Finance (No. 2) Bill 2025-26
Clauses 247 – 250 and Schedule 21
Conduct of tax advisers

BRIEFING FOR MPS ON THE FINANCE BILL BY ICAEW TAX FACULTY

WHO WE ARE

Please see Appendix 2.

EXECUTIVE SUMMARY

1. ICAEW believes that the definition of sanctionable conduct introduced by Sch 21, is:
   a) exceptionally broad;
   b) based on inferred intention; and
   c) not limited to unethical, unprofessional or deliberately incorrect behaviour.
2. This means that the definition could apply to legitimate differences in legal interpretation, technical disputes over complex legislation and cases where HMRC and advisers both act in good faith but disagree.
3. ICAEW believes that there should be a safeguard to protect ordinary professional judgement as, without this, every entry on a tax return and every piece of professional advice would have to be assessed against the risk of future HMRC challenge under these provisions.
4. Further, the revised penalty framework – which bases penalties on the tax at stake – could lead to the withdrawal of mainstream advisers from complex work relating to large tax liabilities. This could weaken – not strengthen – overall tax compliance in the UK.
5. The package of measures contained in the Bill (namely Registration of tax advisers (clauses 220 – 246 and Schedules 19 & 20); Conduct of tax advisers (clauses 247 – 250 and Schedule 21); and Prohibition of promotion of certain tax avoidance arrangements (clauses 156 – 162) materially change the risk profile for delivering certain tax services. Appendix 1 sets out how the tax advice market may respond to these risks.

THE MEASURE

6. This measure extends the tax agent dishonest conduct regime in Sch 38, FA 2012 by lowering the threshold for sanctions to doing "something with the intention of bringing about a loss of tax revenue".
7. The penalties are based on a material fraction of the tax at stake. Therefore, a tax adviser could face a £1m or higher penalty for an incorrect entry in a tax return for which they charged their client a relatively small amount in fees.

OUR CONCERNS AND OUR RECOMMENDATIONS

Definition of sanctionable conduct

8. ICAEW is concerned that the definition of sanctionable conduct is too broad and does not match the policy intention.
9. HMRC has assured stakeholders that the definition is not intended to catch differences in legal interpretation – but the drafting does not deliver that assurance.

10. How the tax legislation applies in a particular set of circumstances is often unclear. In addition, tax legislation includes many examples of motive and purpose tests. Taxpayers look to advisers to provide their professional opinion on the application of those provisions.
11. This uncertainty of tax legislation is demonstrated by the numerous tax cases that make their way through the judicial system each year – often with different outcomes at each level of appeal. This demonstrates how the interpretation can be finely balanced.
12. ICAEW is also concerned about the definition of "a loss of tax revenue." This is unchanged from the current Sch 38, FA 2012 and includes if clients were to:
    a) account for less tax than they are required to account for by law,
    b) obtain more tax relief than they are entitled to obtain by law,
    c) account for tax later than they are required to account for it by law, or
    d) obtain tax relief earlier than they are entitled to obtain it by law.
13. Given these tests, it is unclear where an adviser would stand if they have advised a client to rely on an extra statutory concession. For example, paragraph 1.2 of VAT Notice 48 on extra statutory concessions states: "In certain circumstances where remission or repayment of revenue is not provided for ***by law***, the department may allow relief on an extra-statutory basis." (Emphasis added). This HMRC guidance highlights the problem that advising a taxpayer to rely on an extra statutory concession could be treated as sanctionable conduct – even if that is not the intention of the policy.
14. Professional bodies also advise that their members should obtain their client's approval before submitting a return on behalf of the client as the taxpayer is ultimately responsible for that return. HMRC's terms and conditions for online services also require agents to obtain client approval. Therefore, taxpayers may end up paying their tax late as their adviser is intentionally waiting for the client's approval before submission. The adviser would be acting in line with professional expectations and HMRC's terms and conditions, but their actions arguably fall within the definition of sanctionable conduct.
15. Another challenging situation is where a tax adviser identifies an error in a tax return. ICAEW Members are required to insist that this is remedied or at least disclosed to HMRC, but the decision as to whether to remedy or disclose is that of the client. Confidentiality obligations would prevent the tax adviser from taking an action to remedy the situation (although the tax adviser may make a Suspicious Activity Report under Money Laundering Reporting obligations). As the definition of sanctionable conduct includes omissions as well as positive acts, this would expose the tax adviser to substantial penalties as they would have intentionally (not) done something that brought about a loss of tax revenue.
16. Clarity of the definition of sanctionable conduct is vital given the significant consequences that flow if an adviser is accused of this conduct: namely accessing client files, significant financial penalties; and publishing details about the adviser.
17. The definition does not contain any qualifier criterion that the tax adviser has acted unethically, unprofessionally or deliberately incorrectly, so could catch any situation where HMRC takes a different view to the position taken by the tax adviser.
18. ICAEW considers that there should be safeguards to protect advisers applying ordinary professional judgement and acting within professional expectations.
19. The risks flowing from this broad definition of sanctionable conduct could be reduced if the Minister makes a clear statement to the House when introducing clause 247 and Schedule 21 about what is intended to be in and out of scope of the sanctionable conduct provisions.

Market choice

20. It should be noted that the consequences of sanctionable conduct apply differently across the tax advice market. Paragraph 17, Sch 38, FA 2012 states that a file access notice does not require the

document-holder to provide any part of a document that is privileged. Clearly this would favour the use of lawyers as opposed to other professionals such as accountants, significantly limiting choice and access to quality advice.

21. This could be addressed by replicating 'tax adviser privilege' from para 25, Sch 36, FA 2008 into this legislation.

Penalty framework

22. ICAEW is concerned that calculating penalties for sanctionable conduct by reference to potential lost revenue could have serious repercussions in the tax advice market which would not be in the public interest.
23. While the penalty is initially capped at £1m, the cap increases to £5m for a second breach within 20 years and becomes uncapped where there are six or more breaches in 20 years.
24. Paragraph 4, Sch 21, also introduces a new definition of tax adviser. It includes both organisations that assist other persons with their tax affairs and individuals that work for the organisation and assist other persons with their tax affairs. In an organisation, the person engaging in sanctionable conduct could be argued to be both the organisation and any individuals involved in that work. Therefore, there is the potential for multiple penalties to be levied in respect of the same act.
25. For public policy reasons, the minimum terms of professional indemnity insurance set by several accounting bodies specifically exclude cover for fines and penalties levied on the adviser.
26. This penalty framework means that taxpayers with large tax liabilities may be unable to access quality tax advice from professional tax advisers as the advisers will consider the risk too high.
27. Adviser's may consider that the risk of significant penalties for them individually and potentially also their firm means that they cannot give clients objective advice.
28. This is likely to mean that many High Net Worth Individuals, and companies with significant tax liabilities, would no longer be able to receive professional tax advice on their affairs, with a likely resulting increase in the tax gap.
29. If the definition of sanctionable conduct is not amended, ICAEW considers that calculation of penalties by reference to fees would be more appropriate and should still disrupt the business models of those agents that seek to exploit the tax system (whose fees are often a proportion of the tax at stake).
30. Fees are the basis for penalties for enablers of defeated tax avoidance (Sch 16, Finance (No.2) Act 2017), and that legislation only applies where arrangements are abusive (ie, a high bar). It seems wrong in principle that the penalty provisions for sanctionable conduct are likely to be far higher than penalties on enablers of defeated tax avoidance arrangements.

Publishing information about tax advisers

31. This set of measures contains two sets of provisions that can lead to the publication of a tax adviser's details.
32. The first is contained at clauses 248–250 and allow a tax adviser's details to be published where there is a refusal by HMRC to deal with the adviser or a decision by HMRC to suspend the adviser's access to HMRC's online services. This comes into force on 1 April 2026. It is therefore potentially retroactive as the firm's details could be published after commencement because of an issue that arose pre-commencement.
33. The second is contained at para 20, Sch 21 and amends the power to publish details at para 28, Sch 38, 2012 to reflect the lowering of the bar from dishonest conduct to sanctionable conduct. The changes in Sch 21 apply to acts or omissions on or after 1 April 2026.
34. ICAEW considers that the power contained in clause 248 for HMRC to publish an adviser's details where HMRC has decided to suspend the adviser's access to HMRC's online services undermines

the safeguards contained in clause 243 that restricts publication of an adviser's details to cases where a financial penalty against a registered tax adviser or an ineligibility order from being registered as a tax adviser has become final. Suspension is the first step in the series of actions that HMRC can take in Chapter 1 of Part 7 and may only be temporary. Therefore, the power to publish an adviser's details where sanctions apply to a tax adviser's ability to interact with HMRC's online services should be limited to the cases set out in clause 243.

SUGGESTED AMENDMENTS

35. ICAEW considers that the following amendments should be made to the legislation.

Clause 248: Power to publish information

36. Subclause (1)(a)(ii) should be deleted as it undermines the power to publish information and the effectiveness of the safeguards set out in clause 243 (see paragraph 34).

Clause 250: Power to publish information: interpretation and commencement

37. The commencement provision should be amended to only apply to actions on or after 1 April 2026 (see paragraph 32).

New clause: Tax adviser privilege

38. To ensure that choice and access to advice is not limited, para 17, Sch 38, FA 2012 should be amended to replicate 'tax adviser privilege' from para 25, Sch 36, FA 2008 (see paragraph 21).

Paragraph 5: Schedule 21

39. The definition of sanctionable conduct should be refined to include safeguards to protect advisers applying ordinary professional judgement and acting within professional expectations (see paragraph 18).

Paragraph 18: Schedule 21

40. References to potential lost revenue should be changed to total amount or value of all the relevant consideration received or receivable by the person (see paragraph 29).

FURTHER INFORMATION

As part of ICAEW's Royal Charter, we have a duty to inform policy in the public interest.

Contact details

Laura VillaMil
ICAEW Policy & Public Affairs Executive
Laura.VillaMil@icaew.com

APPENDIX 1

How the tax advice market may respond

Larger UK-based accounting firms are considering how they respond to these risks but any response would impact on the provision of cost-effective tax advice in the market and the potential to effectively withdraw from advising on large and complex matters – the exact kind of transactions where we believe the government would want a taxpayer to take professional advice as these transactions will drive growth. This would not be conducive to increasing the quality of tax compliance nor closing the tax gap.

Smaller firms cannot manage risks in the same way – due both to resources and the price sensitivity of their client base. Where their principals are approaching retirement, this increased risk may be the catalyst that leads them to retire early – a concern we are already hearing in the tax advice market. Where advisers do increase prices, some taxpayers may try to do without advice, which may lead them to make more mistakes causing an increase in the tax gap – particularly the SME tax gap – and more compliance work for HMRC.

These risks also mean that longer term it will be difficult for professional bodies such as ICAEW to be able to convince new members or students that tax is a service line in an accounting firm that they would want to work in, or start their own tax practice, thus choking off the supply of new advisers to assist taxpayers in complying with their obligations and delivering valuable advice.

If the number of UK accounting firms that are able to offer cost-effective support to taxpayers reduces, that raises the question of who will provide that support. Law firms, and others that can offer advice under legal privilege, are not affected by these measures in the same way. However, even though solicitors play a vital role in some areas, their share of the market is currently relatively small, and the capacity is unlikely to exist to expand to meet the shifting market demand.

International firms or boutique offshore advisers could respond by delivering UK tax advice from other jurisdictions and, by choosing to not interact with HMRC, could avoid registering. But moving the delivery of advice to UK taxpayers beyond the reach of these provisions will not deliver the policy intention of raising standards across the tax advice market. The use of advisers located outside the UK or those whose work is protected by legal privilege could also make it harder for HMRC to efficiently conduct compliance checks and therefore increase the tax gap.

APPENDIX 2

ICAEW TAX FACULTY – WHO WE ARE

Internationally recognised as a source of expertise, ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's *Ten Tenets for a Better Tax System* are summarised in Appendix 3.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of sustainable economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 172,000 chartered accountant members in over 150 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

APPENDIX 3

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99.