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By email to taxadviceconsultation@hmrc.gov.uk

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Dear Ms De Brito

Raising standards in the tax advice market: PII and defining tax advice

I am writing on behalf of the Association of Consulting Actuaries in response to the consultation on Raising Standards in the Tax Advice Market: professional indemnity insurance ("**PII**") and defining tax advice. As an association of professionally qualified actuaries, we welcome any initiative to improve standards of advice.

We note that the consultation focuses on the PII requirements and does not concentrate to a great extent on the definition of tax advice itself. However PII requirements might be just one of the tools that HMRC is considering when improving the standards of tax advice, so our comments on the definition of "tax advice" are given in the context that it might also be used in future for wider measures than just PII. Our proposals are therefore aimed at setting a scope for the type of work and who is carrying out that work, keeping in mind that the same rationale might be used when applying any further requirements. As noted elsewhere in this response, this approach might be more appropriate than seeking to define "tax advice" itself, which could lead to a definition that is circumvented by the very people HMRC is seeking to limit.

We would recommend that any new requirements around PII focus on the mischiefs that need to be addressed without inadvertently restricting or damaging the provision of high-quality tax advice or the ability of many individuals who are not primarily tax advisers to provide professional advice in related areas, such as pensions, where commenting on tax is an essential component of that advice.

Overall, there are many challenges in implementing the concept into a practical policy that meets its objectives without imposing unwanted collateral damage on the provision of tax advice and adjacent activities. **It is important that, once HMRC has worked up more ideas on likely policy, the details and practical aspects should be consulted on again before implementation (allowing scope for key changes** so more than just a "technical consultation") to ensure the outcome is workable.

Background

The problems to be addressed by this intervention are poor quality advisers who do not uphold appropriate professional standards of competence and sometimes integrity, and also a small minority who promote tax avoidance schemes.

The tax advice market is diverse and complex, as the previous call for evidence and work in this area has shown. Tax permeates into many different parts of business and people's lives in many different ways. As a consequence, there are many different types of taxpayer and types of advisers helping them.

One size cannot fit all when addressing the tax advice market. It might be helpful to develop principles to be adopted and then to segment the tax advice market to develop solutions in the different segments. The solutions would all be consistent with the principles, but different segments would not need identical solutions.

Suggested principles

1. Protect personal customers and small business customers.
    - The risks and the mischief lie in these segments of the customer base.
    - Large businesses have procurement processes and tend to buy advice from larger professional advisers, and so have less need of government intervention to protect them in this area.
2. Target providing appropriate protection for shortcomings by an adviser rather than impose a uniform amount and design of PII across the whole market.
    - Aiming that there is appropriate protection and redress is more realistic and achievable than aiming for uniformity across such a wide and diverse marketplace.

3. Do not seek to duplicate similar or equivalent requirements already imposed by professional bodies or statutory regulators.
    - HMRC understandably wants to adopt a widely drawn definition of tax advice, which consequently will cover a range of ancillary advice such as advice concerning pension

- schemes, legal advice and IFA advice. Professional bodies and regulators are already active in all these areas, and duplicate regulations will hinder socially important advice services in these areas.
- Focus HMRC's resources on where there is a gap rather than on duplicating work already done by other organisations, professional bodies or statutory regulators.

4. Construct simple PII coverage requirements for smaller unaffiliated tax agents serving individuals and small businesses.
   - The range of services that smaller unaffiliated tax agents offer to individual customers and small businesses might be a more homogenous and less diverse set of services compared to the range in the entire tax market. It might be realistic to define a simple PII coverage requirement for this group of agents and this group of customers.
   - A simple, realistic and affordable PII requirement may enable this group of agents to continue to serve their customers on an affordable basis.
5. Impose more stringent PII requirements on promoters in the Promoters of Tax Avoidance Schemes ("**POTAS**") regime or intermediaries linked to them who in the course of business communicate relevant POTAS arrangements to clients or prospective clients with a view to the client entering into such a POTAS-covered arrangement.
   - These activities potentially impose a higher risk of loss for the clients concerned and so it is appropriate that the promoters and any intermediaries within the meaning of the POTAS regime who facilitate a UK footprint for such arrangements should carry PII cover the reflect the higher risks.

Suggested approach

Based on the above principles, the taxpayers most at risk are individuals and small businesses or organisations rather than large businesses. Therefore, we suggest that:

a) PII requirements should apply only in respect of tax advice given to individuals and small businesses and organisations. Large businesses already look after themselves in this area.

b) PII requirements should apply at the level of the firm giving the advice since this is the level where PII is usually held rather than an individual adviser level.

   a. Where the principals of a firm giving tax advice, i.e. the partners or directors who manage or control a firm's activities, are members of a professional body, including accountants, actuaries, solicitors and other similar professions such as member of the Chartered Insurance Institute, and take personal professional responsibility that the firm meets the PII requirements of that body then this should be deemed automatically to meet any relevant PII requirements.

   b. Similarly, where the firm is regulated by a statutory supervisor such as the Financial Conduct Authority, the firm should also be deemed automatically to meet any relevant PII requirements.

   The basis for this is that the professional body or statutory regulator should already:

i. Supervise the individual to a high standard, impose CPD requirements, have a code of ethics and conduct, and have a sanctions regime to enforce professional standards.

ii. Require appropriate arrangements, e.g. PII cover, to compensate for professional shortcomings.

iii. Structure its regime to reflect the advice its members give and their clients' needs, in line with the very diverse nature of the tax advice market.

c) PII requirements can then be defined for unaffiliated agents providing advice or tax services to individuals and small businesses and small organisations. This smaller group of advisers and customers may be a more homogeneous group who provide a less diverse set of tax advice services, which may make it simpler to define a PII requirement for unaffiliated agents, despite the remainder of the tax advice market being much more diverse and complex.

d) More stringent PII requirements could be imposed on promoters of tax avoidance schemes within the POTAS regime, and on intermediaries who in the course of business communicate tax avoidance arrangements falling within the POTAS regime to clients and prospective clients, irrespective of whether the person was affiliated or unaffiliated.

This approach would address several important concerns.

Addresses the diversity and complexity of the tax advice market: The diversity of the tax advice market, particularly in specialist areas, for example where actuaries and other professionals working in pensions give tax advice as an intrinsic component of pension advice, is addressed by allowing appropriate professionals to be deemed to meet the PII requirements. Since these professionals are not the main source of problems around poor advice or tax avoidance advice, this is a simple, low cost and low risk solution that would allow professional advisers affiliated to professional bodies (and their firms) to continue to give clients high quality advice.

Enables a simpler tailored intervention and support for unaffiliated agents advising individuals and small businesses: By targeting the intervention on unaffiliated advisers advising individuals and smaller businesses, this probably reduces the range of tax services involved and so the PII cover needed might be easier to define. Setting PII standards tailored to this sector of the market would keep the new regime fair, reasonable and affordable for smaller unaffiliated agents, thereby allowing them to continue to provide straight-forward cost-efficient services to their personal and small business clients. The benefit is that this would support this sector of the market and improve services in it, with less risk of disruption for the many other diverse areas of the complex tax advice market.

Targets the extra risks posed by promoters of tax avoidance schemes: Finally, by explicitly targeting promoters within the POTAS regime and the intermediaries linked to them, this addresses a further key group.

We set out a more detailed response in the attached appendix.

We would be happy to discuss this matter further if you wished. **Please contact Tim Sexton, who led on this paper on our Pensions Taxation Committee, at** tim.sexton@pwc.com or on **07841 494194.**

Yours sincerely

Patrick Bloomfield
Chair
On behalf of the Association of Consulting Actuaries Limited

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About the Association of Consulting Actuaries

Members of the ACA provide advice to thousands of pension schemes, including most of the country's largest schemes. Members of the Association are all qualified actuaries and all actuarial advice given is subject to the Actuaries' Code. Advice given to clients is independent and impartial. ACA members include the scheme actuaries to schemes covering the majority of members of private sector defined benefit pension schemes. Members also advise thousands of smaller pension arrangements and individuals (many in self-employment) as well as advising life and general insurers.

Particularly relevant for this consultation, our members' work included general consulting to enable the proper running of pension schemes from the perspective of sponsoring employer and trustee – which includes advice on benefit design (including what structures provide benefits that fit within pensions tax rules), on appropriate funding levels and on member communications. Several of our members' firms also provide third party administration for pension schemes and so are key agents for the trustees running schemes (including operating tax rules at a granular level). Without our work, it would be difficult for pension schemes to comply, and enable compliance of scheme members, within the very complex pensions tax regime.

Appendix

Consultation questions

Q1: In your opinion, would introducing a requirement for anyone providing tax advice to have professional indemnity insurance satisfy the policy aims of improving trust in the tax advice market, by targeting poor behaviour and allowing taxpayers greater redress when things go wrong?

A requirement for anyone providing tax advice to have professional indemnity insurance ("**PII**") would support a policy aim of allowing taxpayers greater redress when things go wrong. However, it would not improve trust in the tax advice market and would not target poor behaviour.

It would probably not improve trust in the tax advice market because HMRC's previous research[1] did not suggest that PII was a factor when micro-businesses chose a tax adviser.

PII would also not directly target poor behaviour because it applies after the event, and targeting poor behaviour needs to happen before the event.

Q2: If the government introduces the requirement for professional indemnity insurance, what further steps would you recommend?

There are many challenges in implementing the concept into a practical policy that meets its objectives without imposing unwanted collateral damage on the provision of tax advice and adjacent activities. It would be important that once a policy had been worked up, there should be a consultation on the details and practical aspects (i.e. more than just a consultation on technical details) before implementation, to ensure that it was workable and achieved its objectives appropriately.

It would be sensible to target a requirement for mandatory PII so that it applies where the adviser is advising an individual or a small business or organisation. Large businesses and organisations are already sophisticated buyers of tax advice and do not need further protection.

There would need to be a suitable definition of what counted as a sufficiently small business or organisation to come within the protection of the new policy.

For reasons outlined under question 13 below, it would also be sensible to deem advisers affiliated to a professional body and regulated by that body, or already regulated by a statutory regulator such as the FCA, as satisfying the PII requirements if they satisfy the requirements of their professional body regarding compensation for professional shortcomings.

Q3: Are there any alternative options you would recommend?

We have nothing to add here.

[1] Link to HMRC research (July 2015) about how small and mid-sized businesses choose a tax agent.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/443794/ChoiceTaxAgents_Report373.pdf

Q4: Apart from the costs and potential effects outlined above, are there any other costs you foresee for advisers?

Other costs would include the costs for firms advising in or around tax matters to map and monitor activities that might stray over a boundary into tax advice. This can be seen in respect of regulated investment advice (e.g. IFA advice) where firms have had to put in governance processes to regulate who may give such advice. This can be expensive and can inhibit the provision of services to customers when firms understandably err significantly on the side of caution and minimise what is said to customers in these areas.

At the moment, reputable pension providers and trustees of pension schemes give useful tax information to scheme members, such as how the annual allowance and lifetime allowance work (and even more basically, how individuals are taxed on contributions by and for them). If the policies around tax advice were not skilfully implemented, it could damage this and hinder HMRC because taxpayers would be deprived of access to help and support. Providers and trustees might manage their own risks by refusing to discuss or inform customers of tax matters and would simply repeat a mantra from the investment advice world that the customer should seek independent tax advice. Experience from the IFA world is that only higher net worth individuals tend to seek and pay for regulated advice. HMRC's customers might then either seek advice from HMRC, increasing the burden on HMRC resources, or muddle through with a greater risk of mistakes and errors, thereby creating more work for HMRC.

See Q24 for more thoughts on this.

Governance around monitoring regulatory requirements can create material costs for firms, particularly where tax advice is not the primary function of the firm, and this could also create barriers that hindered HMRC's customers from accessing support.

Questions for tax advisers

Q5. What are your experiences of obtaining professional indemnity insurance or of the market for professional indemnity insurance?

The ACA's members provide actuarial and pensions advice to clients. Actuaries are required by our professional body to have appropriate compensation arrangements for professional shortcomings, but our market is different from the main tax advice market. In particular, the operation of the pensions tax regime – from the perspective of work for scheme trustees and sponsors – is very complex and specialist, and relatively few in the main tax advice space have the detailed knowledge of pensions tax. As such, our experience may not be directly applicable to much of the rest of the [main] tax advice market.

Q6. If you are a tax adviser who practices without insurance, why is this?

Not applicable to us. As noted above, actuaries are required by our professional body to have appropriate compensation arrangements for professional shortcomings, in order to protect our clients.

Questions for the insurance industry

Q7. What factors do you take into account when pricing professional indemnity insurance?

This question is for the insurance industry rather than for us.

Q8. What are your views on the government's proposals for making information on promoters public? How would having more information about promoters of tax avoidance help you in making decisions about pricing or offering insurance?

In terms of whether making public information on promoters would help insurance companies to price or offer insurance, we would leave this as a matter for the insurance companies to comment. We would note that insurance is offered and priced in advance, while information about who is a promoter might take time become available since a decision about who is a promoter would have to be based on evidence gathered about past behaviour and then go through due process. This information might only be available after the event.

However, if there was a more stringent requirement around PII cover imposed on both promoters within the POTAS regime and on any UK-based intermediary, i.e. introducer of a POTAS promoter's tax avoidance services, then there might be a case for a public register of POTAS promoters. Any introducer of tax advice from an offshore adviser could check a public register to see if the offshore adviser was within the POTAS regime such that introducing it to clients would make the introducer an intermediary for POTAS purposes and hence subject to the more onerous PII obligations.

Q9: In your opinion, does the insurance market have the appetite and capacity to manage the new requirement?

This question is for the insurance industry rather than for us.

We would note that PII is usually provided in the context of professional services that are regulated either by a statutory regulator or by a professional body. The technical competencies and professional standards are assessed by the professional body and not by the insurance underwriters. By contrast, the proposal here is that the legislation is to require PII – so the insurers become the gateway to enabling advisers covered by the regulations to proceed.

If insurance companies had to develop the capabilities to assess technical and professional standards, particularly in respect of unaffiliated advisers, this would add to the insurer's business costs and increase premiums in precisely the segment of the tax agent market that would be most sensitive to these costs, i.e. the smaller unaffiliated agent acting for individuals or micro businesses.

In this context, we further note that the insurance market is subject to commercial cycles with providers entering and pulling out of different parts of the insurance markets at different times. This can create a cyclical impact on pricing as insurers respond to whether their claims experience relative to the premiums charged make different markets commercially viable or not. The implications on the availability and pricing of PII cover of extending the base of advisers carrying insurance may take time to emerge.

Questions for people who use tax advisers

Q10. What checks do you carry out when you engage a tax adviser? Do you check whether they are insured?

This question is for clients who buy or use tax advice rather than for us.

Q11. Do you have any experience of making claims or complaints against a tax adviser for bad advice that you would be happy to share with us?

A dissatisfied client should always raise their concerns with their professional adviser. Where the adviser is a member of a professional body, such as an actuary, or has a statutory regulator, then there will be a complaint mechanism to the professional body or regulator or a statutory ombudsman such as the Pension Ombudsman or the Financial Ombudsman's Service.

Questions for everyone

Q12. Do you think there are any lessons on how complaints are handled in similar industries that we can learn to help improve redress?

It would be important to minimise the duplication of regulation around PII cover.

The Berkeley Burke case, *Berkeley Burke Sipp Administration Ltd v Financial Ombudsman Service Limited* [2018] EWHC 2878 (Admin) (30 October 2018), was in part about whether the Financial Ombudsman Service ("**FOS**") was obliged to be consistent in its approach to a case with how the Pension Ombudsman would have approached it where, because of overlapping jurisdictions, either the FOS or the Pension Ombudsman might have adjudicated the case. Having competing overlapping regulatory regimes created uncertainty and required expensive litigation in the High Court to consider the resulting disagreements.

The proposal for mandatory PII will be most successful if it is precisely targeted at the areas where it is needed: viz (a) unaffiliated agents serving individuals and small businesses where the agent currently does not have any PII cover, and (b) promoters within POTAS, and connected intermediaries who introduce the POTAS-advisers' tax avoidance schemes to clients.

Q13. What is the minimum level of cover you recommend, and why?

HMRC might want to set a minimum level for an unaffiliated agent or adviser dealing with the tax affairs of personal clients and small businesses (the precise definition of a small business would need to be defined). However, it should leave the professional bodies to define the appropriate level of cover for professionals regulated by those bodies, and it need not regulate the market for advice to large organisations who would be more sophisticated buyers of services.

Different professional bodies set different PII requirements reflecting their customers' needs.
As Annexe B of the consultation document shows, the different professional bodies have each arrived at different precise requirements reflecting the different markets their members operate in and the needs of their members' clients. While the professional bodies all require their members to hold appropriate arrangements to meet professional shortcomings, including an adequate level of PII cover, the requirements of the different professional bodies have not naturally converged over time to a similar or common minimum level. Although the precise requirements vary, the tax advice market amongst regulated professional advisers is working well in that clients have appropriate protections including adequate PII cover.

This reflects a conclusion of the earlier consultation that the tax advice market is diverse and covers many different areas and types of client, who in turn are served by a diverse and complex range of advisers. The differences in the precise PII rules between professional bodies is part of a solution to the diversity and complexity of the tax advice market and different clients' needs. This solution of diversity works because it is underpinned at the same time by professional training and examinations, ethics and supervision by the professional bodies.

PII requirements for advisers belonging to a professional body

It would be better to embrace this diversity amongst advisers covered by a professional body, since this area of the tax advice market has been working without problem or need for intervention for a number of years. The professional bodies already set levels which, although the precise details vary by professional body, reflect the different types of work done by that body's members and the needs of those advisers' clients. For advisers covered by a professional body the PII requirement should be that the PII cover must:

a) be appropriate to the tax services being offered by the adviser; and

b) meet the requirements imposed by the professional body on its members in this respect.

Statutory regulators such as the FCA similarly impose standards of competence and conduct on entities which those regulators regulate.

HMRC might set a minimum level for unaffiliated advisers

This would leave unaffiliated advisers, for whom the government might want to set a minimum PII requirement. This could apply to advisers giving tax advice either to individuals on their personal tax affairs or to small businesses or organisations, but it need not apply to advice given only to larger businesses.

By restricting the focus to unaffiliated advisers operating in the personal customer and small business sector this is likely to create a more homogenous group of customers and advisers, and a more homogenous set of tax advice services being performed. That would make it simpler and more achievable to set a fair, reasonable and affordable minimum level and set of standards, e.g. excess amounts, run-off criteria etc, without creating difficulties in the rest of the diverse market.

Special rules for promoters of tax-avoidance schemes

Promoters of tax avoidance schemes are a specific target of the project to raise standards of tax advice. Given the higher risk that their activities could cause harm and loss to their clients, HMRC might want to impose a mandatory higher level of PII requirements on such advisers. These higher levels of cover would apply whether the adviser was affiliated to a professional body or was an unaffiliated agent.

A possible test for whether the higher levels of cover were needed might be that firm was within the POTAS regime or was a UK-based intermediary who in the course of business communicated to clients or potential clients the tax avoidance schemes of a firm within the POTAS regime. Including UK-based intermediaries, i.e. introducers, within the more stringent requirements would help to ensure that whenever there was a UK footprint, e.g. through an intermediary, there should be some PII cover.

The amount of PII cover should be set on the principle of "polluter pays", i.e. that the higher risk adviser should carry sufficient insurance commensurate with the higher risk activities. PII rules should not be used or seen to be used as a punitive or deterrence measure.

Summary

Given the diversity of the tax advice market and the number of specialist areas, such as pensions, with specialist advisers, such as actuaries, it is likely to be impossible to create a universal solution to the question of PII cover. However, the advisers operating within a professional body are largely not an issue, and by focusing on the unaffiliated advisers serving personal and small business customers HMRC is more likely to achieve a practical definition for PII that supports the target customer group.

Special PII requirements could be imposed on promoters within the POTAS regime and on intermediaries who facilitated such advisers by providing a UK footprint and by introducing the POTAS-adviser's schemes to clients and potential clients. Having more stringent PII rules for POTAS arrangements would also allow HMRC to designate appropriate less stringent levels of PII cover for the vast majority of smaller unaffiliated agents who simply want to provide straight-forward cost efficient services to their personal and small business clients, thereby keeping the new PII regime affordable in that sector of the market.

Q14. What activities should it be mandatory to cover, and why?

For advisers who are members of a professional body or who are already regulated by an appropriate statutory regulator, this can be left to the professional body to prescribe, as currently happens at the moment.

For unaffiliated advisers who advise individuals on their personal tax affairs and prepare personal tax returns, or who advise small businesses and organisations on similar matters, the precise range of activities to be covered would be an aspect outside our specific expertise.

Q15. Should the government set mandatory minimum or maximum levels of:

- **cover?**
- **run-off cover?**
- **excess?**

See answer to Q13 above.

Q16. What levels should these be?
See answers to Q13 and Q14 above.

Q17. Should the government specify what advice must be covered by the policy? What advice do you think should be covered?
See answers to Q13 and Q14 above.

Q18. Are there any other insurance requirements the government should require?
Nothing to add.

Q19. Who should be required to hold the insurance? Should it be the firm, the principal, everyone who is acting as a tax adviser?

The insurance should be held by the person which whom the client has the engagement, usually the firm. If something goes wrong the client would look for redress from the person who contracted to provide the service and who owed the client a duty of care.

The firm could be deemed automatically to satisfy the PII requirements if the principals of a firm (i.e. the partners or directors who manage or control a firm's activities) are members of a professional body (including accountants, actuaries, solicitors and other similar professions such as member of the Chartered Insurance Institute) and take personal professional responsibility that the firm meets the PII requirements of that body. Similarly, where the firm is regulated by a statutory supervisor such as the Financial Conduct Authority, the firm should also be deemed automatically to meet any relevant PII requirements.

There are a number of firms where the advisers are qualified with different professional bodies. Having different skills and specialisms can provide more holistic advice to clients. We suggest that people giving tax advice in a multi-disciplinary firm (i.e. the people have different professional qualifications) should be deemed to meet the mandatory minimum PII requirements if the firm itself has appropriate arrangements, e.g. PII cover, to compensate for professional shortcomings as required by the main professional body covering the firm. This would usually be the professional body for the majority of the principals or employees of the firm.

For example, a firm of chartered accountants might have a chartered tax adviser and also an employee who formerly worked at HMRC working in its tax department. Since the firm would comply with the PII rules for chartered accountants, we would suggest that all its members and employees (even those not directly qualified as chartered accountants) would be deemed to meet the PII rules since appropriate arrangements would be in place and the firm's conduct would be subject to supervision by its professional body. Similarly, an individual qualified with the Pensions Management Institute but working for a firm of actuaries (i.e. where a significant number of the firm's partners were actuaries) should be considered to be covered by the PII requirements since the actuarial firm would meet the obligations imposed by the actuarial profession on its members.

Q20. What impact do you think setting minimum mandatory levels of cover would have on:
- the market including availability of insurance?
- affordability?

The answer to this question depends on the way the minimum mandatory levels of cover would be introduced, as discussed in previous questions.

Q21. We intend to model the definition of who the requirement will apply to on one of the definitions currently extant in legislation. What a) benefits and b) issues are there with using the Dishonest Tax Agent definition or the Money Laundering regulations definition? Do you have a preference or alternative and why?

Defined at firm-level

A noticeable difference between the two definitions is that the Dishonest Tax Agent definition refers exclusively to individuals because dishonest agents are potentially subject to criminal penalties, e.g. concealing or destroying documents. The Money Laundering regulations refers to firms or sole practitioners, i.e. at firm level.

As per our answer to Q19 we think that asking for PII at firm-level rather than at individual level is essential since the client engages with the firm. PII cover would be a firm-level matter.

By way of business

Both definitions refer to acting either "in the course of business" or "by way of business". This would be a helpful criterion because it should automatically allow the trustees of a pension scheme to give tax information (and personal illustrations on matters such as lifetime and annual allowance and other core matters) to their members since the trustees would not be doing this by way of business.

Any advisers advising the trustees in these matters would be acting by way of business and would need appropriate PII cover, but the trustees themselves would not automatically be caught by the new regime. We hope HMRC can confirm that it reads this in the same way as we do (if not, then specific action needs to be taken to achieve the described outcome which is essential). It is possible that pension scheme trustees might not respond to this consultation because they would not have imagined that the effects of the proposals could ever apply to their roles and activities.

An explicit link to acting “by way of business” might also allow groups like Citizens’ Advice, the Chartered Institute of Taxation’s Low Income Tax Reform Group, TaxAid, The Pensions Advisory Service (soon to be renamed MoneyHelper as part of the government’s Money Advisory Service) and other similar bodies to operate without falling into a new definition and hence falling foul of the new requirements.

Q22. What activities do you think should be excluded from the requirement for compulsory professional indemnity insurance and why?

Advice to large businesses and organisations can be excluded from the requirement for compulsory regulation-defined professional indemnity insurance. Such organisations are usually sophisticated buyers of services, may have their own in-house tax department or experts and are unlikely to buy material tax advice services from providers who were not qualified tax professionals. There would be a need to define the boundary between a small organisation and a large one, and a large organisation need not be a trading business but could include for example a large pension scheme, a large charity or a large NHS Trust.

Q23. Would there be any benefit in having different minimum requirements for different activities?

There would be a benefit in having different minimum requirements for different activities. This is already illustrated and operating under the different professional bodies who set their PII requirements to meet the needs of their members’ clients.

Assuming that the professional bodies will continue to supervise their different areas appropriately, as now, this leaves the unaffiliated tax adviser community. If mandatory PII was applicable only in respect of advice by unaffiliated agents to individuals and small businesses it might be a more homogenous group where a straightforward requirement would work, e.g. a minimum of £X or if greater “Y” times fee income up to an upper level of cover of £Z.

Promoters of tax avoidance schemes would be different from the vast majority of advisers. Therefore, there could be an overlay that would impose more substantial PII requirements on any adviser in the Promoters of Tax Avoidance Schemes (“POTAS”) regime.

Q24. What benefits or issues would there be in considering the financial services regulatory distinction between advice and guidance for tax advice?

A number of more specialist providers, such as actuaries, would historically have considered that they gave only guidance on tax matters as a component of actuarial advice, and did not give “tax advice” as such. This would reflect a narrower view in the past of what would constitute tax advice compared to the much wider definitions that we understand HMRC is considering using for the purposes of this exercise. In that context, “guidance” might have included also giving a view perhaps caveated as “We are of course not lawyers or tax experts; we trust our analysis is helpful”, but noting that the client might wish to ask their legal and tax advisers for confirmation or in case those advisers had a different perspective on any point

At first glance, it might be tempting to argue that simply providing tax guidance should not fall within the proposals even if providing tax advice became an activity covered by the proposals. For example, as such, many but not all pension advisers might hope that, if there was a relatively narrow scope and definition of tax advice, they would be able to continue to operate untouched by any regulation of tax advisers.

There is also a concept of tax advice being a minor aspect of much wider non-tax work, e.g. legal advice, IFA advice or pensions advice. We are aware that a number of firms providing primarily pensions advice to clients, where that advice necessarily includes commenting on tax matters, would welcome an exemption for guidance on tax as opposed to tax advice, or an exemption for tax advice given as part of wider non-tax work.

However, the problem with this approach is that for various reasons we expect that the definition to be used for tax advice would be widely drawn, e.g. see the two examples in Appendix A of the consultation document. Furthermore, in practice the boundary between guidance and advice, or what was a minor part of advice as opposed to being non-minor, might be blurred and hard to define clearly. The danger is that if either the definition of tax advice was too narrow or guidance was excluded, then the targets of this consultation, i.e. those who provide poor quality advice or promote aggressive tax avoidance schemes, would seek shelter by arguing that they too provided merely guidance and not advice. (We understand that scams are sometimes presented as "views that need checking with tax advisers", so that this too may be something HMRC would be uncomfortable with in a new regulatory environment.)

This would lead to the following bad outcomes:

a) HMRC might be forced to spend a disproportionate amount of time attempting to define, police and pursue through tax tribunals a distinction between appropriate guidance activities and unacceptable tax advice or avoidance that was being camouflaged as guidance.

b) As a consequence, legitimate advisers (e.g. pension advisers, legal advisers or independent financial advisers) would end up subject to regulation, scrutiny or unhelpful restrictions on their legitimate activities involving tax matters as an unfortunate consequence of HMRC's necessary activities to tackle the unacceptable practices that were being camouflaged as guidance.

c) Conscientious advisers would have to set up governance and monitoring procedures to monitor whether their work remained the right side of any exemption, or whether it was in danger of crossing into non-exempted tax advice. This would add cost and complexity for the conscientious advisers, probably without hindering the less conscientious advisers or the very small minority who deliberately promoted egregious tax avoidance schemes.

d) Socially important activities, e.g. providing good quality pension advice, good quality legal advice or legitimate personal financial planning, and enabling the good governance of pension schemes by trustees would be constrained, reduced or made more expensive because of tax regulations or restrictions. A poor policy decision about how to go about raising standards in the tax advice market could be damaging to the provision of other socially important activities.

In light of the above, rather than attempting to define a boundary between tax guidance and advice, using membership (or fully qualified membership) of professional bodies might be a better way to provide a trusted hallmark for identifying legitimate advisers. This would also be much harder for the targets of this consultation to shelter within.

Q25. What benefits or difficulties do you foresee with the inclusion of a provision around UK taxation in the definition?

Multi-national firms might give advice predominantly on a foreign matter, e.g. the Dublin office of an adviser might give advice to an Irish pension scheme with UK members and a component of that advice might cover the effects on members resident in the UK. HMRC is unlikely to be able to enforce a law in this area against an overseas entity. Therefore, it might be more practical to restrict the law to apply persons in the UK who give advice on UK tax to individuals and small businesses, or persons in the UK who facilitate other people outside the UK giving such advice.

Q26. Do you agree with the 3 elements of enforcement? [Transparency, Checking that advisers have insurance, Consequences of operating without insurance]

Transparency

Transparency is likely to be a challenging requirement.

Businesses would be happy to confirm that there are arrangements to compensate for professional shortcomings, but the detail about the PII cover is almost always commercially confidential and sensitive information within a business. Furthermore, it is likely that there would be no PII cover for the first layer of loss. Smaller claims would be met from the firm's revenue, similarly to the excess on an individual's car insurance or house insurance. For larger firms with significant revenue and capacity to meet claims, this uninsured first layer could be correspondingly large. Above the uninsured first layer, the PII could be a simple insurance policy or it could be a sophisticated mix of cover, re-insurance etc. There might not be a simple "insurance certificate" to display, and the larger the business the more likely the PII cover would be much more complex than a simple insurance policy. None of this might be easy to explain simply to an individual client.

As HMRC research about how individuals and small businesses choose a tax adviser has shown, it is unlikely that any rules on making PII cover transparent to potential customers would influence the target market of such customers. It might be better not to rely on individual clients to take the initiative to enforce compliance, and to focus efforts elsewhere.

Checking that advisers have insurance

Checking insurance at the time of interaction with HMRC as an agent would capture some but not all professional advisers. Many professionals will never need to register with HMRC as a tax agent. For example, almost no actuary would need to be appointed as a tax agent using form 64-8 even though many clients may receive pension advice, including advice around tax, from the actuary.

However, the professional bodies already have the arrangements that each body deems appropriate to supervise insurance. The professional bodies guard their reputations jealously and so have an incentive to ensure that their members serve the public appropriately. It may be appropriate to let the professional bodies continue to supervise their members as they have been doing successfully without problems for many years, and then to focus HMRC's resources on specific target populations.

Smaller, unaffiliated advisers who do not directly interact with HMRC as agents are harder to identify. However, these advisers presumably have to file tax returns of their own showing the taxable income of their business activities. This would be relevant if the business activities were in areas of interest such as tax preparation, tax compliance, bookkeeping etc.

Whenever HMRC apply the POTAS regime to an adviser it should in principle be possible for HMRC to track through to all promoters and intermediaries based in the UK who are notified as linked to the tax-avoidance arrangements connected to that POTAS-adviser and to enquire about the PII cover held.

Q27. What are your views on the enforcement options described above?

Imposing the taxpayer's tax liabilities on the tax adviser would not be attractive since there would be no link between the level of culpability of the adviser and the amount of extra tax imposed. A highly culpable adviser who was lucky in its client's circumstances could face a very small tax bill compared to a much less culpable adviser whose client's tax bill turned out to be greater.

A graded scale of enforcement from nudges and reminders, through to temporary disablement of access to online services and penalties would seem a more appropriate way to enforce compliance. The professional bodies would have their own compliance and enforcement procedures with sanctions as appropriate.

The sanctions for not having proper PII cover could be more severe for promoters of tax avoidance schemes, reflecting the higher risks to their clients of these products.

Q28. Do you agree that advisers who already hold professional indemnity insurance as it is required by their professional or regulatory body should automatically satisfy the new requirement? How could we check?

We agree that this would be a sensible way to operate. The existing protections appear to be working satisfactorily in respect of clients of professional or regulated advisers. Adopting this approach would be very efficient for HMRC at very low risk for individual taxpayers or small businesses, and would then allow HMRC to focus its efforts on other areas of the market.

The professional bodies can comment on how often they find an uninsured member or firm, or receive a complaint that reflects that the professional person was not appropriately insured.

Q29. The government's ambition is for HMRC to share information about the adviser with the client digitally. What are your views of this?

Given the wide range of advisers involved in giving tax advice, a digital database made available by HMRC to clients feels like a lot of work and an ambitious project, but it is not clear how much value the clients would get from it. Unless the clients engaged with the database it would have largely unfulfilled value, but it would still have significant costs.

Q30. What effects do you foresee of introducing the requirement for everyone at the same time?

We have no comments to add.

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