Professional Conduct in Relation to Taxation

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THE FUNDAMENTAL PRINCIPLES

- Integrity

  To be straightforward and honest in all professional and business relationships.

- Objectivity

  To not allow bias, conflict of interest or undue influence of others to override professional or business judgements.

- Professional competence and due care

  To maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques and act diligently and in accordance with applicable technical and professional standards.

- Confidentiality

  To respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the member or third parties.

- Professional behaviour

  To comply with relevant laws and regulations and avoid any action that discredits the profession.

1. INTRODUCTION

Scope

1.1. The purpose of this guidance is to assist and advise members on their professional conduct in relation to taxation.

1.2. Chapter 2 explains the fundamental principles which govern the conduct of members.

1.3. Chapters 3 - 11 apply these principles to tax specific situations which all relate to the tripartite relationship between a member, client and HMRC:

- Chapter 3: Tax returns
- Chapter 4: Access to data by HMRC and other authorities
- Chapter 5: Irregularities (including errors)
- Chapter 6: Voluntary disclosures under special disclosure facilities and other special arrangements
- Chapter 7: HMRC rulings and clearances
- Chapter 8: Tax planning, tax avoidance and tax evasion
- Chapter 9: Disclosure of tax avoidance schemes
- Chapter 10: General enquiries and investigation of tax practitioners by HMRC
- Chapter 11: Other interactions with HMRC

1.4. The situations addressed in Chapters 3 – 11 are not intended to be, nor should they be interpreted as, an exhaustive list of all circumstances experienced by a member which may create threats to compliance with the fundamental principles. Consequently, it is not sufficient for a member merely to comply with the examples presented; rather he must observe the fundamental principles across all his professional activities.

1.5. This guidance includes practical advice about ethical and legal issues. If in doubt about the ethical or legal considerations of a particular case, a member should seek advice from his professional body and, where appropriate, his legal advisers. The professional bodies take no responsibility for failure to seek advice where appropriate.

1.6. A member must at all times be aware of his obligations under the anti- money laundering legislation. Anti-money laundering issues are not covered in detail in this guidance; the member is instead referred to the Treasury approved CCAB anti-money laundering guidance for the accountancy sector (which includes an appendix for the tax practitioner) which can be found at www.tax.org.uk/CCAB_guidance and www.att.org.uk/CCAB_guidance. Members working outside the tax and accountancy sector should refer to the relevant guidance for their sector or take advice as appropriate.

Status

1.7. The guidance has been prepared jointly by the:

- Association of Chartered Certified Accountants
- Association of Taxation Technicians
- Chartered Institute of Taxation
- Institute of Chartered Accountants in England and Wales
- Institute of Chartered Accountants of Scotland
- Society of Trust and Estate Practitioners

1.8. HMRC acknowledges that this guidance is an acceptable basis for dealings between members and HMRC.

1.9. The guidance supersedes all previous editions and is based on the law as at November 2013. A member should satisfy himself that there have been no subsequent changes which impact on how this guidance applies to his particular facts and circumstances.

1.10. While every care has been taken in the preparation of this guidance the CIOT and ATT and all those involved in the preparation and approval of this guidance do not accept any responsibility for any loss occasioned by reliance on this guidance. Practical guidance cannot and should not be taken to substitute legal advice.

Application to all members

1.11. Whilst this guidance is addressed primarily to members in professional practice, the principles apply to all members involved in tax including:

- Employees attending to the tax affairs of their employer or of a client; and
- Those dealing with the tax affairs of themselves or family and friends whether or not for payment.

1.12. Where a member's employer is not prepared to follow the ethical approach set out in this guidance (despite the member's reasonable attempts to persuade him to do so) the member should take advice from his professional body. He should also consider whether he should seek legal advice. Further advice can be found at the professional rules area of the websites www.tax.org.uk and www.att.org.uk.

1.13. A member who, for example, is based overseas or who is acting for a client who is subject to the tax jurisdiction of another country could be subject to different legal obligations under the tax law and general law of that country. Subject to that caveat, a member must apply the principles set out in this guidance to professional activities with non UK aspects. The principles would also apply should tax be devolved to jurisdictions within the UK.

Interpretation

1.14. In this guidance

- 'Client' includes, where the context requires, 'former client'
- 'Member' (and 'members') includes 'firm' or 'practice' and the staff thereof
- The masculine gender imports the feminine gender, and
- Words in the singular include the plural and words in the plural include the singular.

Abbreviations

1.15. The following abbreviations have been used:

CCAB Consultative Committee of Accountancy Bodies

DOTAS Disclosure of Tax Avoidance Schemes

GAAR General Anti-Abuse Rule

HMRC HM Revenue and Customs

MLRO Money Laundering Reporting Officer

NCA National Crime Agency (previously the Serious Organised Crime Agency 'SOCA')

SRN Scheme Reference Number

2. THE FUNDAMENTAL PRINCIPLES

Overview of the fundamental principles

2.1. A member must comply with the following fundamental principles:

- **Integrity**

  To be straightforward and honest in all professional and business relationships.

- **Objectivity**

  To not allow bias, conflict of interest or undue influence of others to override professional or business judgements.

- **Professional competence and due care**

  To maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques and act diligently and in accordance with applicable technical and professional standards.

- **Confidentiality**

  To respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the member or third parties.

- **Professional behaviour**

  To comply with relevant laws and regulations and avoid any action that discredits the profession.

Each of these fundamental principles is discussed in more detail below in the context of taxation services.

Integrity

2.2. A member must act honestly in all his dealings with his clients, all tax authorities and other interested parties, and do nothing knowingly or carelessly that might mislead. In particular, a member must comply with all applicable and current disclosure requirements.

Objectivity

2.3. A member may be exposed to situations that could impair his objectivity. It is impracticable to define and prescribe all such situations. Relationships which bias or unduly influence the professional judgement of the member must be avoided.

2.4. A member should take care to explain to his client any material risks of the tax planning or tax positions on which he advises.

2.5. A member must always disclose to his client if he is receiving commission, incentives or any other advantage and the amounts he receives from a third party relating to the matter upon which he is advising his client. He must also follow his professional body's rules on disclosure of and accounting for commission.

Professional competence and due care

2.6. A member has a professional duty to carry out his work within the scope of his engagement and with the requisite skill and care.

2.7. A member must carry out his work with a proper regard for the technical and professional standards expected. In particular, a member must not undertake professional work which he is not competent to perform unless he obtains appropriate assistance from a suitably qualified specialist.

2.8. Where applicable a member should be aware of HMRC's clearance procedures to help provide his client with certainty on HMRC's position. HMRC's guidance notes and manuals can also provide insight to its interpretation of the law.

2.9. A member who is giving what he believes to be a significant opinion to a client should consider obtaining a second opinion to support the advice. Where the second opinion is to be obtained externally, due regard must be had to client confidentiality.

2.10. A member is free to choose whether or not to act for a client both generally and as regards specific activities. However where a member chooses to limit or amend the scope of services he provides to a client he should make this clear in writing.

2.11. When advising a client a member has a duty to serve that client's interests within the relevant legal and regulatory framework and provide him with appropriate advice on managing his tax affairs.

2.12. Advice should be tailored to the commercial and other non-tax objectives and facts and circumstances of the client. See Chapter 8 for further guidance.

2.13. On occasions there may be more than one tenable interpretation of the law. Each case should be considered on its own individual facts and circumstances.

Confidentiality

2.14. Confidentiality is a professional principle and is also a legally enforceable contractual obligation. It may be an express term of the engagement letter between the member and the client. Where it is not an express term, a court would in most circumstances treat confidentiality as an implied contractual term.

2.15. A member may only disclose information without his client's consent when there is an express legal or professional right or duty to disclose.

2.16. The duty of confidentiality is rigorously safeguarded by the courts. Disclosure of confidential material in a member's own interest must be made only where it is considered adequate, relevant and reasonably necessary for the administration of justice - in other words, when a member considers that it would otherwise impair the pursuit of his legitimate interests and rights if he was prevented from disclosing the information in all the circumstances. Only the minimum amount of information necessary to protect those interests may be disclosed. Examples of such circumstances may include, but are not limited to, the following:

- To enable a member to defend himself against a criminal charge or to clear himself of suspicion;
- To enable a member to defend himself in disciplinary proceedings;
- To resist proceedings for a penalty, or civil or criminal proceedings in respect of a taxation offence, for example in a case where it is suggested that a member knowingly engaged in dishonest conduct with a view to bringing about a loss of tax revenue;
- To resist a legal action made against him by a client or third party;
- To enable a member to sue for unpaid fees;
- To enable a member to sue for defamation.

2.17. If there is any doubt that the principle in 2.16 would apply, or there is the risk of challenge by a client or employer, a member is strongly recommended to seek legal advice. In particular, in the case of potential proceedings against a member in respect of a taxation offence, it might be appropriate for the member to ask HMRC to use an appropriate statutory power to secure access to the information required, so that there is a clearer authority (as required by law) for overriding the member's normal duty of confidentiality. A File Access Notice[1] is an example of a document issued by HMRC which, if valid, is likely to override confidentiality.

1 Issued pursuant to Finance Act 2012, Sch. 38, para. 8.

2.18. The anti-money laundering regime provides a statutory code to determine when a disclosure must be made to NCA. While this is a mandatory regime, it also gives a structure for the assessment of the public interest in a tax context, including which of the following should take precedence, in a particular set of circumstances:

- The public interest in reporting knowledge or suspicions of criminal activity to the authorities; or
- The public interest in clients receiving advice in confidence.

A member should follow the Treasury approved CCAB guidance (which includes an appendix for the tax practitioner) at www.tax.org.uk/CCAB_guidance and www.att.org.uk/CCAB_guidance and in particular Chapters 6 on 'Internal Reporting' and 7 on 'Role of MLRO and SAR reporting'.

Professional behaviour

2.19. A member must always act in a way that will not bring him or his professional body into disrepute.

2.20. A member must comply with all relevant legal and regulatory obligations when dealing with a client's tax affairs and assist his clients to do the same. A member who has reason to believe that arrangements are, or may be, tax evasion should strongly advise clients not to enter into them.

2.21. A member should consider whether any tax arrangements with which he might be associated on his own behalf or on behalf of a client, for example, the misuse of charitable tax arrangements for purposes for which they were not intended, might bring the member and the profession into disrepute.

2.22. A member must behave with courtesy and consideration towards all with whom he comes into contact in a professional capacity.

2.23. Serving the interests of his clients will, on occasion, bring a member into disagreement or conflict with HMRC. A member should manage such disagreements or conflicts in an open, constructive and professional manner. However, a member should serve his clients' interests as robustly as circumstances warrant whilst applying these principles.

2.24. A member should ensure that his internal and external communications including those using social media are consistent with the principles in this guidance. See also Professional Rules and Practice Guidelines in the Professional Standards area of the websites www.tax.org.uk and www.att.org.uk.

2.25. A member's own tax affairs should be kept up to date. Neglect of a member's own affairs could raise doubts within HMRC as to the standard of the member's professional work and could bring him or his professional body into disrepute. If tax planning which a member is considering could potentially be construed as tax avoidance, the member should refer to the principles set out in Chapter 8.

3. TAX RETURNS

Definition of tax return

3.1. For the purposes of this Chapter, the term 'tax return' includes any document or online submission of data that is prepared on behalf of the client for the purposes of disclosing to any taxing authority details that are to be used in the calculation of tax due by a client or a refund of tax due to the client or for other official purposes and, for example, includes:

- Self-assessment returns for income or corporation tax;
- VAT returns;
- Returns in respect of any other tax eg environment taxes where paid to the UK Government or any authority, such as a devolved government;
- Making refund claims using the VAT refund portal in order to recover VAT incurred outside the UK in respect of foreign VAT.

A letter giving details in respect of a return or as an amendment to a return including, for example, any voluntary disclosure of an error should be dealt with as if it was a return.

Responsibilities

Taxpayer's responsibility

3.2. The taxpayer has primary responsibility to submit correct and complete returns to the best of his knowledge and belief. The return may include reasonable estimates where necessary. It follows that the final decision as to whether to disclose any issue is that of the client.

Member's responsibility

3.3. A member who prepares a return on behalf of a client is responsible to the client for the accuracy of the return based on the information provided.

3.4. In dealing with HMRC in relation to a client's tax affairs a member must bear in mind his duty of confidentiality to the client and that he is acting as the agent of his client. He has a duty to act in the best interests of his client.

3.5. Save where contractually obliged to do so, a member is not required, in his capacity as a tax practitioner, to audit the figures in the books and records provided or verify information provided by a client or by a third party. However a member must act in good faith in dealings with HMRC in accordance with the

fundamental principle of integrity. In particular the member must take reasonable care and exercise appropriate professional scepticism when making statements or asserting facts on behalf of a client. A member must not be associated with the presentation of facts he knows or believes to be incorrect or misleading. A member must also not assert tax positions in a tax return which he considers have no sustainable basis.

3.6. The GAAR introduced on 17 July 2013 is to be applied on a self-assessment basis. If the member considers the GAAR applies, the client should be made aware of the tax return implications of this. See also paragraphs 8.26 – 8.29.

3.7. Where the client is reluctant to follow the member's advice then the guidance at Chapter 5 should be followed. There may be a particular need for specialist assistance or obtaining a second opinion as mentioned in paragraph 5.10 in the context of the GAAR.

3.8. Where it is uncertain whether the GAAR applies the member should consider recommending additional and appropriate disclosure.

3.9. When a member is communicating with HMRC, he should consider whether he needs to make it clear that he is relying on information which has been supplied by the client or a third party.

Materiality

3.10. Whether an amount is to be regarded as material depends upon the facts and circumstances of each case.

3.11. Where a person carrying on a trade, profession or vocation makes an appropriate election, the profits of that business are calculated on the cash basis for small businesses instead of in accordance with Generally Accepted Accounting Practice (GAAP). The profits of any other trade, profession vocation or property business must be computed in accordance with GAAP subject to any adjustment required or authorised by law in computing profits for those purposes. This permits a trade, profession, vocation or property business to disregard non-material adjustments in computing its accounting profits.

3.12. The application of GAAP does not extend beyond the accounting profits. Thus the accounting concept of materiality cannot be applied when completing tax returns (direct and indirect), for example when:

- Computing adjustments required to accounting figures so as to arrive at taxable profits;
- Allocating income, expenses and outgoings across the relevant boxes on a self -assessment tax return;
- Collating the aggregate figures from all shareholdings and bank accounts for disclosure on tax returns.

Disclosure

3.13. A tax return must contain at least the minimum information required by law. If a client is unwilling to comply with this requirement, the member should follow the guidance in Chapter 5 Irregularities (including errors). Paragraphs 3.14 - 3.20 below give guidance on some of the more common areas of

uncertainty over disclosure.

3.14. In general, it is likely to be in a client's own interests to ensure that factors relevant to his tax liability are adequately disclosed to HMRC because:

- His relationship with HMRC is more likely to be on a satisfactory footing if he can demonstrate good faith in his dealings with them; and
- He will reduce the risk of a discovery or further assessment and may reduce exposure to penalties.

3.15. In addition, it may be desirable to make fuller disclosure than is strictly necessary. The factors involved in making this decision include:

- The terms of the applicable law;
- The view taken by the member;
- The extent of any doubt that exists;
- The manner in which disclosure is to be made; and
- The size and gravity of the item in question.

3.16. When advocating fuller disclosure than is strictly necessary a member has a responsibility to ensure that his client is aware of the various factors involved and their implications.

3.17. Cases will arise where there is doubt as to the correct treatment of an item of income or expenditure, or the computation of a gain or allowance. In such cases a member ought to consider carefully what disclosure, if any, might be necessary. For example, additional disclosure should be considered where:

- A return relies on a valuation;
- There is inherent doubt as to the correct treatment of an item, for example expenditure on repairs which might be regarded as capital in whole or part, or the VAT liability of a particular transaction; or
- HMRC has published its interpretation or has indicated its practice on a point, but the client proposes to adopt a different view, whether or not supported by Counsel's opinion. The member should refer to the guidance on the Veltema case (Langham v Veltema [2004] STC544 (CA), 76 TC 259) (see paragraph 3.21 below and http://www.hmrc.gov.uk/agents/sop.pdf (HMRC SP1/06 - Self Assessment: Finality and Discovery)

3.18. The 2012 case of Charlton (HMRC v Charlton & Others[2013] STC866 [2012] UK FTT 770 (TCC)) clarified the law on discovery in relation to tax schemes disclosed to HMRC under DOTAS. The Upper Tribunal made clear that where the taxpayer has:

a. Disclosed details of a significant allowable loss claim;

b. Declared relatively modest income/ gains; and/ or

c. Included the HMRC issued scheme reference number (SRN) on the appropriate self- assessment tax return,

an HMRC officer of reasonable knowledge and skill would be expected to infer that the taxpayer had entered into a tax avoidance scheme (and that fuller details of such scheme would be contained in the relevant AAG1 Form). As a result, HMRC would be precluded, in most cases, from raising a discovery assessment in a situation where the client implemented the disclosed scheme and HMRC failed to open an enquiry within the required time.

3.19. It is essential where a member is involved in the preparation of a self- assessment tax return that the member takes care to ensure:

- That the tax return provides sufficient details of any transactions entered into (in case the AAG1 Form is incomplete);
- That the SRN is recorded properly in the appropriate box included for this purpose on a self-assessment tax return; and
- The SRN is shown for the self- assessment return for each year in which the scheme is expected to give the client a tax advantage.

3.20. A member who is uncertain whether his client should disclose a particular item or its treatment should consider taking further advice before reaching a decision. He should use his best endeavours to ensure that the client understands the issues, implications and the proposed course of action. Such a decision may have to be justified at a later date, so the member's files should contain sufficient evidence to support the position taken, including contemporaneous notes of discussions with the client and/or with other advisers, copies of any second opinion obtained and the client's final decision. A failure to take reasonable care may result in HMRC imposing a penalty if an error is identified after an enquiry.

Supporting documents

3.21. For the most part, HMRC does not consider that it is necessary for a taxpayer to provide supporting documentation in order to satisfy the taxpayer's overriding need to make a correct return. HMRC's view is that, where it is necessary for that purpose, explanatory information should be entered in the 'white space' provided on the return. However, HMRC does recognise that the taxpayer may wish to supply further details of a particular computation or transaction in order to minimise the risk of a discovery assessment being raised at a later time. Following the uncertainty created by the decision in Veltema, HMRC's guidance can be found at (http://www.hmrc.gov.uk/agents/sop.pdf SP1/06 - Self Assessment: Finality and Discovery).

HMRC's further guidance at http://www.hmrc.gov.uk/manuals/sammanual/sam126040.htm says that

sending attachments online is intended for those cases where the taxpayer 'feels it is crucial to provide additional information to support the return but for some reason cannot utilise the white space'.

Reliance on HMRC published guidance

3.22. Whilst it is reasonable to rely on HMRC published guidance, which in most circumstances HMRC will apply, a member should be aware that the Tribunal and the courts will apply the law even if this conflicts with HMRC guidance. Notwithstanding this, if a client has relied on HMRC guidance which is clear and unequivocal and HMRC resiles from any of the terms of the guidance, a Judicial Review claim would be an available remedy.

Approval of tax returns

3.23. It is essential that the client reviews his tax return. This is for the protection of the client, who is responsible for its contents. It is also in the interests of the member, who has almost invariably relied upon the accuracy and completeness of information provided by the client or third parties in preparing the return.

3.24. When presenting the return to the client for approval, the member should draw the client's attention to the responsibility which the client is taking in approving the return as correct and complete. Attention should be drawn to any judgemental areas or positions reflected in the return to ensure that the client is aware of these and their implications before he approves the return.

3.25. A member should obtain the client's approval of the return in writing, which includes via e-mail.

3.26. A member may sign tax returns in his capacity as liquidator, receiver or administrator or under a personal appointment as trustee, executor, attorney or director.

3.27. If a member is signing a tax return on behalf of a client in his capacity as agent, he should carefully consider:

- His legal authority to do so (for example, is a power of attorney required?). Legal advice may be needed on this issue;
- The process whereby the client will review and take responsibility for the contents of the return; and
- Any legal implications of signing the return for both the practice and the individual signatory.

3.28. One specific scenario, in which these principles may be relevant, is where a member is appointed as tax agent or tax representative for VAT purposes. Such appointments are principally relevant where the client is a 'non established taxable person' (NETP). Where an agent is appointed, the client remains legally responsible for registering for VAT, submitting returns and paying VAT on time. Any arrangement made with an agent to look after a client's VAT affairs will be subject to the particular contractual agreement between the parties.

3.29. Appointment as tax representative for VAT for a NETP means that the member becomes jointly and severally liable for his client's VAT debts. The responsibilities of a VAT representative are specified in Section 48 of the VAT Act 1994 and a member should consider carefully whether he is prepared to take on such responsibilities. As an alternative, the member should consider whether appointment simply as a tax agent for VAT is preferable, as this does not make him jointly and severally liable for his client's VAT debts. The procedures for registering for VAT as VAT agent or VAT representative are specified in HMRC's – HM Revenue & Customs VAT Notice 700/1 Should I be registered for VAT? (see paragraphs 11.1 – 11.6).

3.30. If the member does decide to accept an appointment as tax representative for VAT purposes, he should consider ways of protecting his practice from the implications of joint and several liability. The risk can be mitigated, for example, by obtaining bank guarantees from the client. The member should also be aware of the possibility that his objectivity could be threatened due to the self interest arising from his role as the client's VAT representative.

Electronic filing of tax returns

3.31. Tax administration systems, including the UK's, are increasingly moving to mandatory electronic filing of tax returns. This raises a number of issues:

- Ideally a member will explicitly file in his capacity as agent. In some cases HMRC will issue a pin code to the client for the agent to use. A member is advised to use the facilities provided for agents and to avoid knowing or using the client's access credentials wherever possible.

- A member should keep his access credentials safe from unauthorised use and consider periodic change of passwords.

- A member should consider carefully the terms which he agrees with the tax authority in order to use electronic filing. These may for example include provisions around the security of access credentials or different deadlines. A member will need to consider whether the process of electronic filing creates any different obligations for him from paper filing.

- If electronic filing causes a member to become involved in the payment or repayment of tax, the member should ensure he fully understands his role and responsibilities.

- It remains essential that the client reviews and approves the tax return in writing (which can be by e-mail) before the agent submits it.

- A member should keep normal professional records of the returns filed.

- A member should ensure that his role and responsibilities and those of his client in relation to the electronic filing process are clearly set out and understood by the client. This is ideally achieved through the engagement letter.

These systems are constantly evolving and a member should ensure his practices are updated appropriately.

4. ACCESS TO DATA BY HMRC AND OTHER AUTHORITIES

Introduction

4.1. For the purposes of this Chapter the term 'data' includes documents in whatever form (including electronic) and other information.

4.2. A distinction must be drawn between a request for data made informally ('informal requests') and those requests for data which are made in exercise of a power to require the provision of the data requested ('statutory requests').

4.3. Similarly, requests addressed to the client and those addressed to the member require different handling.

4.4. Where a member no longer acts for a client, the member remains subject to the duty of confidentiality. In relation to informal requests, he should refer the enquirer either to the former client or to his new agent. In relation to statutory requests addressed to the member, the termination of his professional relationship with the client does not affect his duty to comply with that request, where legally required to do so.

4.5. Given the complexity of the law relating to the scope of particular information powers, it may be appropriate to take specialist advice.

4.6. A member should be aware of HMRC's powers in relation to the access, inspection and removal of data. He may also find it helpful as a precautionary measure to have identified a lawyer or other practitioner with relevant specialist knowledge of both civil and criminal law from whom he can obtain advice in such circumstances.

4.7. There are a number of other statutory bodies besides HMRC which can elicit data from taxpayers and their advisers, including the police, the Revenue and Customs Prosecutions Office and NCA.

4.8. Paragraphs 4.9 - 4.18 consider informal requests and paragraphs 4.19 - 4.30 look at statutory requests. Paragraphs 4.31 onwards provide a brief introduction to legal professional privilege.

Informal requests addressed to the member

4.9. Disclosure in response to informal requests can only be made with the client's permission.

4.10. Normally, the client will have authorised routine disclosure of relevant data. However, if there is any doubt

about whether the client has authorised disclosure or about the accuracy of details, the member should ask the client to approve what is to be disclosed.

4.11. The nature of the HMRC enquiry may not be immediately apparent and the position may need reviewing as it progresses. Where an oral enquiry is made by HMRC, a member should consider asking for it to be put in writing so that a response may be agreed with the client. A member is reminded of the importance of confirming the identity and authority of any caller seeking information about clients so as to minimise the risk of breaching client confidentiality.

4.12. Where there is a question as to whether the requested disclosure should be made, in whole or in part, a member should advise the client whether it is in the client's best interests to disclose such data.

4.13. Informal requests may be forerunners to statutory requests compelling the disclosure of such data. Consequently, it will often be sensible for the client to comply with such requests or to seek to persuade HMRC that a more limited request is appropriate. The member should advise the client as to the reasonableness of the informal request and likely consequences of non-compliance, so that the client can decide on his preferred course of action.

Informal requests addressed to the client

4.14. From time to time HMRC chooses to communicate directly with clients rather than with the appointed agent.

4.15. HMRC has confirmed that it has no wish to marginalise the role of tax agents. Where a taxpayer wants an agent to act in relation to their tax affairs and has authorised that agent to do so, HMRC will respect that agent's right to represent their client, as set out in the HMRC Charter https://www.gov.uk/government/publications/your-charter

4.16. HMRC has made it clear in the notes to the authorisation form 64-8 that on occasions it may deal with the taxpayer as well as, or instead of, the agent. This may be required to comply with statutory obligations, for example, where a notice has to be served on a taxpayer. Other examples of where HMRC may contact a member's client directly include:

- Where HMRC is using 'nudge' techniques to encourage taxpayers or claimants with a history of late filing, late payment or other non-compliance to change behaviour;

- Where the taxpayer has engaged in an aggressive tax avoidance scheme, HMRC may on occasion write directly to the client. This is to ensure the client fully understands HMRC's view.

4.17. HMRC has given reassurances that it is working to ensure that initial contact on compliance checks will normally be via the agent and only if the agent does not reply within an appropriate timescale will the contact be direct to the client.

4.18. When the member assists a client in dealing with such requests from HMRC the member should apply the principles in 4.9 - 4.13 above.

Statutory requests addressed to the client

4.19. A member should advise the client how to comply with the request and the consequences of non-compliance with a legally valid notice. The client may wish to investigate whether the request is legally valid, either at a high level or in greater depth. In many cases the client may conclude that the practical answer is to comply. If the notice is legally effective the client is legally obliged to comply with the request.

4.20. To the extent that the client wishes to investigate whether the notice is legally binding, the following issues may be relevant:

- Was the notice lawfully issued in accordance with the relevant legal and procedural safeguards?
- Is it being implemented in accordance with the terms set out therein?
- Do one or more of the pieces of data requested qualify as data which is either expressly or impliedly excluded from the ambit of the power authorising the request? In each case the relevant information power in question should be reviewed carefully.
- Are there any overriding legal principles, which may not be directly referred to in the information power itself, which may limit the power or affect how the statutory language should be interpreted? In particular:
  - The concept of legal professional privilege arises from common law and protects certain data from disclosure. See paragraphs 4.32 – 4.39 below for an outline;
  - Statutory information powers must be interpreted by the courts and applied by HMRC in a manner which is consistent with the client's and the member's rights under Article 8 of the European Convention on Human Rights.

Specialist legal advice may be needed especially on such issues as privilege and human rights.

4.21. The member should also advise the client about any relevant right of appeal against the statutory request if appropriate.

Schedule 36 Finance Act 2008 statutory notices

4.22. The most common statutory notice issued to clients and third parties by HMRC is under Schedule 36 FA 2008. The law relating to the issue by HMRC of statutory notices was substantially revised in 2008 and the penalties for non-compliance significantly increased. The following notes relate only to civil enquiries; in any situation where the member knows or suspects that HMRC is undertaking a criminal investigation, specialist assistance should be sought.

4.23. Schedule 36 FA 2008 allows HMRC to require a taxpayer and/or a third party to provide information and data reasonably required to check the taxpayer's tax position within a specified time. HMRC can also inspect business premises and remove and/or copy data.

4.24. A member may be asked to assist clients who have received a Schedule 36 Notice. Such notices often relate to routine matters and HMRC may issue the notice simply because of delay on the part of the client. A member should nevertheless be familiar with the rules relating to the rights of appeal and should advise only where experienced to do so. Where appropriate experienced tax investigation assistance should be obtained, for example, where the notice is issued by HMRC's Specialist Investigations or the Anti-Avoidance Group or the matter otherwise appears complex or contentious.

4.25. The following points should be noted:

- HMRC can issue a notice to a taxpayer *without* the permission of a Tribunal.
- HMRC can however ask a Tribunal to approve such a notice before it is issued, in which case no appeal can be made and the penalties for non-compliance can be significantly greater.
- HMRC can only issue a notice to a third party where it is approved by the First-tier Tribunal or where the taxpayer to whom the notice relates agrees to the issue. If a member is asked by a client whether the issue of such a notice should be agreed to, the member should be able to explain to the client what action HMRC may take if permission is refused (in practice HMRC rarely seek taxpayer approval).
- There are limited rights of appeal against a Schedule 36 Notice and no right of appeal if the Tribunal approved the issue of the notice before it was issued.
- HMRC may agree to extend any deadline for submission of the data etc and may be prepared to reduce the scope of the notice to make it easier or less costly to comply with. If more time is required then any request for more time should be made well in advance of the deadline where possible.
- HMRC will generally agree the date and time for an inspection but can inspect premises with 7 days' notice or at any reasonable time (if the inspection is carried out by an authorised officer). Schedule 36 does not allow the inspection of premises that consist wholly of a private dwelling. However where part of a dwelling is used as an office that part can be inspected.
- HMRC can ask the Tribunal to approve an inspection in advance in which case the visit can be without prior notice. Schedule 36 does not allow HMRC to force entry to premises to carry out an inspection and the client can refuse HMRC entry. However, where possible the client should be made aware that severe penalties can be charged for obstruction and HMRC should be refused entry only where the client has good reasons for doing so. In any such case the member should recommend that the client seeks specialist advice.
- A Schedule 36 Notice does not override legal professional privilege. HMRC is however able to ask the First-tier Tribunal to decide whether a particular document that the client may assert is protected by privilege is so protected and specialist advice may be appropriate in such cases.

Statutory requests addressed to the member

4.26. If a statutory request is lawful and overrides the member's duty of confidentiality to his client, the member is obliged to comply with the request. Failure to comply with his legal obligations can expose the member to serious civil and criminal penalties. The issues to be considered in determining whether the statutory request is valid and overrides the duty of confidentiality are the same as those outlined in paragraph 4.20 above. Any doubt about whether the statutory request overrides the member's duty of confidentiality to his client can be addressed by either:

- Obtaining the client's consent to the disclosure; or
- Seeking legal advice as to the validity of the notice.

4.27. In cases where the member is not legally precluded by the terms of the notice from communicating with the client, the member is recommended to keep the client informed.

4.28. The member remains under a duty to preserve the confidentiality of his client, subject to the general points in paragraph 2.16 above, so care must be taken to ensure that in complying with any notice the member does not provide information or data outside the scope of the notice.

4.29. If a member is faced with a situation in which HMRC is seeking to enforce disclosure by the removal of data, the member should consider seeking immediate advice from a lawyer or other practitioner with relevant specialist knowledge, before permitting such removal, to ensure that this is the legally correct course of action.

4.30. Where a Schedule 36 notice is in point a member should note that it does not allow HMRC to inspect business premises occupied by a member in his capacity as an adviser. Specialist advice should be sought in any situation where HMRC assert otherwise.

Privileged data

4.31. Legal Privilege arises under common law and may only be overridden if this is expressly or necessarily implicitly set out in legislation. It protects a party's right to communicate in confidence with a legal adviser. The privilege belongs to the client and not to the member. If a document is privileged:

- The client cannot be required to make disclosure of that document to HMRC and a member should be careful to ensure that his reasons for advising a client nevertheless to make such a disclosure are recorded in writing.
- It must not be disclosed by any other party, including the member, without the client's express permission.

4.32. There are two types of legal privilege under common law:

Legal advice privilege

Documents passing between a client and his legal adviser are privileged if they are prepared for the purposes of obtaining or giving legal advice.

Litigation privilege

Data created for the dominant purpose of litigation are privileged. Litigation privilege may arise even where litigation has not begun, but is merely contemplated. Data prepared by non-lawyer advisers (including tax advisers) may be privileged if brought into existence for the purposes of that litigation.

4.33. Other similar protections exist under statute law, including a privilege reporting exemption which applies to the reporting of money laundering in certain circumstances. See Chapter 7 of the CCAB guidance for further details.

4.34. Whether data is or is not privileged and protected from the need to disclose is a complex issue, which will turn on the facts of the particular situation.

4.35. A member who receives a request for data, some of which he believes may be subject to privilege, should take independent legal advice on the position, unless expert in this area.

Tax advisers' privilege

4.36. Communications from a tax adviser who is not a practising lawyer will not attract legal advice privilege. See the Prudential case (R (oooPrudential plc and another) v Special Commissioner of Income Tax and another [2013] UKSC1) ; summary at http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0215_PressSummary.pdf

4.37. Schedule 36, however, applies privilege to tax advisers who receive a statutory request for data. In these circumstances a tax adviser does not have to provide data that are his property and which constitute communications between the adviser and either his client or another tax adviser of the client. Information about such communications is similarly privileged.

4.38. The privilege is disapplied if the request is for explanatory material in relation to data prepared for delivery to (or already delivered to) HMRC.

4.39. Members should note that this privilege only applies to tax advisers; it does not provide a parallel protection for the advice in the hands of a taxpayer.

5. IRREGULARITIES (INCLUDING ERRORS)

Introduction

5.1. For the purposes of this Chapter, the term 'irregularity' is intended to include all errors, whether made by the client, the member, HMRC or any other party in a client's tax affairs ranging from the innocent to those that may amount to fraud.

5.2. In the course of a member's relationship with the client, the member may become aware of possible irregularities in the client's tax affairs. Unless already aware of the possible irregularities in question, the client should be informed as soon as the member has knowledge of them. Where the irregularity has resulted in a tax overpayment, the member should advise the client about making a repayment claim and have regard to any relevant time limits. With the exception of paragraphs 5.3 and 5.19 the rest of this Chapter deals solely with situations where sums may be due to HMRC.

5.3. On occasions it may be apparent that a mistake made by HMRC has given rise to an under collection of tax or interest or an over repayment of tax or interest. The mistake may be one of law or may be a calculation error or a clerical error; equally it may arise from a misunderstanding on the part of HMRC of the facts as presented. Correcting such mistakes made by HMRC may cause expense to a member and thereby to his clients. A member should bear in mind that, in some circumstances, clients or agents may be able to claim for additional professional costs incurred and compensation from HMRC. See http://www.hmrc.gov.uk/factsheets/complaints-factsheet.pdf

5.4. A member must act and be seen to act correctly from the outset. A member should keep sufficient appropriate records of discussions and advice. When dealing with irregularities the member's objectives are:

- To give the client appropriate advice;
- If necessary, so long as he continues to act for the client, to seek to persuade the client to behave correctly; and
- To ensure that he does nothing to assist a client to plan or commit any offence or to conceal any offence which has been committed, as to do so would be an unlawful act.

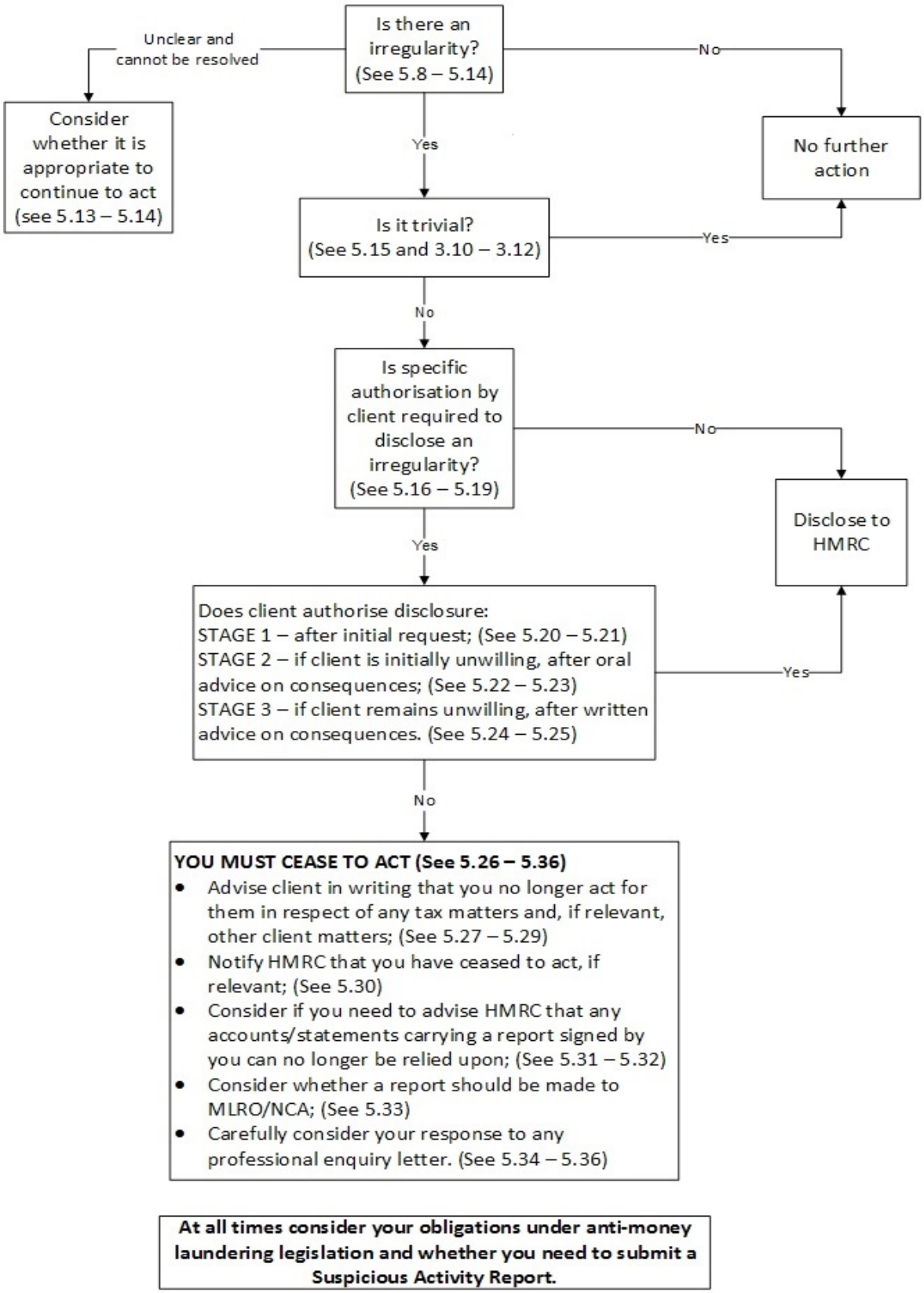
At all stages it may be helpful to discuss the client's situation with a colleague or an independent third party (having due regard to client confidentiality).

5.5. Once aware of a possible irregularity, a member must bear in mind the legislation on money laundering and the obligations and duties which this places upon him (see CCAB guidance at www.tax.org.uk/CCAB_guidance and www.att.org.uk/CCAB_guidance). He should also consider whether the irregularity could give rise to a circumstance requiring notification to his professional indemnity insurers.

5.6. Where a member has concerns about his own position, he should take specialist legal advice. This might arise, for example, where a client appears to have used the member to assist in the commission of a criminal offence in such a way that law enforcement agencies might doubt whether the member had acted honestly and in good faith.

5.7. The flowchart below summarises the recommended steps a member should take where a possible irregularity arises. It must be read in conjunction with the guidance and commentary that follow it.

STEPS TO TAKE IF THERE IS A POSSIBLE IRREGULARITY



Is there an irregularity?

5.8. A member who suspects that an irregularity may have occurred should discuss this with the client to remove or confirm the suspicion. He should take into account the fact that he may not be aware of all the facts and circumstances and may not, therefore, be able to reach a conclusion. Although a member is not under a duty to make enquiries to identify irregularities which are unrelated to the work in respect of which he has been engaged, if he does become aware of any irregularity in a client's tax affairs he should follow this guidance, whether in relation to a matter on which he has acted or not.

5.9. If the irregularity concerns the accounts but is not material from an accounting perspective (see paragraphs 3.10 – 3.12) no adjustment is needed and no further action is required.

5.10. A member should consider seeking specialist advice if there is doubt as to whether or not an irregularity has occurred or about his competence to provide advice to his client in these circumstances. Equally, the client may wish to seek a second opinion.

5.11. Where the client denies any irregularity to the satisfaction of the member, the member is free to continue to act for that client and he should follow the guidance in paragraph 5.14 below.

5.12. Where the client and member have complied with all their obligations under tax law (including providing sufficient and accurate information in a return as required) and HMRC has failed to take any necessary action to start an enquiry or amend an assessment, a member is under no legal obligation to draw HMRC's failure to their attention, nor to take any further action. This will not be relevant where the client is required to self assess. Where it is relevant a member should ensure that the client is aware of the potential for interest and/or penalties.

5.13. Sometimes, despite the client's denial of any irregularity, the member still has reservations. If the member concludes that the relationship of trust which must exist between the member and the client has been impaired, the member should consider whether it is appropriate to continue to act. Where the member concludes that it is appropriate to continue to act he should monitor the position carefully. In cases where a member ceases to act, he should follow the guidance in paragraphs 5.26 - 5.36.

5.14. Whether the member decides to continue to act for the client or not, the member should protect his position and record his compliance with this guidance by documenting:

- The discussions he has had with his client, any colleague, specialist and/or HMRC;
- The client's explanations; and
- His conclusion and the reasons for reaching that conclusion.

It may be appropriate to confirm the facts in writing with the client.

Is the irregularity trivial?

5.15. As a general principle all known irregularities should be corrected (save for non-material adjustments as described in 5.9 above). However, a member should exercise judgement over whether the cost of remedying the error might exceed the tax involved. In the opinion of the professional bodies it is reasonable for a member to take no steps to advise HMRC of isolated errors where the tax effect is no more than minimal, say up to £200, as these will probably cost HMRC and the client more to process than they are worth to the Exchequer.

Is specific authorisation by client required to disclose an irregularity?

5.16. A member must ensure that he has authority to disclose to HMRC. If in any doubt, the member should confirm the position with the client.

5.17. The client may have authorised disclosure in routine circumstances. In addition, a member is recommended to include in his letter of engagement a term authorising the member to correct HMRC errors without recourse to the client. Depending on the circumstances, even where the member has authority to disclose, he should consider whether it is appropriate to discuss the matter with the client. If the client withdraws the member's authority to correct the error, the member should follow the guidance in paragraphs 5.22 – 5.36.

5.18. A member can agree, with the client's authority, a negotiated figure following disclosure of the facts and circumstances. In all other cases, if a member is specifically asked by HMRC to agree a figure, he is not at liberty to accept a figure that he knows to contain an error. If the member does not have the client's authority, in the engagement letter or otherwise, to correct the error he should reply saying he cannot agree the figure but offer no further comment. The member should then follow the guidance on failure/ refusal to disclose.

5.19. If HMRC sends an excessive repayment to the member and the member is aware that it is excessive, he must return it to HMRC as soon as practicable. A member does not require his client's authority to return an excessive repayment but, as a matter of course, he should notify his client that he has done so.

Stage 1: Asking the client for authority to disclose

5.20. Subject to the circumstances set out in paragraphs 5.17 - 5.19 above, the client should be asked to authorise the member to advise HMRC of the error. A member should encourage the client to make a timely disclosure. The member should advise the client of the client's obligations under the relevant tax legislation and refer to interest, surcharges and penalties.

5.21. Whether the client follows the member's advice is, ultimately, the client's decision. If, however, the client decides not to act in accordance with the member's advice as to his obligations, the member should take the further steps detailed in paragraphs 5.22 – 5.36.

Stage 2: Advising the client orally of the consequences of failure to disclose

5.22. Where the client is initially reluctant to authorise disclosure of the irregularity to HMRC, the member should explain to the client that HMRC has wide ranging powers to obtain information from taxpayers, their agents and third parties. He should also orally explain the consequences of non-disclosure and the benefit of making a voluntary disclosure, namely reduced penalties. This will involve the member explaining that he will:

- Be required to put his advice that disclosure is required in writing;
- Be obliged to cease to act and in some circumstances to disassociate himself from any work done, should disclosure not be made. The client should be left in no doubt that adverse inferences could be made and that this step could result in HMRC commencing enquiries which might lead to the discovery of the non-disclosure; and
- Comply with his professional obligations relating to the appointment of a new adviser, as it is the duty of professional advisers before accepting professional work to communicate with the person who previously acted in connection with that work.

5.23. Where the client is an organisation and the client contact still remains reluctant to authorise disclosure of the irregularity to HMRC, the member should raise the issue at a higher level within the client organisation. For example, where the client is a company, the member should consider conveying his advice to the directors or shareholders as appropriate.

Stage 3: Advising the client in writing of the consequences of failure to disclose

5.24. Where the client remains unwilling to make a full disclosure to HMRC after an oral explanation of the risks and consequences of taking such a stance, the member should ensure that his conduct and advice are such as to prevent his own probity being called into question. It is essential therefore to advise the client in writing, setting out the facts as understood by the member, confirming to the client the member's advice to disclose and the consequences of non-disclosure.

5.25. If, after being advised in writing, the client prevaricates about making a full disclosure, the member must consider at which point the prevarication should be treated as a refusal to disclose. At that stage the member should follow the guidance in paragraphs 5.26 – 5.36.

Actions where the client refuses to disclose

5.26. If, despite being fully advised of the consequences, the client still refuses to make an appropriate disclosure to HMRC, the member must:

- Cease to act;
- If relevant, inform HMRC of his withdrawal;

- Consider withdrawing reports signed by the member;
- Consider whether a money laundering report should be made to the firm's MLRO/NCA; and
- Consider carefully his response to any professional enquiry letter (also known as professional clearance letter).

These obligations are set out in more detail below.

Ceasing to act

5.27. Since there is a lack of integrity on the part of the client the member must cease to act in relation to the client's tax affairs and inform the client in writing accordingly. This is because the relationship of trust which must exist between a member and the client will have been irrevocably impaired.

5.28. If HMRC were to realise that the member had continued to act after becoming aware of such undisclosed errors, the member's relationship with HMRC would be prejudiced. HMRC might, in some circumstances, consider the member to be knowingly or carelessly concerned in the commission of an offence.

5.29. The member should consider carefully whether it is appropriate to continue to act in relation to the client's non tax affairs.

Informing HMRC

5.30. Where the member had been dealing with HMRC on the client's behalf or had been formally appointed as a tax agent, the member should notify HMRC that he has ceased to act for that client. Because of the obligation to maintain client confidentiality (see paragraphs 2.14 - 2.18) a member should not provide HMRC with an explanation as to the reasons for ceasing to act.

Withdrawing reports signed by the member

5.31. Where a member has undertaken work to verify or audit accounts or statements which carry a report signed by the member which is subsequently found to be misleading, the same principles of client confidentiality apply. If the engagement letter provides the member with the authority to notify HMRC in such circumstances, he should inform HMRC that he has information indicating that the accounts or statements cannot be relied upon. If the member does not have his client's consent to the disclosure, he should write to the client and explicitly ask for permission to withdraw the report; if unsuccessful, he should then obtain specialist legal advice as to what action he should take.

5.32. A member should not explain to HMRC the reasons why the returns, accounts, etc. are defective. To do so without the client's consent is more likely than not to be considered by a court of law as a misuse of confidential information and an unjustified breach of client confidentiality. See also paragraphs 2.14 - 2.18 on client confidentiality.

Reporting to MLRO/NCA

5.33. In deciding whether a report should be made to NCA, the member (or the member's MLRO) should take into account the various requirements of the legislation and any reporting exemption which might apply. See Chapters 6 and 7 of the CCAB guidance.

Professional enquiry (also known as professional clearance)

5.34. Having ceased to act the member may be approached by a prospective adviser for information relevant to the decision of whether to accept the appointment or not. The member must not volunteer information to a prospective adviser in the absence of authority from his former client.

5.35. Before responding to a request for information from a prospective adviser, a member must ensure that he has authority from the former client to disclose all the information needed and reasonably requested by the prospective adviser to enable him to decide whether to accept the work. To the extent that he is authorised to do so, the member should discuss freely with the prospective adviser all matters of which the prospective adviser should be made aware.

5.36. If the client refuses permission to the member to discuss his affairs, the member should inform the prospective adviser of this fact. It is then up to the prospective adviser to make enquiries from the client as to the reasons for such a refusal.

6. VOLUNTARY DISCLOSURES UNDER SPECIAL DISCLOSURE FACILITIES AND OTHER SPECIAL ARRANGEMENTS

6.1. This Chapter relates to advising on voluntary disclosures, often through a disclosure facility, for non-compliant taxpayers who may have engaged in tax evasion in the past. It does not address routine disclosures of unintended errors for compliant taxpayers.

6.2. It is in the public interest that taxpayers who wish to regularise their tax affairs should receive competent and ethical support from a suitably experienced tax adviser. However, there are risks to the member and the profession in accepting such engagements which should be carefully managed as set out below.

6.3. The use of disclosure facilities is a specialised area and often involves tax liabilities on income arising or assets kept offshore so a member should not undertake this type of activity unless he has the relevant experience and knowledge or obtains specialist support.

6.4. Before accepting a prospective client for a voluntary disclosure, a member should consider carefully the following factors:

- The member must seek to reassure himself that the client will make a full and frank disclosure to the member and regularise his affairs in all respects.
- The member must enquire whether other aspects of the client's tax affairs require remediation. It is not acceptable to advise a client on regularising one specific aspect of their affairs and leave other matters undeclared. This potentially leaves the client exposed to tax authority enquiry, higher penalties and possible criminal prosecution.
- The member should make enquiries as to the source of any undeclared funds. If there are suspicions that the funds may result from wider criminal activities unrelated to tax, the member will need to consider carefully whether to accept the client or not.
- The member should be alert to the possibility that criminals may use regularisation of their tax affairs as a method to bring illegally acquired funds back into the regular economy.

6.5. The member is strongly recommended to meet the prospective client face to face as part of assessing these matters. The member should make it clear to the prospective client that he will only accept the engagement on the basis of full disclosure and regularisation of all aspects of the prospective client's tax affairs.

6.6. The member must at all stages of his interaction with the prospective client comply with his obligations under anti-money laundering legislation which are particularly relevant in this context. The profile of such an engagement suggests that these clients are at higher risk than usual of being involved in money laundering, so extra Customer Due Diligence checks may be needed. This is another reason to meet the prospective client face to face.

6.7. In deciding whether a suspicious activity report should be made to NCA, the member (or the member's MLRO) should take into account the various requirements of the legislation and any reporting exemption which may apply. It is also possible that the member may need to apply for consent to proceed at some point during the engagement. See the CCAB guidance.

6.8. If the member becomes concerned about the client's conduct and circumstances at any stage during the engagement, the member should reassess his anti-money laundering obligations and, subject to his anti-money laundering obligations to avoid 'tipping off' (see CCAB guidance), consider resigning from acting for the client.

7. HMRC RULINGS AND CLEARANCES

7.1. HMRC requires a high degree of disclosure and it is necessary that a 'taxpayer put[s] all his cards face upwards on the table'1 if he is to be able to rely on a ruling or clearance provided by HMRC in response to a request from a taxpayer or his agent.

7.2. The member should err on the side of caution and, where relevant, indicate to HMRC that a fully considered ruling is sought and the use he or his client intends to make of any ruling given. The taxpayer would need to indicate those areas where he is doubtful about the correct interpretation of the law or the application of HMRC practice.

7.3. A distinction should be drawn between situations where the client is seeking the ruling of HMRC pursuant to a statutory clearance procedure and those situations where the client is asking HMRC for a ruling on the tax treatment of a particular transaction. In the former case, the relevant information for an effective clearance will normally be prescribed by the statute creating the clearance procedure. In the latter case it may be necessary to go into more detail concerning the application of the law to the transaction.

7.4. If it is clear that HMRC has made an error in a ruling, a member should follow the guidance in Chapter 5 Irregularities (including errors).

7.5. If there is no apparent error in HMRC's ruling but it is more favourable than expected, the member should check the quality of his submission to ensure that the full details of the specific transaction on which he sought HMRC's ruling were adequately and accurately presented and take corrective action if necessary.

7.6. If a member obtains an adverse ruling with which he disagrees, he may advise the client to consider asking HMRC to reconsider, or to appeal/ask for an internal review under the relevant procedure, if any.

7.7. If HMRC wishes to withdraw a ruling given in relation to a previous period, whether generally or specifically to the client, there may be a remedy in Judicial Review. In this event, the member should seek legal advice as soon as possible as to the applicable time limits for such proceedings. An application may also be made to the Adjudicator or to the Parliamentary Ombudsman.

1 The meaning of 'full disclosure' was considered by Bingham LJ (as he then was) in R v IRC ex parte MFK Underwriting Agents Ltd [1990] 1 WLR 15-45 at 156 9E-G and endorsed by the House of Lords (Lord Jauncey of Tullichettle) in R v IRC ex parte Matrix Securities Limited [1994 STC 272. See also HMRC CAP 1 at HM Revenue & Customs: CAP 1 How non-business customers or customers with a query about non-business activities get advice on HMRC's interpretation of recent tax legislation

8. TAX PLANNING, TAX AVOIDANCE AND TAX EVASION

Introduction

8.1. Tax evasion is illegal and can result in prosecution. A member must never be knowingly involved in tax evasion although, of course, it is appropriate to act for a client who is rectifying his tax affairs. Tax planning is legal and taxpayers are entitled to plan their affairs within the law to minimise the amount of tax they are required to pay. Between these two reasonably clear principles is tax avoidance, a concept less capable of easy definition. Involvement in tax avoidance could subject the client and the member to significantly greater compliance requirements, scrutiny or investigation as well as criticism from the media, Government and other stakeholders.

8.2. The definition of avoidance is an evolving area that can depend on tax legislation, the intention of Parliament, interpretations of case law and the varying perceptions of different stakeholders. Ultimately, only the courts can determine whether a particular piece of tax planning is legally permissible or not. Members are advised to consider the contents of this chapter carefully when advising clients in respect of any tax planning or avoidance arrangements.

8.3. It is advisable to ensure that the basis for tax planning is clearly identified in documentation and to avoid misleading language. Planning which is centred around the client's non-tax objectives is less likely to be considered tax avoidance.

8.4. Where a client wishes to pursue a claim for a tax advantage which the member feels has no sustainable basis the member should refer to Chapter 5 Irregularities (including errors) for further guidance.

HMRC's view

8.5. A member needs to be aware of HMRC's view because this will form the basis of any challenge.

8.6. http://www.hmrc.gov.uk/about/briefings/briefing-avoidance.pdf In September 2012 HMRC issued "Tackling Tax Avoidance". In this document HMRC answers the question 'What is tax avoidance?' with their view on the matter as follows:

'Tax avoidance is bending the rules of the tax system to gain a tax advantage that Parliament never intended. It often involves contrived, artificial transactions that serve little or no purpose other than to produce a tax advantage. It involves operating within the letter – but not the spirit – of the law.

Tax avoidance is not the same as tax planning. Tax planning involves using tax reliefs for the purpose for which they were intended'..

The Issue Briefing later observes that "If a scheme relies upon concealment or providing false information...it will amount to tax evasion and may attract serious sanctions, ranging from financial penalties to a criminal conviction.'

8.7. In addition, http://www.hmrc.gov.uk/avoidance/tempted.htm#1 sets out, inter alia what HMRC view as typical characteristics of a tax avoidance scheme that taxpayers and their advisers should be wary of:

- it sounds too good to be true and cannot have been intended when Parliament made the relevant tax law (for example, some schemes promise to get rid of your tax liability for little or no real cost, and without you having to do much more than pay the promoter and sign some papers);
- the tax benefits or returns are out of proportion to any real economic activity, expense or investment risk;
- the scheme involves arrangements which seem very complex given what you want to do;
- the scheme involves artificial or contrived arrangements;
- the scheme involves money going around in a circle back to where it started;
- the scheme promoter either provides any funding needed to make the scheme work or arranges for it to be made available by another party;
- offshore companies or trusts are involved for no sound commercial reason;
- a tax haven or banking secrecy country is involved;
- the scheme contains exit arrangements designed to side-step tax consequences;
- there are secrecy or confidentiality agreements;
- upfront fees are payable or the arrangement is on a no win/no fee basis;
- the scheme has been allocated a Scheme Reference Number (SRN) by HMRC under the Disclosure of Tax Avoidance Schemes (DOTAS) regime

8.8. Some of these features may exist in cases which are not tax avoidance schemes. For example, a scheme which has been allocated a SRN can sometimes be inoffensive or contingent fees may be charged for analysing expenditure to identify claims to capital allowances or research and development credits. However, the presence of one or more of these features is often an indication that the member should consider carefully whether the planning in question could be viewed as tax avoidance.

8.9. Some of these features at 8.7 above may also be indicative of money laundering, specifically designed to hide the proceeds of criminal activity, not just tax avoidance. See CCAB anti-money laundering guidance for further detail.

The responsibility of a member where tax avoidance may be in point

8.10. A member is required to serve his client with professional competence and due care within the scope of his engagement letter. The recent public debate on tax avoidance has not changed the member's responsibility to his client. This has been highlighted in the debate surrounding Mehjoo v Harben Barker (a firm) and another company [2013] EWHC 1500 (QB).

8.11. A member should be aware of his client's expectations around the aggressiveness of tax planning or tax avoidance arrangements that might be contemplated by the client, and ensure that engagement or scoping letters reflect the member's role and responsibilities, including limitations in or amendments to that role. For further guidance see paragraph 2.10.

8.12. Ultimately it is the client's decision as to what planning is appropriate having received advice and taking into account broader commercial and ethical issues.

8.13. Occasionally a client may advise a member that he intends to proceed with a tax planning arrangement without taking full advice from him on the relevant issues. In such cases the member should warn the client of the potential risks of proceeding without full advice and ensure that the restriction in the scope of the member's advice is recorded in writing.

Advising on a tax planning arrangement

8.14. In the event that a member advises on a tax planning arrangement which may potentially be construed as avoidance , the member should give extra attention to advising on the risks and implications as outlined below and should only recommend the planning for the client's consideration based on balanced advice taking into account any potential risks. Clearly if the member concludes that the planning is ineffective based on consideration of the GAAR or other tax law, the member should not recommend the planning. The member will also be responsible for determining whether disclosure is required under DOTAS (see Chapter 9) and advising the client on the consequences of such disclosure if relevant.

8.15. Where a member concludes that there is a risk that a tax planning arrangement may be viewed by HMRC or the courts or other stakeholders as tax avoidance, the member should give extra attention to advising on the risks and implications. These may include:

- The strength of the legal interpretation relied upon.

- The potential application of the GAAR.
- The issues involved in the implementation of the planning arrangement.
- The implications for the client, including the obligations of the client in relation to their tax return, if the planning requires disclosure under DOTAS.
- The risk of counteraction. This may occur before the planning is completed or potentially there may be retrospective counteraction at a later date.
- The risk of challenge by HMRC. Such challenge may relate to the legal interpretation relied upon, but may alternatively relate to the construction of the facts, including the implementation of the planning.
- The risk of litigation.
- The probability that the planning would be overturned by the courts if litigated.
- The reputational risk to the client if the planning came into the public arena.
- The stress or wider personal or business implications to the client in the event of a prolonged dispute with HMRC. This may involve publicity, costs and loss of management time over a significant period of years.
- If the client tenders for government contracts, the potential impact of the proposed tax planning on tendering for and retaining public sector contracts.

A member should always make a record of the advice given.

8.16. It should be noted that any legal opinion provided, for example by Counsel, will be based on the assumptions stated in the instructions for the opinion and on execution of the arrangement exactly as stated. HMRC and the courts will not be constrained by these assumptions.

8.17. A member may advise on steps to manage elements of the risk if the client chooses to proceed, for example, the merits of a particularly thorough disclosure of the arrangements to HMRC.

8.18. The member may wish to suggest alternative arrangements which involve less risk if this is within the scope of his engagement letter with the client.

Introducing a tax planning arrangement

8.19. A member may be invited to introduce his clients to an arrangement run by a promoter. The member would usually be paid a commission for making such introductions which must be disclosed and accounted for in line with the member's professional body's rules. See Professional Rules and Practice Guidelines in the Professional Standards area of the websites www.tax.org.uk and www.att.org.uk.

8.20. If the member is responsible for preparing the client's tax return he should not include within the tax return a claim for a tax advantage which he considers has no sustainable basis. Therefore, before introducing a client to a promoter, it is recommended that the member establish whether he would be able to submit a tax return claiming the benefit of the proposed arrangement.

8.21. If a member does not have the expertise to advise the client on the potential risks or if the promoter does not release all the legal opinions and implementation details to allow the member to analyse the arrangement, the member should inform the client that he is not able to advise or recommend the arrangement. Where appropriate the member should advise the client to consider very carefully the risks.

Advising on a third party's tax planning arrangement

8.22. A client may ask a member to advise on an arrangement offered to the client by another adviser. The member should consider carefully whether he is qualified to advise the client on the potential risks of the arrangement. If the member does not have the relevant experience, he should seek specialist support or recommend that the client obtains advice elsewhere. The member may be able to advise on the practical issues involved in participation in a tax avoidance arrangement, whilst advising the client to take advice elsewhere on the technical merits of the legal interpretation relied upon.

8.23. If the member does not have the expertise to advise the client on the potential risks or if the promoter does not release all the legal opinions and implementation details to allow the member to analyse the tax planning, the member should not recommend the arrangement. Any commission received must be disclosed and accounted for in line with the member's professional body's rules. See Professional Rules and Practice Guidelines in the Professional Standards area of the websites www.tax.org.uk and www.att.org.uk.

8.24. If the member is responsible for preparing the client's tax return, it is recommended that the member establish whether he would be able to claim the benefit of the proposed arrangement in the tax return, and address this in his advice to his client. As set out in paragraph 3.5, a member should not include within the tax return a claim for a tax advantage which he considers has no sustainable basis.

Entering the tax planning on a tax return

8.25. A client may implement a scheme offered by another adviser and ask a member to reflect the effect of the tax arrangement on their tax return. In this case the member is not responsible for advising the client on the potential risks of the planning although from a client relationship perspective the member may wish to advise on the risk of a challenge. However, the member should not include within the tax return a claim for a tax advantage which he considers has no sustainable basis based on the information provided to him. See also paragraphs 3.13 – 3.20 and Chapter 5 for further guidance.

The GAAR

8.26. HMRC's GAAR Guidance http://www.hmrc.gov.uk/avoidance/gaar.htm provides a detailed articulation of what HMRC consider to be reasonable planning through to abusive arrangements, with extensive examples. A key message is in paragraph B2.1:

'the GAAR .....rejects the approach taken by the Courts in a number of old cases to the effect that taxpayers are free to use their ingenuity to reduce their tax bills by any lawful means, however contrived those means might be and however far the tax consequences might diverge from the real economic position'.

Clearly where the GAAR applies, the arrangements will be ineffective (and counteracted by HMRC) and the client should be advised accordingly.

8.27. A member should ensure that he is aware of the scope and potential application of the GAAR. He should put appropriate measures in place commensurate with the size of his practice and the extent to which he is involved in areas where the GAAR will need to be considered. Measures which may be considered include:

- Training.
- Technical briefing or guidance material linking to and potentially supplementing HMRC's GAAR Guidance.
- Protocols to ensure the quality and consistency of treatment. If a member is unsure or does not have the expertise to advise he may wish to seek specialist input externally or refer the client to a specialist adviser.
- Awareness raising with clients through client alerts etc may be appropriate, especially for clients whose affairs may be more complex or who may undertake planning with other advisers.
- Caveat language to use in advice on the GAAR to explain that the GAAR is new with no precedent (or little precedent as some precedents begin to emerge) and there is therefore a level of uncertainty as to how it will be applied, so that the member cannot guarantee that it will not be applied.
- Transmittal letters for returns might refer to the GAAR for clients whose affairs may be more complex or who may undertake planning with other advisers.
- Updating existing knowledge materials to ensure that they refer to the GAAR where appropriate.
- Reviewing any existing offerings which might be affected by the GAAR.

8.28. Even if the member concludes that the GAAR is not expected to apply, the member should advise on the other issues identified in paragraph 8.15 as applicable.

8.29. A member should note the application of the GAAR to compliance work as set out in paragraphs 3.6 -3.8.

Tax evasion

8.30. Tax evasion is illegal and may involve understating turnover, overstating deductible expenses, false invoicing or backdating documents.

8.31. Tax evasion can also occur in the context of what purports or appears to be a plan to reduce tax liabilities within the law if there is deliberate concealment of the facts from HMRC or if HMRC is misled. For example, attempts to cover up implementation mistakes, eg through backdating documents, may also be tax fraud. An intention not to pay the tax if it is ultimately shown to be lawfully due or a wilful disregard as to how the tax would be paid can be indicative of tax fraud. For such reasons a Counsel's opinion on the technical analysis does not guarantee that arrangements could not be construed as tax fraud.

8.32. Both HMRC and other tax authorities internationally are increasingly considering whether some cases of tax avoidance may involve elements of criminal behaviour. A member should remain vigilant to the possibility of tax evasion when involved in what is ostensibly lawful planning.

8.33. A member must never be knowingly involved in tax evasion although, of course, it is appropriate to act for a client who is rectifying his tax affairs. A member should always seek to persuade his client to comply with the law and should follow the advice in Chapter 5, including consideration of anti-money laundering obligations, if concerned about the activities of clients or third parties.

8.34. A member should also seek to protect both himself and his clients and avoid any perception of involvement in tax evasion by, for example, ensuring that proper disclosure is made. If a member is aware of any confusion in the documentation, he should avoid misleading HMRC or creating any perception that HMRC is being misled.

9. DISCLOSURE OF TAX AVOIDANCE SCHEMES

Introduction

9.1. There are two different regimes covering the disclosure to HMRC of tax avoidance schemes. Under the tax avoidance schemes rules for VAT (see paragraphs 9.3 and 9.4) responsibility lies with the taxpayer to make the disclosure; for other taxes (see paragraphs 9.5 – 9.12) the responsibility will often lie with the promoter of the scheme, although the taxpayer may have a disclosure obligation in certain circumstances.

9.2. Disclosure and registration of a tax avoidance scheme with HMRC is not a clearance or approval process; successful registration does not imply HMRC's acceptance of a scheme. See Chapter 8 for guidance on broader aspects of tax avoidance. In particular, where relevant it should be noted that the failure of a scheme which was or should have been notified under the DOTAS regime is now relevant to the evaluation of actual and potential government suppliers.

VAT

9.3. There are specific requirements for the disclosure of VAT avoidance schemes. The client must inform HMRC if they take part in a 'listed scheme' (i.e. one that is specified as a 'designated scheme' in accordance with Schedule 11A to the VAT Act 1994 and listed in the VAT (Disclosure of Avoidance Schemes) (Designations) Order 2004 (SI 2004/1933). Additionally the client, or any taxable person who participates in a scheme whose purpose is to obtain a tax advantage, must notify HMRC if it triggers certain 'hallmarks of avoidance', in accordance with VAT Notice 700/8 and as specified in Schedule 11A to the VAT Act 1994 and the 'VAT (Disclosure of Avoidance Schemes) Regulations 2004 (SI 2004/1929)'. Someone acting purely in an advisory capacity is not considered to be party to a scheme, so is not required to make the notification.

9.4. A member may consider whether his clients would benefit if any tax avoidance scheme that he was promoting was 'Voluntarily Registered' with HMRC. In this way, the member would be issued with a SRN by HMRC, which the member should pass on to his client. The client then is exempted from the requirement to notify such schemes to HMRC. However the Voluntary Registration scheme does not exempt the client from the requirement to notify his use of a 'listed scheme'.

Other taxes

9.5. A different regime applies to income tax, corporation tax, capital gains tax, inheritance tax, stamp duty land tax, ATED and national insurance contributions. Paragraphs 9.6 - 9.12 address the professional conduct issues where a generic disclosure requirement falls upon a member as a promoter of tax avoidance

schemes for taxes other than VAT. For technical details of the scope and application of such obligations, reference should be made to the relevant legislation and HMRC's guidance available on their website HMRC Disclosure of Tax Avoidance Schemes.

9.6. A member should be aware of the type of tax advice which could trigger such disclosure and be able to identify potentially disclosable items in respect of the taxes upon which he advises. This is particularly important since some planning which may require disclosure may not intuitively appear to be tax avoidance to which HMRC may object and there are very tight time limits.

9.7. Under the regime applicable at the time of writing, the obligation falls upon any 'promoter' but excludes employees of promoters. A member who is an employee is accordingly not legally responsible under the applicable legislation for his employer's compliance and the rest of this Chapter should be read with this in mind. A member who is not comfortable with the approach his employer is taking to such obligations should consider seeking advice, for example, from his professional body.

9.8. Failure to comply with the disclosure regulations may result in penalties both for promoters and scheme users. HMRC has indicated that such failure will be viewed seriously.

9.9. As set out in paragraph 2.14, a member must observe client confidentiality unless there is a legal or professional right or duty to disclose the information. Client specific information should not be provided to HMRC when complying with generic disclosure requirements, unless authorised by the client or there is a specific legal requirement to provide client specific information, or a careful judgement of the public interest in disclosure has been made and recorded. In this regard, the regime requires the promoter to provide certain details to HMRC in respect of clients who have entered into disclosed arrangements within a prescribed period of time. Details are set out in the HMRC guidance referred to in paragraph 9.5 above.

9.10. Whilst a member may take advice from others, such as Counsel, or, where practicable, listen to the views of his client upon disclosure regime matters, the member remains responsible for the disclosure. A member should ensure that he retains control over his disclosure regime decisions and does not cede control over such decisions to his client or third parties.

9.11. A member should put in place instructions, systems and processes to ensure compliance with his disclosure obligations to the extent appropriate given the size of the practice and the frequency with which he is involved in areas which could give rise to disclosure obligations.

9.12. Where a disclosure obligation falls upon the taxpayer, and the role of the member is one of advising his clients upon disclosure obligations and drafting disclosures for client approval where instructed to do so, reference should be made to Chapter 3 for the relevant professional conduct guidance.

10. GENERAL ENQUIRIES AND INVESTIGATION OF TAX PRACTITIONERS BY HMRC

10.1. HMRC occasionally has meetings with agents outside the usual enquiry process, for example, as part of its Agent Strategy work. Many of these meetings are routine and intended only to increase HMRC's understanding of the agents' work generally.

10.2. If HMRC approaches a member for a general meeting the member is recommended to find out the nature and purpose of the enquiry before engaging in further discussion or agreeing to meet.

- If the meeting relates to one or more specific clients the member should refer to Chapter 4.
- If the purpose of the meeting is a general conversation about the firm's portfolio and approach at a generic level, perhaps based on statistics from the Agent and Client Statistics' project or other data, pilots or research the member should refer to paragraphs 10.3 and 10.4 below.
- Any approach to a member by HMRC in relation to the legality or professional competence of his work should be regarded as a serious matter and the advice in paragraphs 10.3 and 10.5 - 10.8 should be followed.

HMRC has given assurances that the reason and purpose for any meeting will be made clear at the outset.

10.3. Whatever the nature of HMRC's enquiries, a member must not disclose confidential client information without the prior consent of the client, unless there is a legal right or duty to do so. HMRC has extensive powers to obtain information. See Chapter 4 for further details of the issues to be considered.

10.4. If the meeting appears to be a general conversation, the member may decide to meet HMRC, but is under no professional obligation to do so. The member should ensure that any information provided to HMRC is accurate. He should caveat any general explanations to make it clear if there are or may be exceptions. If in doubt the member should check the facts before responding. If in doubt how to handle the approach or some of HMRC's questions, the member may wish to consult. If at any stage the enquiry appears to be evolving into challenges to the legality of activities at the member's firm or the professional competence of the firm, the member should refer to the guidance in paragraphs 10.5 to 10.9 below.

10.5. Any approach to a member by HMRC in relation to the legality or professional competence of the member or his firm's work should be regarded as a serious matter. HMRC has specialist units, part of

whose brief is to monitor and investigate the standards of tax practitioners and consider civil or criminal proceedings against individuals or, less commonly, firms.

10.6. Where the situation in 10.5 applies, a member should consider taking the advice of a specialist in investigations of tax practitioners at an early stage. The member should also consider asking the specialist to conduct the discussions with HMRC, since a member may not always be the best advocate in his own cause.

10.7. A member who, at any stage:

- Believes that the Tax Agents: Dishonest Conduct provisions in Finance Act 2012 Schedule 38 provisions may be used against him;
- Believes that other proceedings may be taken against him; or
- Is not confident of the legal position

should take legal advice.

10.8. A member should consider whether he has an obligation to notify his professional indemnity insurer about any HMRC investigation and also or whether any costs incurred by him in the course of the investigation may be covered by any investigation costs insurance held by him.

10.9. A member should also consider whether he has an obligation to notify his professional body at any stage.

11. OTHER INTERACTIONS WITH HMRC

11.1. This Chapter addresses interactions with HMRC which are not in the context of a client's tax affairs (addressed throughout the rest of this guidance) nor in the context of enquiries by HMRC into the member or his firm(see Chapter 10). References to HMRC below should be taken as applying also to other government departments.

11.2. The principles in this Chapter apply whether a member is acting:

- On behalf of the firm by which he is employed or in which he is a principal;
- As a volunteer or an employee of a professional body or charity;
- As a citizen; or
- In any other capacity.

11.3. A member must respect any request by HMRC for confidentiality until such time as HMRC lifts this requirement or the matter comes into the public arena. If in doubt the member should clarify whether confidentiality is required and the scope and duration of the requirement for confidentiality with his HMRC contact on the matter.

11.4. HMRC has confirmed that volunteers acting as representatives of a professional body may share confidential information with senior people from the body, in order to keep the body informed.

Consultations

11.5. Government makes policy. However, many members will be involved in providing input through the consultation process. Consultations can take many forms including formal public consultation processes, HMRC open days for interested parties, consultation discussions with HMRC and participation in HMRC working groups. A member's objective is to apply his technical expertise and practical and commercial experience to provide input to assist government in making informed choices about policy options and in achieving their policy objectives in an effective manner without unintended consequences.

11.6. Some members may assist clients in engaging with government on tax policy matters.

11.7. A member who actively participates in such consultations:

- Should be open and transparent.

- Should make clear the basis upon which he is providing input, eg whether it is on behalf of his firm or, for example, on behalf of a group of clients in a particular industry.

- Should draw to the attention of HMRC any 'loopholes' he has identified in the legislation at the time that he is making representations on that legislation.

Secondments

11.8. From time to time professionals outside HMRC may be seconded to HMRC. A member may be seconded or may be responsible for arranging a secondment. It is strongly recommended that the terms and conditions of any secondment are agreed in writing. The principles below apply equally to secondments from HMRC to other organisations.

11.9. Any potential conflict of interest should be carefully managed and the member should follow the guidance below. It is possible that there could nevertheless be a perception that a conflict of interest might exist. HMRC and the seconding organisation should consider such perceptions carefully.

11.10. Potential conflicts of interest are best managed by open and transparent discussion between the seconding organisation, HMRC and the secondee around the specifics of the situation. The secondee should serve the interests of HMRC whilst on secondment and all parties should take steps to remove the secondee from any situation where there is scope for a conflict of interest between HMRC and the seconding organisation. For example, the secondee should not be involved in matters relating to the seconding organisation or the clients it is representing while working for HMRC. Similarly following the end of the secondment, the secondee should not be involved in the affairs of any taxpayer he was involved with at HMRC for a significant period.

11.11. The secondee's role may be to assist with new legislation, legislative rewrites, simplification initiatives or similar projects whilst at HMRC. The secondee must assist HMRC to implement the policy set by ministers. The secondee should act openly and transparently in providing input based upon his experience outside HMRC. During his secondment, the secondee has a professional duty to draw attention to any 'loopholes' he identifies, when reviewing draft legislation.

11.12. Any stricter or more specific arrangements should be expressly agreed between HMRC and the seconding organisation.