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Notification of uncertain tax treatment by large businesses

Response by the Chartered Institute of Taxation

1 Introduction

1.1 We refer to the *Notification of uncertain tax treatment by large businesses* consultation document published on 19 March 2020 and also to the discussion we had with HMRC on this proposal on 30 July 2020. Our comments below reflect our understanding of the proposals following those discussions.

1.2 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

1.3 Our stated objectives are for a tax system which includes a legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences. We also aim for greater certainty, so businesses and individuals can plan ahead with confidence and a fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented), with a minimum of bureaucracy.

1.4 This proposal fails to meet these objectives. Insofar as we understand the policy intent, we do not believe that this proposal will achieve it. The proposal lacks clarity, both with regard to the intended outcomes and the practical implementation and impacts. As presented the requirement to notify would leave large businesses in a position of considerable uncertainty about their compliance obligations. Further the proposal does not represent a fair balance between the powers of HMRC and the rights of taxpayers, particularly with regard to the penalty, which could arise in circumstances when the taxpayer has taken care with its tax affairs and, consequently, has not done anything wrong. The proposal will, in our view, erode the collaborative compliance relationship which the government has sought to develop with large business over its recent policy initiatives. The proposal will also, in our view, give rise to a large and unnecessary compliance burden for large businesses, with a consequent adverse impact on administration for HMRC, which is disproportionate to the amount of tax which is expected to be raised by the Exchequer.

2 Executive summary

2.1 We would not support the introduction of a requirement on large businesses to notify HMRC of uncertain tax treatments based on the current proposal. We encourage the government to revisit the decision to introduce this new requirement and the policy objectives behind it. In our view the policy objectives of the proposal have not been clearly articulated or explained. We have been unable to discern from the consultation

document or the discussion with HMRC what precisely it is that this measure is intended to achieve or, more particularly, a coherent and practical proposal for achieving it.

2.2 The fundamental building block of the proposal – that is to say what is an 'uncertain tax treatment' that must be notified – is inherently uncertain and unclear. This is both with regard to the wholly subjective test devised around the likelihood of an HMRC challenge, and the principal exclusion proposed, which is intended to ensure that HMRC are not told about 'what they already know'. The lack of coherency around how this proposal interacts with the existing tax system – which already includes (a) many rules around disclosure of specific arrangements (for example DOTAS relating to tax avoidance arrangements), (b) rules relating to full and accurate disclosure in tax returns, (c) procedures for enquiries by HMRC and 'discovery' assessments to deal with issues which come to light at a later date, as well as (d) the collaborative and cooperative compliance procedures such as Business Risk Review - amplifies the flaws in the proposal.

2.3 As it is currently framed the requirement to notify uncertain tax treatments would place large businesses under an obligation with which they would be unable to comply with any confidence or certainty, resulting in an unreasonable, increased compliance burden on compliant taxpayers and a greatly increased administrative burden for HMRC for little benefit to the Exchequer.

2.4 It is in our view inequitable to have a compliance obligation based on a test which is as subjective and uncertain as that currently proposed linked to penalties. Penalties should be reserved for deliberate or careless behaviour and not be applied where a compliance failure arises as a result of uncertainty or a judgement call around reporting obligations. This proposal is very different to more usual administrative obligations, because HMRC is in a position to effectively determine whether or not there has been compliance by their actions, regardless of the care taken by a business to be compliant; because if the test is based on whether HMRC are likely to challenge a tax treatment, and HMRC do later challenge it, it is difficult to see how a penalty could not be imposed, as the mere fact of a challenge almost of itself triggers the compliance failure.

2.5 It is regrettable that the government has, without explanation, bypassed Stage 1 of the consultation process ('Setting out objectives and identifying options') and has moved straight to Stage 2 of the consultation process ('Determining the best option and developing a framework for implementation including detailed policy design')[1]. This is contrary to its pledge in the Tax Consultation Framework that, '*There will be times when it will be necessary to deviate from this Framework. In these circumstances the Government will be as open as possible about the reasons for such deviations*'[2].

2.6 As it stands, we are opposed to the introduction of this new requirement for large businesses to notify uncertain tax treatments to HMRC and would encourage HMRC to revisit the decision to do so. Further, given the many challenges businesses are currently facing, now is not the time to add to compliance burdens unless these measures can be properly justified. We suggest that instead time could usefully be taken to explore more precisely what it is that the government wishes to achieve. In doing this, HMRC could consider utilising this requirement on a voluntary basis via large businesses' Customer Compliance Managers and gather information from this exercise over, say, a 12 month period.

2.7 We note that this measure is intended to address the legal interpretation tax gap. However, it is not clear how it will do so. For example, how much of the legal interpretation tax gap of £4.9bn, which is attributed to large businesses, was not disclosed on tax returns or to Customer Compliance Managers? These are questions which should be explored and answered before new compliance obligations are imposed on large businesses. A measure along the lines of that proposed, which relies on the taxpayer determining an uncertainty based

[1] As outlined in the joint HM Treasury and HMRC document 'Tax Consultation Framework' published in March 2011. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89261/tax-consultation-framework.pdf
[2] Paragraph 9 ibid

on a judgement that may or may not be right, is very unlikely to achieve the policy aim of highlighting a true uncertainty that will result in an Exchequer benefit.

2.8 We discuss below how the existing Business Risk Review process could be improved in order to address the concerns which are identified in the consultation document.

2.9 We welcomed the opportunity to discuss this proposal with HMRC and were encouraged to hear that further thought is being given to some aspects of the proposed measure. However, the proposal as set out in the consultation document remains inherently unclear and uncertain, and fraught with practical difficulties for taxpayers and HMRC.

2.10 Considering these concerns in the context of the proposal as a whole, we have approached our response by setting out in Part 1 a general discussion around the difficult concepts raised by this proposal which explain why, in our view, this proposal is fundamentally flawed and should not be proceeded with. We then provide some comments in response to the specific questions in the consultation document in Part 2. Our comments in this response, both generally, and in response to the specific questions asked by the consultation document should be viewed in light of our strong opposition to the creation of this new compliance obligation as a matter of principle. Nothing in the following paragraphs agreeing with aspects of the proposals put forward by the government in the consultation document should be read as agreement to the proposal overall.

2.11 If the government is minded to pursue a proposal along these lines, we suggest that some changes are required to better focus the proposal on the policy objectives and to mitigate against the undue compliance burden for businesses and the administration burden on HMRC. The proposed rules should be significantly reduced in scope and clarified in important areas. Specifically:

- the definition of uncertain tax treatment should be clear and objective. However the subjective definition proposed is inherently unclear: it is unreasonable to expect taxpayers to be able to form a judgement on what HMRC may or may not do (even if this is based on a test of likelihood) and that is unrelated to anything already expressed for accounting purposes. The definition in the regime in the USA, which relies on the accounting definition of uncertain tax position is, in our view, to be preferred in meeting the requirements of clarity and objectivity. Alternatively, an objective test by reference to published HMRC guidance and other published material or by reference to belief of the company around the expected outcome of the tax treatment (similar to the regime in Australia) could also be workable;
- further clarity around the proposed exclusion for 'what HMRC already knows' is required. In particular, in order to better focus the proposal and reduce the compliance burden on compliant businesses, a business should only be required to notify HMRC of uncertain tax treatments if the business is a certain risk rating under the Business Risk Review process;
- limit to the proposal to corporation tax (at least initially); we note that HMRC may wish to also include VAT and PAYE;
- include additional exemptions to the requirement to notify in order to better focus the compliance obligation;
- provide clarity around how the uncertain tax treatments are to be quantified – both for the purposes of applying the thresholds and for reporting;
- revisit the proposed de minimis threshold, introduce the concept of materiality, and consider setting the threshold and materiality at different levels for different taxes;
- revisit the proposed timing of the notification; we suggest that this should be on a group basis and should be required three months after the due date for filing of the corporation tax return (with similar time limits for other taxes);
- place the obligation to notify and any penalties for non-compliance on the business, and not on any particular individual;
- include a strong reasonable excuse defence (we note below the difficulties of framing this in respect of the proposed subjective test); and

- remove the risk of an inequitable penalty in circumstances where Courts ultimately determine that there is no additional tax due (thus mitigate against the inequitable result of having to prove a negative (if HMRC do raise an enquiry) and the circularity of proposed definition).

Part 1 – Key areas of concern

1 Policy intent and effectiveness

1.1 Insofar as we understand it, the policy behind this proposal is to place an obligation on taxpayers to inform HMRC of aspects of their tax affairs where the taxpayer's interpretation of the law and how it applies to the facts in a particular case (the tax treatment) differs from HMRC's interpretation – this is the legal interpretation tax gap (defined in paragraph 3.3 of the consultation document). As per paragraph 2.7 of the consultation document: '*The measure aims to ensure that HMRC is aware of all cases where a large business has adopted a treatment with which HMRC may disagree …*'.

1.2 We discuss below the very real difficulties in framing the proposed requirement to notify uncertain tax treatments with any degree of certainty. However even if a satisfactory objective definition of uncertain tax treatment can be formulated, it is not clear to us how a requirement to notify such treatments will assist HMRC with closing the legal interpretation tax gap.

1.3 It is acknowledged by HMRC that most large businesses are open and transparent in their dealings with HMRC and much work has been done in recent years to foster a tax administration relationship of cooperative compliance, notably through the Customer Compliance Manager (CCM) and the Business Risk Review process (now BRR+). However, there is a small pool of taxpayers which are resistant to openness with HMRC and we understand that it is this population that this proposal is primarily aimed at. We understand that this measure is intended to encourage transparent and cooperative compliance behaviour from an increased number of large businesses and the requirement to notify is intended to ensure large businesses tell HMRC of 'uncertain tax treatments', so that HMRC has information that it otherwise would not have, or at least would not have so readily to hand – because the tax treatment is not apparent from the face of the return and the accounts.

1.4 HMRC are entitled to seek to assess and collect the right amount of tax. But that has to be balanced against the fairness of the tax system, certainty for taxpayers who have to self-assess, the compliance burden and the expected benefit to the Exchequer. This proposal is not, in our view, a fair balance between the powers of tax collectors and the rights of taxpayers. In particular, this measure reduces the onus on HMRC to properly review the tax returns it receives and decide whether or not to raise an enquiry based on the information presented to it. The onus is already on taxpayer to provide full and fair disclosure in its tax returns and based on that HMRC can open an enquiry into a return and have extensive powers to investigate the return. There are also rules around discovery to the extent that the taxpayer does not fairly present its self-assessed tax position in the return.

1.5 Notwithstanding the general aspiration to have a larger number of cooperative large business taxpayers, we have been unable to discern from the consultation document or the discussion with HMRC what precisely it is that this proposal aims to achieve in terms of reducing the legal interpretation tax gap; or, more particularly, a coherent and practical proposal for achieving those aims; or why those aims could not be achieved under the existing tax system.

1.6 Even assuming a policy objective of HMRC receiving an increased amount of information, it is not clear how this proposal will result in HMRC obtaining more information than they currently receive, either any sooner or at all. Most large businesses that would be within the scope of the new measure already have a CCM and most will be discussing areas of uncertainty with their CCM and also making appropriate disclosures in their corporation tax (CT) returns to protect themselves against discovery assessments down the line. Therefore, HMRC will already have the information that we understand they wish to receive from the majority of businesses that are compliant. Conversely, recognising that this proposal is primarily aimed at non-compliant businesses, it seems unlikely to us that this proposal will change the behaviour of those that do not wish to act in a compliant and co-operative basis with HMRC in a way that reduces the 'legal interpretation' tax gap attributable to these businesses.

1.7 We are not convinced that this proposal is sufficiently well targeted or clear to achieve a policy aim of encouraging non-compliant businesses to disclose tax treatments that they are not currently making apparent to HMRC, either through the BRR+ or in their returns. Thus it is not clear to us why a new requirement to notify is necessary. If the proposal is aimed at a few non-compliant large businesses, which are presumably known to HMRC as a result of their lack of engagement with the BRR+ process, why can HMRC not open enquiries into those businesses' returns in due course, or subject them to real time tax audits? It is not clear how the proposed requirement to notify would result in HMRC receiving more information from these less compliant businesses, or even doing so on a more timely basis. We presume that HMRC is assuming that non-compliant businesses will comply with this requirement and not simply take a view that their positions are 'certain', or sufficiently 'certain' to rely on the reasonable excuse defence and/or possibly accept or fight any penalties imposed for non-compliance with this requirement, and deal with their tax affairs in the usual way? The inherent lack of clarity in the proposed definition of uncertain tax treatment and scope of the proposal would put compliant taxpayers in an invidious position; however it will also provide non-compliant businesses with the opportunity to form their own view as to what the term means.

1.8 On the other hand, we envisage that compliant businesses will either notify everything (on the basis that nothing is 'certain') or nothing (on the basis that they have thought carefully about their tax positions, have confidence in them, and have discussed any real uncertainty with HMRC through CCM, possibly relying on the proposed exemption that notification is not required if HMRC already has the information). Either way, the proposal will increase the compliance burden on compliant, but cautious, taxpayers and introduces the risk that HMRC will have a greatly increased administrative burden dealing with an inundation of information and requests for confirmation that they have sufficient information and, therefore, notification is not required and/or notifications. The proposal is a proverbial sledge hammer to crack a nut.

1.9 We suggest that a more effective approach would be to ensure all companies covered by the proposed requirement to notify have a CCM, and to make sure that relationship within the BRR+ process works properly and effectively. We suggest that, before introducing a new compliance obligation, time should be taken to evaluate this process and the extent to which issues which contribute to the legal interpretation tax gap are not already disclosed to HMRC should be clarified. HMRC can then consider whether any additional measures, such as a requirement to notify uncertain tax treatments, are necessary, and, if they are, to aim these more specifically at where the BRR+ process demonstrates that there is not already compliant and co-operative behaviour.

1.10 The Assessment of Impacts in the consultation document shows only marginal increases in Exchequer tax take over the next 5 years. For some of the largest businesses, £45m in one year (only achieved by 2023/24) could cover just one issue of uncertainty in one company. It is not clear to us that is this worth the effort and complexity of a whole new notification system. In addition, while the Assessment of Impacts notes that 'HMRC will require some additional resources …', no detail around the quantum of these costs is provided. On the current proposals we think that these could be significant.

1.11 The figures quoted for the Exchequer impact are nowhere near the quoted Tax Gap figure for 'Legal Interpretation' (recently reported in the 2020 edition of 'Measuring tax gaps' to be £4.9bn in 2018-19, down from £6.2bn in the 2019 edition, which is the figure noted at paragraph 2.2 of the consultation document)**.** We welcome the confirmation at paragraph 2.7 that HMRC's interpretation of the law is not always correct. Taxpayers have the right to make decisions based on legislation and case law, and do not have to, nor can they always, rely on HMRC guidance or opinions. It is our members' experience that the majority of large businesses go to great lengths to ensure that their submitted tax returns are correct.

1.12 Although the majority of the legal interpretation tax gap is attributable to the large business customer group, we would note that the legal interpretation tax gap is about tax which is not necessarily legally due. It is defined as where the taxpayer's and HMRC's interpretations of the law and how it applies to the facts in a particular case result in different tax outcomes. We understand from our discussions with HMRC that this part of the tax gap is not expected to be addressed by this proposal without further action being taken by

HMRC. Although it may be anticipated that if HMRC are made aware of the areas of uncertainty through the notification, they may dispute the tax position. If HMRC's view prevails as a result of such a challenge, that would raise more revenue. However, we understand that the principle aim is that, as a result of the further information received around areas of uncertainty, HMRC will seek to amend or clarify the law to ensure outcomes aligned with their interpretation of the law. Once again, it is not clear why these actions could not be taken as result of information obtained through judicious enquiries being raised into the relevant returns and as a result of discussions which are already happening with CCMs and through the BRR+ process. Even in circumstances where HMRC are involved in a lengthy dispute which has highlighted an area of uncertainty, in practice we suggest that HMRC should be able to identify from the business they are looking at what hallmarks would identify other taxpayers facing a similar issue, and raise the appropriate enquiries.

1.13 We discussed these questions with HMRC when we spoke on 30 July. Whilst some further explanation of the underlying policy was given, and we recognise the problem that HMRC faces in relation to the small population of large businesses that do not wish to engage in cooperative compliance, we are not convinced that this measure will achieve its aims. We remain disappointed that this consultation began at stage 2 of the tax consultation process. An earlier consultation around what is being targeted and how the proposals will achieve the policy aims would have been helpful, followed by a more open discussion around the best way to achieve those aims.

2 Lack of clarity and certainty for taxpayers

2.1 As currently presented the fundamental building block of this proposal – that is to say what is an uncertain tax treatment - is inherently unclear and uncertain. It will not be possible for a large business to discern with any confidence or certainty what it is that HMRC wishes to be notified about. It is extremely unreasonable to expect the taxpayer to be able to make the judgment on what HMRC may or may not do – or even what it is 'likely' they will or will not do. It is not satisfactory to set up a compliance requirement which, from the outset, is wholly subjective and, therefore, very difficult to apply with any confidence or certainty (particularly one with personal liability to penalties attached to it, although we understand that HMRC have accepted that personal liability is not appropriate for this measure).

2.2 Paragraph 3.5 of the consultation document explicitly recognises the difficulty of 'framing an objective requirement to notify'. It is suggested, therefore, that the proposed test will be based on 'existing definitions and requirements applying to large businesses, which cut across these considerations [of objectivity] and will be familiar to these customers and their advisers'. However, even this compromise position is not what is actually proposed. What is proposed is a wholly subjective test around whether or not there may be a challenge to the tax treatment by HMRC. This subjectivity is not removed by changing the test to one around whether or not HMRC is likely to challenge it, which we understand HMRC is considering.

2.3 The clarity around the definition of uncertain tax treatment will be key to achieving the policy aims of what HMRC wishes to be told about. It seems to us that since HMRC cannot clearly articulate what this is, it is necessarily very difficult to define. In addition, it is not clear how the requirement to notify uncertain tax treatments based on the proposed definition would interact with the current system. Currently a large business will file a CT tax return (focussing on that tax for the moment) having taken a view about a whole range of tax positions and treatments. In the event that HMRC opens an enquiry a whole range of issues come up for debate. These must be issues which the taxpayer thought the tax treatment was clear, but which HMRC does not agree with – or at least wishes to challenge the tax treatment and explore the outcome. How are these multitudes of issues raised in enquiries to be distinguished from uncertain tax treatments as defined?

2.4 Under the self-assessment system the taxpayer reaches its own view of the correct tax that should be assessed and, in doing so, may take the benefit of any doubt. Indeed, if there is a doubt on a matter, a taxpayer is bound to take the benefit of it in filing a self-assessment, as the alternative is that it volunteers tax that

may not actually be due. When it does so, it will obviously need to consider what additional 'white space' disclosure it should make to minimise the risk of penalties for an incorrect or careless return.

2.5 HMRC for their part can open an enquiry into a return and have extensive powers to investigate the return (which for large taxpayers frequently take years to complete). We presume that what HMRC would like to be notified about is where the taxpayer has taken the benefit of the doubt in making its self-assessment (and yet has not made any 'white space' disclosure). In other words, that there is something in the tax return that merits the opening of an enquiry, and some idea of what to enquire into as a result, but where the taxpayer has failed (whether deliberately or not) to draw attention to it in a 'white space' disclosure.

2.6 The difficulty with seeking to impose an obligation on the taxpayer to tell HMRC about such issues is that this necessitates that the taxpayer should have recognised that there are two (or more) ways in which particular transactions or arrangements might be taxed, so that the obligation to draw attention to it arises. Put starkly, your doubt may be my certainty and vice versa; and the more thought given to the matter, the more difficult it may be to answer that question, so the less thought given to it (and the less advice received) the easier it becomes to resolve the matter. In any event, once identified, this also raises the question as to why the taxpayer would (or should) disclose this information under this new obligation to make a separate notification, rather than in the 'white space' of the CT return[3].

2.7 In its discussions on enforcement of powers of Revenue departments, the Keith Committee was concerned with was proper disclosure of the facts in relation to complex avoidance schemes. Criticism of Keith's 'benefit of the doubt' proposal never disputed the idea that taxpayers should make full disclosure of all material facts. Nowadays there are the DOTAS rules (amongst others) to ensure early disclosure of tax avoidance arrangements of various sorts and, as noted above, it is already incumbent on taxpayers to provide full and fair disclosure in its tax returns. However, as Keith recognised in reappraising (and abandoning) its proposal, it is a completely different kettle of fish to assess whether there is a doubt as to the way in which a particular set of fully disclosed facts are properly taxed.

2.8 One of the criticisms of Keith's proposal was that taxpayers were effectively being asked to do the Revenue's work for them. That seems to us to be the essential nature of the current proposal. The difficulty with this proposal can also be demonstrated by considering it from the other end: that is to say from the perspective of the penalty that is proposed to be attached to the failure to draw attention to an uncertain tax treatment.

2.9 A significant proportion of the issues that arise in an enquiry into a tax return stem from some uncertainty as to the correct treatment to be accorded to a payment, transaction or arrangement. Certainly, every technical issue that is litigated can be classified as an uncertain tax treatment. Where something is litigated, the issue of a penalty (if it is raised) depends upon HMRC being successful. Here the penalty potentially attaches to the fact that the issue could be challenged or litigated (whether or not HMRC are successful).

2.10 So, the question is perhaps most easily addressed by asking the question: in what circumstances should a taxpayer face a penalty for failing to tell HMRC about something, even though HMRC have identified the matter from their enquiries? This seems to us to be an inappropriate question to be answered by a compliance obligation on taxpayers.

[3] These issues have previously been considered by the Keith Committee in 1983 in its report on Enforcement Powers of Revenue Departments. In 1983 the Keith Committee proposed (§7.3.6) that tax returns should include the following question: '*In making this return have you taken the benefit of any doubt about whether any item ought to be declared, or any relief or deduction allowed? If so, give brief details*.'. The Committee almost immediately accepted that this was not an appropriate suggestion. The proposal was made in the context of Chapter 7 of the Report and complex tax avoidance schemes. The Committee's underlying thought was that taxpayers should make full disclosure. They returned to the subject in Volume 3 of their report when they said this of their proposal (§30.4.21): '*The objective which we have in view is to secure that the taxpayer makes the fullest possible disclosure of all information which is relevant for the purpose of ascertaining his true tax liability*.'.

2.11 Ultimately, the question comes back to an assessment of what lawfully is or is not taxed, which should be answered through the self-assessment and enquiry process.

3 Definition of uncertain tax treatment

3.1 Paragraph 2 above discusses the general conceptual difficulty around framing a definition of uncertain tax treatment which captures with any degree of clarity the type of information that we believe HMRC wishes to be notified about. The consultation document makes reference to the regimes in the USA and Australia which require notification of uncertain corporate tax treatment. These are discussed further in response to question 3 in paragraph 3 of Part 2 below. On any objective measure around certainty, the approach of the US would be preferred. However, if the government is minded to pursue an obligation to notify tax treatments which goes beyond reflecting the accounting treatment of uncertain tax positions, we can envisage that it would be possible to frame an objective test by reference to published HMRC guidance and other published material, or a test by reference to belief of the company around the expected outcome of the tax treatment (similar to the approach taken by the Australian regime) could also be objective and workable.

3.2 The consultation indicates that this measure is intended to address the legal interpretation tax gap. The legal interpretation aspect of the tax gap is based (broadly) on a difference of opinion. Although it is not clear how the proposal would result in a reduction in the tax gap, it seems reasonable to us that a definition as to what is an uncertain tax position could be based around the known opinion of HMRC of the law, possibly extended to a position taken which is contrary to the clear purpose of the legislation itself.

3.3 We discussed with HMRC a number of objective measures by reference to which uncertain tax treatment could be defined. For example, it may be reasonable to suggest that a tax treatment is uncertain if:

- the treatment is contrary to published HMRC guidance (including Statements of Practice, Business Briefs etc); or
- the treatment is contrary to the intentions of Parliament (this is a concept which is utilised in the Banking Code of Conduct on Tax, see paragraph 3)[4].

3.4 There are, however, difficulties in basing the definition of what is an uncertain tax treatment on published HMRC guidance. Some of the uncertainty that exists in UK tax law arises as a result of HMRC's guidance being unclear or incomplete (for a variety of reasons, including lack of resources), or the published guidance does not adequately cover all of the more complex situations and circumstances faced by business in the real world. In some of these types of situations HMRC may be able to resolve the uncertainty by publishing better guidance, thus making its opinion known.

3.5 It is within HMRC's power (but not taxpayers') to resolve some of the uncertainty by publishing better guidance. Unless HMRC have made their position very clear in published guidance, it seems extremely unreasonable to expect the taxpayer to be able to make the judgment on what HMRC's view is. HMRC's guidance is not always fully up to date and HMRC's position is sometimes different from that set out in the published guidance. Recent examples of HMRC changing their minds or even taking positions which are contrary to their own guidance make the challenges that taxpayers would face in assessing whether a tax

[4] Transactions should not be structured in a way that will have tax results for the bank that are inconsistent with the underlying economic consequences unless there exists specific legislation designed to give that result. In that case, the bank should reasonably believe that the transaction is structured in a way that gives a tax result for the bank which is not contrary to the intentions of Parliament. There should be no promotion of arrangements to other parties unless the bank reasonably believes that the tax result of those arrangements for the other parties is not contrary to the intentions of Parliament.

treatment is uncertain by reference to HMRC published guidance even clearer. For example, in the SDLT sphere HMRC's success in *Project Blue Limited v HMRC UKSC 30* has led to SDLT challenges that go well beyond what was ever in issue in Project Blue. This was demonstrated in *Hannover Leasing Wachstumswerte Europa Beteiligungsgesellschaft MbH and another v HMRC* [2019] in which the position HMRC took on FA 2003 section 75A was the opposite of their position in guidance. Also the decision in *Oxford Instruments UK 2013 Limited v HMRC [2019] UKFTT 0254 (TC)* on unallowable purpose appears to be having a similar effect in the loan relationships area. Thus recent experience indicates that decisions ending with HMRC success lead to HMRC pushing the boundaries of what is caught or not and, therefore, extending the boundaries of what is (or can be regarded) as uncertain.

3.6 In addition, difficult circumstances may arise in circumstances where a taxpayer takes a tax position which is not based on published HMRC guidance as a result of the taxpayer (or its advisers) being aware that HMRC's position is different to that set out in the published guidance. Often a change in HMRC's opinion only becomes apparent to particular taxpayers, for example through enquiries into the affairs of other clients of their advisers, before becoming more widely, even if still 'unofficially', known, before guidance is updated. In other cases the guidance has not caught up with changes in HMRC's opinion or practice as a result of court decisions. For example HMRC's revised position is sometimes made known through consultative groups such as the Joint VAT Consultative Committee or the Research and Development Consultative Committee before the guidance catches up. Would notification be required in these circumstances?

3.7 On the other hand, as noted in paragraph 1.11 above, we welcome the confirmation at paragraph 2.7 of the consultation document that HMRC's interpretation of the law is not always correct. An objection to the use of published HMRC guidance and practice to determine uncertainty, is that it effectively allows HMRC to say what the law means in a way that is backed by a penalty that does not depend upon HMRC being able to show that they are right. Overall, though, it is within the gift of HMRC to address these practical difficulties by ensuring that they do publicly state their positions so that taxpayers can know for sure what HMRC considers the correct tax treatment to be. Then, even if the taxpayer does not agree with this treatment, there is clarity and the potential for an objective definition of what an uncertain tax treatment might be.

3.8 When we spoke to HMRC, HMRC mentioned Professional Conduct in Relation to Taxation (PCRT). In particular, HMRC referenced the parts of PCRT which refer to 'material uncertainty' (see paragraph 3.2 and 3.6 of PCRT). HMRC suggested that, based on this aspect of PCRT, advisers are used to advising that there may be uncertainty in law and thus, it was suggested, it should be possible for taxpayers (perhaps on the advice of their advisers) to assess whether or not there is an uncertain tax treatment based on the definition proposed in the consultation document – that is to say whether or not HMRC is likely to challenge a particular tax treatment.

3.9 We do not agree with this. For those who are members of the PCRT bodies the obligations on tax advisers advising on whether or not the law is materially uncertain are not completely on point with the test suggested by the consultation document for an uncertain tax treatment: whether or not there is uncertainty in law around a tax treatment is not the same question as whether or not HMRC is likely to challenge the tax treatment. We strongly refute the suggestion that the fact that tax advisers complying with PCRT, and, therefore, give advice in relation to uncertainty with regard to tax law, renders the proposed test any more acceptable or easy to apply for large businesses. In our view it is inappropriate for any aspects of PCRT to be considered as supporting the practicability or clarity of the definition of uncertain tax treatment proposed by the consultation document.

3.10 We accept, however, that, in cases where they are involved, tax advisers will necessarily have a role to play in assisting the business in making its judgement on whether or not a notification is required. We suggest that most tax advisers err on the side of caution, which makes it more likely that an adviser will conclude that a treatment is or could be somewhat uncertain (with different levels of confidence depending on the facts and circumstances). As a consequence they will often warn of uncertainty of outcome in order that the client is on notice that HMRC may query the return and that more tax may arise. This cautious, professional approach

will impact on how large businesses deal with a notification requirement, if it comes into effect. We envisage that this is not an outcome that HMRC particularly wants and indicates, again, that the most likely outcome of this proposal would make it largely inefficient and ineffective. If this requirement to notify is enacted with the lack of clarity that is reflected in the consultation document, there will be significant practical implications, as discussed in paragraph 1 above around what HMRC will be told about which will impact on the efficacy of the measure.

3.11 We also discussed with HMRC the diverted profits tax (DPT) regime; specifically that that regime requires a notification from the company in certain circumstances. Whilst it is correct that the DPT regime requires notification, it does so based on an assessment by the business of whether its provisions and arrangements fall within the scope of DPT. Thus, it is outcome focussed, based on an assessment of the law by the business, not based on judging whether or not HMRC may wish to consider whether or not DPT may be due. In the DPT guidance HMRC notes that the purpose of the notification requirement is to alert HMRC to situations where there is a significant likelihood that DPT is chargeable and HMRC does not already have a detailed understanding of these arrangements.

3.12 We acknowledge that an approach along these lines, based on the likely outcome of the tax treatment and the business's reasonably assessment of that outcome could provide a reasonable, objective test. This is the approach taken by the Australian regime.

4 Penalties and reasonable excuse

4.1 It is in our view inequitable to have a test which is as subjective and uncertain as that currently proposed linked to penalties. Penalties should be reserved for deliberate or careless behaviour and not be applied where a compliance failure arises as a result of uncertainty or a judgement call around reporting obligations. A test around whether or not HMRC are likely to challenge a tax treatment seems to us to be very difficult to disprove.

4.2 Unless the test is more objective as to the basis on which is it assessed or the likely outcome of the tax treatment, it operates in a way which is unfair and places the taxpayer in an invidious position; it would be almost impossible to operate the wholly subjective test around 'whether HMRC might (or is likely to) consider a tax treatment to be uncertain' and conclude that no notification is required. If a penalty was then issued for not notifying, it would be even more difficult for a taxpayer to prove that notification was not required. Specifically, the taxpayer would be placed in the position of having to prove a negative if HMRC do, in fact, challenge the tax treatment, by way or an enquiry or otherwise – in fact having to prove that HMRC was not likely to challenge a tax treatment, when HMRC have challenged it is worse than having to prove a negative.

4.3 The way the proposal is presented the result would be that even if a business has a reasonable tax position, and has taken care to consider whether or not the tax position is correct and certain, HMRC can disagree, open an enquiry and levy a penalty for not notifying the tax treatment. Even if the taxpayer goes to Court and eventually wins, such that the tax position is ultimately held to be correct, there is the jeopardy of a penalty. During our discussions HMRC indicated that they would consider amending the proposal so that a penalty would not be due if the outcome of the enquiry/dispute was that there was no further tax due. While this is welcome in terms of addressing the inequity, it may also make framing the circumstances in which the penalty would apply difficult. If a penalty is only due if HMRC wins the eventual dispute, this may encourage the taxpayer to contest rather than agree the position if challenged (and only in circumstances where the challenge comes as a result of failure to notify). Would HMRC would have discretion not to charge the penalty as part of the enquiry process and reaching an agreed position?

4.4 This proposal is presented as being about tax administration, not tax liability (aimed at giving HMRC the full facts to decide whether they can/should open an enquiry), so one might argue that it is not inequitable if there is a penalty even if there is no tax liability (that is to say the penalty arises as a result of not complying

with tax administration requirement). This seems wrong to us. The difference in relation to this proposal, as compared to more usual administrative obligations, is that HMRC is in a position to effectively determine whether or not there has been compliance by their actions, regardless of the care taken by a business to be compliant; because if the test is based on whether HMRC are likely to challenge a tax treatment, and HMRC do later challenge it, it is difficult to see how a penalty could not be imposed, as the mere fact of a challenge almost of itself triggers the compliance failure.

4.5 It is noted in the consultation document that there will be a reasonable excuse defence (at paragraph 6.4). We agree that such a defence is necessary, and the effect of such a defence should be that there is no penalty if due care has been taken by the business. However, it is difficult to see how this would be framed to be effective for HMRC or the taxpayer in these circumstances. Applied to the highly uncertain and subjective definition proposed, every taxpayer has a reasonable excuse if it can say that it did not believe that the tax was so uncertain as to require notification. HMRC's suggestion during our discussions was that possibly the 'double reasonableness' standard of the general anti-abuse rule should apply. But if that is correct, then it suggests that the relevant reasonable excuse test should be something along the lines of 'no reasonable person could reasonably think that the taxation treatment adopted by the taxpayer in its self-assessment would go unchallenged by HMRC'. That seems to us to be an unacceptably high burden which would not mitigate against otherwise inequitable results, when applied to the subjective test proposed.

5 Scope – exclusion for information already given to HMRC

5.1 It is recognised in the consultation document, and was confirmed in our discussions with HMRC, that HMRC does not wish the requirement to notify to apply to uncertain tax treatments in respect of information that has already been given to HMRC.

5.2 Paragraphs 2.14 to 2.15 of the consultation document set out the basic premise for this proposed exclusion from the requirement to notify, citing some circumstances which arise in the usual course of a large business's dealings with HMRC, in respect of which it is suggested there will be an exemption in the legislation from the requirement to make a notification.

These are:

- Subject of 'formal discussions';
- HMRC 'agrees in writing that it has sufficient information'

Whilst we support the principle of this as an exemption from the requirement to notify, we suggest that, as currently framed, these circumstances may be problematic to pin down in legislation and in practice. For example, does 'formal discussions' include only discussions once a formal statutory enquiry has been instigated and/or informal investigations/compliance checks and/or COP8/COP9 investigations and/or regular meetings with HMRC where topics are discussed and a written record of the meeting is made?

5.3 An exemption along these lines will also require HMRC to be in a position to operate in a manner which permits businesses to satisfy the conditions – notably that *'HMRC agrees …. in writing that they have sufficient information*'. Will CCMs be resourced and authorised to have discussions with taxpayers and enter into the suggested written agreement confirming that HMRC has sufficient information and, therefore, a notification of the tax treatment is not required? It is not our members' experience of discussions with CCMs - that CCMs provide confirmation one way or another as to whether or not the information provided is adequate, or whether a tax treatment discussed is, in HMRC's view, uncertain, nor whether they agree with the tax treatment proposed (to render it certain).

5.4 One way or another, we do not see that putting in place an exclusion along the lines suggested would have a good practical outcome for HMRC. If significant resource is not provided by HMRC, in order to achieve a clear

process for businesses to acquire the written 'sign-off' from HMRC around information that has already been provided, compliant businesses will have no choice but to also notify uncertain tax treatments to HMRC – resulting in HMRC receiving a multitude of notifications about information that it already has and does not want to receive again. Alternatively, if the resource is put in place and there is a mechanism to provide written agreement, this will effectively be an additional mechanism/procedure added into the existing BRR+ process. In addition, if HMRC gave such an assurance with regard to the requirement to notify, and then did not open a statutory enquiry but later sought to use discovery, the taxpayer would use HMRC's assurance in subsequent arguments around FA 1998 Schedule 18 paragraph 44.

5.5 As noted in the consultation document and above, the majority of large businesses to which this proposal would apply will be subject to a business risk review. Recent changes to the review regime introduced four risk criteria for each tax regime, namely, low risk, moderate risk, moderate – high risk, high risk. There is significant overlap between the proposals in this consultation and what is required under the BRR+.

5.6 This is because under BRR+ HMRC have introduced assessments of business behaviour for each tax regime across three distinct areas to determine risk ratings:

- systems and delivery;
- internal governance; and
- approach to tax compliance.

Within each of the above areas, there are a number of indicators that have to be met. The determination of a company's risk status for each tax regime will depend on whether it meets all or some of these indicators.

5.7 Some of these indicators appear to achieve the requirements which would be mandated by the new notification requirement. For example:

- under systems and delivery, two of the indicators are:
  - any significant uncertainties or irregularities identified by the business are communicated to HMRC promptly.
  - transactions or issues with significant tax implications are discussed in real time and communications with HMRC are managed collaboratively.

- under approach to tax compliance, two of the indicators are:
  - the business maintains an open and transparent relationship with HMRC.
  - the business is not involved in tax planning other than that which supports genuine commercial activity and they fully disclose the facts and any legal uncertainty of relevant transactions.

5.8 Therefore, if a business achieves a 'low' or 'moderate' risk status under BRR+, it will have already fulfilled any obligations which would otherwise arise under the newly proposed regime. We suggest that the most practical and certain way of ensuring that this measure does not require notification of information that HMRC has already received is to have a link to BRR+.

5.9 We suggest that rather than putting an extra burden on large businesses that are already working constructively with HMRC (as evidenced by achieving a low or moderate risk rating), an exclusion of such companies from this measure would:

- positively encourage behaviour such that it would be an incentive for those businesses with higher risk ratings to achieve a low risk rating; and
- provide HMRC with greater knowledge of such tax payer's affairs than would be achieved by this proposal.

5.10 It is our view that the notification requirement would work much more efficiently for taxpayers and HMRC if businesses which achieve a 'low' or 'moderate' risk status under BRR+ are excluded from it. This should be

acceptable to HMRC because these businesses will have already fulfilled any obligations which would otherwise arise under the newly proposed regime.

5.11 However, there are large businesses within the scope of this measure who are not within the BRR+ and which do not currently have a CCM. It is recognised that they would have to be provided with a suitable point of contact. In our view, this point of contact will have a significant role to play for these businesses in order to ensure that there is parity between taxpayers under the tax system. In reality, in order to achieve fairness between taxpayers and ensure that all large businesses to which this requirement to notify might apply are able to avail themselves of the proposed exemption around information that has already been given to HMRC, the BRR+ process should be extended to all large businesses which will fall within the requirement to notify – or, alternatively, the requirement to notify should be scaled back to those large businesses which are subject to BRR+ and which do have a CCM.

5.12 During our discussions with HMRC, some apprehension was expressed at being able to rely on a low risk rating given under the business risk review process. Specifically it was cited that several businesses with a low risk rating have subsequently fallen within the scope of DPT (the implication being that any activity invoking the DPT rules, or a consideration of them, is not a 'low risk' activity). We are surprised by this and we would like to understand more about the timing of the low risk rating and the liability to DPT. DPT is a relatively new tax, which has resulted in an increased focus on activity which may be pertinent to it. Also, a business is only at risk of DPT if their transfer pricing is not correct. If a business's transfer pricing is incorrect, then their CT is also incorrect. We understand that most DPT checks result in more CT, and not DPT, being paid. With regard to assessing the 'risk' arising from these businesses for the purposes of BRR+, this will surely depend upon why the CT/DPT issue arose: is it due to careless or deliberate behaviour or due to technical interpretation type issues? If it is the latter then it is not clear to us why that should necessarily cause the business to cease to be 'low risk', save to the extent that if a business is involved in an area which generates complex tax issues that are uncertain we understand that it is HMRC's practice not to classify such businesses with a 'low risk' rating. If this is the case, then we assume that the low risk rating was incorrectly set by HMRC in the first place, which is a process matter for HMRC and the BRR+ team. In addition, the BRR+ is a significantly enhanced process for businesses. Much more is required to obtain a low risk or moderate risk rating under the BRR+ than was previously the case.

5.13 In any event, to the extent that HMRC lacks confidence in the efficacy of the BRR+, we suggest that the best answer is for them to work to improve this. Our understanding of the policy objectives of the BRR+ is to target resource where needed. The higher the risk status the more intrusive HMRC will be, with more frequent and detailed risk assessments for higher risk businesses. Our members in large businesses report that their company boards and risk committees take the risk status very seriously, and this often feeds into statements in the annual report and tax strategy. Complaint businesses (the majority) value achieving a low risk status, as part of their corporate social responsibility reporting. BRR+ is intended to be a robust process with companies having to meet a number of indicators across each tax, as explained above. We would also note that HMRC state in their Factsheet pertaining to BRR+ that one of benefits of low risk status is that *'customers will have more certainty over their tax liabilities'*. This statement will not ring true if low risk businesses are then brought within the scope of new proposals such as this requirement to notify uncertain tax treatments. Indeed, it is not encouraging for the cooperative relationships that HMRC is keen to foster with businesses if, even when a business embraces collaborative and cooperative compliance and does everything that is required to achieve a low risk status, the government still imposes new rules which significantly increase the businesses' compliance burden.

5.14 In summary an exclusion of low risk taxpayers from the requirement to notify would be sensible, as these taxpayers will generally have nothing to report but, due to wanting to ensure they are compliant are likely to spend considerable time in checking if there was anything to report. However it is also important that this exclusion would not make low risk status harder to obtain.

5.15 The importance of broad, easily applicable exclusions from the requirement to notify is to a large extent correlated to the how clear and certain the definition of uncertain tax treatment ends up being. If the proposed test is changed to an objective test that businesses can apply with more confidence, the compliance burden on businesses would be reduced and the exclusions from the requirement to notify will be less important in determining the scope of the measure. However, there would still be a duplication of effort for compliant businesses (and HMRC) in relation to the BRR+ process and notification under this measure.

6 Scope – 'relevant taxes'

6.1 We understand that the list of 'relevant taxes' given in paragraph 2.11 of the consultation document are those taxes which are within the scope of the SAO regime. However, for a variety of reasons discussed throughout this response, the SAO regime is not a suitable template on which to build this new requirement to notify. We understand that HMRC broadly agrees with this and as such are open to changes to aspects of this proposal which arose largely because of the link to the SAO regime, rather than explicitly with reference to the policy aims of the measure.

6.2 We discuss below in response to the specific questions the difficulties that arise when some of the concepts, for example, around de minimis thresholds, measuring the uncertain tax treatment, timing of reporting, are applied to taxes other than CT, in particular in relation to PAYE, VAT and SDLT. Many of the concepts relate most straightforwardly to CT (which may be reflected by the fact that the regimes in the USA and Australia apply only to corporate income tax).

6.3 We would welcome, therefore, a reduction in the scope of the measure to apply to only CT, at least initially. This would reduce the compliance burden of the measure. It is our understanding that CT forms the largest part of the legal interpretation tax gap attributable to large businesses. If there remains a policy objective to apply the notification requirement beyond CT, HMRC should consider carefully which of the more material taxes are contributing to the legal interpretation tax gap, which may, therefore, be appropriate to include whilst not creating an undue compliance burden. We understand that HMRC are minded to also include PAYE and VAT from the outset. In any event it would be helpful if HMRC were to publish the available data to split the £4.9bn due to legal interpretation between the different taxes and between the different types of taxpayers. Without this information it will not be clear whether any of these proposals is having an impact.

6.4 As discussed with HMRC and indicated below, in our view it would be preferable to have different reporting requirements for each tax (even if the underlying definition of uncertain tax treatment is the same for all relevant taxes). While this may seem superficially more complicated, it would reflect the fact that each tax is currently operated separately. This approach would also lend itself to a staggered introduction of the requirement to notify on a tax by tax basis, affording HMRC time to assess the administrative burden that arises and the effectiveness of the measure, and also giving taxpayers time to adjust to the measure.

7 Materiality

7.1 We welcome the acknowledgement that the aim of the government is a notification requirement that does not put disproportionate burdens on businesses for smaller areas of uncertainty (even though in our view the proposal overall would result in a disproportionate burden). We discuss below in response to questions 5-8 in Part 2 some of the detailed difficulties around thresholds and materiality.

7.2 In summary, it is important that there are sensible thresholds and a concept of materiality to mitigate against the compliance burden.

7.3 We would note in passing that this is one reason for preferring a regime closer to the US regime, which applies if a relevant corporation reserved an amount for a tax position in audited financial statements (based on the definition of an uncertain tax position in IFRIC23). Because materiality is a concept used by auditors when auditing a set of financial statements, a company may not record immaterial provisions in respect of uncertain tax positions. This approach does not make the financial statements materially incorrect. This would likely result in companies being required to report a much smaller subset of potential areas of uncertainty, where a provision has been made in the financial statements in respect of a tax position which is both 'material' (in order to satisfy the auditors) and with a significant degree of uncertainty. However, alternatively, the Australian regime has a flexible materiality threshold and it is clear what is being asked for. We would much prefer similar concepts in any new UK regime, compared to those proposed in the consultation.

7.4 We understand that HMRC is considering whether the level of the de minimis threshold proposed in the consultation document should be increased, in particular in respect of CT. We agree that the level is very low for most large businesses. In addition, we would welcome consideration of a de minimis threshold of, say, £1m or £2m for each issue (in the year in question), rather than per tax or per entity. In any event, although very complicated, different materiality and de minimis thresholds may be necessary for different taxes in order to reach a more appropriate level at which notification is required for each tax.

8 Responsibility to notify and penalties

8.1 The consultation document puts the reporting obligation and resulting penalties for failure to do so on a named individual (as in the SAO regime). We understand that HMRC recognise that this is not appropriate for this proposed measure. We agree and we would welcome a change to the requirement to notify, such that the obligation to notify and any penalties for failure to do so (if the measure is enacted) would fall on the business. In our view this would be a more appropriate approach because the decision about how to treat something for tax purposes is a corporate decision – which will be made in respect of different taxes at different levels throughout the business, depending on the tax and the issues involved – this is not, therefore, a decision by one person and following the approach of the SAO regime would not be appropriate.

8.2 Also it would be the corporate which would obtain advice from professionals in the preparation of its return and in relation to whether there is a requirement to notify. An individual would not legally be party to such advice normally. That might undermine the individual's ability to mount a reasonable excuse defence (depending on how the reasonable excuse defence is scoped for the purposes of these proposed rules).

8.3 In summary we are strongly opposed to individual penalties for failure to notify.

Part 2 – the questions in the consultation document

Our comments below in response to the specific questions asked by the consultation document should be viewed in light of our strong opposition to the introduction of this new compliance obligation as a matter of principle. Nothing in the following paragraphs agreeing with aspects of the proposal put forward by the government in the consultation document, or indicated by HMRC during our discussions with them, should be read as agreement to the proposal overall.

1 Question 1: Do you think the suggested threshold criteria are suitable for the requirement to notify?

1.1 We agree that any new measure along these lines should only apply to large businesses.

1.2 Broadly the proposed threshold for what is a large business and would, therefore, be within the scope of the notification measure seem reasonable. However, the consultation refers to both the SAO and tax strategy regimes, for which, although the basic threshold tests are similar, the rules differ slightly. It would be helpful if this new proposal could use one or the other of these two regimes, rather than creating a slightly different, third series of thresholds/tests for businesses to consider. Given the move away from a link with the SAO regime, we suggest that the definitions within FA 2016 Schedule 19 (the tax strategy regime) are used. This regime also has definitions for qualifying groups and partnerships; thus the requirement to notify could apply to large businesses which are required to publish a tax strategy. This approach may also assist with the reporting obligation for this measure; this could follow the obligation to publish the tax strategy, insofar as these rules identify which company would have the reporting obligation (but not extending to the timing of the making of the notification of uncertain tax treatment, which is discussed further in paragraph 11 below).

1.3 We would also note that HMRC expects the majority of these large businesses to have a Customer Compliance Manager (CCM) and, therefore, fall within the Business Risk Review (now BRR+). As discussed above and in response to question 2 below, we suggest that the BRR+ model should be improved and built upon, to better focus of the policy aims of providing HMRC with the information sought.

1.4 Paragraph 2.15 of the consultation document refers to some businesses which are expected to be in scope of this proposal, which do not have a CCM; presumably the larger groups within Mid-Sized Business which will be in scope. Since a contact point will have to be provided in any event for these businesses, not least to afford these businesses the opportunity to be able to bring themselves within the proposed exemption for reaching an agreement with HMRC that HMRC has the relevant information, we suggest that these businesses should be given a CCM and brought within the scope of BRR+. This new requirement to notify would otherwise operate unfairly as between different taxpayers.

2 Question 2: Do you think there are any other areas that should be excluded from the notification regime?

2.1 As discussed in paragraph 5 of Part 1 above, it is our view that the notification requirement would work much more efficiently for taxpayers and HMRC if businesses which achieve a ‘low’ or ‘moderate’ risk status under BRR+ are excluded from it. It seems to us that these businesses will have already fulfilled any obligations which would otherwise arise under the newly proposed regime. We suggest that an exclusion from the requirement to notify based on a risk rating under the BRR+ would be much clearer than the proposals in the consultation document at paragraphs 2.14 and 2.15. The approach proposed would also place pressure on CCMs to provide confirmations that HMRC has the relevant information, so that a notification is not required.

2.2 Properly framed, an exclusion from the requirement to notify uncertain tax treatments based on what HMRC already knows, will be the key to ensuring there is not a significantly increased and disproportionate compliance and administrative burden on taxpayers and HMRC respectively.

2.3 We would also suggest an exclusion along the lines of the exempt situations in relation to DPT where a notification is not required, notably when it is reasonable to assume that the business has already provided HMRC with sufficient information to allow a decision to be made as to whether a preliminary notice with regard to DPT should be issued. For the purposes of this requirement to notify, a similar exclusion could be framed around circumstances where it is reasonable to assume that the business has already provided HMRC with sufficient information to allow HMRC to identify the uncertain tax treatment. Although we note that this exclusion would effectively be doing the same thing as the declaration of full and fair disclosure in the tax return, against which HMRC can invoke discovery – demonstrating again that is it not at all clear what this proposal adds to the existing tax system, over and above an additional compliance burden.

2.4 We understand that HMRC is considering excluding issues around transfer pricing from the scope of the requirement to notify on the basis that, due to there always being a range of 'correct' treatments, all transfer pricing positions could be considered to be 'uncertain'. Thus requiring notification of them, would produce a large amount of notifications. We would support an exclusion of transfer pricing issues for these reasons.

2.5 However, there are other areas of tax legislation which are also inherently 'uncertain' – for example (as noted in the definition of legal interpretation in the consultation document), the categorisation of an asset for allowances or the VAT liability of a supply, the accounting treatment of a transaction or VAT partial exemption. Consideration should be given to further exclusions for these difficult areas that are already addressed by the tax system in a variety of ways to reduce the compliance and administration burdens of this measure.

2.6 The corporate interest restriction may be another area that it would be sensible to exclude from the requirement to notify. The corporate interest restriction has its own enquiry provisions which are based around the interest restriction return submitted by the group reporting company (TIOPA 2010 Schedule 7A paragraph 40) applies in the respect. The interest restriction return works primarily at group level and, if there are any revisions or adjustments made to the interest restriction return then these will flow through to the respective consenting companies.

2.7 We discussed with HMRC the difficulties arising in relation to the many areas of tax law where the boundary between one treatment or another is not clear due to an uncertain line in tax legislation. How will the proposed test apply to a business which has taken advice in relation to, say, the VAT treatment of a new product and on the basis of that advice has recommended a VAT treatment? Assuming the advice received is that the position adopted is 'correct', it is not clear on what basis a taxpayer would or should be able to determine whether or not HMRC would be likely to disagree with the taxpayer's position until a tax return has actually been filed. Would the taxpayer have a reasonable excuse for not giving the notification if the advice is that the correct tax treatment is clear or should a notification always be given in areas which are identified as being 'common areas of dispute' (as per paragraph 3.22 of the consultation document)? Is this a good use of business's or HMRC's time? Although these may be common areas of dispute, not every matter arising within them will be 'uncertain'.

2.8 Paragraph 2.16 of the consultation document mentions the position with regard to clearances. It is noted that, although it is not proposed to include an exemption in the legislation, businesses will be entitled to conclude that if they have received a clearance from HMRC, and there have been no changes in relevant facts or circumstances, then there is no uncertainty as to the subject matter of the clearance. However, it would be helpful if the government could also address what conclusion businesses should reach when the business asks for a ruling, but HMRC say there is no uncertainty around the subject matter of the ruling request, and so will not give a ruling. This often arises in the context of VAT. It would appear to be HMRC's position that no notification would be required around this tax position, but from the business's perspective there is uncertainty, which is why the ruling was requested. We suggest that this tension needs to be addressed.

2.9 Also, we suggest that some other exceptions should be considered (in order to avoid duplication of information being provided to HMRC of which it is already aware/waste of time and resource):

- if the taxpayer has filed a notice in respect of the tax treatment under the DPT regime (to the extent that transfer pricing is not also excluded from scope, and there is an implication for the CT position of the company, dependent on the DPT position); or
- if the tax treatment is in relation to an amount or tax position which is being negotiated with HMRC and another tax authority (for example under a MAP); or
- the tax treatment arising in relation to a scheme in respect of which a follower notice has been received by the business; or
- the tax treatment is already the subject of an enquiry with HMRC (for example, an enquiry into an SDLT return has been opened by HMRC), or the taxpayer is under a VAT audit.

2.10 Consideration should also be given how a notification under this proposal would interact with the return itself. A notification under these rules does not seem to obviate the need for an appropriate disclosure in the return in order to ensure that penalties for inaccuracy do not arise under FA 2007 Schedule 24. An amendment to the rules to provide that notification under this proposal would prevent a return being treated as inaccurate would seem appropriate and ensure that there is not a duplication of effort required by a business. However, this does not address the duplication that may also arise as a result of taxpayers making a disclosure of the tax treatment in the 'whitespace' of the tax return in order to protect themselves from a discovery assessment at a later date. Although we understand that HMRC do not want notification of uncertain tax treatments to be given in tax returns, without an exclusion from the requirement to notify if something is disclosed in the CT return, duplication of effort would seem to be inevitable – demonstrating the practical difficulties with this proposal, and that it appears that how the proposal fits into the existing tax system has not been fully considered.

2.11 We suggest that there should be an explicit exclusion for historic transactions and positions, as it does not serve the policy objective to report on historical issues. Although grandfathering is probably not necessary, from a compliance burden perspective the proposal could apply retrospectively as transactions may have happened pre 1 April 2021, but need reporting by reference to a tax return which is filed on or after 1 April 2021.

2.12 As mentioned above, with a view to better focussing the scope of the measure, we suggest that the taxes to which it applies is reduced. Ideally the measure should be limited to CT (at least in the first instance).

3 Question 3: Do you think the definition and principles in IFRIC23 are appropriate to be used for the requirement to notify?

3.1 We discuss in Part 1 above the fundamental challenges in trying to define the concept of an uncertain tax treatment, and the uncertainty and unreasonableness of the definition proposed in the consultation document. We do not repeat these points here, but make some further more specific points around IFRIC23 and the other regimes which have requirements to notify uncertain tax treatments.

3.2 The consultation document says that the concept of uncertain tax treatment will draw on International Accounting Standards, specifically IFRIC23. However, IFRIC23 defines an uncertain tax treatment as 'a tax treatment for which there is uncertainty over whether the relevant taxation authority will accept the tax treatment under the tax law.' The 'taxation authority' for these purposes includes the court or tribunal that decides whether tax treatments are acceptable under tax law. This requires, therefore, an objective assessment as to whether or not it is probable that HMRC or the court/tribunal would accept the tax treatment. The critical difference from this approach to that of this proposal is whether a tax treatment is uncertain is to be determined by reference to whether HMRC may (or is likely to) challenge it, not whether or

not it would ultimately succeed in a court or tribunal. This leaves the taxpayer in a difficult position of having to prove a negative – that HMRC are not likely to challenge – which becomes impossible to prove, if, in fact, HMRC does open an enquiry and so 'challenges' the tax treatment.

3.3 The consultation document also mentions that there are requirements to notify uncertain tax treatments in the USA and Australia, and that large international businesses will be familiar with those measures. However, the measures in the USA and Australia are different to what is being proposed in the consultation document in several fundamental ways. Firstly, as noted, the requirements in those jurisdictions only apply in relation to corporate tax. In addition, and more fundamentally, those notification regimes use demonstrably different definitions as to what is an uncertain tax treatment to the definition which is proposed in the consultation document. Specifically, in the USA a business is only required to notify if the financial statements have recorded a provision in respect of the uncertain tax treatment (under IFRIC23). To the extent that the company intends to litigate, then it would not be expected to have a provision, or to make a notification. The Australian definition of uncertain tax treatment is also based on the outcome of the tax treatment and whether more likely or not to be correct. Thus the tests are objective and are based what the business considers to be the case. In our view referencing that large businesses may be familiar with these regimes will not assist the large businesses in navigating the subjective, unclear definition that is currently being proposed for a new UK regime.

3.4 The consultation document at paragraph 2.6 says that an uncertain tax treatment is one where the business believes that HMRC may not agree with their interpretation of the legislation, case law or guidance'. But then chapter 3, in setting out more detail and 'enhancing the definition' turns the concept on its head and by looking not at the ultimate outcome but at the likelihood of challenge by HMRC.

3.5 As a result it is not clear to us how the definitions or principles of IFRIC23 would be used in the definition of uncertain tax treatment proposed in the consultation document. Indeed, it will be necessary to depart the IFRIC23 definition in order to be able to bring in 'relevant taxes' beyond corporate income tax, which is all that IFRIC23 concerns itself with. There is a lack of clarity as a result of attempting to combine some of the concepts in IFRIC23 with the much broader, subjective test around what HMRC might or might not do.

3.6 Most particularly, the comments in paragraph 3.7 of the consultation document are problematic. As noted, IFRIC23 not only looks to the ultimate outcome but also looks to the likelihood of success; that is to say whether an uncertain tax treatment would probably be accepted. Later in paragraph 3.7 we understand that the ratio of uncertainty to be used for the purposes of this consultation is whether HMRC would be 'likely' to challenge the treatment. The word 'probable' in IFRIC23 is difficult to assess but we believe the word 'likely' is even more difficult to apply. In addition, the test in IFRIC23 relates to outcome, whereas the broader test of 'likely' applies in respect of an action taken or not taken by HMRC. As discussed above these are not objective measures.

3.7 We understand that HMRC does not want to look to the ultimate outcome because they wish to receive the information in order to be able to assess whether or not to set in train a challenge that might result in court action in the first place. However, as discussed in Part 1 above, these probabilistic concepts are too vague; in fact, taxpayers may ultimately send in far more information than HMRC require as a matter of prudence and we think HMRC should try to find an alternative measure. It seems to us unrealistic to expect businesses to be able to determine what HMRC is 'likely' to challenge and to further compound this issue, some HMRC interpretations are ultimately unsuccessful.

3.8 As discussed in Part 1 above, in our view in order to arrive at a test which is objective, it is necessary to either:

- base the test on the published opinion of HMRC (and the law) such that an objective assessment can be made as to whether there is a legal interpretation tax gap; or
- have some examination of or link to the likely ultimate outcome of the tax position, and not merely be by reference to the likelihood of a challenge. For example, in Australia, a reportable tax position is

based around whether the business considers a tax position to be either about as likely to be correct as incorrect, even if it is reasonably arguable or less likely to be correct than incorrect. Although this is not as clear as the US regime, which follows the accounts, it is at least an objective test which is clear as to what must be notified.

3.9 As discussed in paragraphs 2 and 3 of Part 1 above, the lack of clarity in the definition of what is an uncertain tax treatment will have practical consequences. It seems likely that businesses would approach the requirement to notify in one of two ways: either take the view that their tax positions are in general correct (because they have given them due consideration and reached a position that they are confident in), and, therefore, 'certain' and unlikely to be challenged, resulting in few disclosures. Alternatively, businesses may approach this from the other extreme, take the view that HMRC might challenge anything – so therefore everything is uncertain based on this formulation, resulting in a disclosure of everything (or seek written confirmation from HMRC that the information has been given to the CCM through the BRR+ process, so that notification is not required). Neither approach is probably very satisfactory for HMRC.

4 Question 4: Do you think there would be any problems with the person considering whether notification is requirement, being someone other than the SAO?

4.1 As discussed above, we welcome the indication from HMRC that it is intended that this measure will be an obligation on the large business and not any particular individual. It is our view that this is not an appropriate measure to place on any one individual for many reasons.

5 Question 5: do you think the proposed de minimis threshold of £1m is reasonable for the notification of uncertain tax treatment?

5.1 Although £1m is not a significant amount to many of the largest, global multinational businesses, we recognise that it is a significant figure in its own right and it seems a sensible starting point for a reporting threshold for many taxes.

5.2 However, particularly in the context of CT, the practical effect of applying this in a cumulative way to a large volume of smaller value positions could be unduly burdensome, requiring reporting of individual issues down to low levels of materiality, while providing little meaningful information to HMRC on uncertain tax treatments. This is why we believe it is important for there to also be a materiality threshold (question 6 below).

5.3 It is not clear to see how quantum of uncertain tax treatments will be ascertained and ascribed to a particular period of time in respect of all taxes. The position will also be complicated if the interaction between the taxes is considered. For example, in relation to PAYE, is the quantum the PAYE change, or the PAYE change net of the CT impact?

5.4 It will be necessary to have clear rules as to how any tax treatment should be measured. For example, if the headline tax amount is, say £2m, but it is only a cash-flow issue and the interest effect is, say, £50,000, does this need reporting?

5.5 How will a tax treatment be quantified if there are relevant losses, either because the uncertain may reduce a loss (which is yet to be offset against a gain) or where there are losses brought forward which could over the possible liability arising from the uncertain tax treatment?

5.6 Also HMRC will be aware that a set of financial statements will always record accruals in respect of any future known expenses/income that relate to the accounting period, and any changes would be reflected in the following year's accounts – so a matter of timing rather than failing to disclose.

5.7 Another aspect which will require clarification is quantifying the tax treatment where there is foreign exchange. For example, if a UK company has a USD functional currency, depending on the forex rate when the company translate the dollar amount to sterling, a tax treatment may be above the threshold one year and not the next, depending on whether or not the inclusion of the forex puts it over the £1m threshold. This point would apply whatever limit is set.

5.8 Please also refer to our comments at paragraph 15 regarding what information would have to be provided in the notification and VAT is also discussed at paragraph 7 below.

6 Question 6: Do you believe there are strong arguments for a materiality threshold?

6.1 We believe that there should be a materiality threshold in order to ensure that this notification requirement does not place an unsustainable and disproportionate compliance burden on businesses (and administration burden on HMRC).

6.2 Whilst we accept that a total amount of tax of £1m or more is significant to some businesses, for others having to assess, consider, report on smaller, otherwise immaterial, uncertain tax treatments, in case these end up accumulating to more than £1m for the particular treatment (or combination of treatments along the lines of IFRIC23), means that businesses will have the compliance burden of dealing with and tracking smaller areas of uncertainty – even if they do not have the final burden of notifying.

6.3 We suggest that there should be a threshold (or exclusion) which applies to exclude small individual tax treatments entirely, as well as the proposed cumulative de minimis threshold which triggers reporting. We suggest that an exclusion for tax treatments of £1m or less for each particular issue would be appropriate.

6.4 We would prefer an approach similar to that adopted by the Australian Tax Office. This approach employs a flexible materiality threshold which would provide a fairer result, accommodating the different sectors operating within the large business community. It also ties in with the way that external auditors would approach the decision as to whether or not a provision would need to be made in the financial statements.

6.5 Of course, if the requirement to notify is linked to what is reserved in the accounts, in a similar way to the US regime, there would not have to be a separate materiality threshold. Because materiality is a concept used by auditors when auditing a set of financial statements, a company may not record immaterial provisions in respect of uncertain tax positions, which would result in companies being required to notify a much smaller subset of potential areas of uncertainty. The benefit of adopting an approach which follows the accounts is that the tax positions would have already been subject to professional standards and a high degree of scrutiny.

7 Question 7: Do you envisage problems determining the £1m threshold for indirect taxes, particularly VAT? And Question 8: If so, can you suggest how these problems could be mitigated?

7.1 There are specific issues which arise in relation to indirect taxes and VAT in particular in terms of how tax treatments can (and should) be quantified for the purposes of determining the £1m threshold. Our response focusses on VAT as we are hopeful that this measure will be reduced in scope to apply only in respect of VAT (and not other indirect taxes) if, indeed the scope is not further reduced to apply only to CT.

7.2 In the first instance, the netting of input VAT and output VAT may mean that there is no incremental tax payable. We suggest that the threshold should be determined on a net tax payable rather than gross basis.

7.3 How will the de minimis threshold test take account of the interaction between different taxes? For example, a particular VAT treatment may affect something in the profit and loss account which will then impact on the company's CT's position.

7.4 How is it perceived that the rules will work where a company is part of a VAT group? Would the de minimis threshold apply across the group or would the limit apply to each member of the VAT group?

7.5 How will £1m be calculated in circumstances where there are, for example, partial exemption issues which are spread over a number of years or other timing differences – on what basis should amounts be taken into account in one period rather than another? Should the threshold be determined by reference to any amounts of VAT recovered under partial exemption, for example, where that has an impact on the profit and loss account in the financial statements? With regard to businesses seeking assurance from HMRC with regard to their partial exemption position and whether or not a notification is required, this is an area where increased HMRC resource will be required as, in our members' experience HMRC's response capability in this area is currently already stretched.

7.6 With regard to tax treatments for VAT purposes, when should the amount of tax at stake be judged from or by reference to? For example, if a business decides on a VAT treatment for a particular product, does it then have to estimate how much of that product it is going to sell to arrive at a quantum of the tax treatment, or wait until sales reach a particular level which means the £1m threshold is reached?

7.7 Another difficult area in terms of valuing transaction is those involving land. In relation to VAT, as a result of the capital goods scheme, the valuation in relation to a land asset may arise as a result of looking at the value over many years as a result of a decision about the treatment of the capital asset.

7.8 As mentioned at paragraph 2.8 above, it is common in relation to VAT for pre-transaction clearances to be refused because HMRC says that the issue in point is 'not uncertain' (or, for example, it is covered in guidance). The rules should make clear that in these circumstances, no notification is required.

8 Question 8: If so, can you suggest how these problems could be mitigated?

8.1 See above

9 Question 9: Do you consider that it would be beneficial to supplement the main requirement with a specific list of indicators of uncertainty?

9.1 The fundamental problem is that the current proposal around what is to be notified is not at all clear. It is not possible to discern what it is that HMRC wish to be notified about; what is it exactly that HMRC want to know. We suspect that is because HMRC are not clear either – in part this is because the proposal is designed to flush out what HMRC do not know. However, the unsatisfactory position presented is that it will be up to businesses to make the judgement call – and be faced with penalties for calling it incorrectly. This is an area that could usefully have been explored if the consultation process had started at an earlier stage.

9.2 With regard to the suggestion of scoping the compliance obligation through guidance, although this may be helpful, we think that it is important for the legislation to clearly state the principles of the law so that the companies can comply with it in accordance with the general principle of self-assessment. It is not satisfactory

to set up a compliance requirement in respect of which, from the outset, a taxpayer has to rely on guidance to ascertain whether or not it applies.

9.3 There are also many reasons why the suggested examples of what might be covered in guidance would be problematic and may not necessarily provide clarity around the definition of uncertain tax treatment.

9.4 Firstly, inevitably, HMRC would not be able to think of everything across all the sectors, so taxpayers will be forced to consider the primary legislation which must, therefore, be clear on its own terms.

9.5 Secondly, existing HMRC statements of practice, business briefs and other guidance are not kept up to date. The suggested reliance on guidance puts pressure on HMRC to ensure their guidance is comprehensive and up to date (and non-conflicting). How does HMRC intend to ensure that the guidance relating to this notification requirement could be relied upon and would be updated as needed? Further, even the example in the second bullet in paragraph 3.21 could quickly become problematic if the 'stated view' in a VAT Brief or Statement of Practice no longer reflects HMRC's view.

9.6 The difficulties with relying on HMRC guidance in order to reach a position of certainty are also discussed in Part 1.

9.7 That said, with so many areas of uncertainty arising out of this proposal, guidance will inevitably play some sort of role.

10 Question 10: Do you agree with the proposed examples, and do you have any others which you consider would be helpful?

10.1 With regard to the examples suggested in the consultation document in respect of which HMRC envisage providing clarity over issues that they consider to be uncertain, in order to be helpful to taxpayers we suggest that the guidance and other public statements of HMRC's views will actually have to be quite specific, even if they arise in the area of the 'general issues' identified.

10.2 For example, the first bullet point in paragraph 3.21 of the consultation document refers to a 'tax treatment which is under dispute in the courts'. We assume that this is intended to be to a tax treatment which is under dispute in the courts in relation to another taxpayer. If the dispute was involving the taxpayer, considering whether or not a notification of a tax treatment is required would seem to be unnecessary because HMRC would already aware of the relevant tax treatment with regard to that taxpayer. However, assuming this is intended to be the case, in our view it would not be reasonable to require notification by all other taxpayers with regard to a tax treatment which is the subject of current litigation between HMRC and another taxpayer.

10.3 In our view it is not reasonable to expect taxpayers to monitor all court cases in order to be aware of disputes in relation to a similar tax treatment to that which they are adopting. Further, unlike HMRC, taxpayers will not be aware of all tax cases (in particular those before the First Tier Tribunal or judicial review cases) until the decisions are published. Therefore, any general expectation that a notification is required in respect of tax treatments which are currently being litigated should, at the very least, be limited to cases on appeal to the Upper Tribunal, Court of Appeal or the Supreme Court. However, in addition, a case is always dependant on the facts, and it may be that another taxpayer does not have the same facts such that in any event the outcome of the litigation may not apply.

10.4 Paragraph 3.22 of the consultation document refers examples of 'specific common areas of dispute' and the examples in the bullet points are areas where there is an uncertain line in the tax legislation. As noted in paragraph 2.7 above, it is not clear whether these examples would create an expectation to notify all such cases – when in practice the VAT treatment of the specific new product, or the capital/revenue divide might be quite straight forward. This could lead to unnecessary notifications, increasing the compliance and

administrative burden on businesses and HMRC respectively. Although these may be areas of common areas of dispute, not every matter arising within them will be 'uncertain'.

11 Question 11: Do you think the SAO certification process is appropriate for the notification requirement?

11.1 As discussed above, we understand that HMRC is considering that the SAO process is not the most appropriate process for this measure. We agree.

11.2 The SAO is responsible for financial accounting arrangements and a tax reporting regime that sits outside of those responsibilities such as this, should not be part of the obligations on the SAO nor added into the SAO regime. The company, and not any particular individual, should be accountable for notification and reporting of uncertain tax treatments in the same way that it is for the completeness and accuracy of its tax returns and other notification requirements, such as in relation to DPT.

11.3 In addition, we do not consider that the deadlines associated with the SAO process are appropriate.

11.4 We understand that the intention of the proposal being linked to the SAO process may have been an attempt to reduce the additional compliance burdens by combining the notification of any uncertain tax treatment with the SAO notification. However, since this notification would require a different process, and different personnel within the business, combining the two things is unlikely, in practice, to be efficient.

11.5 Taking CT compliance processes as an example. The SAO certification is required six or nine months after the relevant company's year end, whilst the CT return is only required to be filed 12 months after the year end. It is likely to be the case that uncertain tax treatments are unknown until very shortly before the point of filing the CT return and, therefore, determining uncertain tax treatment notifications (at least in relation to CT) by reference to the normal CT compliance process seems more appropriate.

11.6 We suggest that the notification should be required sometime after the annual return for each relevant tax. If returns are submitted, and decisions on treatments are made, close to the tax return submission deadline it would be difficult to submit the notification to the same deadline as that tax return.

11.7 During our discussions, we raised with HMRC the possibility of including notifications of uncertain tax treatments as part of the CT return (or the computations). HMRC said that this is not what they wanted: they wanted to receive a separate notification. We are inclined to agree. Although including notification of uncertain tax treatments within the return seems simpler in some respects, and would address the questions arising around duplication of what is required in the notification with the sort of disclosure needed to protect against discovery, it would also require businesses to consider this new compliance obligation continually throughout the CT return process. Many groups will submit CT returns over a, say, a two month period with the parent company several weeks after most subsidiaries, with group relief and corporate interest restriction allocations and calculations being considered as a final step before submitting the parent company return. A requirement to include notification of an uncertain tax position in each company's CT return would mean HMRC potentially receiving several notifications of the same uncertain tax treatment, as an issue may well impact more than one member of a group.

11.8 Consequently we suggest that the notification in respect of uncertain tax treatments with regard to CT should be required three months after the due date for filing the CT return. This will provide businesses with time to collate notifiable items from all the group companies' returns (and also take into account the very busy period immediately after the deadline for filing of the CT return arising as a result of the this deadline coinciding with the end of the subsequent accounting period).

11.9 There should be one notification for a group. As suggested in paragraph 1.2 above, the company on which the reporting obligation falls could be determined based on the rules regarding the publication of a tax

strategy. With regard to foreign businesses that may have several entry points into the UK, it may also be helpful to reflect the obligation on each sub group to publish a tax strategy - some divisionalised businesses may struggle if they are forced to compile a notification for all UK companies within the overall multinational group. Similar optionality as per the tax strategy rules could be included.

11.10 If the notification requires a list of entities covered, this should require only entities which have filed CT, VAT or PAYE returns (as appropriate). This will avoid the difficulties with the SAO regime which requires a list of ALL entities, including dormant companies, which can lead to inadvertent errors and penalties if one is missed.

11.11 In this regard, we would like to refer back to the comments at paragraph 2.15 of the consultation document, and the overriding principle that HMRC does not wish to be told about matters of which it is already aware. It may only be at this stage in the tax compliance process that the taxpayer is in a position to consider whether or not it thinks that HMRC has sufficient information around the relevant tax positions. We suggest that there should be a mechanism pursuant to which HMRC can be requested to confirm in writing that it agrees with a taxpayer that they have sufficient information at least 30 days in advance of the deadline for notifying an uncertain tax treatment. If such agreement is not forthcoming the taxpayer then has 30 days to seek further advice as to whether or not it considers that a notification is required and/or prepare any further information that may be required. Likewise, it is reasonable to allow HMRC 30 days from the date of the request for confirmation to assess whether all relevant information has been provided.

12 Question 12: Would reporting VAT and PAYE issues occurring in the tax year, rather than in the accounting period for the company, cause any significant difficulties?

12.1 As mentioned above, we suggest that consideration is given to limiting the requirement to notify uncertain tax treatments to CT, at least initially. This would give the new compliance obligation a time to 'bed in' and be assessed as to its effectiveness before extending it to other taxes.

12.2 However, to the extent that the requirement to notify is introduced applying to other taxes, we would support a separate notification for each tax, based around the annual return for that tax.

12.3 We recognise that the aim of HMRC in suggesting one annual report was to reduce the compliance burden. Whilst this is a reasonable aim, different taxes have different timetables, and different personnel within a business is involved for each tax. Thus a separate return for each tax, reflecting the existing reporting obligations and timetables for that tax would be preferable.

12.4 This approach would avoid the timing difficulties that could arise if the requirement to notify is combined for several taxes due to the different timings of annual returns for VAT and PAYE.

12.5 As noted above, we welcome the fact that HMRC is considering that taxes beyond CT, VAT and PAYE are unlikely to be in scope of the requirement to notify measure. For completeness, we suggest that any perceived advantages to HMRC of including SDLT as a relevant tax warrant particular examination. Firstly, if SDLT remains in scope of the requirement to notify, it may be that taxpayers take the view that, since transactions are relatively few and further between than, say, tax treatments that arise as a result of normal trading, it is preferable to notify every complex transaction. This may particularly be the case if the definition of uncertain tax treatment remains very wide, because the way uncertain tax treatment is described in the consultation document would make almost any complex transaction uncertain in its tax treatment for SDLT purposes (particularly if inherently difficult provisions such as FA 2003 section 75A might be in point). This is likely to result in a duplication of effort on the part of taxpayers and HMRC, if details of the transaction giving rise to the uncertainty are also given in the white space of the SDLT return (to mitigate penalties arising under the SDLT regime)).

12.6 More specifically, a notification of an uncertain SDLT position may not assist HMRC at all in relation to having the information in order to decide whether or not to open an enquiry. Under the SDLT regime, the enquiry window ends nine months after the SDLT return filing date (save for discovery). This time period is likely to have elapsed in many cases if the requirement to notify under this new regime is by reference to the accounting period in which the SDLT transaction occurred. Although we appreciate that HMRC may be able to use the information in order to close down any planning for future transactions for other taxpayers.

13 Question 13: What alternative person could be responsible to make the notification for large partnerships?

13.1 The responsibility for making the notification should follow the responsibility for publishing a large partnership's tax strategy.

14 Question 14: Alternatively, what process (other than the SAO) could be used for a single, annual notification?

14.1 As discussed above, it is envisaged that the notification requirement will not be part of the SAO process, and that there will be different annual notifications for each tax. We support this approach as it recognises the differences between the taxes, both in terms of the substantive tests around uncertainty, but also the existing administration of the taxes, which is separate and does not lend itself to one combined annual return.

15 Question 15: For each relevant tax, what information do you think could be reasonably provide as part of the notification requirement, in addition to a concise description and indication of amount?

15.1 The concise description and indication of the amount of tax referred to in the consultation document should be sufficient for the purposes of the notification. Further information should then be requested by HMRC pursuant to a formal enquiry process.

15.2 However, it will be necessary for the legislation to be specific as to the information that is required so that taxpayers are able to comply with the requirement to notify. The description in the consultation document is vague. What one person perceives as 'concise' may be different to another person's view. In addition, for example, does HMRC want to receive an overview of the facts as part of the concise description or is it intended that the description will be only of the technical issues.

15.3 It may also be very difficult for the taxpayer to give a precise indication of the 'amount of tax', if this is intended to be an estimate of what HMRC might consider the amount of tax that is due, based on their interpretation of the tax law. Some areas of tax are inherently uncertain and judgement based, so businesses will again be required to 'guess' what HMRC's judgement on the particular issue would be in order to arrive at the 'right' amount of tax. This would be particularly difficult in relation to transfer pricing and is another reason why we welcome the indication from HMRC that transfer pricing will be excluded from the requirement to notify. We also discuss at paragraph 7 above the complexities that will arise in quantifying the uncertain tax treatment in the context of assessing this for the purposes of the thresholds, for example, as a result of the interaction between different taxes as a result of different treatments or the position of there are relevant losses.

15.4 In any event, it will be important for the legislation to clarify what figure HMRC is looking to the business to disclose under these rules.

16 Question 16: Do you think there are any common disputes, that due to the complex nature of such disputes, where specific documents or information should be provided alongside the notification?

16.1 We do not consider it appropriate for any documentation in relation to the uncertain tax treatment to be required with the notification. Should HMRC wish to investigate any particular tax treatment further they should follow the proper channels to request information. This respects the Taxpayer's Charter.

17 Question 17: Do you think the principle and quantum of the existing SAO penalty regime is sufficient for the integrity of the notification requirement?

17.1 We refer to the discussion in Part 1 of this response and welcome the fact that HMRC are minded to agree that individual penalties are not appropriate for this regime. We strongly believe this to be the case and that the reporting obligation and penalties should fall on the large business.

17.2 As the proposal is framed in the consultation document, the high degree of subjectivity around determining whether a tax treatment is uncertain means there may be an imposition of a penalty without there being any deliberate or careless behaviour on the part of the taxpayer. Imposing penalties in such circumstances could be viewed as unfair. Further, the inequitable nature of the process of the notification proposal means that a tax treatment could be found to be correct and, therefore, the taxpayer is justified in deciding it was 'certain', but because HMRC raised an enquiry, a penalty follows because, while the test for determining whether a tax treatment is uncertain is linked to the likelihood of HMRC challenging the treatment, it becomes impossible to prove a negative as soon as HMRC have opened an enquiry.

17.3 This unfairness could be addressed to some extent by a robust reasonable excuse defence, although as noted in paragraph 4 of Part 1 above, there is some difficulty around framing a reasonable excuse defence in light of the lack of clarity inherent in the proposed compliance obligation. More particularly, we welcome the suggestion from HMRC during our discussions that there should be not a penalty if no tax is found to be due following a challenge to the tax treatment by HMRC.

17.4 In our view a flat rate penalty is to be preferred. The consultation document does not explore how or whether this new requirement to notify, and the penalty for a failure to do so, would interact with the existing rules in relation to penalties.

17.5 There is a potential overlap between this new notification regime and the 'penalties for errors' regime in FA 2007 Schedule 24 or the 'penalties: failure to notify' regime in FA 2008 Schedule 41. We suggest that a tax geared penalty for failure to notify an uncertain tax treatment would be inappropriate as it would potentially extend the scope of these existing regimes to cover things that would currently be outside their scope (because the corporate can argue they took reasonable care or had a reasonable excuse due to professional advice; albeit recognising that FA 2007 Schedule 24 paragraph 3A disqualifies professional advice in avoidance cases such that an error is automatically careless in many situations, so penalties can be charged).

17.6 With regard to quantum, the SAO amounts may be a little on the low side to discourage taxpayers that are not minded to be collaborative or cooperative with regard to their tax compliance from taking the decision not to notify on the basis that the penalty, if the matter, is discovered is low. The level of penalty works for the SAO regime because the SAO themselves is more concerned about the fact it is a personal penalty, thus impacting on their personal reputation, than the quantum of the penalty. However if penalties are too high, there is an increased likelihood that low risk taxpayers will disclose a large number of items for 'safety', with all the issues (discussed above) this would cause. There needs therefore to be some kind of balance, with sensible exclusions from the scope of the measure and a robust reasonable excuse defence against a penalty.

18 Question 18: Regarding the penalty in 6.3.2, who do you think should be liable to a penalty, the person liable to notify or the entity, and, if more than one (legal) person, in what circumstances, and to what quantum, would these persons be culpable/liable?

18.1 As noted above, we strongly believe that individual penalties are not appropriate for this regime and are pleased that HMRC indicated that they agree that the reporting obligation and penalties in respect of this new regime should fall on the large business.

18.2 Also as mentioned above, there should not be a penalty for failure to notify if the large business has a reasonable excuse defence for not notifying the tax treatment, nor where the tax treatment is found to be 'correct' and no tax is found to be due following a challenge to the tax treatment by HMRC.

18.3 In passing, we note that we have assumed that there is a typo in this question and the reference should be to [paragraph] 6.2.3.

19 Question 19: Do you have any comments on the assessment of equality, and other impacts?

19.1 The expected revenue benefits seem very low. The expected revenue rises to £45m over a five year period, staring at only £10m. £45m is less than 1% of the legal interpretation element of the tax gap (£6.2bn). This means that arguably, this is not a very effective measure if it is aimed at legal uncertainty but only brings in such a small proportion of the figure. See points around this in Part 1 above.

19.2 In determining which taxes should be included within the scope of these measures, it would be useful to know the split of the £45m that is expected to be raised between the taxes. If, as we would expect, CT represents a very large proportion of the Exchequer impact, that would be another reason to start with that tax first. It would also be useful to have an understanding of why is it envisaged that the amount of tax expected to be raised in the years presented will rise. We assume that this will be as a result of action taken by HMRC to counter the areas of uncertainty that are notified to it. Or is it taking account of expected changes in taxpayer behaviour such that they adopt a different tax treatment?

19.3 The comments about 'some additional resources' should be more specific. Does HMRC have a sufficient number of CCMs for example, to cover the large business group and large groups in Mid-Size to deal with the increased amount of discussions that should be expected in order to reach the agreements referred to in paragraph 2.15? The CCMs should be given sufficient powers and authority to be able to make decisions on issues raised with them, rather than having to refer matters to a specialist unit.

19.4 Also discussed above, is the extent to which it will be necessary to rely on published HMRC guidance and the requirement to keep this up to date in order to support this measure. Has the cost of resourcing this been taken into account?

19.5 We would welcome some more transparency on the costs and numbers of people at HMRC that will be involved. Will the monitoring of this measure fall under the Tax Avoidance group or CCMs?

20 Acknowledgement of submission

20.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

21 The Chartered Institute of Taxation

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

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

The CIOT's 19,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation
26 August 2020