



# Finance Act 2014

## 2014 CHAPTER 26

### PART 5

#### PROMOTERS OF TAX AVOIDANCE SCHEMES

##### *Conduct notices*

#### **237 Duty to give conduct notice**

- (1) Subsections (5) to (9) apply if an authorised officer becomes aware at any time that a person (“P”) who is carrying on a business as a promoter—
- (a) has, in the period of 3 years ending with that time, met one or more threshold conditions, and
  - (b) was carrying on a business as a promoter when P met that condition.

[<sup>F1</sup>(1A) Subsections (5) to (9) also apply if an authorised officer becomes aware at any time (“the relevant time”) that—

- (a) a person has, in the period of 3 years ending with the relevant time, met one or more threshold conditions,
- (b) at the relevant time another person (“P”) meets one or more of those conditions by virtue of Part 2 of Schedule 34 (meeting the threshold conditions: bodies corporate and partnerships), and
- (c) P is, at the relevant time, carrying on a business as a promoter.]

- (2) Part 1 of Schedule 34 sets out the threshold conditions and describes how they are met.
- (3) Part 2 of that Schedule contains provision about [<sup>F2</sup>when a person is treated as meeting a threshold condition].
- (4) See also Schedule 36 (which contains provision about the meeting of threshold conditions and other conditions by partnerships).

[<sup>F3</sup>(5) The authorised officer must determine—

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- (a) in a case within subsection (1), whether or not P's meeting of the condition mentioned in subsection (1)(a) (or, if more than one condition is met, the meeting of all of those conditions, taken together) should be regarded as significant in view of the purposes of this Part, or
- (b) in a case within subsection (1A), whether or not—
  - (i) the meeting of the condition by the person as mentioned in subsection (1A)(a) (or, if more than one condition is met, the meeting of all of those conditions, taken together), and
  - (ii) P's meeting of the condition (or conditions) as mentioned in subsection (1A)(b),
 should be regarded as significant in view of those purposes.]
- (6) Subsection (5) does not apply if a conduct notice or a monitoring notice already has effect in relation to P.
- (7) If the authorised officer determines under [<sup>F4</sup>subsection (5)(a)] that P's meeting of the condition or conditions in question should be regarded as significant, the officer must give P a conduct notice, unless subsection (8) applies.
- [<sup>F5</sup>(7A) If the authorised officer determines under subsection (5)(b) that both—
  - (a) the meeting of the condition or conditions by the person as mentioned in subsection (1A)(a), and
  - (b) P's meeting of the condition or conditions as mentioned in subsection (1A)(b),
 should be regarded as significant, the officer must give P a conduct notice, unless subsection (8) applies.]
- (8) This subsection applies if the authorised officer determines that, having regard to the extent of the impact that P's activities as a promoter are likely to have on the collection of tax, it is inappropriate to give P a conduct notice.
- (9) The authorised officer must determine under subsection (5) that the meeting of the condition (or all the conditions) <sup>F6</sup>... should be regarded as significant if the condition (or any of the conditions) is in any of the following paragraphs of Schedule 34—
  - (a) paragraph 2 (deliberate tax defaulters);
  - (b) paragraph 3 (breach of Banking Code of Practice);
  - (c) paragraph 4 (dishonest tax agents);
  - (d) paragraph 6 (persons charged with certain offences);
  - (e) paragraph 7 (opinion notice of GAAR Advisory Panel).
- [<sup>F7</sup>(10) If, as a result of subsection (1A), subsections (5) to (9) apply to a person, this does not prevent the giving of a conduct notice to the person mentioned in subsection (1A)(a).]

#### Textual Amendments

- F1** S. 237(1A) inserted (with effect in accordance with Sch. 19 para. 9 of the amending Act) by [Finance Act 2015 \(c. 11\)](#), [Sch. 19 para. 2\(2\)](#)
- F2** Words in s. 237(3) substituted (with effect in accordance with Sch. 19 para. 9 of the amending Act) by [Finance Act 2015 \(c. 11\)](#), [Sch. 19 para. 2\(3\)](#)
- F3** S. 237(5) substituted (with effect in accordance with Sch. 19 para. 9 of the amending Act) by [Finance Act 2015 \(c. 11\)](#), [Sch. 19 para. 2\(4\)](#)
- F4** Words in s. 237(7) substituted (with effect in accordance with Sch. 19 para. 9 of the amending Act) by [Finance Act 2015 \(c. 11\)](#), [Sch. 19 para. 2\(5\)](#)

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- F5** S. 237(7A) inserted (with effect in accordance with Sch. 19 para. 9 of the amending Act) by [Finance Act 2015 \(c. 11\)](#), [Sch. 19 para. 2\(6\)](#)
- F6** Words in s. 237(9) omitted (with effect in accordance with Sch. 19 para. 9 of the amending Act) by virtue of [Finance Act 2015 \(c. 11\)](#), [Sch. 19 para. 2\(7\)](#)
- F7** S. 237(10) inserted (with effect in accordance with Sch. 19 para. 9 of the amending Act) by [Finance Act 2015 \(c. 11\)](#), [Sch. 19 para. 2\(8\)](#)

## **[<sup>F8</sup>237A Duty to give conduct notice: defeat of promoted arrangements**

- (1) If an authorised officer becomes aware at any time (“the relevant time”) that a person (“P”) who is carrying on a business as a promoter meets any of the conditions in subsections (11) to (13), the officer must determine whether or not P’s meeting of that condition should be regarded as significant in view of the purposes of this Part.

But see also subsection (14).

- (2) An authorised officer must make the determination set out in subsection (3) if the officer becomes aware at any time (“the section 237A(2) relevant time”) that—
  - (a) a person meets a condition in subsection (11), (12) or (13), and
  - (b) at the section 237A(2) relevant time another person (“P”), who is carrying on a business as a promoter, meets that condition by virtue of Part 4 of Schedule 34A (meeting the section 237A conditions: bodies corporate and partnerships).
- (3) The authorised officer must determine whether or not—
  - (a) the meeting of the condition by the person as mentioned in subsection (2)(a), and
  - (b) P’s meeting of the condition as mentioned in subsection (2)(b),should be regarded as significant in view of the purposes of this Part.
- (4) Subsections (1) and (2) do not apply if a conduct notice or monitoring notice already has effect in relation to P.
- (5) Subsection (1) does not apply if, at the relevant time, an authorised officer is under a duty to make a determination under section 237(5) in relation to P.
- (6) Subsection (2) does not apply if, at the section 237A(2) relevant time, an authorised officer is under a duty to make a determination under section 237(5) in relation to P.
- (7) But in a case where subsection (1) does not apply because of subsection (5), or subsection (2) does not apply because of subsection (6), subsection (5) of section 237 has effect as if—
  - (a) the references in paragraph (a) of that subsection to “subsection (1)”, and “subsection (1)(a)” included subsection (1) of this section, and
  - (b) in paragraph (b) of that subsection the reference to “subsection (1A)(a)” included a reference to subsection (2)(a) of this section and the reference to subsection (1A)(b) included a reference to subsection (2)(b) of this section.
- (8) If the authorised officer determines under subsection (1) that P’s meeting of the condition in question should be regarded as significant, the officer must give P a conduct notice, unless subsection (10) applies.
- (9) If the authorised officer determines under subsection (3) that—

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- (a) the meeting of the condition by the person as mentioned in subsection (2)(a), and
  - (b) P's meeting of the condition as mentioned in subsection (2)(b),
- should be regarded as significant in view of the purposes of this Part, the officer must give P a conduct notice, unless subsection (10) applies.
- (10) This subsection applies if the authorised officer determines that, having regard to the extent of the impact that P's activities as a promoter are likely to have on the collection of tax, it is inappropriate to give P a conduct notice.
- (11) The condition in this subsection is that in the period of 3 years ending with the relevant time at least 3 relevant defeats have occurred in relation to P.
- (12) The condition in this subsection is that at least two relevant defeats have occurred in relation to P at times when a single defeat notice under section 241A(2) or (6) had effect in relation to P.
- (13) The condition in this subsection is that at least one relevant defeat has occurred in relation to P at a time when a double defeat notice under section 241A(3) had effect in relation to P.
- (14) A determination that the condition in subsection (12) or (13) is met cannot be made unless—
- (a) the defeat notice in question still has effect when the determination is made, or
  - (b) the determination is made on or before the 90th day after the day on which the defeat notice in question ceased to have effect.
- (15) Schedule 34A sets out the circumstances in which a “relevant defeat” occurs in relation to a person and includes provision limiting what can amount to a further relevant defeat in relation to a person (see paragraph 6).

#### Textual Amendments

**F8** Ss. 237A-237D inserted (15.9.2016) by [Finance Act 2016 \(c. 24\), s. 160\(2\)](#)

#### Modifications etc. (not altering text)

**C1** S. 237A modified (15.9.2016) by [Finance Act 2016 \(c. 24\), s. 160\(20\)\(21\)](#)

**C2** S. 237A modified (15.9.2016) by [Finance Act 2016 \(c. 24\), s. 160\(22\)](#)

### **237B Duty to give further conduct notice where provisional notice not complied with**

- (1) An authorised officer must give a conduct notice to a person (“P”) who is carrying on a business as a promoter if—
- (a) a conduct notice given to P under section 237A(8)—
    - (i) has ceased to have effect otherwise than as a result of section 237D(2) or 241(3) or (4), and
    - (ii) was provisional immediately before it ceased to have effect,
  - (b) the officer determines that P had failed to comply with one or more conditions in the conduct notice,
  - (c) the conduct notice relied on a Case 3 relevant defeat,
  - (d) since the time when the conduct notice ceased to have effect, one or more relevant defeats falling within subsection (2) have occurred in relation to—

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- (i) P, and
  - (ii) any arrangements to which the Case 3 relevant defeat also relates, and
- (e) had that relevant defeat or (as the case may be) those relevant defeats, occurred before the conduct notice ceased to have effect, an authorised officer would have been required to notify the person under section 237C(3) that the notice was no longer provisional.
- (2) A relevant defeat falls within this subsection if it occurs by virtue of Case 1 or Case 2 in Schedule 34A.
- (3) Subsection (1) does not apply if the authorised officer determines that, having regard to the extent of the impact that the person's activities as a promoter are likely to have on the collection of tax, it is inappropriate to give the person a conduct notice.
- (4) Subsection (1) does not apply if a conduct notice or monitoring notice already has effect in relation to the person.
- (5) For the purposes of this Part a conduct notice “relies on a Case 3 relevant defeat” if it could not have been given under the following condition.

The condition is that paragraph 9 of Schedule 34A had effect with the substitution of “100% of the tested arrangements” for “75% of the tested arrangements”.

#### Textual Amendments

**F8** Ss. 237A-237D inserted (15.9.2016) by [Finance Act 2016 \(c. 24\), s. 160\(2\)](#)

### **237C When a conduct notice given under section 237A(8) is “provisional”**

- (1) This section applies to a conduct notice which—
- (a) is given to a person under section 237A(8), and
  - (b) relies on a Case 3 relevant defeat.
- (2) The notice is “provisional” at all times when it has effect, unless an authorised officer notifies the person that the notice is no longer provisional.
- (3) An authorised officer must notify the person that the notice is no longer provisional if subsection (4) or (5) applies.
- (4) This subsection applies if—
- (a) the condition in subsection (5)(a) is not met, and
  - (b) a full relevant defeat occurs in relation to P.
- (5) This subsection applies if—
- (a) two, or all three, of the relevant defeats by reference to which the conduct notice is given would not have been relevant defeats if paragraph 9 of Schedule 34A had effect with the substitution of “100% of the tested arrangements” for “75% of the tested arrangements”, and
  - (b) the same number of full relevant defeats occur in relation to P.
- (6) A “full relevant defeat” occurs in relation to P if—
- (a) a relevant defeat occurs in relation to P otherwise than by virtue of Case 3 in paragraph 9 of Schedule 34A, or

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- (b) circumstances arise which would be a relevant defeat in relation to P by virtue of paragraph 9 of Schedule 34A if that paragraph had effect with the substitution of “100% of the tested arrangements” for “75% of the tested arrangements”.
- (7) In determining under subsection (6) whether a full relevant defeat has occurred in relation to P, assume that in paragraph 6 of Schedule 34A (provision limiting what can amount to a further relevant defeat in relation to a person) the first reference to a “relevant defeat” does not include a relevant defeat by virtue of Case 3 in paragraph 9 of Schedule 34A.

#### Textual Amendments

**F8** Ss. 237A-237D inserted (15.9.2016) by [Finance Act 2016 \(c. 24\), s. 160\(2\)](#)

### **237D Judicial ruling upholding asserted tax advantage: effect on conduct notice which is provisional**

- (1) Subsection (2) applies if at any time—
- (a) a conduct notice which relies on a Case 3 relevant defeat (see section 237B(5)) is provisional, and
  - (b) a court or tribunal upholds a corresponding tax advantage which has been asserted in connection with any of the related arrangements to which that relevant defeat relates (see paragraph 5(2) of Schedule 34A).
- (2) The conduct notice ceases to have effect when that judicial ruling becomes final.
- (3) An authorised officer must give the person to whom the conduct notice was given a written notice stating that the conduct notice has ceased to have effect.
- (4) For the purposes of this section, a tax advantage is “asserted” in connection with any arrangements if a person makes a return, claim or election on the basis that the tax advantage arises from those arrangements.

In relation to the arrangements mentioned in paragraph (b) of subsection (1) “corresponding tax advantage” means a tax advantage corresponding to any tax advantage the counteraction of which contributed to the relevant defeat mentioned in that paragraph.

- (5) For the purposes of this section a court or tribunal “upholds” a tax advantage if—
- (a) the court or tribunal makes a ruling to the effect that no part of the tax advantage is to be counteracted, and
  - (b) that judicial ruling is final.
- (6) For the purposes of this Part a judicial ruling is “final” if it is—
- (a) a ruling of the Supreme Court, or
  - (b) a ruling of any other court or tribunal in circumstances where—
    - (i) no appeal may be made against the ruling,
    - (ii) if an appeal may be made against the ruling with permission, the time limit for applications has expired and either no application has been made or permission has been refused,

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- (iii) if such permission to appeal against the ruling has been granted or is not required, no appeal has been made within the time limit for appeals, or
- (iv) if an appeal was made, it was abandoned or otherwise disposed of before it was determined by the court or tribunal to which it was addressed.

(7) In this section references to “counteraction” include anything referred to as a counteraction in any of Conditions A to F in paragraphs 11 to 16 of Schedule 34A.]

#### Textual Amendments

**F8** Ss. 237A-237D inserted (15.9.2016) by [Finance Act 2016 \(c. 24\), s. 160\(2\)](#)

### 238 Contents of a conduct notice

- (1) A conduct notice is a notice requiring the person to whom it has been given (“the recipient”) to comply with conditions specified in the notice.
- (2) Before deciding on the terms of a conduct notice, the authorised officer must give the person to whom the notice is to be given an opportunity to comment on the proposed terms of the notice.
- (3) A notice may include only conditions that it is reasonable to impose for any of the following purposes—
  - (a) to ensure that the recipient provides adequate information to its clients about relevant proposals, and relevant arrangements, in relation to which the recipient is a promoter;
  - (b) to ensure that the recipient provides adequate information about relevant proposals in relation to which it is a promoter to persons who are intermediaries in relation to those proposals;
  - (c) to ensure that the recipient does not fail to comply with any duty under a specified disclosure provision;
  - (d) to ensure that the recipient does not discourage others from complying with any obligation to disclose to HMRC information of a description specified in the notice;
  - (e) to ensure that the recipient does not enter into an agreement with another person (“C”) which relates to a relevant proposal or relevant arrangements in relation to which the recipient is a promoter, on terms which—
    - (i) impose a contractual obligation on C which falls within paragraph 11(2) or (3) of Schedule 34 (contractual terms restricting disclosure), or
    - (ii) impose on C obligations within both paragraph 11(4) and (5) of that Schedule (contractual terms requiring contribution to fighting funds and restricting settlement of proceedings);
  - (f) to ensure that the recipient does not promote relevant proposals or relevant arrangements which rely on, or involve a proposal to rely on, one or more contrived or abnormal steps to produce a tax advantage;
  - (g) to ensure that the recipient does not fail to comply with any stop notice which has effect under paragraph 12 of Schedule 34.

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- (4) References in subsection (3) to ensuring that adequate information is provided about proposals or arrangements include—
- (a) ensuring the adequacy of the description of the arrangements or proposed arrangements;
  - (b) ensuring that the information includes an adequate assessment of the risk that the arrangements or proposed arrangements will fail;
  - (c) ensuring that the information does not falsely state, and is not likely to create a false impression, that HMRC have (formally or informally) considered, approved or expressed a particular opinion in relation to the proposal or arrangements.
- (5) In subsection (3)(c) “specified disclosure provision” means a disclosure provision that is specified in the notice; and for this purpose “disclosure provision” means any of the following—
- (a) section 308 of FA 2004 (disclosure of tax avoidance schemes: duties of promoter);
  - (b) section 312 of FA 2004 (duty of promoter to notify client of number);
  - (c) sections 313ZA and 313ZB of FA 2004 (duties to provide details of clients and certain others);
  - (d) Part 1 of Schedule 36 to FA 2008 (duties to provide information and produce documents).
- (6) In subsection (4)(b) “fail”, in relation to arrangements or proposed arrangements, means not result in a tax advantage which the arrangements or (as the case may be) proposed arrangements might be expected to result in.
- (7) The Treasury may by regulations amend the definition of “disclosure provision” in subsection (5).

### **239 Section 238: supplementary**

- (1) In section 238 the following expressions are to be interpreted as follows.
- (2) “Adequate” means adequate having regard to what it might be reasonable for a client or (as the case may be) an intermediary to expect; and “adequacy” is to be interpreted accordingly.
- (3) A person (“C”) is a “client” of a promoter, if at any time when a conduct notice has effect, the promoter—
- (a) makes a firm approach to C in relation to a relevant proposal with a view to the promoter making the proposal available for implementation by C or another person;
  - (b) makes a relevant proposal available for implementation by C;
  - (c) takes part in the organisation or management of relevant arrangements entered into by C.
- (4) The recipient of a conduct notice “promotes” a relevant proposal if it—
- (a) takes part in designing the proposal,
  - (b) makes a firm approach to a person in relation to the proposal with a view to making the proposal available for implementation by that person or another person, or



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- (c) makes the proposal available for implementation by persons (other than the recipient).
- (5) The recipient of a conduct notice “promotes” relevant arrangements if it takes part in designing, organising or managing the arrangements.

#### **240 Amendment or withdrawal of conduct notice**

- (1) This section applies where a conduct notice has been given to a person.
- (2) An authorised officer may at any time amend the notice.
- (3) An authorised officer—
  - (a) may withdraw the notice if the officer thinks it is not necessary for it to continue to have effect, and
  - (b) in considering whether or not that is necessary must take into account the person's record of compliance, or failure to comply, with the conditions in the notice.

#### **241 Duration of conduct notice**

- (1) A conduct notice has effect from the date specified in it as its commencement date.
- (2) A conduct notice ceases to have effect—
  - (a) at the end of the period of two years beginning with its commencement date, or
  - (b) if an earlier date is specified in it as its termination date, at the end of that day.
- (3) A conduct notice ceases to have effect if withdrawn by an authorised officer under section 240.
- (4) A conduct notice ceases to have effect in relation to a person when a monitoring notice takes effect in relation to that person.

[<sup>F9</sup>(5) See also section 237D(2) (provisional conduct notice affected by judicial ruling).]

#### **Textual Amendments**

**F9** S. 241(5) inserted (15.9.2016) by Finance Act 2016 (c. 24), s. 160(6)

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