

2017 No. 1245

TAXES

The Penalties for Enablers of Defeated Tax Avoidance (Legally Privileged Communications Declarations) Regulations 2017

<i>Made</i>	- - - -	<i>11th December 2017</i>
<i>Laid before the House of Commons</i>		<i>12th December 2017</i>
<i>Coming into force</i>	- -	<i>2nd January 2018</i>

The Treasury make the following Regulations in exercise of the powers conferred by paragraph 44(4) of Schedule 16 to the Finance Act (No. 2) 2017(a).

Citation and commencement

1. These Regulations may be cited as the Penalties for Enablers of Defeated Tax Avoidance (Legally Privileged Communications Declarations) Regulations 2017 and come into force on 2nd January 2018.

Interpretation

2. In these Regulations a reference to a numbered paragraph is a reference to the paragraph in Schedule 16 to the Finance Act (No. 2) 2017 which is so numbered.

The declaration

3. A declaration under paragraph 44 must satisfy Conditions A, B and C.

Condition A

4. Condition A is that the declaration must contain sufficient information as might reasonably be expected to enable HMRC to identify—

- (a) the person who would rely on the declaration for the purpose of establishing that that person is not liable to a penalty under paragraph 1;
- (b) the relevant lawyer making the declaration;
- (c) the relevant lawyers whose legally privileged communications would otherwise be relied upon to establish that the person referred to in paragraph (a) is not a person who enabled the arrangements for the purposes of paragraph 1; and
- (d) the arrangements (and, where appropriate, the proposal which was implemented by the arrangements) to which the declaration relates.

Condition B

5. Condition B is that the declaration must contain the confirmations set out in regulations 6 to 10 which must be made by the relevant lawyer making the declaration.

Designer of arrangements (paragraph 8)

6. In relation to whether the person referred to in regulation 4(a) is a designer of arrangements falling within paragraph 8, the confirmation is that the person—

- (a) was not, in the course of a business carried on by that person, responsible to any extent for the design of the arrangements or a proposal which was implemented by the arrangements; or
- (b) was responsible to an extent for such design because of having provided advice but—
 - (i) the advice provided is not relevant advice within the meaning of paragraph 8(3); or
 - (ii) the knowledge condition in paragraph 8(4) is not met.

Managers of arrangements (paragraph 9)

7.—(1) In relation to whether the person referred to in regulation 4(a) is a manager of the arrangements falling within paragraph 9(1), the confirmation is that—

- (a) the person was not, in the course of a business carried on by that person, to any extent responsible for the organisation or management of the arrangements; or
- (b) if the person was so responsible for the organisation or management of the arrangements, the condition set out in paragraph 9(1)(b) is not met.

(2) Where the person referred to in regulation 4(a) is not a manager of the arrangements because of paragraph 9(2), the confirmation is that the person referred to in regulation 4(a) meets the condition set out in paragraph 9(2)(b).

Marketers of arrangements (paragraph 10)

8. In relation to whether the person referred to in regulation 4(a) marketed arrangements to T so as to fall within paragraph 10, the confirmation is that the person did not in the course of a business carried on by that person—

- (a) make available for implementation by T a proposal which has since been implemented, in relation to T, by the arrangements; or
- (b) communicate information to T or another person about a proposal which has since been implemented, in relation to T, by the arrangements with a view to T entering into the arrangements or transactions forming part of the arrangements.

Enabling participants (paragraph 11)

9. In relation to whether the person referred to in regulation 4(a) is an enabling participant falling within paragraph 11, the confirmation is that—

- (a) the person is not a person (other than T) who entered into the arrangements or a transaction forming part of the arrangements; or
- (b) if the person did enter into the arrangements or a transaction forming part of the arrangements, the condition set out in paragraph 11(c) is not met.

Financial enablers (paragraph 12)

10. In relation to whether the person referred to in regulation 4(a) is a financial enabler falling within paragraph 12, the confirmation is that—

- (a) the person did not in the course of a business carried on by that person, provide a financial product (directly or indirectly) to a relevant party within the meaning of paragraph 12; or
- (b) to the extent that the person did provide a financial product, the condition set out in paragraph 12(1)(c) is not met.

Condition C

11. Condition C is that the declaration must contain—

- (a) a certificate that the information provided by the relevant lawyer making the declaration is correct to the best of their knowledge and belief; and
- (b) a statement that the relevant lawyer making the declaration understands that any of the persons referred to in regulation 4 may have to pay financial penalties as set out in paragraphs 1 and 45 and that any relevant lawyer named in the declaration may face prosecution for providing false information should that declaration prove to be incorrect.

Multiple implementations of a proposal

12. Where a proposal for arrangements was implemented more than once by arrangements which are substantially similar, the declaration may contain a statement that this is the case and that the involvement of the person referred to in regulation 4(a) in relation to those arrangements was such that all the things stated in the declaration are equally true in relation to those arrangements.

*David Evennett
Mark Spencer*

11th December 2017

Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made further to the provisions contained in Schedule 16 (“the Schedule”) to the Finance Act (No. 2) 2017. The Schedule makes provision for a penalty for any person who enables a taxpayer to enter into abusive tax arrangements that are defeated. Paragraphs 8 to 12 of the Schedule contain the definitions of an enabler. A potential enabler who is a relevant lawyer (as defined in the Schedule), or a relevant lawyer acting on their behalf, may be unable to provide information in defence of a penalty because communications made by them, or on their behalf by a relevant lawyer, may be the subject of a claim to legal professional privilege or, in Scotland, protected from disclosure in legal proceedings on the grounds of confidentiality of communication. These regulations, made under paragraph 44(4) of the Schedule, make provision that in such circumstances a relevant lawyer may make a declaration that the communications in question demonstrate that the person potentially liable for a penalty is not an enabler within the meaning of any of paragraphs 8 to 12 of the Schedule without requiring them to breach legal professional privilege.

Regulation 1 provides for citation and commencement.

Regulation 2 provides for interpretation of a reference to a numbered paragraph to be to a paragraph of the Schedule which is so numbered.

Regulation 3 states that the information contained within Conditions A, B and C must be provided by the relevant lawyer and makes provision for the form and content of a declaration to ensure that it does not cause the relevant lawyer making the declaration to breach legal professional privilege.

Regulation 4 contains Condition A which states that a declaration must identify the person who would otherwise be liable to a penalty under paragraph 1 of the Schedule; the relevant lawyer making the declaration; the relevant lawyer or lawyers whose communications are privileged; and

the proposal for arrangements which the arrangements referred to in paragraph 1 of the Schedule implement.

Regulation 5 contains Condition B which states that the person making the declaration must provide the confirmations described in regulations 6 to 10.

Regulations 6 to 10 require the relevant lawyer to confirm that at least one of the items listed in each of those regulations apply to prevent the person referred to in regulation 4(a) falling within the meaning of an enabler.

Regulation 11 contains Condition C which states the relevant lawyer making the declaration must certify that the information that is being provided is correct to the best of their knowledge and belief, and that they understand that the potential enabler and any person referred to in regulation 4 may have to pay a financial penalty and that any person named in the declaration may face prosecution for providing false information.

Regulation 12 makes provision for a declaration to include, if appropriate, confirmation that a proposal for arrangements was implemented more than once by arrangements which are substantially similar and that the involvement of the person referred to in regulation 4(a) in respect of those arrangements was such that all the things stated in the declaration are equally true in relation to those arrangements.

A Tax Information and Impact Note covering this instrument was published on 5 December 2016 alongside the Autumn Statement 2016 and is available on the GOV.UK website at <https://www.gov.uk/government/publications/strengthening-sanctions-and-deterrents-for-tax-avoidance/strengthening-sanctions-and-deterrents-for-tax-avoidance>. It remains an accurate summary of the impacts that apply to this instrument.

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