

## Higher and higher?

*Mark McLaughlin looks at HMRC's standard for agents and asks whether this approach is necessary and proportionate*

It might be argued that HMRC should get its own house in order before seeking to impose standards on tax advisers. On the other hand, tax advisers are a mixed bunch in terms of qualifications, experience and abilities; within that broad spectrum the professional standards of tax advisers are, putting it mildly, variable. So, it should probably come as no surprise that HMRC is taking a close interest in regulating agents' behaviour.

The professional standards for those engaged in tax work who are members of professional bodies are generally set out in regulatory documents produced by those bodies. For example, 'Professional Conduct in Relation to Taxation' (PCRT) was produced by seven professional bodies (including the Chartered Institute of Taxation, Institute of Chartered Accountants in England and in Scotland, Society of Trust and Estate Practitioners) "...to assist and advise members on their professional conduct in relation to taxation, and particularly in the tripartite relationship between a member, client... and HMRC".

Solicitors and barristers who advise on tax are subject to their own rules and regulations, but still need to be mindful of the PCRT standards for members of the relevant professional bodies.

### HMRC's standard for agents

It has been estimated that around 65% of individuals and firms who undertake tax work are not members of any professional body. Consequently, HMRC has developed its own set of standards for tax advisers ('The HMRC standard for agents'). HMRC expects all 'agents' (a term that includes tax advisers) who interact with them to maintain HMRC's standards, regardless of professional body membership. However, HMRC's standards will be particularly relevant to unqualified and unregulated tax advisers.

The first HMRC standard was published in February 2016. There have been subsequent iterations, the latest of them being on 11 May 2023 ([tinyurl.com/HMRC-HSFA](https://www.tinyurl.com/HMRC-HSFA)). HMRC has incorporated some of the PCRT fundamental principles into their own standard for agents, albeit that the principles are largely expressed in terms of the relationship between HMRC and agents.

There are separate standards for tax compliance and tax planning.

### Compliance standards

The HMRC standard for tax compliance requires agents to maintain high standards in respect of the following:

- Integrity: this includes providing HMRC with relevant information when asked or when appropriate, and providing clients with relevant and material information before, during and (where necessary) after their engagement.
- Professional competence and due care: this includes maintaining correct and up-to-date knowledge, working to prevent client errors and reporting suspicions of tax fraud or evasion.
- Professional behaviour: this involves legal compliance (e.g. with money laundering and data protection legislation), interaction with HMRC (co-operating with HMRC enquiries, and

dealing courteously and professionally with HMRC staff), and interaction with clients (e.g. clear and agreed terms of engagement, and ensuring all communications are fair, clear, accurate and not misleading).

### **Tax planning standards**

HMRC has four standards for those advising on tax planning:

- **Lawful behaviour:** agents are expected to act lawfully, and tax planning should be based on a realistic assessment of the facts and a credible view of the law. Agents are also required to advise their clients if there is material uncertainty in the law.
- **Disclosure and transparency:** HMRC expects agents to represent all relevant facts fairly.
- **Advising on tax planning arrangements:** agents must not create, encourage or promote tax planning which sets out to achieve results contrary to the clear intention of Parliament in enacting relevant legislation, or which are highly artificial or highly contrived and seek to exploit shortcomings in the relevant legislation.
- **Professional judgement and appropriate documentation:** agents are required to exercise professional judgement in applying HMRC's standards to client advisory situations. Agents are also required to keep timely notes of the rationale for judgements exercised in seeking to comply with those requirements.

HMRC enforces its standard broadly by monitoring and collecting evidence of poor agent behaviour, and taking what it considers to be appropriate action.

### **Falling below HMRC's standards**

HMRC has a range of powers and practices to deal with breaches of the standard by agents. On 11 January 2023, HMRC published 'How HMRC works with agents' ([tinyurl.com/HMRC-HAWA](https://tinyurl.com/HMRC-HAWA)), which sets out HMRC's approach when dealing with tax agents and advisers. HMRC warns that if an agent does not meet the required standard, action will be taken: "We will encourage agents to improve their behaviour, impose sanctions to address poor behaviours, limit what they can do or prevent them from acting for clients altogether." HMRC states the action taken will be "proportionate, reasonable, justifiable, lawful and procedurally fair".

Various policy approaches to address poor tax agent behaviours are considered by HMRC to be supported by the framework provided by CRCA 2005. The actions to address poor taxpayer behaviour comprise HMRC policies and statutory powers. There are three main HMRC policies and statutory powers:

1. HMRC could consider suspending agent codes to limit access to self-assessment and corporation tax functions. In most cases, access will be restored if the tax agent responds constructively to HMRC's concerns and addresses their poor behaviour or non-compliance.
2. HMRC can adopt a 'refusal to deal with' (RTDW) approach to agents. This sanction is reserved for 'extreme and exceptional' circumstances of poor agent behaviour, such as threatening, abusive and rude behaviour towards HMRC staff, and serious abuses of the tax system. There is no statutory right of appeal against HMRC's refusal to deal with an agent. However, HMRC points out that this approach is an 'option of last resort'.
3. Certain statutory powers are potentially available for HMRC to address what it considers to be poor agent behaviour. These broadly include:

- Conduct notices and financial penalties of up to £50,000 to tax agents who have acted dishonestly in their dealings with HMRC (FA 2012, Sch 38).
- A ‘public interest disclosure’ (under CRCA 2005, s 20(3)) to the agent’s professional body (if they are a member of one).
- A penalty under the regime for errors in tax returns and other documents, where the error in the taxpayer’s document is attributable to another person (FA 2007, Sch 24, para 1A). However, in practice it is uncommon for a tax agent to deliberately give a taxpayer false information with the intention of the taxpayer then giving HMRC a document containing an error.
- The promoters of tax avoidance scheme (POTAS) provisions (in FA 2014 and FA 2021), which allow HMRC to issue formal notices, such as ‘conduct notices’ and ‘defeat notices’, to tax agents who promote avoidance schemes.
- The disclosure of tax avoidance schemes (DOTAS) provisions (FA 2004, Pt 7) and corresponding rules for the disclosure of avoidance schemes relating to VAT and other indirect taxes (DASVOIT) (F(No 2)A 2017, Sch 17), which require promoters of tax avoidance schemes to disclose to HMRC details of the schemes they are promoting, how they work and who their clients are.
- The ‘enablers’ legislation (F(No 2)A 2017, Sch 16), which allows HMRC to impose financial penalties on those who have enabled tax avoidance where abusive tax arrangements have been defeated.
- The money laundering regulations, which require all external accountants and tax advisers to be supervised for anti-money laundering purposes.
- The corporate criminal offences legislation, which provides for criminal offences relating to the evasion of UK and foreign tax; these are strict liability offences.
- Naming tax avoidance scheme promoters, enablers, and suppliers (FA 2022, s 86). A regularly updated list is published on the [Gov.uk](https://www.gov.uk) website ([tinyurl.com/HMRC-NTASPES](https://tinyurl.com/HMRC-NTASPES)).
- In the most extreme cases, HMRC may carry out criminal investigations into tax agents who have potentially committed offences such as tax fraud (whether in respect of their own tax affairs, or the tax affairs of others).

The combination of statutory powers, policy approaches (within the framework of CRCA 2005) and engagement initiatives represent a formidable armoury for HMRC to ‘encourage’ compliance with its standard for agents, and to ‘tackle’ those who do not. It behoves tax advisers to have an awareness of them.

## **Conclusion**

The HMRC standard states: “If agents meet their professional body’s code of ethics... the HMRC standard for agents should not place further requirements on them.” However, despite its existing powers HMRC is hungry for more, and is continually looking at potential new policies and powers to deal with tax agents who fail to live up to the standards HMRC sets for them, irrespective of whether the agent is a member of a professional body.

By comparison, aside from judicial review where HMRC’s statutory powers are considered to have been exceeded, the main recourse available to taxpayers when HMRC’s own performance has fallen below the standards (as set out in its Charter) are very limited, broadly to complaints to HMRC, the adjudicator and Parliamentary ombudsman. External regulation could potentially drive up HMRC’s standards, while levelling the playing field between HMRC and taxpayers. However, there are currently no indications that the external regulation of HMRC will happen any time soon.

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