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SCHEDULES

SCHEDULE 27

DISTRIBUTING FUNDS^{M1}

Modifications etc. (not altering text)

- C1** Sch. 27 applied (with modifications) (22.10.2004 with effect in accordance with reg. 1(2) of the affecting S.I.) by [The Offshore Funds Regulations 2004 \(S.I. 2004/2572\)](#), **regs. 1(1), 4**

Marginal Citations

- M1** Source—[1984 Sch.19; 1986 s.50; 1987 (No.2) s.66]

PART II

MODIFICATIONS OF CONDITIONS FOR CERTIFICATION IN CERTAIN CASES

Exclusion of investments in distributing offshore funds

- 6 (1) In any case where—
- (a) in an account period of an offshore fund (in this Part of this Schedule referred to as the “primary fund”), the assets of the fund consist of or include interests in another offshore fund; and
 - (b) those interests (together with other interests which the primary fund may have) are such that, by virtue of subsection (3)(a) or, if the other fund concerned is a company, subsection (3)(b) or (c) of section 760, the primary fund could not, apart from this paragraph, be certified as a distributing fund in respect of that account period; and
 - (c) without regard to the provisions of this paragraph, that other fund could be certified as a distributing fund in respect of its account period or, as the case may be, each of its account periods which comprises the whole or any part of the account period of the primary fund;
- then, in determining whether anything in section 760(3)(a) to (c) prevents the primary fund being certified as mentioned in paragraph (b) above, the interests of the primary fund in that other fund shall be left out of account except for the purposes of determining the total value of the assets of the primary fund.
- (2) In this Part of this Schedule an offshore fund falling within sub-paragraph (1)(c) above is referred to as a “qualifying fund”.
- (3) In a case falling within sub-paragraph (1) above—

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- (a) section 760(3)(a) to (c) shall have effect in relation to the primary fund with the modification in paragraph 7 below (in addition to that provided for by sub-paragraph (1) above); and
- (b) Part I of this Schedule shall have effect in relation to the primary fund with the modification in paragraph 8 below.

7 The modification referred to in paragraph 6(3)(a) above is that, in any case where—

- (a) at any time in the account period referred to in paragraph 6(1) above, the assets of the primary fund include an interest in an offshore fund or in any company (whether an offshore fund or not); and
- (b) that interest falls to be taken into account in determining whether anything in section 760(3)(a) to (c) prevents the primary fund being certified as a distributing fund in respect of that account period; and
- (c) at any time in that account period the assets of the qualifying fund include an interest in the offshore fund or company referred to in paragraph (a) above;

for the purposes of the application in relation to the primary fund of section 760(3) (a) to (c), at any time when the assets of the qualifying fund include the interest referred to in paragraph (c) above, the primary fund's share of that interest shall be treated as an additional asset of the primary fund.

- 8 (1) The modification referred to in paragraph 6(3)(b) above is that, in determining whether the condition in paragraph 1(1)(b)(ii) above is fulfilled with respect to the account period of the primary fund referred to in paragraph 6(1) above, the United Kingdom equivalent profits of the primary fund for that period shall be treated as increased by the primary fund's share of the excess income (if any) of the qualifying fund which is attributable to that period.
- (2) For the purposes of this paragraph, the excess income of the qualifying fund for any account period of that fund is the amount (if any) by which its United Kingdom equivalent profits for that account period exceed the amount of the distributions made for that period, as determined for the purposes of the application of paragraph 1(1) above to the qualifying fund.
- (3) If an account period of the qualifying fund coincides with an account period of the primary fund, then the excess income (if any) of the qualifying fund for that period is the excess income which is attributable to that period of the primary fund.
- (4) In a case where sub-paragraph (3) above does not apply, the excess income of the qualifying fund which is attributable to an account period of the primary fund is the appropriate fraction of the excess income (if any) of the qualifying fund for any of its account periods which comprises the whole or any part of the account period of the primary fund and, if there is more than one such account period of the qualifying fund, the aggregate of the excess income (if any) of each of them.
- (5) For the purposes of sub-paragraph (4) above, the appropriate fraction is—

$$\frac{A}{B}$$

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where—

A is the number of days in the account period of the primary fund which are also days in an account period of the qualifying fund; and

B is the number of days in that account period of the qualifying fund or, as the case may be, in each of those account periods of that fund which comprises the whole or any part of the account period of the primary fund.

- 9 (1) The references in paragraphs 7 and 8(1) above to the primary fund's share of—
- (a) an interest forming part of the assets of the qualifying fund, or
 - (b) the excess income (as defined in paragraph 8 above) of the qualifying fund,
- shall be construed as references to the fraction specified in sub-paragraph (2) below of that interest or excess income.
- (2) In relation to any account period of the primary fund, the fraction referred to in sub-paragraph (1) above is—

$$\frac{C}{D}$$

where—

C is the average value of the primary fund's holding of interests in the qualifying fund during that period; and

D is the average value of all the interests in the qualifying fund held by any persons during that period.

Offshore funds investing in trading companies

- 10 (1) In any case where the assets of an offshore fund for the time being include an interest in a trading company, as defined in sub-paragraph (2) below, the provisions of section 760(3) have effect subject to the modifications in sub-paragraphs (3) and (4) below.
- (2) In this paragraph “trading company” means a company whose business consists wholly of the carrying on of a trade or trades and does not to any extent consist of—
- (a) dealing in commodities, as defined in paragraph 4(2) above, or dealing, as so defined, in currency, securities, debts or other assets of a financial nature; or
 - (b) banking or money-lending.
- (3) In the application of section 760(3)(b) to so much of the assets of an offshore fund as for the time being consists of interests in a single trading company, for the words “10 per cent.” there shall be substituted the words “ 20 per cent. ”.
- (4) In the application of section 760(3)(c) to an offshore fund the assets of which for the time being include any issued share capital of a trading company or any class of that share capital, for the words “more than 10 per cent.” there shall be substituted the words “ 50 per cent. or more ”.

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Offshore funds with wholly-owned subsidiaries

- 11 (1) In relation to an offshore fund which has a wholly-owned subsidiary which is a company the provisions of section 760(3) and Part I of this Schedule shall have effect subject to the modifications in sub-paragraph (3) below.
- (2) Subject to sub-paragraph (3) below, for the purposes of this paragraph, a company is a wholly-owned subsidiary of an offshore fund if and so long as the whole of the issued share capital of the company is—
- (a) in the case of an offshore fund falling within section 759(1)(a), directly and beneficially owned by the fund; and
 - (b) in the case of an offshore fund falling within section 759(1)(b), directly owned by the trustees of the fund for the benefit of the fund; and
 - (c) in the case of an offshore fund falling within section 759(1)(c), owned in a manner which, as near as may be, corresponds either to paragraph (a) or paragraph (b) above.
- (3) In the case of a company which has only one class of issued share capital, the reference in sub-paragraph (2) above to the whole of the issued share capital shall be construed as a reference to at least 95 per cent. of that share capital.
- (4) The modifications referred to in sub-paragraph (1) above are that, for the purposes of section 760(3) and Part I of this Schedule—
- (a) that percentage of the receipts, expenditure, assets and liabilities of the subsidiary which is equal to the percentage of the issued share capital of the company concerned which is owned as mentioned in sub-paragraph (2) above shall be regarded as the receipts, expenditure, assets and liabilities of the fund; and
 - (b) there shall be left out of account the interest of the fund in the subsidiary and any distributions or other payments made by the subsidiary to the fund or by the fund to the subsidiary.

Offshore funds with interests in dealing and management companies

- 12 (1) Section 760(3)(c) shall not apply to so much of the assets of an offshore fund as consists of issued share capital of a company which is either—
- (a) a wholly-owned subsidiary of the fund which falls within sub-paragraph (2) below; or
 - (b) a subsidiary management company of the fund, as defined in sub-paragraph (3) below.
- (2) A company which is a wholly-owned subsidiary of an offshore fund is one to which sub-paragraph (1)(a) above applies if—
- (a) the business of the company consists wholly of dealing in material interests in the offshore fund for the purposes of and in connection with the management and administration of the business of the fund; and
 - (b) the company is not entitled to any distribution in respect of any material interest for the time being held by it;
- and paragraph 11(2) above shall apply to determine whether a company is, for the purposes of this paragraph, a wholly-owned subsidiary of an offshore fund.

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- (3) A company in which an offshore fund has an interest is for the purposes of sub-paragraph (1)(b) above a subsidiary management company of the fund if—
 - (a) the company carries on no business other than providing services falling within sub-paragraph (4) below either for the fund alone or for the fund and for any other offshore fund which has an interest in the company; and
 - (b) the company’s remuneration for the services which it provides to the fund is not greater than it would be if it were determined at arm’s length between the fund and a company in which the fund has no interest.
- (4) The services referred to in sub-paragraph (3) above are—
 - (a) holding property (of any description) which is occupied or used in connection with the management or administration of the fund; and
 - (b) providing administrative, management and advisory services to the fund.
- (5) In determining, in accordance with sub-paragraph (3) above, whether a company in which an offshore fund has an interest is a subsidiary management company of that fund—
 - (a) every business carried on by a wholly-owned subsidiary of the company shall be treated as carried on by the company; and
 - (b) no account shall be taken of so much of the company’s business as consists of holding its interests in a wholly-owned subsidiary; and
 - (c) any reference in sub-paragraph (3)(b) above to the company shall be taken to include a reference to a wholly-owned subsidiary of the company.
- (6) Any reference in sub-paragraph (5) above to a wholly-owned subsidiary of a company is a reference to another company the whole of the issued share capital of which is for the time being directly and beneficially owned by the first company.

Disregard of certain investments forming less than 5 per cent. of a fund

- 13
- (1) In any case where—
 - (a) in any account period of an offshore fund, the assets of the fund include a holding of issued share capital (or any class of issued share capital) of a company; and
 - (b) that holding is such that by virtue of section 760(3)(c) the fund could not (apart from this paragraph) be certified as a distributing fund in respect of that account period;then, if the condition in sub-paragraph (3) below is fulfilled, that holding shall be disregarded for the purposes of section 760(3)(c).
 - (2) In this paragraph any holding falling within sub-paragraph (1) above is referred to as an “excess holding”.
 - (3) The condition referred to in sub-paragraph (1) above is that at no time in the account period in question does that portion of the fund which consists of—
 - (a) excess holdings, and
 - (b) interests in other offshore funds which are not qualifying funds,exceed 5 per cent. by value of all the assets of the fund.

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Power of Board to disregard certain breaches of conditions

- 14 If, in the case of any account period of an offshore fund ending after the passing of the ^{M2}Finance (No. 2) Act 1987 (23rd July 1987), it appears to the Board that there has been a failure to comply with any of the conditions in paragraphs (a) to (c) of section 760(3) (as modified, where appropriate, by the preceding provisions of this Part of this Schedule) but the Board are satisfied—
- (a) that the failure occurred inadvertently; and
 - (b) that the failure was remedied without unreasonable delay,
- the Board may disregard the failure in determining whether to certify the fund as a distributing fund in respect of that account period.

Marginal Citations

M2 1987 c. 51.

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