HMRC consultation document
Tackling offshore tax evasion: A requirement to notify HMRC of offshore structures
Response by the Chartered Institute of Taxation

1 Introduction

1.1 This consultation is considering the introduction of a new legal requirement that intermediaries creating or promoting certain complex offshore financial arrangements notify HM Revenue and Customs (HMRC) of their creation and provide a list of clients using them. Clients in their turn would be expected to notify HMRC of their involvement via a notification number on their self-assessment tax return or personal tax account. Those who fail to comply with these requirements would incur civil sanctions.

1.2 The proposed measure is intended to apply to arrangements which could easily be used for tax evasion purposes. However, as the government recognises, in many cases these arrangements are used for legitimate purposes. Therefore the challenge will be to design a system that gives HMRC the information it wants without placing excessive administrative burdens on professional advisers or duplicating existing reporting obligations.

1.3 We welcome the fact that this consultation is taking place during stage one of the consultation process: 'Setting out objectives and identifying options'. At this stage, HMRC are seeking views on the feasibility and high level design principles, with further consultation planned should the decision be taken to proceed with introducing such a requirement. This is, in our view, the right approach to take when considering the introduction of new legislation.

1.4 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the Chartered Institute of Taxation (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.

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2 Executive summary

2.1 The vast majority of professional tax advisers would never knowingly advise on any structure in relation to tax evasion. Professional Conduct in Relation to Taxation[1], the guidance written by seven accountancy and taxation bodies (including CIOT) for their members working in tax is completely clear on this. A member must never be knowingly involved in tax evasion. We accept that it is possible that a structure, onshore or offshore, could be used for evasion by someone determined to break the law, but it is extremely unlikely that they would be doing it with a professional alongside.

2.2 If a new notification system can be designed which successfully provides HMRC with information about offshore tax evasion that they would not otherwise receive and which helps their investigatory work, then this deserves consideration. But since tax evasion or fraud can take place regardless of the form in which a taxpayer's business is, or investments are, organised, the challenge will be to define what it is that HMRC really want and to ensure that the legislation/hallmarks are appropriate, so that both advisers and HMRC do not face an onerous compliance burden and HMRC are not inundated with information they neither need nor want.

2.3 Any new disclosure system should not duplicate existing reporting obligations, such as the Common Reporting Standard (CRS) and Disclosure of Tax Avoidance Schemes (DOTAS). Additionally, professional firms are already required by Money Laundering Regulations to disclose any cases when there is a reasonable suspicion of a crime, which includes tax evasion.

2.4 We appreciate that applying the obligation to non-UK based operators could be difficult but if it is not extended to them the risk is that those will be the operators who are used by individuals determined to evade tax.

2.5 If the issue of Legal Professional Privilege (LPP), explained in paragraphs 4.27 and 4.28 of the consultation document, cannot be overcome, this presents a fundamental difficulty with these proposals.

2.6 We are also concerned to ensure that the implications of notification under the requirement are not broadened. It would be helpful if HMRC could make an upfront commitment that a notification will not lead to unforeseen consequences for the adviser and their client in the future. Our recent experience with DOTAS is that a measure introduced as a notification exercise has been expanded to become a trigger or hallmark with additional consequence such as the issue of accelerated payment notices (APNs) and certain threshold conditions under the Promoter of Tax Avoidance Scheme regime (POTAS).

2.7 This is a very important point. If there is any possibility that an offshore structure notification could lead to anything connected with, for example POTAS or the Banking Code, taxpayers may have difficulty in obtaining advice from reputable advisers on legitimate offshore arrangements.

[1] Professional Conduct in Relation to Taxation effective from 1 March 2017
https://www.tax.org.uk/sites/default/files/PCRT%20Effective%201%20March%202017%20FINAL_211216.pdf

3 Q1: Should the proposal apply only to UK-based persons/businesses who create offshore arrangements, or should offshore persons/businesses also be in scope?

3.1 We see no reason in principle why the proposals should not also apply to offshore persons/businesses, and agree that excluding offshore creators would reduce the impact of the proposal. It is inevitable that anyone determined to engage in tax evasion would simply use a formation agent or adviser outside the UK, where HMRC could not access information until they can get beneficial ownership data under the forthcoming OECD convention.

However, if an adviser is based overseas there will be obvious difficulties with enforcement and many overseas organisations will not have processes in place to manage requirements in the UK.

3.2 The work that HMRC have done in designing and enacting the new corporate offence of failure to prevent facilitation of tax evasion which is contained in Part 3 of the Criminal Finances Bill 2017 may be of assistance, since this offence applies to overseas entities as well as UK entities.

4 Q2: How should HMRC define the scope according to which both UK-based and non-UK-based persons/businesses would be liable to report?

4.1 In addressing this question we refer to the policy rationale and objectives set out in Chapter 3 of the consultation document, because the scope of what will need to be reported will be determined by what it is that HMRC are seeking to gain from the information. The policy objectives are principally the obtaining of data in order to:

- increase transparency around the use of offshore arrangements;
- improve HMRC's understanding of how offshore arrangements are structured;
- improve HMRC's risk assessment by helping to identify enablers and users of arrangements used for the purposes of tax evasion;
- raise awareness and promote voluntary compliance;
- target HMRC's resources more effectively on non-compliance and tax evasion.

4.2 While increased transparency and the improvement of HMRC's understanding of how offshore arrangements are structured are both worthy aims, we think that there should be a limit to how much information HMRC should compel advisers to provide if it is unclear or questionable whether it assists them directly in their compliance activity. A new notification obligation should not increase administrative burdens on advisers unnecessarily.

4.3 In particular, advisers should not be obliged to provide HMRC with information that they will already be receiving from other sources, such as under international Exchange of Information Agreements or under HMRC's data-gathering powers, such as those in Schedule 23 Finance Act 2011.

4.4 Ideally in our view, the obligation should not apply where the offshore jurisdictions involved are all within the CRS. CRS jurisdictions should be collecting information on

ultimate beneficial ownership (and therefore nominee/ power of attorney type of arrangements) and HMRC should be getting reports on such structures, so the obligation would be burdensome if it applies to CRS countries.

4.5 HMRC's suggestion that options could include identifying the types of arrangements or clients who are in scope then setting out the characteristics that arrangements must demonstrate to be notifiable sounds logical. We would suggest that the scope is limited specifically to the obtaining of information that directly assists HMRC with identifying if arrangements are being used to facilitate tax evasion.

5 Q3: Are there any key circumstances missing from the proposed concept and can you see any opportunities to improve on this basic concept?
Q4: Do respondents have any concerns about this approach?
Q5: Are there any other approaches we could consider?

5.1 No further comments.

6 Q6: Can you suggest any hallmarks to identify which arrangements would be subject to notification?
Q7: Do respondents have any concerns about the use of hallmarks to identify which arrangements would be subject to notification?
Q8: Are there any other approaches we could consider?

6.1 No further comments.

7 Q9: Should the requirement be limited to offshore?

7.1 Yes, we think the requirement should be limited to offshore arrangements in the first instance.

8 Q10: Should the requirement be limited to individuals?

8.1 Yes, we think the requirement should be limited to individuals in the first instance.

9 Q11: Are there any further opportunities to change the scope of the measure in order to maximise its effectiveness?

9.1 No comments.

10 Q12: In your view, what impact will issues of Legal Professional Privilege (LPP) have on the effectiveness of the requirement?
Q13: How might HMRC address the issue of Legal Professional Privilege?

10.1 If any advice from a lawyer could fall outside these provisions due to LPP being engaged, this is an obvious fundamental flaw in the proposals.

10.2 Our understanding is that LPP may present difficulties. We note that the Law Society has recently taken counsel's advice on whether HMRC's use of its powers under Schedule 23 Finance Act 2011 to seek information about beneficial ownership or interests in offshore trusts and companies from trust and company service providers engages LPP or not[2]. Counsel has advised that it does engage LPP, but it appears that this view is not shared by HMRC.

10.3 Modelling the measure on DOTAS where, if privilege is not waived, the arrangements must be disclosed by any person in the UK who enters into any transaction forming part of them presents a fundamental difficulty. DOTAS involves a different compliance mind-set because it concerns tax avoidance, not tax evasion. Passing an obligation to notify HMRC of the details of an offshore arrangement to a taxpayer engaged in non-compliance is clearly pointless. If the taxpayer is using a structure to evade tax, they are not going to tell HMRC about it.

11 Q14: In your view, what impact will this measure have on UK resident but non-domiciled individuals?

11.1 No comments.

12 Q15: How might HMRC address the impact on UK resident but non-domiciled individuals?

12.1 No comments.

13 Q16: Do you agree the measure should apply to existing arrangements and not just new ones?

13.1 We believe the measure should apply only to new arrangements. Applying the measure to existing arrangements will create a disproportionate compliance burden on advisers.

14 Q17: In your view, are there any other considerations that HMRC should take into account when considering the feasibility and design of a requirement to notify HMRC of offshore structures?

14.1 The consultation document does not mention the existing notification requirements in s218 IHTA 1984 (non-resident trustees) and schedule 5A TCGA 1992 (settlements with foreign element: information). Can HMRC explain why those provisions might be

[2] http://www.lawsociety.org.uk/news/stories/beneficial-ownership-of-offshore-companies-and-trusts-hmrc-data-holder-notices-to-firms/

insufficient? Could they be adapted in some way eg by applying the requirements to barristers and taking out the non-dom limitation)?

15 Acknowledgement of submission

15.1 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.

16 The Chartered Institute of Taxation

16.1 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 18,000 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
27 February 2017