

EXPLANATORY MEMORANDUM TO
THE TAX AVOIDANCE SCHEMES (INFORMATION) (AMENDMENT) (No.2)
REGULATIONS 2010

2010 No. 2928

1. This explanatory memorandum has been prepared by HM Revenue and Customs (HMRC) and is laid before the House of Commons by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 These Regulations (“the amending regulations”) amend the Tax Avoidance Schemes (Information) Regulations 2004 (S.I. 2004/1864) (“the principal regulations”). They prescribe the information to be provided, and the time limits for doing so, under obligations introduced in the Finance Act 2010. They also prescribe the period after which the maximum rate of penalty as increased by the Tax Avoidance Schemes (Penalty) (Amendment) Regulations 2010 (S.I. 2010/2743) applies.
 - 2.2 The amending regulations will come into force on 1 January 2011.
3. **Matters of special interest to the Select Committee on Statutory Instruments**

None
4. **Legislative Context**
 - 4.1 Part 7 of Finance Act (“FA”) 2004 (sections 306 – 319) provides for the notification, or “disclosure”, to the HMRC of certain tax arrangements and proposals for those arrangements (“schemes”).
 - 4.2 Sections 308, 309 and 310 require certain persons to disclose information about schemes falling within certain descriptions. The requirement usually falls on the promoter who must explain how the scheme works within 5 days of its being made available for implementation or implemented.
 - 4.3 Section 98C of the Taxes Management Act 1970 (“TMA”) provided for penalties for failure to disclose. Section 98C(1)(a) and (b) TMA provided for the tribunal to impose an initial penalty not exceeding £5,000 and for HMRC to impose further daily penalties, not exceeding £600, for each day that the failure continued after the imposition of the initial penalty.
 - 4.4 Section 108 of FA 2007 amended FA 2004 and introduced new information powers in relation to the disclosure of tax avoidance schemes. These new powers provide for HMRC to enquire into the reasons why a promoter has failed to disclose a scheme and to enforce disclosure where the evidence warrants it. In particular:
 - section 306A provides for HMRC to apply to the Special Commissioners (now the tribunal) for an order deeming a scheme to be notifiable where HMRC has taken all reasonable steps to establish the facts and has reasonable grounds to suspect that it is notifiable. The effect of an order

under section 306A is that the promoter has a duty to disclose the scheme under section 308.

- section 314A provides for HMRC to apply to the tribunal for an order that a scheme is notifiable. The tribunal can make such an order only if satisfied that the scheme is notifiable under the existing law. An order under section 314A confirms that the promoter has a duty to disclose the scheme under section 308.

4.5 Section 108 also amended the penalty provisions of section 98C TMA 1970 providing:

- for the Treasury to make regulations increasing the level of daily penalty for failure to disclose a scheme where that failure continues after an order has been made under sections 306A or 314A; and
- for HMRC to make regulations prescribing the period after which the increased penalty level is to apply after an order under section 314A.

4.6 The Tax Avoidance Schemes (Penalty) Regulations 2007 (S.I. 2007/3104) increased the daily penalty from an amount not exceeding £600 per day to an amount not exceeding £5,000 per day where a promoter's failure to disclose a scheme continues after the making of an order under section 306A or 314A.

4.7 The Tax Avoidance Schemes (Information) (Amendment) (No.2) Regulations 2007 (S.I. 2007/3103) prescribed the time after which the increased penalty applies when an order has been made under section 314A. It is 10 days from the date of the order.

4.8 Schedule 17 to FA 2010 further amends FA 2004 and section 98C TMA to -

- bring forward the obligation to disclose a scheme to the time a promoter first takes steps to market it;
- require promoters to provide periodic lists of clients who have implemented schemes;
- allow HMRC to require intermediaries in the marketing of schemes to provide information leading to the identification of the promoter;
- replace the initial penalty of up to £5,000 with an initial daily penalty of up to £600 in cases of failure to comply with a disclosure obligation under sections 308, 309 or 310 (but not with an ancillary information obligation under other sections in Part 7);
- provide for the initial penalty to be an amount not exceeding £1 million where the Tribunal considers the aggregate initial daily penalties inappropriately low;
- provide for the Treasury to make regulations increasing the level of the new initial daily penalty where a failure to notify a scheme continues after the Tribunal has made an order under section 306A or 314A; and
- provide for HMRC to prescribe the period after which increased penalties apply.

These amendments will come into force on 1 January 2011.

- 4.9 The Tax Avoidance Schemes (Penalty) (Amendment) Regulations 2010 (SI 2010/2743) increase the maximum amount of the initial daily penalty to £5,000 where a promoter's failure to disclose a scheme continues after the making of an order under section 306A or 314A. These regulations will also come into force on 1 January 2011.

5. Territorial Extent and Application

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 The Government is committed to tackling tax avoidance and will continue to take necessary steps to protect the Exchequer and maintain fairness in the tax system.
- 7.2 The objectives of disclosure are to:
- Provide early information to HMRC about new avoidance schemes to allow the risk they pose to be assessed and, where appropriate, to inform legislation to close loopholes;
 - Identify users of avoidance schemes, informing HMRC's compliance work
 - Reduce the supply of avoidance schemes by altering the economics of avoidance, reducing the returns to promoters and users as schemes are closed down more quickly.
- 7.3 Part 7 of FA 2004, section 98C of TMA, and instruments made under them are intended to achieve early identification of avoidance schemes.
- 7.4 Part 7 applies across all of the direct taxes. However, the disclosure rules are targeted at the areas at high risk from avoidance. The arrangements prescribed in secondary legislation schemes are limited to those that concern income tax, corporation tax, capital gains tax and stamp duty land tax.
- 7.5 These rules were aimed at new and innovative schemes and intended to redress a timing information gap that exists in relation to the prescribed taxes. For example, the filing date for income tax and corporation tax returns is many months after the end of the period to which the return relates. So it may be long after an avoidance scheme has been used that HMRC receives a return and can open enquiries.
- 7.6 The rules on disclosure have made it possible to move quickly to close off avoidance opportunities.

- 7.7 Most promoters comply with their obligations to disclose, but a minority do not. FA 2007 introduced new information powers (outlined above) aimed at tackling non-compliant promoters of tax avoidance schemes, including provision for HMRC to apply to the tribunal for orders requiring disclosure, along with related enhancements of the penalty regime.
- 7.8 FA 2010 contains further enhancements of the regime (again outlined above) closing unintended gaps and targeting egregious non-compliance by promoters.
- 7.9 These amendment regulations prescribe:
- the information to be included on client lists, the periods covered and the time limits for providing them;
 - the information to be provided by intermediaries in response to a notice by HMRC, and the time limits for providing it; and
 - the period after which the maximum daily penalty as increased by S.I. 2010/2743 applies after a disclosure order is made.

Consolidation

- 7.10 The principal regulations have been amended by S.I.s 2004/2613, 2005/1869, 2006/1544, 2007/2153, 2007/3103, 2008/1947, 2009/611, 2010/410 and by these regulations. It had been intended to consolidate the principal regulations and the amending regulations towards the end of 2009, but the exercise was postponed pending further amendments, including the present instrument. It is now intended to consolidate during 2011.

8. Consultation outcome

The amendments in FA 2010 and subordinate legislation follow a consultation exercise in autumn 2009 and subsequent informal discussion with interested parties. The present regulations incorporate suggestions made by consultees. In particular, the time limit for providing client lists is 30 days from the end of the period covered, not 14 days as originally intended; the list is limited to clients who have implemented schemes; and the address to be provided is that to which the promoter has sent the reference number under section 312 FA 2004.

9. Guidance

A copy of the guidance issued by HMRC has been placed in the House of Commons library.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is limited to those which engage in avoidance schemes.
- 10.2 The impact on the public sector is nil.
- 10.3 An Impact Assessment of the effect that the package of measures of which this instrument forms part will have on the costs of business and the voluntary sector is available at:
<http://webarchive.nationalarchives.gov.uk/20091222074811/http://hmrc.gov.uk/budget2010/strength-revise-dotas-ia-5295.pdf>.

11. Regulating small business

- 11.1 The legislation applies to small business.
- 11.2 The reasons for not exempting small businesses from obligations in relation to DOTAS are:
- Revenue protection. Small businesses may promote or use avoidance schemes where the tax at risk is significant and disproportionate to the size of the business;
 - Fairness. Avoidance puts compliant businesses, large and small, at a disadvantage and distorts competition.

12. Monitoring & review

A review of the effects of the measure is expected 3 years from implementation on 1 January 2011.

13. Contact

David Easton at the HM Revenue and Customs Tel: 020 7147 2418 or email: David.Easton@hmrc.gsi.gov.uk can answer any queries regarding the instrument.