GUIDANCE NOTES

ON

MANDATORY DISCLOSURE REGIME

Revenue Commissioners
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Guidance Notes

Part 1. Introduction

1.1 *What these Guidance Notes are about*

The following Guidance Notes set out what you must do if you promote or use certain transactions that will, or are intended to, provide the user with a tax advantage, in order to comply with the Mandatory Disclosure legislation and Regulations.

In that regard, however, it is important to note that the Mandatory Disclosure rules do not impact on ordinary day-to-day tax advice between a tax adviser and a client or on the use of schemes that rely on ordinary tax planning using standard statutory exemptions and reliefs in a routine fashion for bona fide purposes, as intended by the legislature. It is reasonable to assume that the tax advice given by most tax advisers to clients would be of an ordinary routine nature.

For illustrative purposes, examples of what Revenue would consider as ordinary day-to-day tax advice and the routine use of statutory exemptions and reliefs for bona fide purposes, are set out in ***Appendix 1***.

1.2 *What law these Guidance Notes cover*

The legislation covered by these Guidance Notes is:

- *Chapter 3 of Part 33 of the Taxes Consolidation Act 1997(No. 39 of 1997) as inserted by section 149 of the Finance Act 2010 (No. 5 of 2010), and*

- *The Mandatory Disclosure of Certain Transactions Regulations 2011 (S.I. No. 7 of 2011)*

The Guidance Notes also anticipate a number of changes to the primary legislation which the Minister for Finance indicated[1] *he would be making in Finance Bill 2011. These changes relate to the commencement date for the Mandatory Disclosure regime and the requirement on promoters to provide a client list.*

1.3 *Terminology*

A reference in these Guidance Notes to a section of legislation is a reference to a section of the Taxes Consolidation Act 1997, unless otherwise stated. Likewise, a reference to a Regulation is a reference to a Regulation of the Mandatory Disclosure of Certain Transactions Regulations 2011, unless otherwise stated.

[1] In a Press Statement issued on the publication of the Regulations.

For ease of the reader, the term ***"scheme"*** is used throughout these Guidance Notes, unless the context otherwise requires, to denote a transaction or a proposal for a transaction.

Whilst you can rely on these Guidance Notes as an accurate explanation of how Revenue will apply the legislation and regulations, they may not cover every possible issue that may arise.

1.4 *Objectives of the Mandatory Disclosure Regime*

The policy objectives underlying the Mandatory Disclosure regime are :-

- to obtain early information about certain tax schemes and how they work,
- to obtain information about who has availed of them, and
- to close down by legislative action, or use of anti-avoidance provisions, any such schemes that are viewed as aggressive.

1.5 *The Effect of Disclosure*

Of itself, the disclosure of a scheme under the disclosure rules will not affect the tax treatment of the scheme or invite any judgement about the nature of the scheme. In that regard, ***Section 817N(1)&(2)*** specifically provide that a disclosure, whether made by a promoter or a client/user, is made in a totally non-judgemental way and no inference can be drawn from the fact that a scheme is disclosed that it is, or may be, a tax avoidance transaction.

In that regard, it is important to be aware that the fact that a scheme does not come within any of the specified descriptions cannot be regarded as a guarantee that the scheme is not a tax avoidance scheme or constitutes practices that are acceptable to Revenue. Equally, the fact that a transaction may come within the specified descriptions does not, of itself, mean that it will be unacceptable to Revenue.

The nature of the Mandatory Disclosure regime is such that the "net it casts" is wider than simply a self-assessment against the parameters of section 811 – the general anti-avoidance provision, and it may, therefore, result in the disclosure of some schemes that would not be considered as avoidance.

The consequences of disclosure will be two-fold:

- Firstly, the Government of the day and the Oireachtas may decide that a particular scheme disclosed is indeed an aggressive scheme that should be closed down and may move to close it down by appropriate legislative action. This may be done immediately by way of a Media Statement by the Minister for Finance or in the next available Finance Bill.
- Secondly, as respects individual users of a disclosed scheme, Revenue may seek to nullify the tax consequences of the scheme in the normal way through use of the general anti-avoidance provisions of section 811, specific anti-

avoidance legislation contained elsewhere in the various Tax Codes or through other anti-avoidance mechanisms (e.g. abuse of rights in the context of VAT). In such cases, taxpayers who have used a disclosed scheme may continue to avail of the Protective Notification regime under section 811A .

1.6 ***Scope of the Mandatory Disclosure Regime***

The Mandatory Disclosure rules impact on certain tax transactions relating to Income Tax, Corporation Tax, Capital Gains Tax, the Universal Social Charge, Value Added Tax, Capital Acquisitions Tax, Stamp Duties and Excise Duties. It does not encompass Customs Duties.

Part 2. What Transactions have to be Disclosed

2.1 *General*

Under the Mandatory Disclosure legislation, any transaction, or any proposal for any transaction, is a disclosable transaction and must, therefore, be disclosed, if it meets all of the following tests or filters and is not specifically excluded under the Regulations or by these Guidelines:

- It will, or might be expected to, enable a person to obtain a tax advantage,
- The tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the transaction, and
- It falls within any one of the specified descriptions i.e. classes of transaction, set out in the Regulations.

2.2 *Meaning of certain terms*

2.2.1 Any Transaction or any Proposal for any Transaction – This phrasing in the definition of "disclosable transaction" in ***section 817D(1)*** ensures that the disclosure rules apply not only to proposals for new schemes developed on or after the effective date of the Regulations but also to existing schemes where they are offered to a person for implementation on or after that date - once the three mains tests are met. The definition of disclosable transaction also ensures a scheme is disclosable whether it is a "marketed scheme" or a "bespoke" scheme.

2.2.2 Marketed Scheme - A marketed or "off the shelf" scheme means a scheme designed with no specific client in mind, or designed with a view to marketing it to a particular class of user, for example to high worth individuals, large companies or employers. The promoters of such schemes may actively seek out potential users or make the scheme available in response to a general request for tax efficient ideas from, say, an accounting or law firm. While marketed schemes may require minor alterations to suit specific clients, the way in which the scheme is expected to achieve the tax advantage remains the same.

2.2.3 Bespoke Scheme – A "bespoke" or "tailored" scheme means a tax arrangement that is designed in response to a taxpayer's particular requirements. Typically, the promoter of a "bespoke" scheme is likely to be working exclusively with a client with a particular and complex set of financial/tax circumstances and the tax adviser will be designing the most tax efficient structure specific to the client's needs.

2.2.4 Meaning of "transaction" - The term "transaction" is defined very broadly in ***section 817D(1)*** to cover all types of schemes, arrangements, transactions, series of transactions and devices. It is largely based on the definition of transaction in ***section 811***, the general anti-avoidance provision (which is also used in ***section 811A*** relating to Protective Notifications). The term "any proposal for any transaction" when used in the legislation, is to be construed accordingly.

2.2.5 Meaning of "tax advantage" – The term "tax advantage" largely reflects the definition of that term in ***section 811*** – the general anti-avoidance provision (which is also used in ***section 811A*** relating to Protective Notifications). It is defined broadly to include any advantage arising out of, or by reason of, a transaction relating to a reduction, deferral or avoidance of any assessment, charge or liability to tax, or any relief from, or refund of tax, or the avoidance of any obligation to deduct or account for tax.

2.2.6 Main benefit test – This test requires the promoter, or user, as the case may be, to consider objectively the value of the expected tax advantage as compared with the value of any other financial benefits likely to arise under the transaction. Those who plan tax schemes fully understand the tax advantages such schemes are intended to achieve and are in a position to objectively assess whether or not the main benefit, or one of the main benefits, for the scheme is a tax advantage.

2.2.7 Specified Descriptions - The term "specified description" is essentially defined in ***section 817D(2)*** in terms of a class or classes of transaction to be specified in regulations under ***section 817Q***. Such class or classes of transaction must fall within at least one of a series of categories of transaction set out in ***paragraph (c)*** of ***section 817D(2).*** The categories are:

- Confidentiality: Transactions where the promoter or person (i.e. the user) would wish, or might reasonably be expected to wish, to keep the transaction or the element of the transaction that gives rise to the tax advantage, confidential from Revenue or from any other class of person (to be specified in regulations). (***Section 817(2)(c)(i) and Regulations 7 & 8)***.

- Fees: Transactions where a promoter obtains or charges, or might reasonably be expected to obtain or charge a person wishing to implement the transaction, fees that are to a significant extent attributable to the tax advantage, or to any extent contingent upon the tax advantage being secured. (***Section 817D(2)(c)(ii) and Regulation 9***).

- Standardised Documents: Transactions that involve standardised, or mainly standardised, documentation, the form of which is largely determined by the promoter and which require certain standard transactions or steps to be entered into by the user. (***Section 817D(2)(c)(iii) and Regulation 10***).

- Class of Tax Advantage: Transactions that give rise to a tax advantage of a particular class to be specified in regulations made under ***section 817Q***. (***Section 817D(2)(c)(iv) and Regulations 11 to 15***).

Part 4 of the Guidance Notes sets out further details on the specified descriptions.

It should be noted that in the case of "bespoke" schemes and "in-house" schemes only those schemes that have actually been entered into are required to be disclosed. There is no requirement to disclose proposals, plans or ideas in these situations.

Part 3. Who has to Disclose?

3.1 *General*

The primary duty to disclose falls on the promoter of a scheme (***section 817E***), but the client, or user, of a scheme may have to disclose in certain circumstances. These are:

- where the promoter of the scheme is outside the State and there is no promoter in the State. (***Section 817F***).

- where there is no promoter (e.g. the scheme is devised "in-house" for use within that entity or a corporate group to which it belongs or is devised by an individual for his or her own use). (***Section 817G***).

- where the promoter is a legal professional and asserts that legal professional privilege prevents a disclosure being made. (***Sections 817H & 817J***).

3.2 *Meaning of Promoter (Section 817D(1) & Regulations 28 to 30)*

Section 817D(1) defines "promoter" in very broad terms, whilst ***Regulations 28 to 30*** narrow the definition in certain respects.

Under ***section 817D(1)***, a person may be a promoter, if during the course of a relevant business (i.e. a business which includes the provision to other persons of services relating to taxation, or a banking business) the person:

- is to any extent responsible for the design of a scheme,

- has specified information about the scheme and makes a marketing contact,

- makes a scheme available for implementation by other persons, or

- is to any extent responsible for organising or managing the implementation of the scheme.

In practice, promoters are likely to be accountants, solicitors, banks and financial institutions, along with small firms of specialist promoters. Whilst the disclosure requirements apply to promoters, whether or not they are located in the State, this is only to the extent that the scheme enables, or is expected to enable, an Irish tax advantage to be obtained.

3.3 *Narrowing of promoter definition*

Regulation 30 narrows the application of the term "promoter" in certain circumstances. In the case of scheme designers, where a person is only involved in the design of a scheme and is not involved in marketing the scheme, making it available to others for implementation or in the organisation or management of the scheme, the

person will not be considered a promoter where any of the following conditions apply:

- the tax advice is benign and does not contribute to the design of the tax advantage element of the scheme (***Regulation 30 (a)***).

  This could arise where a promoter designing a scheme seeks advice from another person, say an accounting or law firm, as to whether two companies are connected for the purposes of the Tax Acts. Whilst the accounting or law firm might be considered to be involved in the "overall design" of the scheme in the broadest sense, and could, therefore, be a promoter under the definition in ***section 817D(1), Regulation 30(a)*** ensures that such a person will not be treated as a promoter so long as any tax advice given does not contribute to the design of the tax advantage element of the scheme. In that regard, tax advice that would seek to highlight opportunities to exploit the provisions of the Tax Acts would not be considered benign advice.

- the advice given is not tax related (***Regulation 30(b)***).

  This could arise where a person, although involved in the design of a scheme does not provide any tax advice. For example, a promoter might consult a law firm (that operates a business that includes giving tax advice) in relation to the company law aspects of a scheme, or an accounting firm about the accounting aspects of a scheme. So long as the law or accounting firm does not provide tax advice (other than benign advice) it will not be treated as a promoter.

- the person could not reasonably be expected to have sufficient information as would enable them:

  - to know whether or not the transaction is a disclosable transaction, or
  - to comply with the disclosure requirements.(***Regulation 30(c)***)

  This could arise where the person simply has insufficient knowledge of the overall scheme to know whether or not it is disclosable and, as such, would not be in a position to comply with the disclosure requirements.

3.4 *Makes a Marketing Contact*

The primary objective of the Mandatory Disclosure regime is to get information about tax avoidance schemes as early as possible so that, on the advice of the Revenue Commissioners, the Minister for Finance, the Government and the Oireachtas can decide, where appropriate, to close them down with immediate effect so as to protect tax revenues.

To that end, it is vital that the event that triggers disclosure comes as early as possible in the scheme's lifecycle. In the case of "marketed schemes" this is considered to be the point where both of the following events apply/take place:

- the design of the scheme has reached the stage where the promoter has a high degree of confidence in it such that he would be in a position to disclose details of the scheme to Revenue (i.e. the specified information required by the legislation and set out in the Regulations) under the disclosure requirements, and

- the promoter takes steps to make the existence of the scheme known to third parties (i.e. potential clients or marketers who may make the existence of the scheme known to potential clients).

In essence, a person is considered to "make a marketing contact" and is, therefore, a promoter when the scheme has been substantially designed and the person describes the general nature of the scheme to another person with a view to that person, or any other person, considering whether to get further details of the scheme, or to have it made available to them for implementation. This encompasses communications or contact with persons who may wish to use the scheme directly themselves i.e. clients, and to "marketers" i.e. intermediaries or introducers who may in turn market the scheme to potential users.

3.5 *Makes a Scheme available for implementation by others*

A scheme can be "made available for implementation" by more than one person e.g. by the scheme designer or by those who provide the scheme to others under, say, a licensing agreement with the designer. Each such person may be a promoter for disclosure purposes and have obligations under the legislation and Regulations. However, a person who acts solely as a marketer (i.e. an introducer or intermediary) between the scheme provider/designer and potential clients would not be regarded as making the scheme available for implementation by others and, therefore, would not be considered to be a promoter under this test.

A scheme is to be regarded as being "made available for implementation" by another person (as opposed to being marketed) when the promoter communicates what is essentially a fully formed proposal to a client in sufficient detail that he could be expected to understand the expected tax advantages and decide whether or not to avail of, or enter the scheme.

For the purposes of new "marketed schemes" a person is most likely to come within the definition of promoter on foot of the "makes a marketing contact" test rather than the "makes a scheme available for implementation" test, as clearly the marketing contact will come first. The latter test is essentially included to capture situations where, say, the "marketing contact" was made prior to the effective date of the Regulations and the scheme would, therefore, in the absence of the latter test, fall outside of the legislation. In addition, where a scheme that existed before the effective date of the Regulations is made available by a person to another person for implementation on, or after, that date, that person will be a promoter for the purposes of the disclosure rules.

3.6 ***Scheme Organisers and Managers***

Any person who organises or manages a scheme is a promoter for the purposes of the disclosure rules. This could include, for example, an accountancy firm that actively manages a scheme by bringing together clients and promoters and organising the transfer and completion of scheme documentation etc. This is in contrast to a "marketer" whose role is solely in introducing potential clients to promoters with no other active involvement in organising or managing the scheme.

3.7 ***Other Exclusions from the term "Promoter"***

- *Corporate Groups* ***Regulation 28(1)*** provides that a group company that provides tax services to other companies within the same group is not a promoter for the purposes of the disclosure rules. However, disclosable schemes devised within a group for its own use must be disclosed (under ***section 817G***) in the same way as those devised by a company "in-house" for its own use. ***Regulation 28(2)*** provides that "group", for the purposes of the draft Regulations, has the same meaning as in the definition of "relevant business" in ***section 817D(1)***. Essentially, it brings within a group all 51% subsidiaries.

- *Employees* ***Regulation 29(1)*** ensures that employees are not to be treated as promoters where the employer is a promoter in relation to the scheme and, therefore, has disclosure obligations under ***section 817E*** or where the scheme is an "in-house" scheme in respect of which the employer has responsibilities to disclose the scheme under ***section 817G. Regulation 29(2)*** also provides that an employee of a person connected (within the meaning of section 10) with another person shall be treated as an employee of that other person.

3.8 ***Disclosure Obligations on Clients/Users***

While primary responsibility for disclosure under the disclosure rules falls on the promoter, the legislation identifies certain situations and circumstances where the responsibility to disclose shifts to, or rests with, the scheme user. These are:

- *Where Promoter is Offshore:* The Mandatory Disclosure regime applies equally to promoters based in the State and to those based outside the State. However, where a scheme involves a promoter based outside the State and there is no promoter based in the State who can comply with the disclosure requirements under ***section 817E***, the user of the scheme is obliged to disclose the scheme details to Revenue under ***section 817F***.

- *Where there is no Promoter:* Where there is no person who is a promoter in relation to a scheme, it has to be disclosed by the person using the scheme. This could arise, for example, where a scheme is developed "in-house" for use by a company. While this is the most likely scenario envisaged by ***section 817G***, it also encompasses situations where a scheme is developed by an individual, partnership or trust for their own use. It should be noted, however,

that in all of these cases disclosure only applies to schemes that have actually been implemented. There is no requirement to disclose proposals, plans or ideas in these situations.

- *Where Promoter asserts Legal Professional Privilege:* While schemes promoted by legal professionals come within the scope of the Mandatory Disclosure rules, the legislation recognises that legal professional privilege (LPP) may act to prevent the promoter from providing the information required to make a full disclosure. ***Section 817J*** provides that a promoter is not required to disclose to the Revenue Commissioners any privileged information; which is information with respect to which a claim to legal professional privilege could be maintained by that promoter in legal proceedings.

  In those circumstances, the obligation to disclose falls on the user of the scheme promoted by the legal professional (***section 817H(1)***). The promoter asserting LPP must advise clients of their obligation to disclose (***section 817H(2)*** and must also advise the Revenue Commissioners that the promoter's duty to disclose is not being complied with because of the assertion of legal professional privilege (***section 817H(3)***).

  It should be noted that, the client of a legal professional has the option of waiving any right to legal privilege and, if that happens, the obligation to disclose remains with the legal professional. Such waiving will have to be done in sufficient time to allow the legal professional to meet the timescale for disclosure placed on promoters (see ***Part 5*** of the Guidance Notes for further details). Any waiver of privilege can be limited to the extent necessary to enable the legal professional to comply with the disclosure obligations.

  Note also, that where a legal professional is marketing a scheme or is having a scheme marketed on their behalf, legal professional privilege does not apply. This means that such "marketed" schemes are subject to the disclosure rules and the legal professional must disclose.

  It should be further noted that merely asserting that LPP applies is insufficient in itself and, if it transpires that such a claim cannot be maintained, the legal professional may leave himself or herself liable to civil penalties for failure to disclose.

Part 4. The Specified Descriptions

4.1 *General*

To be a disclosable transaction, a transaction or a proposal for a transaction, in addition to giving rise to a tax advantage which must be the main, or one of the main, benefits arising or expected to arise from the scheme, must also come within one of a number of "specified descriptions".

As mentioned in ***Part 2*** of the Guidance Notes, the term "specified description" is defined in ***section 817D(2)*** in terms of a class or classes of transaction to be specified in regulations made under ***section 817Q***. Such class or classes of transaction must fall within at least one of a number of categories of transaction set out in ***paragraph (c)*** of ***section 817D(2).***

The categories relate to:

- Confidentiality
- Fees
- Standardised Documentation, and
- A Class or classes of Tax Advantage specified in Regulations.

Regulations 7 to 15 deal with the classes of transaction that are to be "specified descriptions" based on these four categories and, in accordance with ***section 817Q(2),*** certain of those Regulations also set out the circumstances in which they are not to apply by reference to a list of transaction contained in the ***Schedule*** to the Regulations.

Note in relation to the specified descriptions, that ***Regulation 2(2)*** makes clear that for the purpose of the Regulations any reference to the term "transaction" is to be treated as including a reference to "a proposal for a transaction" and, in respect of certain of the Regulations, as including a reference to "any element of a transaction (including the way in which the transaction is structured)". This is purely to simplify the construction of the Regulations and to aid the reader of the Regulations.

Any use of the term "transaction" in the Regulations and the generic term "scheme" as used in these Guidance Notes in relation to the specified descriptions should, therefore, be given this wider meaning, unless the context otherwise requires.

4.2 *Types of Specified Description*

The specified descriptions are essentially of two types. The first type is generic in nature and is primarily designed to capture new and innovative tax planning schemes. These are the descriptions relating to "confidentiality" and "fees". The second type

targets areas of specific concern and perceived high risk i.e. those relating to standardised transactions and particular types of tax advantage.

The specified descriptions are not mutually exclusive – a transaction may be disclosable by virtue of coming within any one or more of the specified descriptions.

Also, it should be noted that the fact that a particular type of transaction listed in the ***Schedule*** to the Regulations is deemed not to come within a specified description relating to standard tax products or a particular type of tax advantage, does not necessarily mean that it would not have to be disclosed under the generic descriptions of confidentially or fees.

It is also likely that the range of specified descriptions will change over time reflecting perceived changes in the tax planning/avoidance landscape and the actual effectiveness of particular descriptions.

As mentioned in ***Part 1***, it is important to be aware that the fact that a scheme does not come within any of the specified descriptions cannot be regarded as a guarantee that the scheme is not a tax avoidance scheme or constitutes practices that are acceptable to Revenue. Equally, the fact that a transaction may come within the specified descriptions does not, of itself, mean that it will be unacceptable to Revenue. The nature of the mandatory disclosure regime is such that it may require the disclosure of some schemes that are not avoidance.

4.3 *Details of the Specified Descriptions*

4.3.1 ***Specified Description 1A - Confidentiality where Promoter involved***
Section 817D(2)(c)(i) and Regulation 7

This specified description only applies where there is a promoter of the scheme (including situations where a client/user must disclose because the promoter is off-shore or asserting legal professional privilege).

4.3.1.1 ***Specified Description 1A(i)*** *- Confidentiality from other promoters*

The first part of the specified description relates to wishing to keep the scheme confidential from other promoters – ***Regulation 7(2)(a)***. To come within this part of the specified description, promoters must ask themselves the following ***hypothetical*** questions:

- *Might it reasonably be expected that **any promoter** of the scheme would wish the way in which the scheme gives rise to and secures the expected tax advantage (i.e. the way in which the scheme works) to be kept confidential from **any other promoter**, at any time after the relevant date (i.e. the date that triggers the disclosure requirement – which is generally the day it is first marketed or implemented)?*

- *Would a purpose for doing so be to maintain the promoter's competitive advantage over other promoters?*

If the answer to both of these questions is "yes", then the scheme must be disclosed. This hypothetical test would be met if the scheme, or an element of it, were sufficiently new and innovative that any promoter would want the details of this "intellectual property" to remain confidential in order to maintain their competitive advantage over other competing promoters.

The test is unrelated to any general rule (e.g. terms of engagement) or agreement by a client that the client keeps the advice confidential.

The use of an explicit confidentiality agreement before revealing full details of a scheme to a client by advisers who do not normally use such agreements may indicate that the test is met.

Notwithstanding, that certain promoters would routinely insist on an explicit confidentially agreement from their clients, Revenue would accept that the test is not met if the scheme is reasonably well known in the tax community as evidenced from, for example, articles in the tax press, textbooks or case law.

Revenue will not engage in "fishing" expeditions to establish if schemes have not been disclosed under this specified description. In that regard, while certain information seeking powers are given to Revenue under the legislation (see Part 8), any notice issued by Revenue to a person suspected of being a promoter of a scheme seeking information as to why a scheme has not been disclosed, must specify the scheme that Revenue is interested in.

4.3.1.2 ***Specified Description 1A(ii)*** - *Confidentiality from Revenue (promoter)*

This part of the specified description relates to a promoter wishing to keep the scheme confidential from Revenue – ***Regulation 7(2)(b)***. In this case, the test is not a hypothetical one. It does not ask what another promoter may do; what Revenue knows, or how Revenue, the Minister for Finance or the Oireachtas may react if they knew about the scheme. Rather the promoter must ask himself/herself the ***factual*** questions:

- *Do **I** wish to keep confidential from Revenue the way the scheme gives rise to and secures the expected tax advantage at any time after the relevant date (i.e. the date that triggers the disclosure requirement – which is the generally the day it is marketed or implemented)?*

- *Is **a** reason for doing so to facilitate the repeated or continued use of the scheme in the future?*

If the answer to both of these questions is "yes", then the scheme must be disclosed.

The promoter is required to ask himself these questions at the time the relevant trigger for disclosure arises. In the case of a marketed scheme, this is generally when the first

marketing contact is made. For a bespoke scheme, it is the date the promoter first becomes aware that any transaction forming part of the disclosable transaction has been entered into.

Promoters will answer the relevant questions in one of the following ways:

- I wish to keep an element of the scheme confidential from Revenue in order to facilitate repeated or continued use of that element, or substantially the same element, in the future;

- I do not wish to keep any element of the scheme confidential in order to facilitate repeated or continued use of that element, or substantially the same element in the future but, and disregarding any obligation of confidentiality, I nevertheless wish to keep it confidential from Revenue for other reasons; or

- I do not wish to keep any element of the scheme confidential from Revenue.

Where the answer falls within the second or third bullet, a promoter is not required to make a disclosure under this specified description.

The reference to "repeated use" in the question effectively tests whether the scheme, or the key element of the scheme, that achieves the tax advantage is being kept confidential in order that it may be inserted into further schemes to be used by the same, or other clients. This may be in order to secure fee income in the future. It could apply, for example, where the totality of the scheme is expected to be repeatable in its generic form time and again, or where a key element was, or key elements were, conceived as part of a bespoke scheme and then recorded for possible use in other schemes in the future.

The reference to "continued use" of the scheme in the future, looks at whether the element of the scheme that achieves the tax advantage is being kept confidential in order to allow the tax advantage to accrue over time or the scheme to run its course.

Revenue will not assume that because a scheme was not disclosed that the promoter wanted to keep it confidential from Revenue, nor, as indicated in paragraph 4.3.1.1 foregoing, will Revenue carry out "fishing" expeditions. If Revenue comes across a scheme that has not been disclosed, all of the evidence will be looked at in forming a balanced view as to whether this test was correctly applied and, in light of that, whether the scheme should have been disclosed. In forming this view Revenue will have regard to how innovative and aggressive the scheme is, whether a promoter imposes an obligation on potential clients, verbally or in writing, to keep details of the scheme confidential (other than by way of a general agreement) from third parties including Revenue and the degree of cooperation from the promoter to requests for information concerning a specific scheme and the reasons for not disclosing the scheme.

Schemes that promoters know are known to Revenue are not caught by this specified description. This can be evidenced from, for example, technical guidance notes, case law or instances where full details of how a scheme may operate has been made

known to specialised areas within Revenue such as Large Cases Division and the Revenue Legislation Services area.

4.3.1.3 ***Specified Description 1A(iii)*** *- Confidentiality from Revenue (client/user)*

This part of the specified description relates to situations where, even though there is a promoter of the scheme, the obligation to disclose has shifted to the client/user because the promoter is either off-shore or is asserting legal professional privilege - ***Regulation 7(2)(c)***. In this scenario the client/user must ask himself/herself the ***factual*** questions:

- *Do **I** wish to keep confidential from Revenue the way the scheme gives rise to and secures the expected tax advantage, at any time from the date I enter the first transaction forming part of the scheme?*

- *Is a reason for doing so any of the following :*

    - *to facilitate the repeated or continued use of that scheme, in the future?*

    - *to prevent Revenue from using information about the scheme to enquire into any return that a person is required by, or under, any enactment to deliver to Revenue?, or*

    - *to prevent Revenue from using the information relating to the scheme to withhold a refund or repayment of, or a payment of, any amount claimed separately from a return under any of the provisions of the Acts?*

If the answer to both of these questions is "yes", then the scheme must be disclosed.

As with the "confidentiality from Revenue" test relating to promoters, in this case also the test is not a hypothetical one. It does not ask what another client/user might do etc – it is focussed on what the specific client/user would do in the circumstances.

The fact that certain details or aspects of a scheme would be disclosed in a return to Revenue in due course is irrelevant.

As regards the reasons for wishing to keep the scheme confidential from Revenue, the first of these i.e. "to facilitate repeated or continued use", mirrors the equivalent specified description in the case of promoters (i.e. ***7(2)(b)***). The second and third reasons are, however, unique to scheme users and cover the circumstances where a user wishes not to disclose the scheme to Revenue in order to prevent:

- information getting into Revenue's hands that Revenue could use to enquire into any return that a person is required to make to Revenue, or

- the information relating to the transaction being used by Revenue to withhold a refund or repayment of, or a payment of any amount claimed separately from a return under any of the provisions of the Acts.

There is no requirement on a scheme user to make a disclosure under this specified description where they do not wish to keep any element of the scheme confidential Revenue.

Promoters and clients/users must consciously answer the questions in specified description 1A ***honestly*** and ***truthfully*** at the time the relevant trigger for disclosure arises and to act accordingly.

Specified Descriptions 1A(ii) and 1A(iii) are also worded so as to forestall a circular argument that "because the mandatory disclosure legislation requires a scheme to be disclosed, it cannot be kept confidential from Revenue and if it cannot be kept confidential, the scheme is, therefore, not disclosable".

4.3.2 ***Specified Description 1B - Confidentiality where no promoter (i.e. in-house schemes)*** ***Section 817D(2)(c)(i) and Regulation 8***

This specified description only applies to schemes devised for 'in-house' use – ***Regulation 8***. It is similar to Specified Description 1A(ii) and 1A(iii), in that the in-house user must consider their own circumstances and not those of a hypothetical third party.

The tests for a person using an in-house scheme are the same as for a user under specified description 1A(iii) and the considerations are the same. Having entered into the first transaction forming part of the scheme, the in-house user must ask himself or herself the following questions:

- *Do **I** wish to keep the way the scheme gives rise to and secures the expected tax advantage confidential from Revenue at any time from the date of entering the first transaction forming part of the scheme?*
- *Is **a** reason for doing so any of the following:*
    - *to facilitate the repeated or continued use of that element, in the future?*
    - *to prevent Revenue from using that information to enquire into any return that a person is required by or under any enactment to deliver to Revenue?, or*
    - *to prevent Revenue from using the information relating to the scheme to withhold a refund or repayment of, or a payment of, any amount claimed separately from a return under any of the provisions of the Acts?*

If the answer to both of these questions is "yes", then the scheme must be disclosed.

As with the "confidentiality from Revenue" test relating to specified description 1A(ii) and 1A(iii), in this case also, the test is not a hypothetical one. It does not ask

what another "in-house" user might do – it is focussed on what the specific "in-house" user would do in the circumstances.

As with specified description 1A(iii), the fact that certain details or aspects of a scheme would be disclosed in a return to Revenue in due course is irrelevant. Also, as with that specified description, there is no requirement on an in-house scheme user to make a disclosure under this specified description where they do not wish to keep any element of the scheme confidential from Revenue.

In line with specified description 1A(ii), Revenue will not assume that because an "in-house" scheme was not disclosed by the user that the user wanted to keep it confidential from Revenue, nor as indicated earlier, will Revenue carry out "fishing" expeditions. If Revenue comes across an "in-house" scheme that has not been disclosed, all of the evidence will be looked at in forming a balanced view as to whether this test was correctly applied and, in light of that, whether the scheme should have been disclosed. In forming this view Revenue will have regard to how innovative and aggressive the scheme is, whether the user imposed an obligation on other parties to the scheme, verbally or in writing, to keep details of the scheme confidential from Revenue and the degree of cooperation from the user to requests for information concerning a specific scheme and the reasons for not disclosing the scheme.

Schemes that users know are known to Revenue are not caught by this specified description. This can be evidenced from, for example, technical guidance notes, case law or instances where full details of how a scheme may operate has been made known to specialised areas within Revenue such as Large Cases Division and the Revenue Legislation Services area.

In-house users must consciously answer the above questions ***honestly*** and ***truthfully*** at the time the relevant trigger for disclosure arises and to act accordingly.

4.3.3 ***Specified Description 2 – Fees*** ***Section 817D(2)(c)(ii) and Regulation 9.***

This specified description relates to a fee-based test referred to as a "premium fee" in ***Regulation 9(1).*** The test is a ***hypothetical*** one and applies to both promoter-based and "in-house" schemes.

In applying the test, a promoter must ask himself or herself the question as to whether:

- *it might reasonably be expected that **any promoter would** be able to charge a premium fee for the scheme on the basis of how it gives rise to and secures the expected tax advantage?*

Being a hypothetical test, it does not depend on a premium fee **actually** being charged, received or paid, but rather on whether it might reasonably be expected that such a fee would be charged by any promoter for that "intellectual property". If the promoter has charged such a fee, then the test is clearly met.

In the case of "in-house" users, the hypothetical question they must pose to themselves is, if the scheme they have developed and implemented in-house was being made available by a promoter, whether:

- *it might reasonably be expected that **any promoter would** be able to charge a premium fee for the scheme on the basis of how it gives rise to and secures the expected tax advantage?*

The term "premium fee" is defined in ***Regulation 9(2)*** as a fee that is:

- to a significant extent attributable to the tax advantage, or

- is contingent upon a tax advantage being obtained (i.e. that the scheme actually works).

The term "fee" is very broadly defined in ***Regulation 9(2)*** to include all consideration in whatever form, whether paid directly or indirectly. This is to prevent attempts to disguise or portray fees as something else.

The test is to be applied from the perspective of a client who is experienced in receiving tax advice or other services of the type being provided. The assumption underlying this specified description is that where a client regards the advice as valuable and not generally available the client would be prepared to pay a premium fee for it. Equally, by contrast, if similar advice was available elsewhere the client would be unwilling to pay more than a normal fee for it. The test is designed to identify tax advice that is innovative and valuable and which the promoter could use to obtain premium fees.

Revenue recognises that almost any fee obtained in relation to tax planning can to some extent be said to be attributable to obtaining a tax advantage. In that regard, however, fees charged or calculated purely on the basis of "scale rates" or "time and materials" are not to be considered as premium fees for the purposes of this test.

Neither is a fee a "premium fee" solely on account of factors such as:

- the adviser's location – fees might be higher in Dublin than elsewhere;

- the urgency with which the advice is sought

- the size of the transaction involved

- the skill or reputation of the adviser.

As the definition of premium fee makes clear, it is a fee that could be charged in respect of the scheme, such that it would to a significant extent be attributable to the tax advantage or contingent on the tax advantage being obtained.

The "premium fee" specified description is also worded so as to forestall a circular argument that "because the mandatory disclosure legislation requires a scheme to be

disclosed, a premium fee is not obtainable and, therefore, the scheme is not disclosable".

4.3.4 ***Specified Description 3 – Standardised Tax Products*** ***Section 817D(2)(c)(iii) and Regulation 10.***

This specified description only applies to promoter–based schemes and is intended to capture what are often referred to as "mass marketed" or "off-the-shelf" schemes. Such schemes are often described as "shrink wrapped" or "plug and play" schemes. The fundamental characteristic of such schemes is their ease of replication. Essentially, the client purchases a finished tax product that requires little, if any, modification to suit his or her circumstances. To adopt it would **not** require a client to receive significant additional professional advice or services.

A scheme comes within this specified description (to which the term "standardised tax product" is applied) if it is a finished "product" rather than a package of proposed arrangements and additional services. A scheme will be a finished product if it meets certain conditions and is not specifically excluded by ***Regulation 10(4)*** by reference to the ***Schedule*** to the Regulations. The conditions are:

- the scheme has, or is intended to have,
  - standardised, or substantially standardised, documentation ***(Regulation 10(2)(a)***,
  - the form of which has been determined by the promoter,
  - do not require tailoring to the client's circumstances to any material extent, and
  - which enable the client to implement the arrangements.

  As a minimum this will generally mean that standardised contracts, agreements or other written understandings between the parties to the scheme are provided to the client. Instructions on how to implement the scheme might, typically, also be included. In general, where, before they can be implemented, the relevant transactions and/or documentation require significant tailoring to suit the client's circumstances, or there are other circumstances where the input from a professional goes substantially beyond basic oversight and checking, such schemes would not be caught by this description, but of course may be caught by one of the other descriptions.

- the scheme commits the client to enter either a specific standardised (or substantially standardised) transaction, or more usually, a number of specific standardised (or substantially standardised) transactions, comprising the scheme (***Regulation 10(2)(b)***).

  For example, a client who enters into the scheme may be required to buy a specific financial instrument etc.

Regulation 10(3) provides that, subject to the other conditions referred to above, this specified description will apply to any tax-based scheme that a promoter makes, or intends to make available, to more than one person.

Revenue accepts that tax professionals often maintain "solutions registers" and hold "precedent documents" that enable the same or similar tax solutions to be provided to more than one client, sometimes using relatively standard documentation. As regards "precedent documents", the type of documents Revenue would see as coming within this term would include, for example, legal documents providing for group loans, corporate reorganisations and the like.

It will be a matter of scale and degree as to whether schemes included in these registers or using precedent documents fall within this specified description. Revenue would not expect such schemes to be caught where, before they can be implemented, the relevant transactions or documents require significant tailoring to suit the client's circumstances or where the input from the tax professionals etc. goes substantially beyond the rudimentary oversight and checking that is a feature of the "mass marketed" schemes that this specified description is primarily aimed at.

It is important to note, however, that even though schemes included in these "solutions registers" or schemes using "precedent documents" may not fall within the "standardised tax product" specified description, they may be disclosable under one or more of the other specified descriptions.

4.3.4.1 ***Exemptions from Specified Description 3***

The nature of Specified Description 3, based as it is on standardised documentation and transactions, could result in a significant volume of unwanted disclosures under the disclosure rules linked to standard tax-based incentive schemes and reliefs provided for in the various taxation codes that can be marketed or made available to a wide range of individuals. To minimise this, ***Regulation 10(4)*** provides that a scheme will not be considered a standardised tax product where it is a type of transaction listed in the ***Schedule*** to the Regulations. The ***Schedule*** is reproduced in ***Appendix 2.***

For the most part, these exclusions reflect standard schemes or arrangements where, in general, there is some Revenue oversight or approval involved. Examples are approved Profit Sharing Schemes, approved Salary Sacrifice Arrangements, approved PRSA contracts and investments under the BES and Seed Capital schemes. Such schemes etc., are not disclosable under this specified description, notwithstanding that they would meet the criteria of a "standardised tax product" in the Regulations.

However, ***Regulation 10(4)*** also makes clear that the exclusion of such schemes and transactions from the standardised tax product specified description does not preclude the possibility that such schemes might be disclosable under the generic confidentiality and/or premium fee specified descriptions. This could happen, for example, if a promoter was to combine such reliefs with other reliefs, allowances or abatements provided for under the various taxation codes in such a way as would result in a tax outcome that was not intended by the legislature and which a promoter would wish to keep confidential or charge a premium fee for, such that the scheme would be disclosable in any event, under the generic specified descriptions.

4.3.5 ***Specified Description 4 – Loss Schemes: Individuals – Section 817D(2)(c)(iv) and Regulation 11***

This specified description only applies where there is a promoter of the scheme (i.e. it does not apply to in-house arrangements) and where the promoter expects more than one individual to avail of the scheme. It is targeted at an area of perceived risk and is intended to bring within the disclosure regime various "loss creation" schemes that are typically used by wealthy individuals.

It is not intended to capture investments in genuine business start-ups where losses are more the rule rather than the exception, or the use of genuine trading losses against other income.

Loss creation schemes can vary significantly in detail but are normally designed so that they generate a trading or capital gains loss for high worth individuals that they can use to set off against income tax or capital gains tax liabilities or generate a refund or repayment.

A scheme will come within this specified description where the following tests are met:

- the promoter expects that there will be more than one individual client for each transaction, having the same or substantially the same form, and

- the transaction is such that an informed observer, having examined the transaction, could reasonable conclude that a main outcome of the transaction for some or all of the individuals participating in it, is the provision of loses that those individuals could be expected to use to reduce their income tax or CGT liabilities.

This would be the case, for example, where it would be reasonable to expect that the tax relief expected by any participant in a scheme would be greater than the total amount of a participant's investment which represents real personal risk.

An informed observer is a person who is independent and has knowledge of the various taxation codes, such as an Appeal Commissioner. He need not necessarily be a tax practitioner.

4.3.6 ***Specified Description 5 – Loss Schemes: Companies – Section 817D(2)(c)(iv) and Regulation 12.***

Specified Description 5 targets corporate "loss buying" and similar schemes that seek to free up otherwise unrelieved corporate losses which, in the current economic climate, is viewed as an area of perceived risk. It has no application to the use of standard loss relieving provisions in the Tax Acts, such as Group Relief.

Many companies have accumulated trading and similar losses that cannot be relieved, other than by carrying them forward to set against future profits. At best, such

unrelieved losses will only be utilised for tax purposes when the company moves back into trading profit. At worst the losses may never be useable and become stranded.

A scheme will come within this specified description if the following test is met:

- one of the parties to the scheme is a company that has or expects to have unrelieved losses at the end of an accounting period, and an informed observer, having examined the scheme, could reasonably conclude that a main benefit of the scheme is:

    - that the company transfers those losses to another party which would be expected to use them to reduce its corporation tax liability, or

    - that the company is able to accelerate the use of those losses to reduce its corporation tax liability.

An informed observer is a person who is independent and has knowledge of the various taxation codes, such as an Appeal Commissioner. He need not necessarily be a tax practitioner.

Paragraph (2) of ***Regulation 12*** makes it clear that unrelieved losses at the end of an accounting period means trading losses in respect of which, in the absence of the scheme, relief could not have been given under any of the loss relieving provisions of the Taxes Consolidation Act 1997, in that or previous accounting periods. By definition "unrelieved losses" would include trading losses arising from the treatment of capital allowances as a trading expense.

4.3.7 ***Specified Description 6 – Employment Schemes*** ***Section 817D(2)(c)(iv) and Regulation 13***

Specified Description 6 specifically targets employment schemes that seek to avoid income tax and the income levy or to obtain a corporation tax advantage. It applies to both promoter-based and "in-house" schemes. Employment schemes may seek to use vehicles such as, for example, Employee Benefit Trusts, notwithstanding the anti-avoidance provisions contained in section 81A of the Taxes Consolidation Act 1997, or may seek to circumvent in some fashion salary sacrifice anti-avoidance provisions contained in that Act.

Specified Description 6 is not intended to impact on schemes that rely solely on routine tax planning using statutory exemptions and reliefs for bona fide purposes such as, for example, approved Share Ownership Trusts or pension schemes.

A scheme will come within the specified description if the following test is met:

- the tax advantage obtained or expected to be obtained by virtue of the scheme is by way of a reduction in, or a deferment of a tax liability of the employer, the employee or any other person by reason of the employee's employment:

- where the tax advantage relates to employment income, in any year of assessment, or

- in any other case, in any accounting period

Paragraph (2) of ***Regulation 13*** defines "employment income" broadly as meaning salaries, fees, wages, perquisites or profits (by whatever name called including expenses) from an office or employment.

4.3.7.1 ***Exemptions from Specified Description 6***

Specified Description 6 would, of itself, bring within the disclosure regime "employment schemes" that rely on routine tax planning that are not required to be disclosed. With a view to ensuring that unnecessary disclosures are minimised, ***Regulation 13(3)*** provides that a scheme will not be considered to be an employment scheme as defined, where it is a transaction of a kind listed in the ***Schedule*** to the Regulations. The ***Schedule*** is reproduced in ***Appendix 2.***

For the most part, these exclusions reflect schemes that rely on ordinary tax planning using standard exemptions and statutory reliefs provided for in the legislation where, in general, there is some Revenue oversight, certification or approval involved. Examples are approved Profit Sharing Schemes, approved Salary Sacrifice Arrangements and approved Retirement Benefit schemes. Such schemes are not disclosable under this specified description when used in a routine fashion for bona fide purposes, notwithstanding that they would meet the criteria of an "employment scheme " in the Regulations.

However, ***Regulation 13(3)*** also makes clear that the exclusion of such schemes and transactions from the "employment scheme" specified description does not preclude the possibility that such schemes might be disclosable under the generic confidentiality and/or premium fee specified descriptions. This could happen, for example, if a promoter or in-house user was to combine such reliefs with other reliefs, allowances or abatements provided for under the Tax Acts in such a way as would result in a tax outcome that was not intended by the legislature and which a promoter or user would wish to keep confidential or charge a premium fee for, such that the scheme would be disclosable in any event, under the generic specified descriptions.

4.3.8 ***Specified Description 7 – Income into Capital Schemes Section 817D(2)(c)(iv) and Regulation 14***

Specified Description 7 targets schemes that seek to convert income into capital with a view to avoiding the higher rate of income tax and the income levy and having any gain taxed at a lower rate or relieved or exempted from tax altogether. It is not intended to impact on schemes that rely solely on routine tax planning using statutory exemptions and reliefs for bona fide purposes such as, for example, approved Share Ownership Trusts.

A scheme will come within the specified description if the following test is met:

- as a consequence of the scheme, a person who would otherwise incur, or be expected to incur, a liability to income tax chargeable in any tax year, will:

    - incur, or be expected to incur, a lesser or nil liability to income tax chargeable in that year, and

    - the person acquires an asset, the disposal of which would in principle give rise to a chargeable gain under the Taxes Consolidation Act 1997.

Paragraph (2) of ***Regulation 14*** ensures that situations where the scheme creates a capital receipt but without creating a potential CGT liability, due to CGT reliefs or exemptions, also come within this specified description.

4.3.8.1 ***Exemptions from Specified Description 7***

As with Specified Descriptions 3 and 6 relating to standardised tax products and employment schemes, Specified Description 7 is not intended to target ordinary tax planning. With a view to ensuring that unnecessary disclosures are minimised, ***Regulation 14(3)*** provides that a scheme will not be considered to be an income into capital scheme, as defined, where it is a transaction of a kind listed in the ***Schedule*** to the Regulations. The ***Schedule*** is reproduced in ***Appendix 2.***

For the most part, these exclusions reflect schemes that rely on ordinary tax planning using standard exemptions and statutory reliefs provided for in the legislation where, in general, there is some Revenue oversight or approval involved. Examples are approved Share Ownership Trusts and approved Share Options Schemes. Such schemes are not disclosable under this specified description, when used in a routine fashion for bona fide purposes, notwithstanding that they would meet the criteria of an "income into capital scheme " in the Regulations.

However, ***Regulation 14(3)*** also makes clear that the exclusion of such schemes and transactions from the "income into capital scheme" specified description does not preclude the possibility that such schemes might be disclosable under the generic confidentiality and/or premium fee specified descriptions. This could happen, for example, if a promoter or in-house user was to combine such schemes with other reliefs, allowances or abatements provided for under the various taxation codes in such a way as would result in a tax outcome that was not intended by the legislature and which a promoter or user would wish to keep confidential or charge a premium fee for, such that the scheme would be disclosable in any event, under the generic specified descriptions.

4.3.9 ***Specified Description 8 – Income into Gift Schemes Section 817D(2)(c)(iv) and Regulation 15***

Specified Description 8 targets schemes that seek to convert income into gifts with a view to avoiding the higher rate of income tax and the income levy and having the gain taxed at the lower gift tax rate or possibly relieved or exempted from tax altogether.

A scheme will come within the specified description if the following test is met:

- as a consequence of the scheme, a person who would otherwise incur, or be expected to incur, a liability to income tax chargeable in any tax year, will:

    - incur, or be expected to incur, a lesser or nil liability to income tax chargeable in that year, and

    - the person is instead deemed to take a gift under the provisions of the Capital Acquisitions Tax Consolidation Act 2003.

There are no exemptions provided for income into gifts schemes.

Part 5. When to Disclose a Scheme

5.1 *General*

Part 3 of the Guidance Notes explain who is required to disclose a disclosable transaction under the Mandatory Disclosure rules. This ***Part*** sets out the time period within which disclosure must be made.

5.2 *Schemes where the Promoter must disclose (Section 817E and Regulations 18 & 21)*

Where the obligation to disclose falls on the promoter of a scheme, the scheme must be disclosed within the period of 5 working days commencing on the day following the "relevant date" (***Regulations 18 & 21***). Non-business days such as weekends, bank holidays, Christmas Day etc. are disregarded for the purposes of determing the due date). "Relevant date" is defined in ***Section 817D(1***) as the earliest of three possible dates. These are:

- *The date the promoter has specified information about the scheme and first makes a marketing contact:* In essence, this means the date on which the design of the scheme has reached the stage where the promoter is fully confident in its structure and would be in a position to disclose details of the scheme (i.e. the specified information to be set out in regulations) to Revenue under the disclosure requirements (effectively the scheme is fully formed) ***and*** steps are first taken to market the scheme or to have it marketed – so that a person interested in the scheme could seek further information on the scheme or seek to have it made available for implementation.

- *The date on which the promoter makes the transaction available for implementation by another person:* In relation to "marketed schemes" the first date referred to above is most likely to be the relevant date and so the time for disclosure would normally be by reference to that date. However, the "date the transaction is made available for implementation" could be relevant in a situation where a scheme has already been marketed before the effective date of the Regulations but is only made available for implementation after that date. This date also has relevance where a scheme may have been first made available to clients before the effective date of the Regulations but is then made available to another client after that date when the obligation to disclose has arisen. As mentioned in ***paragraph 3.5*** a scheme is to be regarded as being made available for implementation by another person (as opposed to being marketed) when the promoter communicates what is essentially a fully formed proposal to a client in sufficient detail that he could be expected to understand the expected tax advantages and decide whether or not to avail of or enter the scheme.

- *The date the promoter first becomes aware of any transaction forming part of the disclosable transaction having been implemented*: This date is specific to promoters dealing with "bespoke" schemes. Such schemes are not "marketed" or "made available for implementation" in the same way as "marketed schemes". Typically the promoter of a "bespoke" scheme is likely to be

working exclusively with a client with a particular and complex set of financial/tax circumstances and the tax adviser will be designing the most tax efficient structure specific to the client's needs. In such cases, the "relevant date" is the date the promoter becomes aware that a transaction forming part of the scheme has taken place. Linking it to the date the promoter becomes aware that the scheme has been implemented ensures that where a bespoke scheme goes through several iterations it is only the implementation of the final version that triggers disclosure.

5.3 *Situations where the client/user must disclose (Sections 817F to H and Regulations 19 & 20))*

As mentioned in ***Part 3***, while primary responsibility for disclosure under the disclosure rules falls on the promoter, the legislation identifies certain situations and circumstances where the responsibility to disclose shifts to, or rests with, the scheme user. These are,

- where the promoter is offshore,
- where the promoter asserts legal professional privilege and
- where there is no promoter i.e. the scheme is an "in-house" scheme.

(See ***paragraph 3.8*** for further details). In such cases, the disclosure obligation arises by reference to the date of the first transaction entered into by the user, which forms part of the scheme. The time period within which disclosure must be made by reference to that date is 5 working days, where the promoter is offshore or legal professional privilege is asserted, and 30 working days in the case of "in-house" schemes – ***Regulations 19, 20 & 21.***

In this regard, it should be noted that where a client waives legal privilege, such that the promoter who is a legal professional can disclose, such waiver must be made in sufficient time as to enable the promoter to meet his obligations under the disclosure rules i.e. to disclose within 5 working days of the promoter becoming aware of any transaction forming part of the disclosable transaction having been implemented. It should be noted that legal professional privilege does not arise in the context of a marketed scheme, as no professional/client relationship can exist at the point such schemes are required to be disclosed (i.e. within the period of 5 working days of first making a marketing contact).

Part 6. What information must be Disclosed

6.1 *General*

Promoters and, in certain circumstances, clients/users of disclosable transactions have to disclose to Revenue information about how the scheme works, within tight deadlines. This information is referred to in the Mandatory Disclosure legislation as "specified information" (***sections 817D(1), 817E, 817F, 817G, 817H(1)***). ***Section 817Q(1)(e)*** allows Revenue to set out the required information in regulations. ***Regulation 16*** does this.

Basically, what is required is for sufficient information to be provided as would allow a Revenue officer to understand how the scheme operates, or is intended to operate - in other words, how the expected tax advantage arises. The explanation should be in straightforward terms and should identify each of the steps involved and the relevant Irish tax law on which the scheme relies.

6.2 *The Specified Information*

Regulation 16 requires the following "specified information" to be included in a disclosure:

- If you are a promoter making the disclosure or if you are a user making a disclosure in relation to, for example, an "in-house" scheme:
    - your name, address, phone number and tax reference number (***Regulation16(2)(c)(i) & (iii)***).
- If you are disclosing as a client of a promoter who is outside the State or as a client of a promoter who is asserting legal professional privilege:
    - your name, address, phone number and tax reference number, and
    - the name, address, phone number of the promoter (***Regulation 16(2)(c)(ii)***).

In all cases ***(Regulation 16(2)(b)***):

- Details of the particular legislative/regulatory provision that makes the scheme disclosable i.e. the relevant "specified description" categories etc.
- A summary of the scheme and any name by which it is known.
- Full references to the provisions of the Acts that the person disclosing considers to be relevant to the treatment of the scheme for tax purposes.
- Full details of the scheme with information explaining:
    - each element of the scheme,

- how the expected tax advantage arises, and
- how each provision of the Acts that are held to be relevant to the treatment of the scheme for tax purposes applies or, as the case may be, does not apply to the scheme.

In a case where a client is required to make a disclosure due to the promoter asserting legal professional privilege, only the information outlined above must be provided on the relevant disclosure Form. There is no requirement to furnish privileged documentation or advice between the client and his legal adviser.

6.3 *Other Information to be provided to Revenue*

Apart from the specified information that has to be disclosed to Revenue in relation to a scheme, certain other information is required to be disclosed within strict time frames as follows:

6.3.1 Promoter asserting LPP: ***Section 817H(2)*** requires a promoter who is asserting legal professional privilege under ***section 817J*** to advise Revenue of that fact. ***Regulation 23 & 26*** requires that information to be provided within the period of 5 working days commencing on the day after the relevant date. The information required to be provided is the name, address, telephone number and tax reference number of the promoter. As legal professional privilege does not arise in the context of marketed schemes (because the reference date for disclosure is the first date a marketing contact is made which will pre-date any professional relationship with a client in respect of the scheme), the claiming of legal professional privilege will be confined to bespoke schemes. As such, a promoter claiming legal professional privilege must do so within 5 working days of first becoming aware that a transaction forming part of the scheme has been implemented by the client.

6.3.2 Client List: The Minister for Finance indicated (in a Press Statement issued on the publication of the Regulations) that he would be making a change in Finance Bill 2011 to the requirement on promoters to provide a "client list" in section 817M. In essence, the change will require a promoter to include a client to whom a scheme has been made available for implementation on a client list unless the promoter has satisfied him/herself that the client has not actually implemented the scheme.

This forthcoming change in the primary law may also give rise to changes in Regulation 24 which governs the period of time within which the initial and subsequent client lists have to be provided. This is because Regulation 24 reflects the existing section 817M which requires the listing of a client on the client list solely on the grounds of the scheme being made available to the client for implementation.

The following paragraphs anticipate the above change

Section 817M requires a promoter to provide Revenue at regular intervals with information on persons to whom a disclosable transaction has been made available for implementation, unless the promoter has satisfied him/herself that the client has not actually implemented the scheme at the time such information is required. This is known as the client list. A separate client list must be provided for each disclosable transaction (i.e. scheme) made available by the promoter and disclosed to Revenue.

It is up to the promoter to take all reasonable steps to establish if a client to whom the promoter has made a scheme available has actually implemented the scheme. Unless the promoter can establish that the client has not implemented the scheme, the client must be included on the list. This will only be an issue in relation to "marketed" schemes, as in the case of "bespoke" schemes the trigger for disclosure of the scheme is the promoter first becoming aware of any transaction forming part of the disclosabe transaction having actually been implemented – in other words, for bespoke schemes the matter of a client list only arises after the scheme has been commenced by the client.

The information to be provided is:

- the name,
- address, and
- where known to the promoter, the tax reference number

of the client.

Section 817Q(1)(g) provides that the period of time within which, or by which, the client list is to be made available may be set out in Regulations.

Regulations 24(1)(a) & 26 provide that the initial client list must be provided:

- where the scheme is a marketed scheme, within the period of 30 working days commencing with the day after the day on which the promoter first makes the disclosable transaction available to a person for implementation, and

- where the scheme is a bespoke scheme, within the period of 30 working days commencing with the day after the date the promoter first becomes aware of any transaction forming part of the disclosable transaction having been implemented.

Regulations 24(2)(b) & 26 provide that, following the submission of the initial client list, a further client list must be provided to Revenue in respect of the scheme within the period of 5 working days after the end of each calendar quarter. This is qualified by ***Regulation 24(3),*** which provides that where a promoter, following the submission of the initial client list, either has not made the scheme available to any other person for implementation during either the calendar quarter in which the initial client list was submitted, or in any subsequent calendar quarter, or having made the scheme available to another client(s) has satisfied him/herself that the client has not implemented the scheme during those periods, there is no requirement to submit a "nil" client list.

Regulation 24(4) also makes clear that any subsequent client list should only include a person to whom the scheme has been made available since the previous client list was submitted (unless of course the promoter is satisfied that such client has not implemented the scheme within the relevant reporting period).

It may be the case, of course, that a promoter makes a scheme available to a client for implementation and for reasons of, for example, delay on the part of the client, the scheme is not implemented immediately but at some later time. In order to fulfil the promoter's obligations in relation to the client list, the promoter may have to satisfy him/herself as to whether or not the client has implemented the scheme in relation to subsequent calendar quarters and if the client has then he or she must be included in the list for the relevant quarter.

The timing of the initial provision of the client list in relation to marketed schemes will, by definition, be linked to the date that a scheme is made available to clients for implementation. Such a list could not be provided at the same time as a marketed scheme is disclosed to Revenue, as the disclosure date for such schemes is by reference to the date the scheme is substantially designed and the first marketing contact is made - which clearly pre-dates the "making available of the scheme for implementation". The promoter will be expected to continue to provide Revenue with updated client lists at quarterly intervals after the initial list is made available, as outlined above.

In the case of "bespoke schemes" the client list will, by definition, include a single client who has already commenced to implement the scheme and so ongoing client lists will, generally, not arise.

Where a promoter asserts legal professional privilege in relation to the disclosure requirements (***section 817J***), the promoter will not be providing Revenue with specified information on the scheme under ***section 817E*** and, therefore, the requirement to provide a client list will not apply. However, in such situations the user of the scheme must disclose the scheme details to Revenue within 5 working days of entering into the first transaction forming part of the scheme. The disclosure by the client will identify the client to Revenue and so the clients of legal professionals and other promoters involved in bespoke tax planning will be in a broadly equivalent position.

Where a promoter is a legal professional engaged in promoting marketed schemes, the promoter is obliged to disclose the scheme to Revenue under ***section 817E***, as legal professional privilege does not arise. That being the case, the promoter is also required to disclose a client list under section 817M like any other promoter. The information to be disclosed in the client list, comprising the name, address and tax reference number (where known) of clients is not privileged information.

6.3.3 Appeal Commissioners' determinations: The Mandatory Disclosure legislation allows Revenue to make an application to the Appeal Commissioners for a determination in respect of various issues arising under the legislation (***section 817P***). These include, for example, making an application for a determination that information or documents be made available to Revenue where a person has failed to provide the information or documents on foot of a statutory notice, and seeking a determination that a scheme is and always was a disclosable transaction.

The Appeal Commissioners may make a determination in favour of Revenue or in favour of the person in respect of whom the application for a determination has been made. Where a determination is made in favour of Revenue, ***Regulations 25 & 26*** set

out the period of time within which the information, documents or the specified information, as the case may be, must be made available to Revenue. In all cases it is within the period of 5 working days commencing on the day after the date of the Appeal Commissioners' determination.

Part 7. How to make a Disclosure

7.1 *Forms to be Completed*

Whether you are required to disclose as a promoter or as a client/user, disclosure must be made on the appropriate Forms. Use of these Forms is a legal requirement and no other form of disclosure will be accepted (***Regulation 31***). The following Forms are available:

- ***Form MD1*** – for use where scheme disclosed by promoter.

- ***Form MD2*** – for use where scheme disclosed by:
  - User in case of "in-house" scheme
  - Client where promoter outside the State, and
  - Client where promoter asserts LPP

- ***Form MD3*** – Continuation sheet for use with ***Forms MD1*** and ***MD2***

- ***Form MD4*** – for use by promoter when providing "client list"

- ***Form MD5*** – Continuation sheet for use with ***Form MD4***

7.2 *How to obtain Forms*

Copies of the relevant Forms can be obtained from the:

- ***Mandatory Disclosure Unit***

  - **Phone**:01 6131800 or for callers outside the Republic of Ireland 00 353 1 6131800

  - **Fax**: 01 6034445 or 00 353 1 6034445

  - **e.mail**: mandisc1@revenue.ie

- Online at www.revenue.ie under: forms / forms for individuals/ forms for businesses

- Forms and Leaflets Lo-call 1890 306706 or 00353 1 7023050 for callers outside of the Republic of Ireland

7.3 *Where to submit Forms*

All forms should be sent to

Mandatory Disclosure Unit
Office of the Revenue Commissioners
Large Cases Division

Ballaugh House
73-79 Mount St. Lower
Dublin 2.

7.4 *Will Receipt of Forms be Acknowledged*

All disclosures under the Mandatory Disclosure requirements will be acknowledged promptly. However, Revenue will not express any view or opinion on a transaction disclosed.

Part 8. Information Powers

8.1 *General*

Under the Mandatory Disclosure legislation, certain information seeking powers are give to the Revenue Commissioners to enable them:

- to enquire into the reasons why a promoter has not disclosed a scheme - ***section 817I***,
- to seek more information where a disclosure is incomplete, or in support of, or in explanation of, information disclosed – ***section 817K***, and
- to seek information from a "marketer" about the promoter of a scheme – ***section 817L***.

In addition, Revenue can make an application to the Appeal Commissioners for a determination in respect of various issues arising under the Mandatory Disclosure legislation – thus effectively "enforcing" disclosure of information – ***section 817P***.

8.2 *Explaining why a Scheme has not been disclosed*

Revenue can, by written notice, require a person suspected of being a promoter of, or the user of, a disclosable transaction to state whether, in the person's opinion, the person is required to disclose the scheme (***section 817I(1)***). This is called a "pre-disclosure enquiry" in the legislation. Any notice issued by Revenue under this section has to specify the scheme in respect of which the person's views are sought. This is designed to give reassurance that Revenue cannot simply go on a "fishing exercise" without having reasonable grounds for looking for the information sought (***section 817I(2)***).

A "pre-disclosure enquiry" notice requires the person to whom it is addressed to state whether, in the person's opinion, the scheme is a disclosable transaction and, if not, the reasons for that opinion. If the person is of the view that no disclosure obligation arises, a full explanation must be provided as to why that view is held (referred to as a "statement of reasons" in ***section 817I(3)***) and must demonstrate, based on the requirements of the legislation and the regulations, why that view is justified. In that regard, it is not sufficient that the person has an opinion from a solicitor, or barrister or other professional (i.e. an accountant or member of the Irish Taxation Institute) to the effect that the scheme is not a disclosable transaction (***section 817I(4)***).

In other words, it is insufficient for a reply to a notice to simply say that the person has a professional opinion to the effect that the scheme is not disclosable – the person is required to demonstrate by reference to the various legislative requirements and tests that the scheme is not disclosable. For example, if the person asserts that the scheme does not fall within any of the "specified descriptions" set out in the Regulations, sufficient information must be provided to allow Revenue to affirm the assertion. Equally, if a person was to assert that the obtaining of the tax advantage was not a main benefit arising from the scheme – the statement of reasons would have

to identify the various benefits and how they had been measured relative to the tax advantage.

A "pre-disclosure enquiry" notice has to be complied with within the period specified in the notice, which may not be less than 21 days from the date of the notice (***section 817I(5)***) or such longer period as may be agreed by Revenue.

8.3 *Seeking Supplementary Information*

Where a person makes a disclosure and Revenue has reasonable grounds for believing that not all of the specified information required to be disclosed has been made available, Revenue may by written notice require the person to provide the "missing" information. The notice must specify the information that Revenue is seeking (***section 817K(1)***). Revenue can issue such a notice not alone to a promoter, but also to a client/user where the obligation to disclose rests with them.

Even where a person has complied fully with their disclosure obligations, Revenue may issue a notice requiring the person to provide other information about, or documents relating to, the disclosable transaction as they may reasonably require in support of, or in explanation of, the specified information already provided about the scheme (***section 817K(2)***).

A notice seeking supplementary information has to be complied with within the period specified in the notice, which may not be less than 21 days from the date of the notice (***section 817K(3)***) or such longer period as may be agreed by Revenue.

8.4 *Seeking Information from a Marketer*

Situations may arise where Revenue knows or suspects that a disclosable scheme is being marketed but the person marketing the scheme claims not to be the promoter and the available evidence supports that assertion. In such situations, ***section 817L*** allows Revenue to issue a notice in writing to a "marketer" requiring the marketer to provide the name, address and, where known, the tax reference number of every person who has provided the marketer with information in relation to the scheme.

A "marketer" is defined in ***section 817D(1)*** as a person who is <u>not</u> a promoter but who has made a marketing contact in relation to a disclosable transaction. Essentially, it means an intermediary or introducer who brings potential clients and promoters together with a view to the clients availing of a marketed scheme.

The name of the person divulged by the marketer in response to a notice may be the true promoter, or it may turn out to be another intermediary, in which case a further notice would be issued to that intermediary and so on. The provision will assist Revenue in tracing back to the actual promoter.

A notice issued to a marketer by Revenue has to specify the scheme to which it relates (***section 817L(2)***). This is designed to give reassurance to marketers that Revenue cannot simply go on a "fishing exercise" without some basis for seeking the information on promoters.

A notice under this provision has to be complied with within the period specified in the notice, which may not be less than 21 days (***section 817L(3)***) or such longer period as may be agreed by Revenue.

8.5 ***Seeking a Determination by the Appeal Commissioners***

8.5.1 *General* The Mandatory Disclosure legislation allows Revenue to make an application to the Appeal Commissioners for a determination in respect of various issues arising under the legislation (***section 817P***). These include, for example, making an application for a determination that information or documents be made available to Revenue where a person has failed to provide the information or documents on foot of a statutory notice.

While the right to make such an application rests with Revenue, it will be heard by the Appeal Commissioners as if it were an appeal by a taxpayer against an assessment to income tax (***section 817P(4)***). As such, any party affected by an application will be able to argue their case before the Appeal Commissioners and have representation at any application hearing (***section 817P(5)***).

8.5.2 *Applications to Appeal Commissioners:* The specific situations in which Revenue can make an application to the Appeal Commissioners and the basis on which the Appeal Commissioners must make a determination, are as follows:

- ***Section 817P(1)(a)*** - requiring information or documents to be provided by a person in support of a statement of reasons (to the effect that a scheme is not disclosable) provided by the person in compliance with a notice under ***section 817I*** – see ***paragraph 8.2*** foregoing.

  In this situation the Appeal Commissioners have to determine the application on the basis of whether or not the information or documents sought should be made available to Revenue (***Section 817P(2)(a)***).

- ***Section 817P(1)(b)*** - requiring information to be provided by a person, following the failure of that person to provide the information in compliance with a notice under ***section 817K(1)*** (to the effect that Revenue has reasonable grounds for believing that not all of the specified information required to be disclosed in relation to the disclosable transaction has been made available) – see ***paragraph 8.3*** foregoing.

  In this situation the Appeal Commissioners may make a determination in favour of Revenue only if they are satisfied that Revenue have reasonable grounds for believing that the information forms part of the specified information in relation to the disclosable transaction (***Section 817P(2)(b)***).

- ***Section 817P(1)(c)*** - requiring supporting information or documents to be provided by a person following the failure of that person to provide the information or documents in compliance with a notice under ***section 817K(2)*** – see ***paragraph 8.3*** foregoing.

In this situation the Appeal Commissioners have to determine the application on the basis of whether the information or documents sought should be made available to Revenue in their entirety, partially or not at all (***Section 817P(2)(c)***).

- ***Section 817P(1)(d)*** - seeking a determination that a transaction is to be treated as a disclosable transaction for the purposes of the legislation.

  Revenue may make an application to the Appeal Commissioners for a determination to the affect that a scheme is to be treated as disclosable. In this situation the Appeal Commissioners may only make such a determination if they are satisfied that Revenue has reasonable grounds for believing that the scheme may be disclosable and has taken all reasonable steps to establish whether it is so. A determination in favour of Revenue has the effect of deeming a scheme to be disclosable and it must, therefore, be disclosed by the promoter or client/user as appropriate (***Section 817P(2)(d)***).

- ***Section 817P(1)(e)*** - seeking a determination that a transaction is, and always was, a disclosable transaction for the purposes of the legislation.

  Revenue may make an application to the Appeal Commissioners for a determination to the affect that a scheme is, and always was, disclosable. In this situation the Appeal Commissioners may only make such a determination if they are satisfied on the evidence presented that the scheme is indeed disclosable. A determination in favour of Revenue has the effect of confirming that a scheme is, and always was, disclosable and as such Revenue could seek the Courts to impose a civil penalty on the promoter or client/user under ***section 817Q*** (see ***Part 9*** following) for failing to comply with the disclosure obligations (***Section 817P(2)(e)***).

8.6 *What constitutes "reasonable steps" and "reasonable grounds for believing"*

Section 817P(3) sets out what may constitute "reasonable steps" (***subsection (a)***) and "reasonable grounds for believing" (***subsection (b)***) on the part of Revenue in relation to an application to the Appeal Commissioners under ***section 817P(1)(d)*** for a determination to the effect that a transaction is to be treated as a disclosable transaction for the purposes of the legislation.

"Reasonable Steps" may, but need not necessarily, include:

- the fact that Revenue made a "pre-disclosure enquiry" in relation to the scheme under ***section 817I.***

- the fact that Revenue made an application to the Appeal Commissioners under ***Section 817P(1)(a)*** for a determination seeking information or documents in support of a "statement of reasons" provided under ***section 817I*** in response to a "pre-disclosure enquiry" in relation to the scheme.

"Reasonable grounds for believing" may include:

- the fact that the transaction falls within a particular specified description as set out in the Regulations,

- an attempt by the person to avoid or delay responding to a pre-disclosure enquiry from Revenue under ***section 817I*** in respect of the transaction under enquiry,

- an attempt by the person to avoid or delay complying with a determination by the Appeal Commissioners under ***Section 817P(2)(a)*** in respect of the provision of information or documents in support of a statement of reasons provided by the person under a "pre-disclosure enquiry" in relation to the scheme,

- a failure of the person to comply with a pre-disclosure enquiry from Revenue under ***section 817I*** in relation to another transaction, and

- a failure by the person to comply with a determination by the Appeal Commissioners under ***Section 817P(2)(a)*** in respect of the provision of information or documents in support of a statement of reasons provided by the person under a "pre-disclosure enquiry" in relation to another scheme.

Part 9. Civil Penalties

9.1 *General*

A failure to comply with any of the obligations imposed by the Mandatory Disclosure legislation, or the Regulations made under it, may leave a person liable to a civil penalty, as provided for by ***section 817O***.

The level of civil penalty that may apply varies depending on the nature of the failure. The liability to a penalty and the amount of the penalty is to be determined by the Courts in all cases.

9.2 *Civil Penalties for "lesser" failures*

For certain specified "lesser" failures, there is an initial civil penalty of up to €4,000. If the failure continues after the initial penalty is imposed, a further fixed daily penalty of €100 per day applies. These lesser penalties apply in the following situations:

- A promoter asserting legal professional privilege failing to inform clients that the obligation to disclose rests with them (***section 817H(2***)).
- A promoter asserting legal professional privilege failing to inform Revenue of that fact (section ***817H(3)***).
- A person failing to respond to a statutory notice relating to a pre-disclosure enquiry (***section 817I***).
- A person failing to respond to a statutory notice requiring the provision of specified information where Revenue believes that an incomplete disclosure has been made (***section 817K(1)***).
- A person failing to respond to a statutory notice requiring the provision of information or documents in support of, or in explanation of, specified information (***section 817K(2)***).
- A failure by a "marketer" to respond to a statutory notice requiring information about a promoter (***section 817L***).
- A failure by a promoter to provide a client list (***section 817M***).

9.3 *Civil Penalties for more serious failures*

For more serious compliance failures, more significant civil penalties apply. In these cases, there is a flexible initial penalty of up to €500 per day during the "initial period", as defined in ***section 817O(2)***, and where the failure continues after that penalty is imposed, a further penalty of €500 per day applies for every day that the failure continues.

The "initial period" means, in essence, the period starting on the day after the end of the period within which a promoter or person was obliged to provide specified information to Revenue on the disclosable transaction and ending on the day an application is made by Revenue to the Courts seeking the imposition of the penalty.

The purpose of the variable daily penalty in the initial period for the more serious failures is to deter promoters from deliberately delaying disclosure of a scheme, given the damage that non-disclosure could do in terms of potential loss of tax revenue to the Exchequer, if it turned out to be a scheme that would have been closed down had it been disclosed. If a standard fixed penalty of "up to €4,000" was to apply in all cases instead of the variable penalty, some promoters and users might take the view that a fixed penalty of up to that amount was worth paying as an additional "cost" of the scheme which, given the fee income or tax advantage likely to arise, could be easily absorbed. Such persons may delay disclosure until significant fees had been earned or tax advantage gained, to the detriment of the Exchequer.

The more serious compliance failures to which these higher civil penalties apply are as follows:

- Failure of a promoter to discharge obligations imposed by ***section 817E***.
- Failure of a person to discharge obligations imposed by ***section 817F*** (where promoter is outside the State).
- Failure of person to discharge obligations imposed by ***section 817G*** ("in-house" scheme).
- Failure of person to discharge obligations imposed by ***section 817H(1)*** (where promoter claims legal professional privilege).

9.4 *How are the Civil Penalties applied*

Under ***section 817O(3)***, the normal civil penalty procedures contained in ***section 1077B*** are adapted so as to allow Revenue apply directly to the relevant court (i.e. the District, Circuit or High Court, as appropriate) for the court to determine if a person named in the application has failed to comply with an obligation imposed on the person by the Mandatory Disclosure legislation or Regulations, and to determine the amount of the civil penalty (***section 817O(5)***).

Under the legislation (***section 817O(4)***) Revenue is required to issue a copy of the Court application to the person to whom it relates. This will be done at the same time as the application to the Court is made.

Flexibility is given to the Courts in terms of the absolute amount of civil penalty that may be imposed, and the penalty provision is designed to allow the Courts take account of the promoter's fee income and the tax advantage gained by the client/user. Specifically, in determining the amount of the civil penalty to be applied, the court is required to have regard–

- in the case of a promoter, to the amount of the fees received or likely to be received in connection with the disclosable transaction (***section 817O(6)(a)***), and

- in any other case, to the amount of the tax advantage gained or sought to be gained from the disclosable transaction (***section 817O(6)(b)***).

The legislation also provides (***section 817O(7)***) for the application of ***section 1077C*** (relating to the making of an order by the court for the recovery of a civil penalty where it has determined that a penalty applies) for the purposes of a penalty imposed under the Mandatory Disclosure legislation and for the non-application of ***section 1077D*** (relating to proceedings against an executor, administrator or estate in the case of the death of a person in respect of whom the court has imposed a penalty).

Part 10. Commencement and Transitional Provisions

The Minister for Finance indicated (in a Press Statement issued on the publication of the Regulations) that he would be making a change in Finance Bill 2011 to the commencement provision for the Mandatory Disclosure regime as contained in section 149(2) of Finance Act 2010. The amendment will provide for the disclosure rules to apply prospectively from the effective date of the Regulations i.e. 17 January 2011.

The following Guidance anticipates that change

Commencement The commencement provision brings within the scope of the disclosure requirements:

- *promoters in respect of disclosable transactions where the relevant date falls on or after 17 January 2011.*

  This essentially means that on or after that date all new proposals for marketed schemes are caught by the legislation, along with new bespoke schemes.

- *promoters in respect of disclosable transactions where, even though the earliest of the relevant dates i.e. the date a "marketing contact" is made, may have occurred before the 17 January 2011, the disclosable transaction is made available for implementation on or after that date.*

  This ensures that marketed schemes in respect of which the marketing contact has been made prior to the 17 January 2011 come within the disclosure rules if they are made available for implementation on or after that date.

  It also ensures that "old" schemes that pre-existed the 17 January 2011 commencement date come within the disclosure rules if they are made available to any person for implementation on or after that date.

- *clients/users who have a duty to disclose, where the whole of the transaction takes place on or after the 17 January 2011.*

  This ensures that where the responsibility to disclose the scheme shifts to, or rests with, the client/user, they must disclose where all of the transaction takes place on or after the 17 January 2011. If any step of the transaction is entered into prior to that date disclosure of the scheme is not required.

Transitional Arrangements The period of time within which a disclosure must be made is provided for in ***Regulations 18 to 21*** *(*see ***Part 5*** of the Guidance Notes for details) and is:

- in the case of a promoter, the period of 5 working days, commencing on the date after the relevant date,

- in the case of a client/user where the promoter is either offshore or legal professional privilege has been asserted by the promoter, the period of 5 working days from the date the person enters the first transaction forming part of the disclosable transaction, and

- in the case of an in-house scheme the period of 30 working days from the date the first transaction forming part of the disclosable transaction is entered into.

In addition, Regulations 23 to 26 also specify the period of time within which other information is to be provided to Revenue e.g. a promoter asserting legal professional privilege and a promoter providing clients lists.

With a view to allowing tax advisers (and clients) time to fully comprehend the Regulations and to allow time for the finalisation of compliance procedures and systems, ***Regulation 27*** provides that where a period of time within which a disclosure must be made or other information must be provided to Revenue ends before **15 April 2011** it shall instead end on that date. This means that the first disclosures etc. under the disclosure rules have to be made not later than 15 April 2011. Thereafter, the statutory deadlines will apply.

It is important to note, in that regard, that the Mandatory Disclosure rules apply to schemes and transactions as on and from the effective date of the Regulations as outlined above. It is only the actual reporting of the schemes to Revenue that is covered by the transitional arrangements.

Appendix 1

Examples of what Revenue would consider as routine day-to-day tax advice and the routine use of statutory exemptions and reliefs for bona fide purposes

Stamp Duty

- Advising a client in relation to the reliefs available under sections 79 SDCA 1999 (intra-group relief) and section 80 SDCA 1999 (scheme of reconstruction or amalgamation) in the case of a corporate group reorganisation.

- Advising a farmer of the conditions which need to be satisfied in order to avail of the relief for young trained farmers (section 81AA SDCA 1999) and for farm consolidation (section 81C SDCA 1999).

- Advising a client of the various rates of stamp duty and the requirement for certificates in deeds in order to attract the appropriate stamp duty charge.

Corporation Tax

- Advising on the impact of close company legislation (Part 13 of the TCA) on owner-managed or family-owned companies, including surcharges applicable in respect of retained profits and provisions dealing with loans to and expenses incurred for directors/ participators.

- Advising on the requirements that must be met for a share buy-back by a company not to treated as a distribution for tax purposes (Chapter 9 of Part 6 of the TCA).

- Advising on the tax consequences of a company reconstruction/ amalgamation undertaken for bona-fide commercial reasons.

- Advising on the requirements that must be met for a proposed acquisition of intangible assets by a company to qualify for capital allowances under section 291A of the TCA.

CAT

- In anticipation of a gift/inheritance, advising the making of prior gifts so as to ensure the beneficiary meets the 'farmer' test of section 89 CATCA 2003.

- Advising on the arrangement of assets within a group of companies so as to ensure that excepted assets are not within companies whose shares are to be gifted or will from a bequest, thus maximising a later claim to business relief. (S93(3) CATCA).

CGT

- Advising on arranging a share buy-back for a parent or long-standing shareholder so as to avail of the CGT share buy-back provisions and CGT retirement relief simultaneously (Chapter 9 and section 598 TCA).

VAT

- Advice in relation to the operation of transfer of business relief (Section 20(2)(c) and Section 26(2) VAT Consolidation Act 2010).

- Advice on the VAT implications of property transactions including the option to tax and the Capital Goods Scheme.

- Advice on the VAT application to taxable persons who are closely bound by financial, economic and organisational links (VAT Grouping)

- Advice on the portion of VAT borne or paid that can be deducted in accordance with Section 59 VAT Consolidation Act 2010 including qualifying activities

- Advice in relation to the preparation for a Revenue audit and on-going advice in the course of the conduct of the audit

Employee Share Schemes etc.

Advising on the structure of share based schemes so as to benefit from:

- Profit sharing schemes under which employees are not chargeable to income tax on free shares received;

- Savings-related share option schemes, comprising a share option scheme element and a savings element where interest or bonuses arising on any savings used to acquire shares are not chargeable to income tax;

- Employee share ownership trusts which work in conjunction with approved profit sharing schemes and have the further tax advantage of not being taxable on any dividends received in respect of shares held by the trust where such dividend income is used to purchase further shares.

Income Tax

- Advising on the application of section 201 TCA 1997 on termination of employment.

- Advising on the use of BES schemes/ film relief and on the timing of the individual's contribution (so as to get the tax relief as soon as possible).

- Advising on the use of AVC for the purposes of maximizing tax relief and pension benefits.

- Advising on the implications of using joint or single assessment.

- Advising on the taxation implications of marriage breakdown and whether to claim relief for maintenance payments or make a continued claim for joint assessment (Sections 1025 and 1026 TCA 1997).

- Advising that losses in a self-employment situation (Case I or II) can be set against any other income (Sections 381 to 390 TCA 1997).

Appendix 2

Schedule to Mandatory Disclosure of Certain Transactions Regulations 2011

SCHEDULE

Transactions to which these Regulations do not apply

1. A Profit Sharing Scheme approved by the Revenue Commissioners under Part 2 of Schedule 11 to the Principal Act.

2. An Employee Share Ownership Trust approved by the Revenue Commissioners under paragraph 2 of Schedule 12 to the Principal Act.

3. A Savings Related Share Options Scheme approved by the Revenue Commissioners under paragraph 2 of Schedule 12A to the Principal Act.

4. A Contractual Savings Scheme certified by the Revenue Commissioners under Schedule 12B to the Principal Act.

5. A Share Option Scheme approved by the Revenue Commissioners under paragraph 2 of Schedule 12C to the Principal Act.

6. An approved salary sacrifice arrangement referred to in section 118B of the Principal Act

7. A Retirement Benefits Scheme within the meaning of section 771 of the Principal Act, for the time being approved by the Revenue Commissioners for the purposes of Chapter 1 of Part 30 of that Act.

8. An Annuity Contract or a Trust Scheme, or part of a Trust Scheme, for the time being approved by the Revenue Commissioners under section 784 of the Principal Act.

9. A PRSA contract, within the meaning of section 787A of the Principal Act, in respect of a PRSA product, within the meaning of that section.

10. A Qualifying Overseas Pension Plan, within the meaning of Chapter 2B of Part 30 of the Principal Act.

11. A transaction qualifying for relief for investment in films under section 481 of the Principal Act.

12. A transaction qualifying for relief for investment in renewable energy generation under section 486B of the Principal Act.

13. A transaction qualifying for exemption for profits or gains arising from the occupation of certain woodlands under section 232 of the Principal Act.

14. A transaction qualifying for exemption from CGT of certain proceeds of sale of woodlands under section 564 of the Principal Act.

15. A transaction qualifying for relief for investment in corporate trades under Part 16 of the Principal Act.

16. A transaction qualifying for the tax treatment of certain venture fund managers under section 541C of the Principal Act.

17. A transaction qualifying for repayment of tax for relevant employees where earnings not remitted under section 825B of the Principal Act.