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.

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 systems by showing our ability to detect risks and our willingness to deal with them.

We communicate our concerns early about arrangements in the interests of 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.

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

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

not be complying with the law and there are significant risks for the tax and superannuation systems.

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 we can have on the behaviours and attitudes of advisers and the community, even beyond those involved in the activities
- what action we 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 factors 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), which can advise you on the suitability of the Alert, as well as any business line specific requirements for its development.

The responsible business line's PAG Unit must advise PAG Units from all other business lines, and also the Tax Counsel Network (TCN) PAG Centre, as soon as the need for an Alert is identified. As a general rule, the PAG Unit from the responsible business line should keep all other PAG Units informed throughout the Alert's development. However, this will not be necessary where another business line's PAG Unit confirms the issues and risks covered by the Alert are not relevant to its market segment.

7. What should you include in an Alert?

Each Alert must clearly describe:

- the issue or mischief at a high level – that is, why we are concerned
- the key features of the activity, arrangement or transaction
- our specific technical and/or administrative concerns (while 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 are not 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 TCN[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 (internal link only).

The Alert package

The Alert package includes:

- the Alert
- an Office Minute to the Second Commissioner Client Engagement Group and Second Commissioner Law, Design and Practice Group
- a media brief and/or media release (depending on the communications strategy), and
- a Ministerial briefing note.[5]

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.

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

[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 TCN 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 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] 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 in section 12 of this Practice Statement for more information).

community confidence in the tax and superannuation systems.

Approvals and endorsements

The Alert package must be approved by your business line's Deputy Commissioner, who 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.[6]

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 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 and should review its Alerts every two years to ensure they have been appropriately amended, annotated, archived or withdrawn.[7]

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.

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:

- 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.

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

[7] 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.

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

11. Post-issue governance

Each business line is responsible for ensuring there are appropriate post-issue governance arrangements in respect to the Alerts it has issued.

This should include ensuring:

- 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.

12. More information

For more information, see:

- Alerts on the ATO Legal Database
- the Alerts SharePoint page for contact details, templates and process outline (links available internally only)
- the PAG Manual (link available internally only)

You can also email your business line's PAG Unit:

Goods and Services Tax	GSTPAG
Individuals and Intermediaries	PAGI&I
Private Wealth	PAGPW&IC
Integrated Compliance	PAGPW&IC
Public Groups and International	PGIPAGUnit
Small Business	PAGSMB
Superannuation and Employer Obligations	PAGSEO

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Contact officer PAGPW&IC

Amendment history

Date of amendment	Part	Comment
12 August 2021	Section 6	Updated to reflect that each business line PAG Unit is responsible for notifying and updating other business line PAG Units of the intention to issue an Alert and provide updates as required.
	Section 11	Updated to reflect the removal of the Alert governance panel and the introduction of the requirement for each business line to maintain a post issue governance process for Alerts it issues.
	Throughout	Numerous changes made to style/language that align with current Practice Statement format.
16 January 2019	Throughout	Rewritten into new LAPS format and to reflect our renewed corporate process for issuing Taxpayer Alerts, including relevant external consultation to be undertaken, updated endorsement processes and consideration of follow-up public advice and guidance. Provides a framework for staff on when and how we issue Alerts, confirming Alerts are not confined to aggressive tax planning arrangements and that a range of factors are to be considered in deciding whether an Alert is appropriate. Introduces the new governance framework for Alerts, including the establishment of a cross business line panel of senior officers to assure the progress of follow up activities, and for the evaluation of individual Alerts, and the program, generally.
28 June 2012	Throughout	Updated to reflect the issue of PS LA 2012/1 and the withdrawal of PS LA 2003/10.
17 June 2011	Generally	Update contact details and styles.
	Paragraph 3	Update description of Taxpayer Alert.
	Paragraph 16	Update GST to ITX.
	Paragraphs 17 to 20	Simplify wording.
	Paragraph 25	Included reference to Second Commissioner of Compliance.
	Paragraphs 29 to 31	Simplify wording.
	Paragraph 35	Include ATO view clarification.
	Attachment A	Attachment renumbered to Attachment 1 and diagram updated.

References

Other references	PAG Manual (link available internally only)
File references	1-QF63K9I
Related Practice Statements	PS LA 1998/1 PS LA 2001/5 (withdrawn) PS LA 2005/13 (withdrawn) PS LA 2003/3 PS LA 2012/1

ATO references

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