



## RAISING STANDARDS IN THE TAX ADVICE MARKET: PROFESSIONAL INDEMNITY INSURANCE AND DEFINING TAX ADVICE

Issued 11 June 2021

ICAEW welcomes the opportunity to comment on the *Raising standards in the tax advice market: professional indemnity insurance and defining tax advice* consultation published by HMRC on 23 March 2021, a copy of which is available from this [link](#).

In principle we support the proposal that those who provide tax services should hold professional indemnity insurance (PII). The definition of tax advice should be narrower than proposed by HMRC, with certain areas, eg payroll, sub-contractors, tax software providers, and those providing advice pro bono and as family and friends, scoped out pending further work. We urge HMRC to undertake further research and hold further consultations with stakeholders including insurers before any final decisions are made.

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1. We welcome the opportunity to comment on the **consultation** which follows on from HMRC's call for evidence last year on raising standards in the tax market to which ICAEW responded in **ICAEW REP 45/20**. The Government published a **summary of responses** in November 2020. We welcome the constructive discussions we and other professional bodies have had with HMRC. In drafting our response to this consultation, we have engaged extensively with ICAEW's professional indemnity insurance (PII) experts.
2. This latest consultation was published alongside a further document, **Clamping down on promoters of tax avoidance**, which includes a number of measures to tackle the promotion of tax avoidance schemes, including the power for HMRC to publish details of promoters and schemes where it suspects arrangements constitute tax avoidance. It is clearly important that HMRC continues to bear down on those who promote aggressive tax avoidance schemes as they remain a high-risk sector.
3. It is clear from discussions with members and insurers that in order to identify whether compulsory PII is a viable approach, there will need to be further discussion and consultation with stakeholders and insurers. We would urge HMRC to reflect on the comments received and we recommend that there is a further consultation undertaken with those affected before any final decisions are made about whether to proceed. We will be happy to participate in further discussions.

## EXECUTIVE SUMMARY

### Professional indemnity insurance

4. In principle we support the proposal that those who provide tax services should hold professional indemnity insurance (PII). We believe that PII provides an important level of consumer protection. The proposal should not, in theory, affect the approximately 70% of tax advisers who are members of professional bodies such as ICAEW. In Appendix 1 to this response, we have set out further details of the ICAEW's PII scheme rules.
5. The proposal for compulsory PII is only one aspect of the wider raising standards agenda and we reiterate a conclusion from our previous response that better data on the performance of agents and others who provide tax services is essential.
6. In relation to high-risk promoters, the PII proposals by themselves may not be sufficient to stop their activities and the professional bodies and HMRC need to continue to work together to try and stamp out such activity.
7. Any PII regime will need to be proportionate and ensure that it does not result in potentially undesirable outcomes which would be contrary to the policy intention, for example increasing costs for all advisers and/or pricing taxpayers out of taking advice when they need it.
8. We recommend that further research is undertaken into the PII arrangements of unaffiliated advisers as this will help identify the issues in more detail and support the evidence base on which any final decisions are made.
9. The support of the insurance industry is essential. HMRC needs to work closely with the insurance industry and other stakeholders to identify a viable and comprehensive PII solution which the insurance industry can deliver successfully.

### Defining tax advice

10. We would suggest that the definition of tax advice should be narrower than that which has been proposed by HMRC, but with the power to add to it later.

11. Of the two possible definitions suggested, we would prefer the definition to be based on anti-money laundering rules. However, whatever base definition is adopted, it must be sufficiently wide to include activities which are identified as high risk.
12. Serious concerns have been raised about the activities of some of those operating in the umbrella company sector – these activities may need a far greater level of intervention than is proposed in this consultation.
13. PII is only required where there is a contractual duty of care between the taxpayer and the person providing the tax advice. It follows that in-house advisers and those working pro bono, family and friends, etc, would be scoped out.
14. Further consideration needs to be given to whether the definition should include those providing only processing and submission services. Separate discussions might be needed with various sectors, before any decisions are made.
15. We suggest that for the time being that those who provide payroll processing services only are scoped out, pending a separate review/consultation on the oversight arrangements for the payroll industry.
16. Likewise, we suggest that for the time being tax software which merely processes information should be scoped out pending a separate review/consultation on the oversight arrangements for the tax software industry.
17. Subcontractors whose work is covered under a tax adviser's PII policy should not be required to hold their own PII.
18. We have set out in Appendix 2 our views on whether the services cited in Annexe C of the consultation document should be in or out of scope of any definition of tax advice.

#### **Next steps**

19. We urge HMRC to reflect on comments received and hold further discussions and consultations with stakeholders including insurers before any final decisions are made about how to proceed.

### **KEY POINTS**

#### **KEY POINTS ON PROFESSIONAL INDEMNITY INSURANCE**

##### **The public interest and consumer protection**

20. In principle we support the proposal that all those who provide tax advice or tax services should be required to hold PII. We believe that PII provides an important level of consumer protection and should help to drive up standards and improve compliance. The proposal should not, in theory, affect the approximately 70% of practising tax advisers who are members of professional bodies such as ICAEW as they already need to hold PII as part of their membership obligations.
21. The public interest benefits of PII will need to be tested against its impact on the wider PII market and the design of any PII regime must be proportionate and not result in potentially undesirable outcomes which might militate against the public interest, for example if the outcome merely results in increases in PII costs across the board and which might then restrict the ability of taxpayers to receive appropriate advice about their tax affairs at a reasonable cost.

## The PII requirements of ICAEW

22. Annexe B of the consultation document compared the PII arrangements of a number of professional bodies and regulatory bodies which included ICAEW. Although the details in Annexe B in relation to ICAEW are broadly correct, we include in Appendix 1 of this response an updated schedule of the detail set out in the consultation document in relation to the PII requirements that ICAEW makes of its members.
23. The differing PII requirements highlighted in Annexe B of the consultation document can make comparison of the regimes more difficult. We would also point out that, for example, ICAEW members will usually be undertaking a variety of work of which tax is only a part, but our members will hold PII cover which will cover all their work. The different work undertaken by accountants as compared to the legal profession will also give rise to differences in the PII arrangements, although the underlying principles should be similar.

## Raising standards

24. We recognise, however, that the proposal for compulsory PII is only one aspect of the wider raising standards agenda and it is important that the other aspects identified in the next steps are also developed. We stated in our response to the call for evidence that HMRC needs better data so as to properly risk assess the work performed by agents and which will allow for evidence-based policy decisions. While we support PII as a step change in helping to provide better consumer protection, we reiterate our comments from our previous consultation response that better data on the performance of agents and others who provide tax services is essential if standards are to be raised, as it will provide a platform for evidence-based decision making and allow for proper targeting of any interventions based on risk analysis.
25. We remarked in our response to the call for evidence that, over and above the risks posed by certain sectors of the tax agent market, there appears to be a hard core of promoters of abusive tax avoidance schemes (and potentially abuse of legitimate tax reliefs) who appear to be resistant to any action to curtail their activities, but who inflict serious damage on the integrity of the UK tax system. Their activities damage the role and reputation of those professional advisers who are working compliantly and following best practice, and damage trust in the tax system. Given their egregious and high-risk activities, we think it unlikely that any reputable insurer would provide them with suitable PII cover, in which case it would be expected that they would have to cease those activities and exit the market, although some may continue to act as tax advisers but stop working in high risk areas of work such as tax avoidance schemes. These would be the expected policy outcomes but, based on past experience, there must be a danger that such advisers they are likely to either reinvent their activities but in a slightly different form or within a new structure, move offshore or, at worst, ignore the rules altogether. We remain concerned that such providers will continue to present a real and present threat to the UK tax system and that PII by itself may not be sufficient to stop them.
26. As we know, previous attempts to close down these promoters appear to have had mixed success: HMRC has had a number of successes, which we welcome, but such promoters appear to have the ability to resurface and carry on undertaking similar activity. It is therefore essential that the HMRC and the tax profession work together on highlighting and tackling promoters through a variety of means. There is a danger that such advisers might then operate under the radar, so any measures to tackle such behaviour will need to be robust.
27. We remain concerned that those who promote the above types of activity may also have failed to comply with anti-money laundering (AML) rules. As an AML supervisor of last resort, HMRC should by now have a growing evidence base and experience about the AML

behaviours in this sector. HMRC should work with OPBAS and other AML supervisors to identify what more can be done to improve AML compliance by and the ethical standards of businesses that HMRC supervises.

### **The requirements for compulsory PII**

28. The rationale for mandating PII is to provide a baseline level of protection and reassurance to the consumer (i.e., taxpayers) that they have a method of redress should they receive incorrect or incomplete advice and suffer financial loss. It would be reasonable to assume that market forces would drive up standards as riskier advisers will face higher premiums and be forced to adhere to stricter standards (which could include becoming a member of a professional body that maintains oversight over its members as well as adopting more robust client engagement and risk assessment procedures). Potentially, high risk advisers would face not being able to obtain cover and therefore, unless they are able to access any 'special measures' arrangements, such as entering the ICAEW/ICAS Assigned Risk Pool, they would in theory have to exit the market.
29. All ICAEW members in practice should hold PII under ICAEW's PII regulations. However, and as noted above, the precise terms of the PII regulations of the professional bodies vary and may not match entirely the proposals in this consultation. For example, ICAEW requires cover to be held with participating insurers (which are required to hold a minimum credit rating) and it prescribes the minimum terms of cover for ICAEW firms. Specifying the minimum terms of cover provides additional protection to firms and clients – ICAEW requires, for example, that insurers provide an additional 30 day extended policy period if it is unwilling to renew cover and a firm is unable to obtain alternative, compliant terms. Defence costs are in addition to the limit of indemnity that is available for claims, the excess is only payable on defence costs in certain cases and insurers are only permitted to apply certain exclusions.
30. What are the requirements needed to ensure that PII is effective in providing client protection? We believe that the following questions all need to be addressed:
  - What level of cover will be needed as a minimum? Will this be on a 'per claim' or aggregate basis?
  - Will the level of excess on policies be capped? Will excesses be on a 'per claim' or aggregate basis?
  - Will the minimum terms of cover be mandated? If so:
    - Will defence costs be inclusive or exclusive of the limit of indemnity that is available to meet claims?
    - What will be the territorial scope of cover?
    - Will there be any jurisdictional restrictions?
    - What exclusions will be permitted?
    - What will be the requirements for notification of claims and circumstances?
    - Will cover be on a 'claims made' or 'claims made and notified' basis or by reference to when the negligent act or omission was made?
  - What will be the run-off requirements, if any? If there are run-off requirements, how will legally enforceable run off insurance cover claims that emerge after the normal 6 year run off insurance cover has expired be settled?
  - Should insureds be able to choose their own broker?
  - What happens when advisers have tried to obtain cover but either cannot obtain PII or only at a prohibitive premium?
  - How are PII requirements monitored and managed?
  - How are PII requirements enforced?



31. We have set out in Appendix 1 of this response details of ICAEW's own requirements for policies of 'qualifying insurance' held by members / firms.
32. According to the consultation document HMRC estimates that there are around 21,000 advisers who are not affiliated to a professional body. Of these, HMRC estimates that around half of unaffiliated advisers may hold PII. However, no further analysis is provided about this aspect nor what sort of PII these advisers hold and whether it is adequate to provide consumer protection. We recommend that further research is undertaken into the PII arrangements of unaffiliated advisers as this will help identify the issues in more detail and support the evidence base on which any final decisions are made.

### **How will the PII market react?**

33. This is a very important question. If the policy objective is to be realised, the support of the insurance industry is essential. HMRC needs to work closely with the insurance industry and other stakeholders to identify a viable and comprehensive PII solution which the insurance industry can deliver successfully.
34. We do not know for certain how the PII market will react. However, the requirement that all those providing tax services will need to hold PII will increase the demand for PII cover, raising the question about how that demand will be satisfied and whether there will be sufficient underwriting capacity in the market to meet it. Given the increased demand and possible limits on supply (i.e. capacity), at least in the short term, PII costs could rise for all those who provide tax services and not just those who have never obtained PII cover.
35. Further, we are concerned that insurers could raise premiums for advisers who are members of a professional body in order to cover potentially higher risks in the unaffiliated market, in effect passing on some of the costs of obtaining PII in that sector to the professional body sector. Thus, it could have a disproportionate impact on the existing PII market for professionally qualified advisers. This would be an unwelcome result and contrary to the wider public interest. If there is a danger that this might happen then the proposal for compulsory PII would need to be reconsidered. One suggestion we have seen mentioned that might reduce the problem is whether it may be possible to place unaffiliated advisers in a separate risk pool, but discussions would need to be held with the insurance industry about whether this is feasible.
36. Further, insurance providers may look to scrutinise more closely tax activities for all insureds and not just those who have previously been uninsured. Over time, we would expect the market to settle down and premiums would adjust as insurers gain knowledge and experience of relative risks. However, there is a risk that there could be an unwelcome general rise in PII premiums in the short to medium term in what is already a hard PII market for the professions.

### **The public interest: balancing consumer protection against increased costs**

37. As noted above, it is possible that the proposal for compulsory PII could increase costs, and tax advisers in practice will almost certainly try and recover the costs through an increase in their charges. The costs of improving standards through PII will need to be proportionate and balanced against the public interest that taxpayers are able to obtain advice about their tax affairs at a reasonable cost. If the increased costs are too high, this could result in sectors of the taxpayer population being priced out of the tax market which would be contrary to the public interest given that many taxpayers will want to appoint an agent to help them to keep their tax affairs in order.
38. The proposal will need to be designed to ensure that the very taxpayers who need the most help are not shut out of the tax advice market, otherwise they may try to complete their own tax returns, potentially reducing tax compliance and increasing the tax gap. It is important to

ensure that, in improving standards, the UK tax advice market remains healthy and that taxpayers are able to access appropriate support when they need it. This will be even more important over the coming years as the UK moves to digital tax systems and the potential changes we may see in the administration of the tax system.

39. More generally, we remain very concerned that the UK tax system is far too complicated and needs to be simplified. A complicated tax system makes it difficult for taxpayers to comply with the rules and results in more errors and mistakes. As part of the move to digital tax systems, the UK tax system needs radical simplification to make it easier for taxpayers to get their tax right. Digitalising a complicated tax system is not the answer and is unlikely to improve compliance .

## KEY POINTS ON DEFINING TAX ADVICE

### General comments

40. We agree that, in order to identify who should hold PII, it will be necessary to define what constitutes tax advice. HMRC's suggested approach is to adopt a definition as wide as possible (encompassing all tax work undertaken in the UK or related to UK taxation) but with some exceptions and exemptions.
41. PII is a benefit for the consumer and protects the person giving the advice from claims that are made against them. In our view, the principle should be that there needs to be a duty of care which is typically (although not necessarily exclusively) evidenced by a contractual relationship between the taxpayer and the person providing tax advice. A claim by a taxpayer against an adviser is only likely to succeed if the taxpayer has such a contractual duty of care with the adviser and they have suffered loss due to the negligence or failing of the adviser.
42. Further, one of the Tax Faculty's principles for a good tax system is that any tax rules should be properly targeted. It follows that proper targeting should consider not only whether a contractual duty of care exists between the taxpayer and the person providing the advice but also what is the level of risk involved. There is a danger that if the definition is drafted too widely, it could catch many areas where there is little or no risk, while imposing substantial compliance burdens on the rest of the tax advice sector.
43. Given the above comments, we would caution against adopting a definition which is as wide as possible. Subject to the comments made below, we think it would be best to start with a slightly narrower definition, but which could include a reserve power to add categories of tax services by way of a Treasury Order. This might be necessary in any event as a 'backstop' to prevent any new and merging threats that could impact on the efficacy of the proposals.
44. Of the two possible definitions mentioned, namely those found in the AML and the dishonest tax agent rules, on balance we would prefer a definition based upon the AML rules as this would give a measure of consistency between the need to be registered for AML and to hold PII. However, and given the comments below about areas of risk, it may be necessary to extend the definition to ensure that it a) includes enablers of tax avoidance as set out in para 7 of Sch 16 F(No 2)A 2017 and b) those providing non-tax assistance who are caught by the final part of the dishonest tax agents definition, namely where "assistance given for non-tax purposes counts as assistance with a client's tax affairs if it is given in the knowledge that it will be, or is likely to be, used by a client in connection with a client's tax affairs".

### Review of the examples of tax advice in Annexe C

45. Annexe C of the consultation document sets out some examples of activities and professionals who may be providing tax advice for these purposes. This is a useful starting point for consideration of whether the activities highlighted should be included, and highlights some of the problem areas which might require further consideration.



46. For example, should the definition include those providing only processing and submission services and not advice except to query data provided that fails to process or looks inconsistent or incorrect? We have considered payroll activities in more detail in paras 56 to 59 below. Similar considerations are also likely to apply to processing and lodging of customs declarations and forms.
47. We believe that the tax software industry requires separate consideration – see paras 60 to 63 below.
48. Applying the principles set out earlier, we have reviewed the tax services set out in Annexe C of the consultation document and have set out in Appendix 2 of this representation our conclusions on whether they should be included or excluded in the definition.

### **Exceptions and exemptions**

49. In the consultation document., HMRC has proposed that these could include, for example:
- Advisers working on a pro-bono or charitable basis only.
  - In-house tax staff.
  - Those providing guidance only, rather than recommending a specific course of action (potentially mirroring the distinction made between advice and guidance in the financial services sector).
50. In the first two examples quoted above, it is unlikely that a contractual duty of care exists and therefore it seems reasonable that such activities are excluded. As for the third example, although helpful, we are not convinced that the distinction between advice and guidance is sufficient by itself to provide a clear boundary and there is a danger that it could be exploited by unscrupulous advisers such as those who promote high risk tax avoidance schemes – see our answer to Q24 below in paras 103/4.

### **High risk areas – including promoters and boutiques**

51. The approach of those who have been promoting tax avoidance schemes and aggressive tax planning arrangements appears to be based on trying to argue that they are not providing tax advice and that this position is set out in any contractual arrangements. Any definition adopted therefore needs to ensure that higher risk activities are within scope regardless of the precise contractual arrangements. We refer to our comments above about the need to extend any definition to include such activity.
52. As for high-risk areas, we have noted some of these in our earlier response but there is a clear and pressing need to make sure that so-called boutique advisers providing, for example, capital allowances/R & D claim services, often on a contingent fee basis, must be included in any definition. The introduction of the “super deduction” and freeports is likely to encourage further participants into these sectors and, given the higher risk profiles, it is clearly essential that such activities must be included in any definition.

### **Umbrella companies**

53. Further consideration also needs to be given generally as to whether umbrella companies should be included within the definition of tax services and, specifically, the urgent need to address the unacceptable behaviours of some unscrupulous promoters of such arrangements. In April 2021 the All Party Parliamentary Group (APPG) published a report *How contracting should work* which highlights that there appears to be some serious problems with some unregulated umbrella companies or payment intermediaries who “can and do facilitate or actively promote tax avoidance schemes to contractors, often with the collaboration of non-compliant recruitment agencies who receive incentives or ‘kickbacks’.”
54. At para 389, the APPG states that “the unregulated umbrella market is out-of-control, all too often exploiting contractors (even without them realising it) and is also a key reason for tax

avoidance schemes operating and being so readily and openly advertised.” and at para 393 that “We call on the Government to announce plans to introduce statutory regulation for payment intermediaries.”

55. There are, clearly, serious concerns with some behaviours in this sector that need to be addressed as a matter of urgency and which may need far greater level of intervention than is proposed in this consultation. We do not think that the activity highlighted by the AAPG is being undertaken by professional and reputable advisers. Further, we are also aware that there are many bona fide umbrella companies which operate correctly and thereby help to support improved compliance, so care is needed in framing any definition to ensure that good practices in this sector are not driven out of the market.

### **Payroll**

56. Payroll is a hugely important and specialist area of the market which is different from the normal services provided by tax advisers and therefore requires separate consideration. Reputable providers in this market are likely already to carry PII.
57. Payroll advisers range from those which provide advice and recommend a course of action to manage liabilities to tax, NIC and other employer levies to those which provide pure processing and submission services. At the boundary it can be difficult to distinguish between these two activities. For example, we think that payroll agents which confine their services to processing information provided to them by their clients and submitting PAYE RTI and P11D/P11D(b) returns to HMRC and do not give advice other than to simplify or enable compliance or to query data provided that fails to process or looks inconsistent or incorrect should be scoped out of these proposals, although in practice we would expect that reputable providers would have PII cover. A key determinant in such cases might be: is the service provider providing an opinion to the taxpayer?
58. In addition, other than individual advisers who might be members of a professional body which maintains oversight of its members, there appears to be no clear oversight of the sector as a whole.
59. We think that, for the present, payroll services should be scoped out of any definition of tax advice arising out of this call for evidence. However, we believe that HMRC should undertake a separate review of, and consultation on, the payroll market and products, the risks they present to consumers and the tax system and what, if any, arrangements might be required for proper oversight of the market.

### **Tax software**

60. There have been some initial discussions and debate about whether tax software firms should be included within the definition of tax services. This is going to be a critical area for the future, especially given Making Tax Digital.
61. The discussion has highlighted the important role of tax software, but currently the sector is largely left to its own devices with no clear oversight of the sector nor the standards within it despite the government’s intention to mandate electronic accounting records and quarterly returns for businesses and property rentals from 6 April 2023. Most taxpayers are bewildered by the range of tax software products and do not know where to start in choosing suitable products, but they face considerable costs (and possibly risks) if they choose inappropriate products.
62. There is also a need for greater consideration of the different range and capabilities of tax software. For example, where tax software to any extent goes beyond the processing of taxpayer data and, for example, either ‘pushes’ taxpayers to make certain decisions (eg whether or not to make a particular claim, or possibly to present information to HMRC in a particular way), or applies a particular treatment automatically where other reasonable

options are available, then this would appear to constitute tax advice. Where tax software goes beyond mere processing and could be seen to provide advice which taxpayers will act on, then it would seem unfair and unreasonable for them not to be subject to the same PII requirement as mainstream tax advisers.

63. We think that, for the present, tax software which merely processes information etc should be scoped out of any definition of tax advice arising out of this call for evidence. However, given the complexities of the tax software market and its key role in the future direction of the tax system, we believe that HMRC should undertake a separate review of, and consultation on, the tax software market and products, what risks they present to consumers and the tax system and what, if any, arrangements might be required for proper oversight of them. In this context, we recommend that HMRC should consider the principles set out in para 1.2.5 of the [Anti-Money Laundering and Counter-Terrorist Financing Guidance for the Accountancy Sector](#) published by the CCAB along with separate tax and insolvency appendices which sets out (albeit in the context of AML) when a tax software-based product might be subject to the AML rules.

### Sub-contractors

64. Sub-contractors provide a very useful role in helping firms to manage workloads and provide access to more specialist help and support, and consideration should be given to whether they would be subject to the need to hold PII. Under ICAEW rules, a practising certificate is not required when a person is a self-employed consultant (and not held out as a principal) to a public practitioner who takes responsibility for their work.
65. Such a consultant is also not required to hold PII, although it is recommended that they consider doing so. If they consider that their work is covered by the professional indemnity insurance (PII) of the firm to whom they are subcontracting, then their name and status as a subcontractor must be advised to that firm's PII insurers. ICAEW recommends that this is confirmed in writing.
66. In principle, we think that subcontractors can provide a valuable service and that provided they meet the requirements set out above, they should be scoped out of the need to hold PII.

## ANSWERS TO SPECIFIC QUESTIONS

### CHAPTER 2: INTRODUCTION

***Question 1: In your opinion, would introducing a requirement for anyone providing tax advice to have professional indemnity insurance satisfy the policy aims of improving trust in the tax advice market, by targeting poor behaviour and allowing taxpayers greater redress when things go wrong?***

67. In principle PII is an important consumer safeguard and should help to satisfy the policy aim of improving trust in tax advice. However, it is important that any PII proposals are properly designed and proportionate so that they provide a reasonable level of consumer safeguards at a reasonable cost. Further, and as noted in our response to Question 3 below, PII is only one tool in achieving the wider aim of raising standards and promoting trust in the tax profession.
68. It also needs to be remembered that merely having PII does not mean that the insurer will necessarily pay out in the event of any claim, for example because the adviser did not meet the strict terms of the policy.

***Question 2: If the government introduces the requirement for professional indemnity insurance, what further steps would you recommend?***

69. Steps are needed to ensure that the PII is adequate, that there is oversight of compliance and that there are robust enforcement arrangements. In designing / specifying minimum PII requirements, government should work closely with the insurance market to understand the impact of any proposals on the wider market.

**Question 3: Are there any alternative options you would recommend?**

70. In our response to the earlier Raising Standards consultation, we set out in para 62 to 64 some other possible approaches to raising standards in the unaffiliated sector. These are still relevant and were as follows:
- **Strengthening HMRC's Standard for Agents.** HMRC could introduce penalties for breaches of the Standard where the adviser is not a member of a body that has signed up to the PCRT and which has in place suitable disciplinary arrangements for breaches. The exemption could be based on the existing statement on compliance with the PCRT found in the [guidance on penalties for enablers](#) which was published on 30 April 2018, but put on a statutory footing.
  - **A requirement to undertake practice reviews.** Unaffiliated firms could be required to submit to a regular external practice review which could help practices improve by identifying areas of weakness and suggest improvements. The review should be independent of HMRC but could build on, or replace, existing AML compliance checks. However, there is a danger that it could focus on (likely compliant) UK advisers rather than offshore advisers. Consideration would need to be given as to how offshore advisers can be brought onshore which would require a legislative solution.
  - **The need for affiliation in higher risk areas.** Consideration could be given to a requirement that certain but high-risk (which would need to be defined) areas of the tax system can be undertaken only by a person or firm which is affiliated to an approved body, for example a PCRT signatory. This requirement could then be extended more widely if the data shows that services provided by the non-affiliated is of sufficiently higher risk that such an action was justified in the public interest.
71. In principle, these options could be explored further alongside, and to strengthen, the PII proposal. For example, the requirement to undertake practice reviews could be part of measures to reduce risk and premiums for those providers who might struggle to obtain cover. ICAEW's experience is that our Practice Assurance scheme, which includes monitoring visits to member firms on a cycle, are proving effective in helping to raise standards. Consideration should be given to whether introducing such requirements would help to support the PII proposal.

**Question 4: Apart from the costs and potential effects outlined above, are there any other costs you foresee for advisers?**

72. See the general comments made earlier. There is a danger that extending the PII requirement to the sector which presents a higher risk could result in higher premiums for all advisers, in effect sharing the extra costs of those who do not have PII with those who do. Any changes to the wider PII market must be proportionate, otherwise it might exacerbate the hardening of the PII market that has occurred in recent years which has already resulted in substantial premium rises for professional body affiliated firms.

## CHAPTER 3: THE MARKET FOR PROFESSIONAL INDEMNITY INSURANCE

### Questions for tax advisers

**Question 5: What are your experiences of obtaining professional indemnity insurance or of the market for professional indemnity insurance?**

73. Our experience is that the PII market has hardened considerably in recent years: some insurers have exited this market, others have ceased to underwrite certain activities and, as a result, PII premiums have already risen significantly for professional body members in practice.
74. Further, our intelligence is that PII insurers are taking a cautious view of insuring firms that have any involvement in tax avoidance and tax mitigation schemes (whether this be advice on such schemes or referrals to third party providers). Initially, insurers will try to identify such firms through questions on the proposal form. Then they will probably ask such firms to complete a further questionnaire with more detailed questions about what the firm is doing and the procedures it has in place to minimise the risk of claims. Based on the firm's answers, the insurer will then decide whether to insure the firm and, if so, the premium to be paid and the terms of the cover.
75. We also understand that insurers are also reviewing the position of firms that just introduce clients to other firms that give advice on tax avoidance and tax mitigation schemes. PII is thus helping to drive out poor behaviours which might exist in the affiliated tax advice market.
76. Given that insurers are reviewing more critically the risks they are willing to accept and the price they will set for cover, this is likely to particularly affect firms with a claims/notifications history and/or those involved in ongoing legal action, as well as firms engaged (or which have engaged previously) in activity which insurers perceive as more high risk (eg, tax mitigation schemes, R & D claims, investment advice, insolvency, M&A, and audit work). We have had reports of some members who engage in specialist areas such as R & D claims facing substantial increases in premiums and who might face being unable to obtain cover. Further, we are receiving reports that run-off cover is becoming much more difficult to obtain.

**Question 6: If you are a tax adviser who practices without insurance, why is this?**

77. All ICAEW members in public practice are required to hold PII. We suspect that there will be a number of reasons why those who are not required to do not hold PII which will include the expense of obtaining it, the size of the practice, possibly the risk profile of the practice (which could range from very high risk to very low), the burdens and admin associated with obtaining it, and the danger that cover might not be available.

### Questions for the insurance industry

**Question 7: What factors do you take into account when pricing professional indemnity insurance?**

78. Not applicable.

**Question 8: What are your views on the government's proposals for making information on promoters public? How would having more information about promoters of tax avoidance help you in making decisions about pricing or offering insurance?**

79. In our response to the raising standards call for evidence, we supported publicising the names of promoters of tax avoidance schemes. In para 35 of that response, we stated that "Given the activities involved are clearly abusive and high-risk for taxpayers, we believe there



is a public interest case that HMRC should have the power to publish the names of such promoters and facilitators.”

**Question 9: In your opinion, does the insurance market have the appetite and capacity to manage the new requirement?**

80. We refer to our general comments made earlier. This is a very important question which needs to be explored thoroughly before any decisions are made.
81. We would not want to see the existing PII market for professional advisers, which is well understood, dislocated. Clearly, the market needs to have sufficient capacity to absorb this without imposing unexpected burdens and increased costs on the ordinarily compliant professional adviser.

**Questions for people who use tax advisers**

**Question 10: What checks do you carry out when you engage a tax adviser? Do you check whether they are insured?**

82. This is a good question. Taxpayers should undertake due diligence before they appoint an adviser but, in practice, we suspect relatively few do so. There is a useful Helpsheet [choosing an accountant/tax adviser](#) which was once on HMRC’s website but which (following some concerns that it excluded some bodies) was removed from there and is now hosted on the website of the main accountancy bodies. However, we suspect it has little visibility in its current place and that this needs to be improved as part of a wider campaign (which should be supported or even led by Government) to highlight what taxpayers should be looking for when they choose an accountant and that they should check the professional qualifications of any adviser they plan to appoint. One solution might be to mandate that all those who provide tax advice need to make it clear in their public information that they hold PII and/or are affiliated to a professional body or association.
83. In addition, under the terms of the [Provision of Services Regulations 2009 \(SI 2009/2999\)](#) advisers who have PII, which will include members of a professional body but potentially also unaffiliated advisers who have PII, are required to disclose the name of their insurer and the territorial coverage of the insurance. This requirement is set out in para 27.3 of Part 4 of ICAEW’s guidance on engagement letters.

**Question 11: Do you have any experience of making claims or complaints against a tax adviser for bad advice that you would be happy to share with us?**

84. Claims for damages etc against ICAEW member firms will be made against the firm. ICAEW has an investigation and disciplinary process so does receive complaints against member firms and these will include some in relation to tax matters. Full details of cases which are taken to a disciplinary hearing are publicised on [ICAEW’s website](#) and disciplinary records can also be checked.

**Questions for everyone**

**Question 12: Do you think there are any lessons on how complaints are handled in similar industries that we can learn to help improve redress?**

85. All ICAEW firms need to comply with ICAEW’s disciplinary by-laws which includes a duty to investigate complaints. The by-laws are supported by ICAEW’s [guidance](#) on how to handle complaints. The duties include the following requirements:
- a firm must ensure that all new clients are made aware in writing of



- the Principal to be contacted in the event of their wishing to complain about the firm's services; and
  - their right to make a complaint to the ICAEW;
- If a firm receives a complaint concerning the services it has provided or failed to provide to a client or former client, it must immediately cause the complaint to be investigated by a Principal; and
  - If, following such an investigation, the firm is of the opinion that the complaint is justified in whole or in part, it must do whatever is appropriate to resolve the complaint, whether by way of remedial work, apology, the provision of information, the return of books or documents, the reduction or repayment of fees, or otherwise.
  - That if the client remains dissatisfied, the firm must notify them of their right to make a complaint to ICAEW.
86. These duties mean that, in many cases, complaints will be resolved between the firm and the client without recourse to the client making a complaint to ICAEW. The vast majority of ICAEW members prize their membership and the mere threat of a complaint being made about them to ICAEW is one which members treat very seriously – it is in itself an important safeguard for the public.

#### CHAPTER 4: MANDATORY PROFESSIONAL INDEMNITY INSURANCE FOR TAX ADVISERS

##### **Question 13: What is the minimum level of cover you recommend, and why?**

87. ICAEW's PII regulations require a minimum level of 2.5 x a firm's gross fee income for the previous accounting period, subject to a minimum of £100,000 and a maximum of £1.5m per claim and aggregate.
88. However, these are minimum amounts only and all firms have a duty to take reasonable steps to meet claims arising from public practice and to put in place appropriate levels of cover.

##### **Question 14: What activities should it be mandatory to cover, and why?**

89. See comments earlier about the definition of tax advice and Appendix 2. In principle for a paid adviser any activity that impacts upon somebody's tax position should be in scope.

##### **Question 15: Should the government set mandatory minimum or maximum levels of:- cover; - run-off cover; - excess?**

###### **Cover**

90. Given the comments that have been made earlier that the PII must be sufficient to provide suitable public protection, it follows that a level should be specified. Consideration should be given to excluding those who belong to specified professional bodies and associations from the minimum cover requirement. Consideration will need to be given as to whether an 'any one claim' or 'aggregate' basis for coverage should be required.

###### **Run-off cover**

91. Run-off cover would be required and an appropriate time period and limits will need to be considered. The consultation document proposes that cover should be obtained that remains in force for up to six years after a firm or adviser has ceased business as this is the period over which it can potentially seek to recover unpaid tax liabilities. ICAEW requirements are that run-off PII must be held for a minimum of two years after a practice ceases but a member should use best endeavours to obtain compliant run-off cover for a further four

years. We refer also to our comment in Question 5 above that it is proving much more difficult to obtain suitable run-off cover.

### **Excess**

92. It would be reasonable to allow for an excess to be included but this should be set at a reasonable level appropriate to the practice. ICAEW's PII Regulations permit firms to hold a maximum, aggregate excess of £30,000 x the number of principals in the firm.

### **Question 16: What levels should these be?**

93. See answer above.

### **Question 17: Should the government specify what advice must be covered by the policy? What advice do you think should be covered?**

94. See our *Key points on defining tax advice* section set out at para 22 et seq. above and our responses to Questions 21 to 25 below and Appendix 2.

### **Question 18: Are there any other insurance requirements the government should require?**

95. Please see the list of questions mentioned in para 30 above which government should consider – in particular whether the minimum terms of cover should be mandated.

### **Question 19: Who should be required to hold the insurance? Should it be the firm, the principal, everyone who is acting as a tax adviser?**

96. In principle it should be the firm which provides the tax advice and has the contractual duty of care with the consumer.

### **Question 20: What impact do you think setting minimum mandatory levels of cover would have on: - the market including availability of insurance; - affordability**

97. See comments made earlier. ICAEW has already seen a hardening of the PII market and increased concerns from insurers about those undertaking tax advice. Given that the unaffiliated are likely to represent a higher risk profile than those who are members of a professional body, it would be reasonable to expect that in general premiums would be higher for the unaffiliated sector, although as insurers gain more experience of the sector premiums may start to reflect more accurately the risk profiles of each adviser. It would be a concern if, as a result of this proposal, premiums for tax advisers rose across the board.

## **CHAPTER 5: DEFINING TAX ADVICE**

### **Question 21: We intend to model the definition of who the requirement will apply to on one of the definitions currently extant in legislation. What a) benefits and b) issues are there with using the Dishonest Tax Agent definition or the Money Laundering regulations definition? Do you have a preference or alternative and why?**

98. The definition will need to cover a wide variety of activity which would need to include all the types of activities mentioned in both the dishonest tax agents and the tax adviser definition found in the money laundering regulations. As mentioned above, the definition needs to be extended so that includes high risk areas such as tax avoidance schemes, , but not so extensive that it catches a wide variety of peripheral and low risk activity.
99. It is important that the definition is sufficiently clear so that it provides certainty to both advisers and consumers on whether a particular activity falls within the need for PII. While the breadth of the existing definition in the money laundering regulations is useful, it would

require further explanation and examples of which services are within scope for PII purposes and which are outside.

**Question 22: What activities do you think should be excluded from the requirement for compulsory professional indemnity insurance and why?**

100. See under *Defining tax advice* section in the general comments above.

**Question 23: Would there be any benefit in having different minimum requirements for different activities?**

101. This has not been the approach adopted in framing the PII rules for the professional bodies and we think it is likely to be unhelpful from a consumer protection context. For example, a provider may provide only tax compliance services, but that does not mean that such activity is necessarily lower risk than providing, say, pure tax advice, where the latter may be subject to more rigorous review processes. Thus, the submission of an inaccurate tax return could result in considerable loss to the consumer.
102. It is likely that applying different minimum requirements will also be confusing for the consumer and the insured, which would not be in the public interest.

**Question 24: What benefits or issues would there be in considering the financial services regulatory distinction between advice and guidance for tax advice?**

103. We agree that this distinction is an important consideration but are not convinced that it is sufficient by itself to provide a clear boundary. Further, we are also concerned that it could be exploited. The distinction would work in certain areas. For example, members who lecture on tax matters have expressed concern about whether their lecturing activities would be included. Based on the financial service distinction our conclusion is that they will usually be providing guidance and not specific advice and, in these cases, we think that is the right result.
104. However, although tax advisers will often make definitive recommendations, which the client has the option of accepting or rejecting, it is also commonplace to identify the client's options within the law to meet their objectives and the benefits and risks associated with each reasonable option. This allows the client to make an informed choice, and whilst this may often lead to further work to explore the client's chosen option(s) in more depth, in many cases it will be the only "advice" given. We would expect such cases to be included within any definition, not least because there is a danger that this distinction could be exploited by those who promote tax advice schemes, for example by setting out high risk options without mentioning other, lower risk, options that might also meet the client's objectives.

**Question 25: What benefits or difficulties do you foresee with the inclusion of a provision around UK taxation in the definition?**

105. We agree that the definition should include advice given which is related to UK taxation. Such a provision is included within ICAEW's existing PII regulations and no doubt other professional bodies. We would be happy to explore further with HMRC how this could be achieved.

## **CHAPTER 6: ENFORCEMENT**

**Question 26: Do you agree with the 3 elements of enforcement?**

106. In order to be an effective consumer protection, the requirement to hold adequate PII must be capable of being enforced. We agree in principle with the three elements listed, namely transparency, checking advisers have insurance and sanctions for non-compliance.
107. The suggestions in para 64 of the consultation document for improving transparency are interesting and we would be happy to have further discussions about them. It may be a challenge to get consumers to look at such information but with marketing and support the aim would be to build engagement over time by providing useful information to consumers. We have referenced the choosing an accountant page above which could form part of a wider programme to support the positive role played by tax agents to improve tax compliance.
108. Our comments on the additional ideas suggested in para 66 are set out below:

***Advisers could be required to display their certificate of insurance at their premises, on their website and pass a copy to clients with the letter of engagement***

109. As noted in our response to Q10 above, under the terms of the **Provision of Services Regulations 2009 (SI 2009/2999)** advisers who have PII, which will include members of a professional body but potentially also unaffiliated advisers who have PII, are required to disclose the name of their insurer and the territorial coverage of the insurance.
110. Given this legal requirement already exists, we do not think it is necessary for the adviser to display any certificate nor provide a copy of any certificate to the client except on request. It would further complicate the process of engaging an adviser and could act to encourage spurious claims.

***Insurers could enable taxpayers to check the adviser had a valid policy number via an online portal***

111. This is one for the insurance industry to answer but we suspect it could be expensive to implement and the costs will be recovered through higher premiums.

***Adding the requirement to hold professional indemnity insurance to the HMRC Standard for Agents***

112. We think it would be reasonable to add the requirement for PII to HMRC's Standard for agents.

***Publishing information about advisers who HMRC discovers are not complying with the insurance requirement***

113. We think it would be reasonable to publish such information which could be included in HMRC's AML reports of fines etc levied. Whether taxpayers would ever look at it is another question.

***Question 27: What are your views on the enforcement options described above?***

114. Clearly there will need to be appropriate sanctions and enforcement options. However, at this stage we do not think that it should be an offence for providing tax advice without holding PII. We think that such a measure would be disproportionate and, given that many providers now operate through companies, it would also have to be extended to include directors. Only if it appears that the measure is not working or is being abused would we think a criminal sanction might be considered appropriate.
115. We agree that there need to be sanctions for not holding adequate cover, or for taking out cover but letting it lapse by deliberately not paying premiums. Again, at this stage and without any evidence as to how the measure might apply in practice, we do not think that an

adviser should be made jointly and severally liable. It would be disproportionate and potentially unfair. For example, if the taxpayer did not disclose all the relevant facts to the adviser when asked and it turns out later that more tax was due, it would be unfair to penalise the tax adviser who had made reasonable enquiries to ascertain the position. It would be essential with any joint and several measure to ensure that any tax liability which arose did so directly result of negligent activity on the part of the adviser.

***Question 28: Do you agree that advisers who already hold professional indemnity insurance as it is required by their professional or regulatory body should automatically satisfy the new requirement? How could we check?***

116. Yes. We believe that advisers who are required to hold PII under the rules of their professional body should automatically satisfy the new requirement, subject to the comments made earlier about the need for the PII rules of the professional body to comply. In view of the generally higher risk profile of unaffiliated tax advisers, we think it is reasonable to have a tougher PII regime for them in terms of enforcement.
117. As for checking, given that members in practice who belong to a professional body must hold PII which meets minimum requirements then it should not normally be necessary to undertake further checks. If in the course of any enquiries etc, HMRC found members of a professional body practising without PII then we would expect HMRC to report them to their professional body under the s 20 Commissioners for Revenue and Customs Act 2005 gateway as this would be a prima facie disciplinary offence. As for the unaffiliated sector, one approach might be for the insurance industry to develop a central database of PII cover. In any such system it will be important to ensure that GDPR requirements are met, that the tax adviser has been identified correctly and can be matched to a current PII record.

***Question 29: The government's ambition is for HMRC to share information about the adviser with the client digitally. What are your views of this?***

118. It is unclear what is proposed in this question and we would welcome clarification.
119. If it is just to validate basic factual information, for example that the adviser is a member of a professional body and identify which one it is, then there would appear no reason not to be able to share such information digitally with the taxpayer client, subject to GDPR requirements. If the proposal is to share much more information than this, such a proposal would need much more detailed consideration.

## **CHAPTER 7: IMPLEMENTATION**

***Question 30: What effects do you foresee of introducing the requirement for everyone at the same time?***

120. There is a danger that requiring all unaffiliated to obtain PII at the same time could disrupt the market and cause knock-on problems for those who are already required to obtain PII cover. At this stage, it might make sense to scope out customs agents especially given that the original concerns about raising standards did not consider this sector of the tax advice market. The views of the insurance industry should be sought on this before any decisions are made.
121. As for gradual implementation, it is difficult to know how effective any of the suggested approaches listed in para 80 would work without a better understanding of the make-up of the unaffiliated market. In principle, we would expect many of the unaffiliated firms to be relatively small, so some of the suggested segmentations may not make much difference in practice. There is also a danger that some providers might change the way they operate to fall within a different segment with a longer transitional period. A better alternative might be

to have no transitional rules or arrangements but allow a longer period of grace before it becomes compulsory, but that might merely shift the problem of capacity further down the line. However, the threat of not being able to obtain PII if left too late would act as an incentive for providers to start arranging for cover as soon as possible.



## APPENDIX 1

### ICAEW PII regime – an update to the information included in Annex B of the HMRC consultation document

As noted below, ICAEW, ICAS and CAI have very similar PII requirements and operate a joint advisory panel with insurers.

	ICAEW/ICAS (and also CAI)
<b>Regulatory requirements</b>	<p>ICAEW - PII regulations</p> <p>ICAS – PII regulations</p> <p>(each set of regs are tailored to each institute, but they have common requirements)</p>
<b>Latest version</b>	<p>1 January 2021 (ICAEW)</p> <p>March 2020 (ICAS)</p>
<b>When is cover required?</b>	<p>Members who hold a practising certificate and are engaged in public practice in the UK / Republic of Ireland</p> <p>Where individuals / firms carry on audit and other activity that is regulated by ICAEW / ICAS under statute</p>
<b>Tax work included?</b>	Yes as part of ‘public practice’
<b>Territorial extent</b>	Worldwide excluding US and Canada
<b>Participating insurers required</b>	Yes
<b>Brokers – do members have to use a particular broker/are any recommended?</b>	No
<b>Minimum level of cover required.</b>	<p>Yes – the minimum required limit of indemnity is 2.5 x a firm’s gross fee income for the previous accounting period, subject to a minimum of £100,000 and a maximum of £1.5m per claim and aggregate.</p> <p>Larger firms (50 or more partners) can make own arrangements.</p>
<b>Where not already stated are levels of indemnity per claim or aggregate?</b>	The limit of indemnity is on a ‘per claim and aggregate’ basis
<b>Level of excess permitted and whether this is per claim or aggregate.</b>	A maximum of £30,000 per principal in the aggregate.

<b>How is cover for defence costs dealt with (inclusive or exclusive)?</b>	Defence costs are exclusive of the limit of indemnity that is available to meet claims.
<b>Is cover subject to minimum terms and conditions?</b>	Yes – minimum approved wording.
<b>Insurance cover declined - procedure and time limits for member notification and PB procedure on receipt of information</b>	<p>Firms that can demonstrate ‘declinature’ or ‘constructive declinature’ can apply for cover in the Assigned risks pool (ARP) for up to 2 years.</p> <p>(‘Declinature’ is where cover is not available in the commercial market; ‘constructive declinature’ is where cover is available, but at a cost that could jeopardise the financial stability of the firm).</p> <p>Firms that cease public practice while in the ARP can access a further 2 years’ cover for run-off purposes.</p> <p>Normally, firms may only remain in the pool after 24 months at the discretion of the Joint Advisory Panel (see below).</p>
<b>Extended Policy Period if cover declined?</b>	Yes – under the minimum approved wording, participating insurers are required to provide a 30 day Extended Policy Period if they refuse renew cover and the insured is unable to obtain alternative, compliant terms.
<b>Run-off</b>	<p>Compulsory – two years</p> <p>Best endeavours – following four years</p>
<b>Monitoring</b>	Annual return declaration; reviews by monitoring departments
<b>Enforcement</b>	<p>Disciplinary action</p> <p>Under ICAEW’s Guidance on Sanctions (1 July 2019) the starting point for sanction for a serious failure to hold PII is exclusion from membership and a financial penalty (for the most serious breaches).</p>
<b>Easements</b>	Various, but must be approved by the PII committee.
<b>How does the body oversee the PII rules</b>	<p>ICAEW - PII Committee</p> <p>ICAS – Authorisation Committee.</p>
<b>How does the body liaise with insurers?</b>	<p>Joint Advisory Panel</p> <p>It includes representatives from ICAEW, ICAS and CAI and four insurers.</p> <p>It meets twice a year.</p>

**Annexe C: Examples of activities and professionals who may be providing tax advice –  
ICAEW views on whether they should be included in any definition**

*An employment intermediary advising a worker to work through an umbrella company*

Included.

*An accountant preparing and submitting a corporation tax or self assessment return on behalf of a client*

Included.

*A customs agent advising a client on excise duties and VAT to enable them to make decisions about how to conduct their business*

In principle included, but policy decision may be to exclude them for the time being.

*A customs agent (completing and) submitting an import declaration using information provided to them by a client*

In principle included, but see answer above.

*A financial adviser, who in the course of providing investment advice to a client, advises on the most tax efficient ways to invest*

Included.

*Tax software: especially software that carries out categorisation or calculations*

Excluded pending a review of the oversight etc of the tax software market.

*A barrister providing an opinion on a potential avoidance scheme*

Included.

*A solicitor providing advice on the most efficient way of managing Stamp Duty Land Tax as part of conveyancing work*

Included.

*An agent who makes claims for repayment of expenses on behalf of clients*

We assume that this is referring to the reclaiming of tax-deductible expenses. We would expect it to be included.

*An employer advising an employee about taxable benefits for the year*

Excluded.

*A payroll bureau managing an outsourced company payroll*

Excluded pending consideration about whether payroll providers should be included.

*A bookkeeper maintaining records of money coming in and out of a company and preparing end of year returns*

If providing a paid for bookkeeping service that includes the submission of tax returns then included.

*An accountant giving advice on gift aid to a charity on a pro bono basis*

Excluded.

*An advice worker at a charity helping a client with an inheritance tax return*

Excluded.

*A family member helping their parents with a tax return*

Excluded.

*An insolvency practitioner advising a client on tax liabilities as part of a formal insolvency procedure*

Included.

*A financial adviser providing advice on long-term estate planning including setting up a trust*

Included.

*A VAT representative acting on behalf of a person who outside of the UK who is selling goods via the internet into the UK*

Included.

*A family office advising on wealth and investment management for a high net worth family, including the tax implications of any recommended actions*

This would depend upon the contractual relationships etc between the parties and would require further consideration.

*A promoter of a tax avoidance scheme*

Included.