

15 September 2025

By email to: david.bagg@hmrc.gov.uk

Dear Mr Bagg,

RE: CITY OF LONDON LAW SOCIETY'S RESPONSE TO "CLOSING IN ON PROMOTERS OF MARKETED TAX AVOIDANCE"

Please find below The City of London Law Society's ("**CLLS**") response to the HM Revenue & Customs ("**HMRC**") policy paper published on 21 July 2025 entitled "Closing in on promoters of marketed tax avoidance" (the "**Policy Paper**") and accompanying draft legislation (the "**Draft Legislation**"), and the updated summary of responses published on the same date entitled "Closing in on promoters of marketed tax avoidance" (the "**Summary of Responses**"). We also refer in this response to the related consultation document that HMRC published on 26 March 2025 (the "**Consultation Document**"), our response to the Consultation Document dated 18 June 2025 (the "**CLLS 18 June Response**") and our response to the changes to DOTAS Hallmarks in 2014, which we re-attach for ease of reference (the "**CLLS 2014 DOTAS Response**").

INTRODUCTION

The CLLS represents over 22,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response to the Consultation has been prepared by the CLLS Tax Committee.

The current members of the Tax Committee are listed at <https://cls.org/committees/tax.html>

PRELIMINARY COMMENTS

As stated in the CLLS 18 June response, CLLS supports the Government's broad objective to counteract the activities of the small group of abusive promoters who are responsible for the repeated mass-marketing of ineffective, possibly fraudulent tax avoidance schemes, and who in doing so are not co-operative with HMRC. CLLS members meet the highest of professional and ethical standards and are subject to a comprehensive regulatory regime, supervised by the Solicitors Regulation Authority (**SRA**), as well as long-established duties both to their clients and to the Court. CLLS does not represent the small number of organisations engaged in the behaviour at which the Government's "Closing in on promoters of marketed tax avoidance" proposals (the **Proposals**) are directed, and does not condone their behaviour which, CLLS considers, brings the tax profession as a whole into disrepute.

CLLS welcomes the modifications to the Proposals set out in the Summary of Responses and the Policy Paper, particularly the removal of the proposals for the repeal of Regulation 6 and the deemed waiver of LPP. We are also grateful to have had the opportunity to discuss the revised Proposals with HMRC along with other industry representatives in the video call held on 12 August 2025.

However, we have a significant number of remaining concerns with the Proposals. As these concerns were all previously set out in the CLLS 18 June Response, we do not intend to repeat them exhaustively here. Instead, in this response we would like to draw HMRC's attention to what we consider to be the most serious problems with the revised Proposals, in the hope that these at least might be addressed in further revisions to the Proposals.

SPECIFIC COMMENTS

1. Disclosure of tax avoidance schemes (DOTAS)

We are disappointed that the Government still intends to introduce a criminal offence for the failure of a promoter of tax avoidance arrangements to notify the arrangements to HMRC. This would in our view be a regrettable change. As we stated in the CLLS 18 June Response, such a change threatens to have a pernicious effect on reputable advisors and taxpayers and their activities, while we doubt it would be effective in deterring the very small group of promoters that are HMRC's focus.

We are, however, glad that the Government has indicated in the Summary of Responses that it would welcome further engagement with stakeholders on how the scope of the proposed offence might be narrowed during the draft Finance Bill consultation period.

The fundamental concern that we believe needs to be addressed is that the Proposals do not give reputable advisors and taxpayers adequate comfort that they will not risk prosecution if they have acted honestly and prudently. This is a consequence of the combination of: (i) the boundaries of DOTAS being set broadly and not precisely; and (ii) the great uncertainty around the scope of a defence which requires a person to prove that they have a "reasonable excuse".

By way of illustration of our points, the breadth of the financial products hallmark in particular in the DOTAS rules was the subject of much consultation with HMRC at the time of its introduction in 2016. See the attached 2016 DOTAS response. We noted in that response that HMRC themselves accepted at the time that:

"...it is possible that some arrangements may need to be disclosed which do not pose particular risks to the Exchequer."

Based on this, the new proposals would introduce a criminal offence for failure to disclose something which was deliberately set widely enough to catch arrangements which do not pose a risk to the Exchequer. To address some of the well-founded concerns over the financial products hallmark in particular, HMRC were forced to include exemptions and to issue guidance in respect of their reasoning as to why the DOTAS rules were not in point in a variety of circumstances which would typically be considered to be normal tax planning. By way of reminder to emphasise the point, this is a hallmark otherwise so widely drawn that HMRC had to include a specific exemption for including terms in a loan note to ensure it is a normal commercial loan, and transferring trading assets to a subsidiary prior to a sale. In addition to these statutory exemptions, HMRC have issued guidance on their interpretation of the DOTAS tests to a number of specific scenarios. These comments are obviously only HMRC's views, cannot be relied upon by advisers as a defence, only cover specific things which were raised with HMRC in 2016, and are generally considered by advisers to be somewhat unclear in their reasoning (particularly when compared to the reasoning for needing statutory exemptions for other similar type points). For instance, HMRC consider that REIT status does not arise from the inclusion of company shares in the arrangements. However, only a company with shares can be a REIT, the conditions for REIT status specifically have requirements as to the nature and terms of the shares in the REIT (and loans entered into by it) and it is common for listed REITs to include terms in their articles of association (i.e. share terms) which aim to protect it against the holders of excessive rights provisions in the REIT rules. HMRC's reasoning on partition demergers and JV arrangements are similarly high level and unclear. This is to be compared with HMRC's conclusion that including a 49 year redemption date for a loan security is caught

and therefore requires a statutory exemption. These comments were all made at the time. We therefore would reiterate that the DOTAS rules are completely inappropriate as the basis for a criminal offence.

HMRC and Treasury may reasonably ask why, if the financial products hallmark is so wide, are so few disclosures being made? First, it will naturally be the case that advisers are, in some cases, currently taking comfort from HMRC's guidance and statements made regarding the application of the rules. However, it is not reasonable to expect them to do so in relation to a potential criminal penalty. Secondly, where comfort cannot be taken, tax advisers in CLLS member firms advise clients not to proceed with proposals which would require disclosure. This is a key point and one which was made in the CLLS 2014 DOTAS Response.

We pointed out that businesses faced a stark choice between:

- (1) not disclosing and running the risk of failing to comply with the DOTAS regime;
- (2) disclosing and facing the disadvantages described in that Response, or
- (3) not proceeding with the transaction.

The implication in the Consultation Document is that outcome (1) has occurred and that schemes are going ahead which ought to be disclosed but are not. That may be the case in one sector of the market but it is not CLLS member firms' experience. The reality for City firms has been outcome (3). DOTAS has removed the appetite of large multinationals to engage not only in aggressive tax planning but in any tax planning at all which strays into the wide penumbra of DOTAS. Government should be celebrating that success rather than viewing lack of disclosures negatively.

However, if the Government were minded to push ahead with the Proposals we would urge them to consider the changes suggested below.

(a) Restriction of the new offence to the Disguised Remuneration hallmark only

We think this would target the offence at the mischief at which it has been aimed. Whilst the CLLS would still have principled objections to the Proposals in our view this would to a large extent mitigate the harm of the Proposals for CLLS member firms, which stem from the excessive breadth of the Financial Products hallmark as explained above.

(b) Restriction of the new offence to tax advisers who are not registered or required to be registered under the current proposal

Removing registered tax advisers or those who are not required to be registered from the scope of the offence would be a useful start in cutting down the scope of this offence. We have responded separately on the requirement to register, which we are opposed to and alternatively have proposed that it only applies to currently unregulated advisors.

(c) Addition of "reasonableness" filters as basic condition(s) for the new offence

In our view, given the evident scope for reasonable disagreement on the interpretation of the DOTAS "notifiable arrangements" definition, the proposed offence should not permit a person to be prosecuted where they have followed what, objectively, is a reasonable interpretation of the DOTAS rules and are not engaged in "egregious" tax planning of the type that would fall within the GAAR. We would urge the Government to introduce an additional, objective requirement for the offence, requiring that the person in question has failed to report under DOTAS a purported tax avoidance arrangement which either:

- (1) cannot reasonably be regarded as a reasonable course of action in order to obtain the relevant tax benefit; or

- (2) cannot reasonably be regarded as not being a notifiable arrangement under DOTAS.

It is clear to us that neither a "reasonable excuse" defence, nor an assurance from HMRC that only the most serious cases would be prosecuted, would (alone or together) give reputable taxpayers and advisors adequate comfort that they would not risk prosecution if they have acted honestly and prudently. Additional objective criteria such as those we have outlined above would, we believe, provide significant practical comfort to reputable taxpayers and advisors, while leaving HMRC scope to pursue prosecution of disreputable promoters who flagrantly disregard DOTAS obligations.

(d) *Addition of filter for proposals intended for mass-marketing*

It is also clear that the mischief at which the Proposals are directed is "marketed" tax avoidance, and that the business model of the 20 to 30 disreputable promoter organisations that HMRC is focused on involves the unsolicited mass-marketing of purported tax avoidance arrangements to potential users. We consider that, given the draconian nature of the proposed DOTAS offence, the Government should, in the interests of proportionality, make every effort to focus the proposed offence on such "marketed" tax avoidance.

If a requirement were introduced for the proposed offence that restricted it to "marketed" tax avoidance (such as that the promoter in question was, or ought reasonably to have been, aware that the arrangements were intended to be made available through unsolicited marketing to more than a stated number of (e.g. 25) potential participants), this would in our view significantly reduce the likelihood of the proposed offence, as an unintended consequence, impacting reputable taxpayers and advisors. We appreciate that, as HMRC explained on the call on 12 August 2025, designing such a requirement may not be straightforward. However, as such a requirement would be very clearly aligned with the stated policy objectives of the Proposals, and would in our view deliver a material improvement in the Proposals, we would urge the Government to explore the possibility further and would be glad to offer the resources of our committee to assist.

2. **Universal Stop Regulations (USRs)**

The revised proposals for USRs have addressed some of the difficulties of the "universal stop notices" proposal, and the greater focus on "promotion" with a connection to "marketing" is welcome. There are, however, in our view still several significant concerns with the USRs proposal. If the proposal is to be pursued, we would urge the Government to address the following matters at the least.

- (a) *USRs should not remain effective where the Commissioners' "reasonable opinion" is proved incorrect*
- The change in the Proposals from "universal stop notices" to USRs, while improving the level of parliamentary scrutiny involved, still leaves it largely to HMRC's discretion as to when a USR may be issued, and as to what the USR may specify. The proposal is that it will be left to the Commissioners' "reasonable opinion" whether among other things, arrangements are "unlikely to provide the tax advantage".
 - This creates the possibility that a USR could be validly made under the terms of the enabling legislation on the basis of a "reasonable opinion" in circumstances where, on a fully objective assessment of the relevant facts and law, a court or tribunal would find that the arrangements are not in fact "unlikely to provide the tax advantage". If the USR would (as the Draft Legislation would provide) be valid merely if the relevant conditions are met in the "reasonable opinion" of the Commissioners, judicial review of the USR on the basis of *ultra vires* would appear very difficult. Given that USRs would be the basis of criminal liability, it would not in our view be appropriate for a USR to remain effective in such circumstances. The same would apply if a USR

were validly made at the outset but, due to a subsequent change of law, it became the case that arrangements covered by the USR were no longer "unlikely to provide the tax advantage".

- We would therefore urge the Government to consider:
 - Removing the "reasonable opinion" threshold, so that it would become a fully objective test as to whether the conditions for making a USR have been satisfied;
 - Introducing a procedure to enable any interested person to apply to the Tribunal for a declaration as to whether the conditions for making a particular USR (aside from the Commissioners having formed a particular opinion) have been, or remain, satisfied, such that the USR will cease to apply if the Tribunal finds accordingly; and
 - Including in the enabling legislation a time restriction on all USRs, providing that a USR will expire automatically after a period (we would suggest five years). This would be with a view to minimising the burden of the compliance requirements that, HMRC must acknowledge, USRs will create for reputable advisors and businesses. This would not prevent HMRC from maintaining (by re-making) USRs which have a continuing practical use, but would in our view be a helpful means of ensuring that the "bank" of effective USRs is regularly reviewed, so that obsolete USRs can be dispensed with and therefore cease to be a concern for reputable taxpayers and advisors.

(b) *Greater clarity on meaning of "marketing"*

As mentioned above, we welcome the greater focus of the USR proposal on "marketed" arrangements. It would, however, be helpful in our view for there to be further definition of "marketed" for these purposes, as the term does not have a generally understood meaning of any precision, either in common law or ordinary usage. In particular, we consider that it would be helpful, with a view to the activity carried on by reputable advisors, for it to be made clear in legislation that making a bespoke recommendation for an existing client as part of normal paid advice cannot be categorised as "marketing".

3. **Promoter Action Notices (PANs)**

We welcome the removal of the proposal for non-compliance with a PAN to be a criminal offence, and other modifications to the PAN proposals including the clearer focus in the Draft Legislation on "promoters" (rather than also "enablers").

One particular aspect of the revised PAN proposals which still concerns us in principle is the lack of any right of appeal for the promoter to which the PAN relates. We appreciate that HMRC considers that, in practice, it is unlikely that a PAN could be issued in circumstances where a promoter would be able to appeal successfully. However, in our view, an appeal right for the promoter should be included under ordinary principles of justice and the rule of law.

We understand that HMRC are considering including statutory protection for those issued with a PAN. We would support this and urge that there should be immunity from all forms of contractual, tortious, equitable, and statutory claims for actions required to be taken in order to comply with a PAN.

CONTACT DETAILS

Should you have any queries or require any clarifications in respect of our response or any aspect of this letter, please feel free to contact me by telephone on 020 7296 5783 or by email at Philip.harle@hoganlovells.com.

Yours faithfully

Philip Harle
Chair of the City of London Law Society Tax Committee

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