www.hmrc.gov.uk/aiu/index.htm; and

- do so within 30 days of either being provided with the scheme reference number or becoming aware of any transaction that forms part of the scheme, whichever is later.

While there is no obligation to do so, you may find it more convenient to provide the number to a client when you make the scheme available rather than wait until it has been implemented. If, but only if, you do so using the form AAG 6, you need not re-notify the number to your client when you become aware of a transaction forming part of the scheme.

If you have been provided with more than one scheme reference number in relation to any given scheme, you only need provide one of those numbers to your client.

13.3 Clients must provide scheme reference number to parties to the scheme

As explained at paragraph 13.2 above, if a promoter provides, or has provided, you with services in connection with a disclosable scheme, he may also provide you with a scheme reference number. This should be given to you on an HMRC form AAG6 (SDLT) containing guidance about when and how to report the reference number to HMRC or provide it to other parties.

When you have been provided with a scheme reference number, by whatever route, you must:

- provide it to any other person who you might reasonably expect to be a party to, and whom might reasonably be expected to gain a tax advantage from, the scheme;
- do so using form AAG 6 available by clicking the relevant links on the Anti-Avoidance Group website at http://www.hmrc.gov.uk/aiu/index.htm; and
- do so within 30 days of either being provided with the scheme reference number by the promoter or becoming aware of any transaction that forms part of the scheme, whichever is the later.

13.3.1 Reasonable expectation

Your obligation, as the client of a promoter, to pass a scheme reference number to third parties only applies when you have sufficient commercial connection with that party to have a reasonable expectation that they will gain a tax advantage from the scheme. As examples:

- You are a parent company which purchases a scheme and makes it available for subsidiary companies to use but without yourself becoming a party to the arrangements that make up the scheme. You must provide the scheme reference number to those subsidiaries that are expected to gain a tax advantage from the scheme.
- You are a property developer which purchases a scheme and makes it available to property purchasers but without yourself becoming a party to the arrangements that make up the scheme. You must provide the scheme reference number to those purchasers that are expected to gain a tax advantage from the scheme.

You are not required to provide a number to a person simply because, for example, you learn about their use of a scheme through hearsay, reading about it in the press or a Tribunal decision, etc.

13.4 Purchaser receiving a stamp duty land tax advantage must include the scheme reference number and other information on form AAG 4 (SDLT)

As explained at paragraphs 13.2 and 13.3, if you expect to obtain a tax advantage from a tax avoidance scheme, the promoter of the scheme or his client may provide you with a scheme reference number. This should be provided to you on an HMRC form AAG6 (SDLT), which contains guidance about when and how to report the reference number to HMRC. In some cases you may receive the number directly from HMRC as a result of disclosing the scheme yourself (see paragraphs 3.7 to 3.9).

The scheme reference number and additional information specified at paragraph 13.4.2 must be entered on form AAG 4 (SDLT). This is the only means by which HMRC may be notified of a stamp duty land tax scheme. The Scheme reference number for stamp duty land tax schemes should never be entered on either an SDLT 1 return or the user's tax return. Such an entry will not discharge a scheme user's obligations under DOTAS.

If you are a purchaser for stamp duty land tax purposes (see SDLTM07200 for definition) and expect to receive a stamp duty land tax advantage you must within the time limit detailed at 13.4.1:

- include the number on form AAG 4 (SDLT) and
- provide the information specified in paragraph 13.4.2

The purchaser is limited to a person who is either a party to the transaction or has provided consideration for that transaction. The term purchaser is defined as the person who acquires the subject matter of a land transaction and includes a tenant if the interest in land is a grant of a lease (S43 Finance Act 2003).

When stamp duty land tax group relief is withdrawn, group relief may be recovered from a person other than the purchaser (Schedule 7, Para 5, Finance Act 2003, SDLTM 23100). The obligation to disclose a Scheme Reference Number falls only on the purchaser. Any other person from whom Group Relief may be recovered whilst they may be in receipt of a stamp duty land tax advantage, they are not obliged to be passed a Scheme Reference Number nor to disclose that to HMRC.

13.4.1 <u>When to enter information on form AAG 4 (SDLT)</u>

The information detailed at paragraph 13.4.2 must be entered on form AAG 4 when you receive the number or you enter into the first land transaction in connection with the arrangements, whichever is later.

You must continue to do this for each subsequent transaction in which you expect to obtain a stamp duty land tax advantage from the scheme.

Form AAG 4 (SDLT) should be sent to the Anti-Avoidance Group (Intelligence) within HMRC (the address can be found at paragraph 1.8) in sufficient time for it to be received within 30 days of the later of the following two events:

- receiving a scheme reference number from the promoter or another party to the scheme;

- the effective date of the first land transaction which forms part of the scheme

The effective date takes its normal meaning for stamp duty land tax purposes (S119 Finance Act 2003). The general rule is when the land transaction is completed but there are exceptions and further guidance may be found in the Stamp Duty Land Tax Manual at SDLTM 7600.

13.4.2 What to enter on form AAG 4 (SDLT)

- the scheme reference number;
- the name and address of the person providing the scheme reference number (the person who is expecting to obtain a stamp duty land tax advantage);
- the address of the property forming the subject of the arrangements (see 13.4.3);
- the title number (or numbers) of the property (see 13.4.4);
- the unique transaction reference number which is found, for a paper return, in the 'Reference' box attached to the payslip on the Land Transaction Return (Form SDLT 1) or, for an electronic return, on the electronic SDLT submission receipt.
- the market value of the property (see 13.4.5);
- the effective date (see 13.4.1) of the first land transaction which forms part of the arrangement;
- the name of the person providing the declaration as to the accuracy and completeness of the notification (see 13.4.6); and
- the capacity in which that person is acting (for example purchaser, company secretary etc). Regardless of who has provided the information the signatory should be that of the purchaser.

13.4.3 Address of property

Give the full address including the postcode if there is one. If the property does not have a postcode or a building number then you must provide sufficient information of the nature and location of the property to enable it to be accurately identified;

13.4.4 Title number

If the property or properties that is/are the subject(s) of the arrangements is/are registered give the title number for the property. If no title number has been allocated then this information need not be provided.

13.4.5 Market Value

The figure to be entered for the market value is the Open Market Value of all the property on which a stamp duty land tax advantage is to be obtained assuming it has

been purchased without the benefit of the stamp duty land tax arrangements. Market value takes the statutory definition for stamp duty land tax purposes at S118 Finance Act 2003. This in turn is tied to Sections 272 to 274 of the Taxation of Capital Gains Tax Act 1992.

The market value of an asset is the price which that asset might reasonably be expected to fetch on a sale in the open market. In a normal land transaction such a value will normally have been arrived at by an independent valuer before the transaction has been entered into and so should be readily available.

If, exceptionally, such a value has not been obtained then a reasoned estimate is acceptable bearing in mind that HMRC requires the information in order to assess the likely tax at risk. Submission of the AAG4 (SDLT) should not be held up because a valuation has not been obtained nor should the market value be omitted. Either of these courses of action could render the user liable to a penalty.

13.4.6 Declaration as to accuracy and completeness.

The person obtaining the stamp duty land tax advantage from the arrangements should sign the declaration. This will usually be the purchaser. Whilst in the majority of cases the return is likely to be drafted and submitted by a solicitor, licensed conveyancer, legal executive or accountant, it is the responsibility of the person obtaining the advantage to ensure that the information given on the AAG 4 (SDLT) is complete and correct and sign the declaration accordingly.

13.4.7 Expectation of obtaining a tax advantage

If you are a party to a scheme, have been provided with a scheme reference number, but do not expect to obtain a tax advantage (for example, because the advantage is expected to be obtained by another person or you have not yet decided to implement the scheme), you need not include the number on form AAG 4 (SDLT) unless and until such time as your expectation changes.

13.4.8 Partnerships Finance Act 2003, Schedule 15, Part3

Where the arrangements involve a partnership all of the partners have joint and several liability for any stamp duty land tax subject to special provisions. Further guidance may be found at http://www.hmrc.gov.uk/so/pftmanual.htm

Whilst more than one partner might therefore be expected to receive a stamp duty land tax advantage, HMRC will accept a single joint notification, signed by the representative partner on behalf of all of the liable partners, rather than each making their own notification.

13.5 How to obtain and submit form AAG 4 (SDLT)

You can obtain and submit form AAG 4 (SDLT) online by clicking the relevant links on the Anti-Avoidance Group website at http://www.hmrc.gov.uk/aiu/index.htm

You can obtain PDF and WORD versions of the forms by clicking the relevant links on the same web page, or by contacting the Anti-Avoidance Group (Intelligence) within HMRC at the address shown at paragraph 1.8. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should be sent by either post or e-mail to the Anti-Avoidance Group (Intelligence) at the address shown at paragraph 1.8.

14. Information powers

14.1 Summary

Information powers introduced in 2007 enable HMRC to:

- enquire into the reasons why a promoter has not disclosed a scheme;
- enforce disclosure in appropriate cases; and
- call for more information where a disclosure is incomplete.

These provisions are mostly exercisable through the Tribunal (see paragraph 14.6 below) and provide a mechanism for resolving disagreements as to whether a scheme is required to be disclosed.

14.2 Enquiries into non-disclosure of a scheme

14.2.1 Explaining why a scheme has not been disclosed (FA 2004, s.313A and SI 2004/1864, reg. 8A(1))

HMRC can, by written notice, require a person suspected of being the promoter of a notifiable scheme to state whether, in his opinion, he is required to disclose the scheme. The notice will specify the scheme in relation to which the promoter's opinion and reasons are sought.

If the person does not consider there to be a disclosure obligation he must provide a full explanation as to why this is the case. In doing so it is insufficient for the reply to simply refer to the fact that a lawyer or other professional has given an opinion to that effect. Instead it must engage with the relevant legal tests. For example, where it is asserted that the obtaining of a tax (or National Insurance contribution) advantage is not a 'main benefit' of a scheme, the response must include an identification of the various benefits and how they had been measured relative to the advantage.

Where it is asserted that the scheme does not fall within any of the hallmarks, sufficient information must be provided to enable HMRC to confirm the assertion.

The opinion and reasons must be provided by the 10th day after the date of the notice or any longer period directed by HMRC. Failure to do so may result in a penalty (see section 15).

14.2.2 Orders for supplementary information or documents (FA 2004, s.313B and SI 2004/1864, reg. 8A(2))

HMRC may apply to the Tribunal for an order that a person provide specified information or documents in support of his stated reasons as to why a scheme is not disclosable, whether or not the reasons were given in response to a notice under s.313A (see paragraph 14.2.1 above).

The information must be provided by the 14th day after the date of the order or any longer period directed by HMRC. Failure to do so may result in a penalty (see section 15.1).

14.3 Enforcing disclosure

14.3.1 Orders stating a scheme is disclosable (FA 2004, s.314A; TMA 1970, s.98C(2E))

HMRC may, in relation to a specified promoter, apply to the Tribunal for an order stating that a scheme is disclosable.

The Tribunal can only make an order if they are satisfied on the evidence that the scheme is indeed disclosable.

As an order has the effect of confirming that a scheme is, and was always, disclosable under s.308, HMRC may, subject to 'reasonable excuse' considerations, seek a late notification penalty of up to £5,000 under the existing penalty regime – see paragraphs 15.1 and 15.2.

Once a late disclosure penalty is awarded, should non-disclosure continue after the tenth day from when the order is made, the maximum daily penalty rate will increase. The increased daily maximum will be £5,000. After the tenth day the specified promoter cannot, in respect of any time after then, rely on doubt as to notifiability as a reasonable excuse for failing to disclose.

14.3.2 Orders deeming a scheme to be disclosable (FA 2004, s.306A)

HMRC may, in relation to a specified promoter, apply to the Tribunal for an order that a scheme is to be treated as disclosable.

The Tribunal can only make an order if they are satisfied that HMRC have reasonable grounds for suspecting that the scheme is disclosable and have taken all reasonable steps to establish whether it is.

Grounds for suspicion may include:

- the fact that the arrangements fall with any 'hallmark' prescribed in the relevant regulations;
- an attempt to avoid or delay complying with s.313A or s.313B; or
- a failure to comply with s.313A or s.313B in relation to another scheme.

The effect of an order is that a scheme is deemed to be disclosable under s.308 and must be disclosed. The disclosure must be made by the 10th day after the date of the order. Failure to do so may result in HMRC applying to the Tribunal for a late notification penalty under the existing penalty regime in section 98C of the Taxes Management Act 1970.

If the failure continues after the initial penalty has been imposed, an additional penalty of up to £5,000 per day may be imposed.

However, even if disclosure is made within the time period described above, if HMRC can nevertheless demonstrate the information was always disclosable and has been provided later than the normal disclosure due date, an application to the Tribunal for a late notification penalty may still be made.

14.4 Incomplete disclosures (FA 2004, s.308A)

If HMRC believe that a promoter has not provided all the prescribed information in relation to a disclosure, they may apply to the Tribunal for an order that the promoter provide specified information and/or related documents.

The Tribunal can make an order only if they are satisfied that HMRC have reasonable grounds for suspecting that the specified information or documents form part of, or will support or explain, the prescribed information.

The effect of an order is that the specified information and/or documents must be provided to HMRC in the same way as if it were prescribed information. This must be done by the 10th day after the date of the order. Failure to do so may result in HMRC applying to the Tribunal for a late notification penalty. If the failure continues after the initial penalty has been imposed an additional penalty of up to £600 per day may be imposed.

If the information or documentation is provided within the time period described above but HMRC nevertheless believe the information was always disclosable as prescribed information, and has been provided later than the normal disclosure due date, an application to the Tribunal for a late notification penalty may still be made.

14.5 Invoking the powers

In order to use the powers described above, HMRC must have reasonable grounds to suspect that the promoter has been non-compliant in relation to a particular scheme. In the majority of cases, HMRC expect to be able to resolve the issue in an informal way, with use of the powers limited to those occasions where a promoter does not provide sufficient information to resolve the issue or where there is a genuine dispute as to notifiability which can only be resolved before the Tribunal. The powers will be exercised only by officers within HMRC's Anti-Avoidance Group.

14.6 Application hearings

The majority of the powers described above are dependant upon the Tribunal making a relevant order following an application from HMRC. The precise procedure is a matter for the Tribunal. However, when making an application, HMRC will notify the potentially affected promoter at the same time.

15. Penalties

15.1 Penalties for non-compliance by scheme promoters (TMA 1970, s.98C(1))

A promoter is liable to a penalty if he fails to comply with his obligations. A penalty may be charged where, without reasonable excuse, he fails to:

- make a disclosure to the Anti-Avoidance Group in HMRC when required to do so (see paragraph 3.1);
- make the disclosure in the prescribed form and manner (see paragraph 1.5.3);
- provide his client with the scheme reference number, when required to do so – the number may have been obtained from either HMRC or (other than for stamp duty land tax schemes) from a co-promoter who has disclosed the scheme (see paragraphs 10.2.2, 12.1 and 12.2);
- provide the reference number using the specified HMRC form AAG 6 (see paragraphs 12.1 and 12.3); or
- respond to enquires (see paragraph 14.2).

There is an initial penalty and a daily penalty. The maximum initial penalty is £5,000 for each failure. If the failure continues after the initial penalty has been imposed then an additional penalty of up to £600 per day can be imposed.

The Tribunal are responsible for imposing any initial penalty and there is a right of appeal.

Failures to disclose after the making of an order from the Tribunal that a scheme is, or is to be treated as, disclosable can be subject to increased daily penalties (see paragraph 14.3).

15.2 Penalties for non-compliance by client of promoter or parties to the scheme (TMA 1970, s.98C(1) and (3))

A client of a promoter or a party to a scheme is liable to a penalty if he fails to comply with his obligations. A penalty may be charged where, without reasonable excuse, he fails to:

- disclose a scheme when required to do so (the obligation may arise as a result of the promoter being offshore or a lawyer who is unable to make a full disclosure, or
- when the scheme is devised 'in-house' – see paragraphs 3.1 and 3.7 to 3.9);
- make the disclosure in the prescribed form and manner (see paragraph 1.5.3);
- where he is a client of the promoter, provide the scheme reference number to any other person whom he might reasonably expect to be a party to, and who might reasonably be expected to gain a tax advantage

from, the scheme, when required to do so (see paragraphs 12.1 and 12.3);

- where he is a client of the promoter, provide the reference number to another person using the specified HMRC form AAG 6 (see paragraphs 12.1 and 12.3); or

- where he is a party to the scheme, enter on his tax return or form AAG4 (as appropriate) the scheme reference number and the last day of the year of assessment, tax year, accounting period or earnings period (as the case may be) in which, or the date on which, he expects the advantage to be obtained (see paragraph 12.4).

15.2.1 Failure to disclose a scheme or pass on number, etc.

The penalty is the same as for promoters – i.e. an initial penalty of £5,000 and daily penalties of up to £600 per day for continued failure.

15.2.2 Failure to enter the scheme reference number on return, etc.

The penalty will increase for each failure as follows:

- 1st failure penalty £100

- 2nd failure penalty £500

- 3rd and subsequent failure penalty £1000

There is a right of appeal against the penalty to the Tribunal and onwards to the High Court on a point of law.

It is important to note that the penalty is per failure per scheme and not per year.

15.2.3 Stamp duty land tax schemes

Stamp duty land tax schemes are always notified on form AAG4 (SDLT) so there is no requirement to enter a scheme reference number on a stamp duty land tax return. HMRC will only require one AAG 4 (SDLT) from a partnership in respect of each notifiable arrangement, regardless of the number of partners. All partners are jointly and severally liable for any penalties arising from any non-compliance as detailed at 15.2 above.

15.3 Reasonable excuse (TMA 1970, s.118(2))

No penalty is due where the promoter, client or party to a scheme (as applicable) has a reasonable excuse and the failure to comply is remedied within a reasonable time after the excuse ceased. Consideration of reasonable excuse will include whether the person has clearly followed current guidance or has otherwise made a reasonable judgement in determining whether or not a disclosure is required.

15.4 Failures involving both disclosable NI contribution arrangements and disclosable income tax arrangements (SI 2007/785, reg 14(6))

No penalty will be charged for a failure to disclose a NI contribution arrangement if the arrangement, or substantially the same arrangement, is also a disclosable income tax arrangement and a penalty has been imposed for failing to disclose that arrangement.

The same principle applies for failures to declare a scheme reference number.