PS LA 2008/15 - Taxpayer Alerts

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PS LA 2008/15
Taxpayer Alerts

This Law Administration Practice Statement provides guidance on the Taxpayer Alert program.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

1. What is this practice statement about?

We issue Taxpayer Alerts (Alerts) to warn taxpayers and advisers of arrangements we are concerned represent a high risk.

This practice statement outlines:

- our Alert framework, including why we issue Alerts
- factors to consider when deciding whether an Alert is appropriate
- key activities in developing and issuing an Alert
- post-publication responsibilities, including follow-up guidance, evaluation activities and maintenance
- the governance of the Alert program, and
- where to find further information on procedures for issuing Alerts.

2. What is an Alert?

An Alert is an early warning to the community about a new or emerging activity or arrangement that is causing the ATO concern.

3. Why do we issue Alerts?

We issue Alerts to:

- enable taxpayers who have entered into an arrangement, or may be contemplating doing so, to make informed decisions about their tax affairs
- prevent widespread adoption or promotion of higher risk arrangements, and
- build community confidence in the integrity of the tax and superannuation system by showing our ability to detect risks and our willingness to deal with them.

We communicate our concerns about arrangements early in the interests of an open and transparent tax administration. Doing so supports voluntary compliance and can also lead to reduced post-lodgment compliance activity and fewer disputes.

4. When we issue Alerts

Alerts form part of a broader strategy for treating an identified risk. We issue Alerts based on intelligence of what is happening in the market.

The community expects us to give timely warnings about risky arrangements. An Alert can issue before the extent of the risk is fully known, where we have information that the risk has sufficient prevalence or has the potential to become widespread and have a revenue impact.

We can issue an Alert before we have finalised our view on how the law applies to the arrangement. Alerts are not a source of the precedential ATO view[1] and should not be used to provide advice or guidance on technical or administrative issues arising from a particular arrangement.

Types of arrangements that may be the subject of an Alert

Alerts target significant, higher risk tax planning and superannuation arrangements. Other types of significant arrangements that we have under risk assessment may also become the subject of an Alert.

Typically, such arrangements are new or emerging. However, we may also issue Alerts to address recurrences of arrangements that have previously been risk assessed where there is information that indicates a need to take immediate action. It does not matter that a published ATO view may already exist on the issue.

[1] Precedential ATO view is defined in Law Administration Practice Statement PS LA 2003/3 *Precedential ATO view.*

Alerts commonly address schemes or arrangements that go beyond the policy intent of the law or involve deliberate approaches to avoid any type of tax or superannuation obligation.

Alerts are not limited to mass marketed schemes or to arrangements that constitute aggressive tax planning. More sophisticated tax planning activities may be suitable for an Alert where we believe taxpayers may not be complying with the law and there are significant risks for the tax and superannuation system.

Circumstances when we may consider issuing an Alert include where:

- we are considering the application of specific, or the general, anti-avoidance provisions
- the arrangement constitutes a sham or is legally ineffective
- the arrangement involves exploitation or deliberate misapplication of the law
- we are considering the application of the promoter penalty laws
- the purported tax result of the arrangement is not reasonably arguable, or
- we consider there may be fraud or evasion.

5. Factors to consider when deciding whether to develop an Alert

Key factors to consider in deciding if an Alert is appropriate include:

- the nature of the arrangement or activity and our concerns
- the revenue at risk (where quantifiable)
- participant population and any promotion of the arrangement, or potential for it to be promoted or become more widespread
- what influence you can have on the behaviours and attitudes of advisers and the community, even beyond those involved in the activities
- what action you expect taxpayers and/or advisers to take in response to the release of the Alert
- how the Alert fits into the overall strategy for treating the identified concerns or risks (for example, early engagement reviews or other compliance activities, marketing and education campaigns, published advice or guidance on the ATO view, law reform)
- whether alternative products or channels are more appropriate for communicating our concerns quickly and to the intended audience based on information available, and
- the risks that may arise from issuing, or not issuing, the Alert, including reputational risks, risk to relationships with other agencies, increased uncertainty and reduced community confidence in the tax system.

A decision to proceed with the development of an Alert is a matter of judgment. We need to weigh up the desirability of providing an early warning to taxpayers with the legal, administrative and commercial risks which may arise following its publication.

Depending on other circumstances that may be present, factors that *may* weigh against issuing an Alert include:

- the risk or issue is isolated to a particular region, adviser or taxpayer – this would need to be weighed against the likelihood or prospect of the risk becoming widespread or systemic
- we do not yet have sufficient information to assess if there is a significant population affected and/or revenue at risk, or
- the arrangement concerns taxpayers not understanding how the law applies, rather than deliberate exploitation or misapplication of the law.

Communicating our concerns in each of the above examples would require a consideration of whether our objectives could be achieved through other more appropriate products or (targeted) educational campaigns.

6. Notifying your intention to issue an Alert

If you identify an issue that may be suitable for an Alert, you must advise your business line's Public Advice and Guidance Unit (PAG Unit). Your business line's PAG Unit can advise you on the suitability of the Alert, as well as any business line specific requirements for its development.

Each business line's PAG Unit must advise the Private Groups and High Wealth Individuals (PGH) PAG Unit as soon as the need for an Alert is identified and keep the PGH PAG Unit informed of progress throughout the process.

The PGH PAG Unit will also forward information received from a business line that is progressing an Alert to other PAG Units, the PAG Centre and the

Aggressive Tax Planning area for their information and/or action, as appropriate.

7. What should you include in an Alert?

Each Alert must clearly describe:

- the issue or mischief at a high level – that is, why are we concerned
- the key features of the activity, arrangement or transaction
- our specific technical and/or administrative concerns (whilst we need not have settled technical views on all issues, Alerts must not make statements about the potential application of the law without a reasonable basis)
- what action we are taking, or are proposing to take, to better understand the risk and how we may treat it
- any action taxpayers should take if they are considering entering into the arrangement or have already done so, and
- a contact officer.

The scope of an Alert should be clear to reduce uncertainty for taxpayers who aren't intended to be affected by it and to assist certain taxpayers in determining whether arrangements need to be disclosed in the reportable tax position schedule to their tax returns.[2]

8. What is the process for issuing an Alert?

Each business line is responsible for the strategy, development and arranging the approval of its own Alerts. This includes:

- developing the Alert package
- arranging technical and editorial clearances by the business line and an Assistant Commissioner in the ATO's Tax Counsel Network[3]
- coordinating and managing consultation
- engaging the relevant Marketing and Communications audience team and/or the Media Unit to develop the communication strategy[4]
- obtaining approvals and endorsement, and
- arranging publication of the Alert on the ATO Legal database.

The key steps and timeframes for issuing an Alert are mapped in the Alert process outline.[5]

The Alert package

The Alert package includes:

- the Alert
- Office Minute to the Second Commissioner Client Engagement Group and Second Commissioner Law, Design and Practice Group
- media brief and/or media release (depending on the communications strategy), and
- Ministerial briefing note.[6]

Consultation

The timeframes for developing your Alert need to allow for consultation.

Alerts often deal with sensitive topics and can have a powerful impact on the market. An external perspective can assist in ensuring the scope of the arrangements, and our concerns, are clearly articulated and properly targeted. This minimises uncertainty for sections of the community who are not intended to be impacted by the Alert.

Generally, we consult externally on a confidential basis. In deciding when, with whom and how much to consult, you need to balance the benefits of accessing a range of expert views with supporting the timely communication of information to the community.

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[2] Certain large business taxpayers are required to disclose reportable arrangements that relate to an arrangement described in an Alert as part of the reportable tax position schedule to the company tax return.

[3] The Tax Counsel Network Assistant Commissioner must confirm that the Alert is not inconsistent or incompatible with the ATO view, and that there is a reasonable basis for statements about the potential application of the law. The Chief Tax Counsel or a Deputy Chief Tax Counsel ought to be consulted to assure that the Alert is strategically appropriate, including as to any strategy for subsequent public advice and guidance.

[4] Supporting documents such as scripting for telephony or advice staff must also be prepared.

[5] This is an ATO internal document.

[6] The briefing note is included in a Ministerial Minute which outlines notable public advice and guidance products the ATO plans to issue (see link to the PAG Manual under section 12 more information).

Prior to commencing any external consultation, your business line SES sponsor must approve the draft Alert and be briefed on your nominated stakeholders. Internal stakeholders should be consulted before this point.

We consult externally in all but exceptional circumstances. A decision not to consult externally must be made by your business line's Deputy Commissioner.

Communicating our concerns

You should consider communication strategies as early as possible in the development of an Alert.

This includes:

- developing the key messages that you want to convey in relation to the arrangement and tailoring these for the different audiences (including ATO officers), and
- identifying the most appropriate channels to ensure the Alert reaches the target audience (it may involve a mix including the press and social media).

An effective communication strategy will strike the right balance in conveying our concerns but not undermine community confidence in the tax and superannuation systems.

Approvals and endorsements

The Alert package must be approved by your business line's Deputy Commissioner. Your business line's Deputy Commissioner will then seek endorsement from the Second Commissioner Client Engagement Group and Second Commissioner Law, Design and Practice Group for the Alert to issue.

9. What do you need to do after publishing the Alert

Each business line is responsible for implementing the broader strategy to address the issues covered in its Alert.

Public advice and guidance

The publication of an Alert can create uncertainty for taxpayers about the tax treatment of their arrangements.

You must consider whether we ought to provide timely public advice or guidance on how the law applies to the arrangement covered by the Alert to support taxpayers in managing their tax affairs.

The most appropriate form of public advice or guidance will depend on the nature of the issue. Binding advice is often the most appropriate. The need for public guidance, and the form and content of that guidance, will also be informed by community and industry feedback in response to the Alert's release.[7]

Not all Alerts need to be followed by further public advice or guidance. For example, we would rarely issue public advice or guidance to further explain when an arrangement is a sham or when general anti-avoidance rules would apply. The Alert should include a statement if no follow up public advice or guidance will be provided.

Contact your business line's PAG Unit in the first instance to discuss possible options for public advice or guidance.

Evaluating the effectiveness of Alerts

Your responsibilities after publication of the Alert include undertaking evaluation activities for your Alert.

Considering the factors listed in section 5 of this practice statement from the outset will assist in identifying sources of evidence that can assist in measuring the impact of the Alert and its effectiveness.

10. Amending, annotating or withdrawing an Alert

Each business line is responsible for maintaining the currency of its Alerts. Each business line should review its Alerts every two years to ensure they have been appropriately amended, annotated, archived or withdrawn.[8]

Requests to amend, annotate or withdraw an Alert should be arranged through your business line's PAG Unit who can also assist with the notifications.

Amending Alerts

Occasionally, we may need to amend an Alert after it has published to clarify the description of the issue, the arrangement or our concerns.

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[7] Any public advice or guidance must be developed following the processes in the PAG Manual.

[8] It is important to maintain the currency of Alerts, noting that current Alerts may affect disclosures in the reportable tax position schedule to the company tax return.

While an Alert does not need to deal with every possible variation of an arrangement, there are circumstances when it is advisable to add variations. If we see new variations or features becoming more common in arrangements, and it is not clear whether these fall within the scope of the original Alert, an amendment is appropriate.

Prepare an addendum to the Alert and include reasons for the amendment.

An amendment will require approval from your business line's SES who has responsibility for the risk that is the subject of the Alert.

Annotating Alerts

An Alert is annotated to either:

- reference any public advice or guidance that sets out our final view on how the law applies to the arrangement (or features of it), or
- note any legislative changes or court decisions that address some or all of our concerns with the arrangement.

After all the issues identified with the arrangement have been addressed, or the risks have sufficiently abated, the Alert will be archived on the ATO Legal database.

Withdrawing Alerts

Alerts must be withdrawn where we reach a view that there are no concerns with the arrangement.

Withdrawals will require approval from your business line's SES who has responsibility for the risk that is the subject of the Alert.

11. Governance of Alert program

PGH has responsibility for the governance of the Alert program. The PGH PAG Unit is available to assist you throughout the Alert process.

A panel of SES representing the business lines within the Client Engagement Group and Tax Counsel Network has been established as part of the governance framework.

The Governance Panel provides assurance that:

- follow up activities are being progressed in relation to the risk addressed in the Alert, with a focus on whether public advice or guidance is being progressed (where appropriate), and
- appropriate evaluation activities occur for individual Alerts and the program more broadly.

12. More information

For more information:

- see Alerts on the ATO Legal Database
- see the Alerts SharePoint page for contact details, templates and process outline
- email the PGH PAG Unit
- PAG Manual.

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