

DAC6: Hallmark evaluation in certain capital markets transactions

October 2020

I. Background

AFME members (“firms”) are routinely involved in a large number of transactions involving multiple principals and advisors. Where clients are undertaking tax planning, in many (if not most) circumstances, firms will not have sufficient knowledge to be regarded as “service provider” intermediaries under the DAC6 implementing legislation. However, while firms may or may not (depending on the circumstances) have reporting obligations in their own right, it is recognised that clients and/or their independent tax advisors will have further knowledge regarding any tax planning undertaken in relation to a particular transaction or arrangement and therefore may have their own reporting obligations under DAC6. Further, firms do not provide and are not authorized to provide tax advice to issuers and clients. To the extent issuers and clients require tax advice, they are strongly advised to consult their own independent advisors on any tax issues relating to their transactions.

It is in the interests all parties to these transactions that efficient, effective and common processes are established to facilitate DAC6 compliance in these circumstances. With this in mind, we have adopted the following principles that represent the view of AFME Members.

1. Each participant in a potentially reportable transaction is responsible for its own compliance. This includes determining whether they are an intermediary or taxpayer responsible for reporting in the context of a particular arrangement and whether the arrangement in question is subject to reporting under DAC 6 as implemented in a relevant member state or jurisdiction.
2. Notwithstanding the first principle, in many common transactions that require the participation and cooperation of a number of firms and advisors, there is usually one or more “Primary Participants” that will generally be best placed among all of the parties involved to understand the totality of the circumstances. Examples of Primary Participants in common transactions would include:
 - a. The borrower in a syndicated loan arrangement
 - b. The issuer of securities in a capital markets transaction
 - c. The principal actors in the context of a corporate transaction (e.g., both the acquirer and the target in a corporate acquisition with each making commitments to their respective advisors)
3. In transactions where there is an identifiable Primary Participant, it would be efficient and effective for each Primary Participant to undertake the following:
 - a. To instruct a qualified (external or internal) advisor to determine whether the relevant transaction – or arrangement of which the transaction forms a part – is reportable under the laws of the jurisdiction of the Primary Participant, and any other material participants or intermediaries to the arrangement. This determination should be made taking into account all relevant facts and circumstances of which the Primary Participant is aware, and without regard to whether the relevant advisor (or other intermediary) is excused from reporting on the basis of professional privilege.

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- b. On request, to provide, to any other participants or service providers ("Ancillary Participants") to the transaction or arrangement, the name of the advisor, the conclusion reached by the advisor, and (if requested) a summary explanation of the reason why the advisor has reached that conclusion;
- c. If the advisor has determined that the transaction or arrangement of which the transaction forms a part is reportable, the Primary Participant should:
 - i. file or instruct an advisor to file a report under DAC 6 as required in any relevant jurisdiction; and
 - ii. on request, provide each Ancillary Participant with the reporting reference number where such reference number is provided.

II. Model contractual clause

Below is a model contractual clause which members may include in relevant M&A or ECM engagement contracts, where appropriate, in order to give effect to the above principles. It is noted that members may amend the wording of the below clause to:

1. align with the definitions or wording used in their existing contracts; and
2. in line with their own preferences regarding frequency of disclosure of information by clients.

"The Company [the client] shall determine whether any tax planning or tax arrangements it is entering into in connection with a proposed or consummated Transaction result in reporting obligations due to the operation of Council Directive (EU) 2018/822 (commonly known as Mandatory Disclosure Rules or DAC6) as implemented into local laws and, where a proposed or consummated Transaction is reportable, the Company shall file or instruct a tax or other advisor to file a report to the extent required under DAC6 laws. Upon reasonable request, and within 28 days, the Company shall provide [the bank] in writing:

- 1. the determination it or its advisor(s) has made regarding whether a proposed or consummated Transaction is subject to reporting under DAC6, as implemented under local laws;*
- 2. the name of the external advisor (if any) that has provided or advised on the determination;*
- 3. a summary of the reasoning for that determination; and*
- 4. if relevant, the reporting reference number received upon submission of a DAC6 filing."*

III. Alternative suggested contract clause for Equity Capital Markets transactions

Information Undertaking

DAC6

(a) In this Clause [insert number] .[insert clause name], "DAC6" means the Council Directive of 25 May 2018 (2018/822/EU) amending Directive 2011/16/EU.

(b) The Company shall supply to the Global Coordinator (in sufficient copies for all the Underwriters, if the Underwriters so requests): (i) promptly upon the making of such analysis or the obtaining of such advice, any analysis made or advice obtained on whether any transaction contemplated by the Transaction Documents or any transaction carried out (or to be carried out) in connection with any transaction contemplated by the Transaction

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Documents contains a hallmark as set out in Annex IV of DAC6; and (ii) promptly upon the making of such reporting and to the extent permitted by applicable law and regulation, any reporting made to any governmental or taxation authority by or on behalf of any member of the Group or by any adviser to such member of the Group in relation to DAC6 or any law or regulation which implements DAC6 and any unique identification number issued by any governmental or taxation authority to which any such report has been made (if available).

Additional Disclosure Permission

Nothing in any Transaction Document shall prevent disclosure of any Confidential Information or other matter to the extent that preventing that disclosure would otherwise cause any transaction contemplated by the Relevant Documents or any transaction carried out in connection with any transaction contemplated by the Transaction Documents to become an arrangement described in Part II A 1 of Annex IV of Directive 2011/16/EU.

Disclaimer

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