

EXPLANATORY MEMORANDUM TO

THE PENALTIES RELATING TO OFFSHORE MATTERS AND OFFSHORE TRANSFERS (ADDITIONAL INFORMATION) REGULATIONS 2017

2017 No. 345

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs ("HMRC") on behalf of Her Majesty's Treasury ("the Treasury") and is laid before the House of Commons by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument sets out the additional information that a person who is liable for certain penalties in connection with an offshore matter or an offshore transfer under Schedules 24 to the Finance Act 2007 (c. 11), 41 to the Finance Act 2008 (c. 9) and 55 to the Finance Act 2009 (c. 10) must give to HMRC when seeking a reduction in the penalty on account of the person's co-operation and disclosure of information to HMRC.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 This is the first exercise of powers under paragraph 9(1C) of Schedule 24 to the Finance Act 2007 (c. 11) (penalties for errors), paragraph 12(2C) of Schedule 41 to the Finance Act 2008 (c. 9) (penalties: failure to notify etc) and paragraph 14(2C) of Schedule 55 to the Finance Act 2009 (c. 10) (penalty for failure to make returns etc) which were inserted by paragraphs 2(4), 6(4) and 10(5) of Schedule 21 to the Finance Act 2016 ("paragraphs 2(4), 6(4) and 10(5)") respectively. Schedules 24, 41 and 55 to the Finance Acts 2007, 2008 and 2009 respectively are collectively referred to in this memorandum as "the penalty Schedules" and as "Schedule 24", "Schedule 41" and "Schedule 55" when referred to individually.
- 4.2 Paragraphs 2(4), 6(4) and 10(5) came into force on 8th March 2017 for the purposes of making these Regulations by virtue of regulation 3 of the Finance Act 2016, Schedule 21 (Appointed Days) Regulations 2017 (S.I. 2017/259 (C. 22)) ("the Schedule 21 Appointed Days Regulations"). The Schedule 21 Appointed Days Regulations appoint the 1st April 2017 as the day for the coming into force of Schedule 21 for all other purposes and provide that it has effect, for inheritance tax purposes, in relation to transfers of value made on or after that day. For income tax and capital gains tax, the amendments made by Schedule 21 have effect in relation to

tax years starting on or after 6th April 2016 (no penalty under the penalty Schedules in relation to either of those taxes can be incurred before 6th April 2017).

- 4.3 The penalty Schedules created a unified penalty regime across a range of taxes and duties for which HMRC has the care and management in respect of certain categories of failures (e.g. making an inaccurate return to HMRC) which are common to the relevant taxes and duties. The penalty Schedules (see paragraphs 9 and 10 of Schedule 24, paragraphs 12 and 13 of Schedule 41 and paragraphs 14 and 15 of Schedule 55 (collectively referred to in this memorandum as the “reductions for disclosure paragraphs”)) require HMRC to reduce the amount of penalty otherwise payable where a person discloses failures giving rise to a penalty and provides information and assistance etc. in correcting their tax affairs. The maximum amount by which a penalty may be reduced is greater if the person makes an “unprompted” disclosure rather than a “prompted” disclosure. The extent of the reduction made in a particular case depends upon the extent of the co-operation and quality of information the person provides to HMRC.
- 4.4 The penalty Schedules were amended by Schedule 10 to the Finance Act 2010 (c. 13) (penalties: offshore income etc) (“Schedule 10”) in relation to penalties for income tax and capital gains tax failures to distinguish between failures involving UK income and gains (a “domestic matter”) and those involving non-UK territories (an “offshore matter”). (See, in particular, the new paragraphs 4, 4A-4D, 10, 21A, 21B and 23B of Schedule 24, paragraphs 6, 6A-6D and 13 of Schedule 41 and paragraphs 6(3A), (4A) and (6), 6A, 15(1) and (2), and 17(4) of Schedule 55 (inserted by Schedule 10) and the Penalties, Offshore Income etc (Designation of Territories) Order 2011 (S.I.2011/976 (amended by S.I. 2013/1618))).
- 4.5 Under the scheme introduced by Schedule 10, non-UK territories are designated under categories “1”, “2” or “3”. Penalties for failures involving offshore matters relating to “category 1” territories are the same as for those involving a domestic matter (indeed, domestic matters also fall within “category 1” for these purposes). Penalties relating to “category 2” territories are 50% higher than the corresponding penalty relating to “category 1”. Penalties relating to “category 3” territories are double those for the corresponding “category 1” penalty. The category to which a territory is assigned for these purposes depends upon the level of co-operation the territory provides to the United Kingdom in relation to tax matters e.g. whether there are arrangements for automatic exchange of information relating to tax matters between the territory and the United Kingdom. Category 1 territories provide the highest levels of tax co-operation and category 3 territories the lowest.
- 4.6 Schedule 20 to the Finance Act 2015 (c. 11) (penalties in connection with offshore matters and offshore transfers) (“Schedule 20”) extended the offshore penalty regime to include penalties for failures relating to inheritance tax. Schedule 20 also rendered certain failures previously falling outside of the offshore penalty regime introduced by Schedule 10 subject to that regime if they met the requirements for involving an “offshore transfer”. A deliberate failure giving rise to a penalty in relation to inheritance tax, income tax or capital gains tax under the penalty Schedules “involves an offshore transfer” if it does not already fall as an “offshore matter” and the condition relevant to the tax at stake is satisfied (see paragraph 4AA of Schedule 24, paragraph 6AA of Schedule 41 and paragraph 6AA of Schedule 55 inserted by Schedule 20 for the conditions).

- 4.7 Schedule 20 also introduced a further territory category (“category 0”) into the offshore penalty regime with consequential amendments to the rates of penalty applying to the other categories of territory. Unlike the amendments made by Schedule 20 described in paragraph 4.6 of this memorandum (which came into force in April 2016 (see the Finance Act 2015, Schedule 20 (Appointed Days) Order 2016 (S.I. 2016/ 456 (C. 24))), no date for the coming into force of those provisions has been set at the time of the making of the Regulations described in this memorandum.
- 4.8 Apart from necessary consequential amendments arising from the introduction of the offshore penalty regime by Schedule 10 (as amended by Schedule 20), the conditions and requirements in connection with the reduction of penalties incurred under the penalty Schedules applying before Schedule 21 to the Finance Act 2016 (c. 24) remained the same for domestic matters, offshore matters and offshore transfers.
- 4.9 Schedule 21 amends the reductions for disclosure paragraphs of the penalty Schedules to require “additional information” to be provided by a person seeking to reduce a penalty concerning an offshore matter or offshore transfer. In addition, Schedule 21 lowers the maximum amount by which penalties for deliberate tax non-compliance may be reduced in relation to an offshore matter or offshore transfer.
- 4.10 These Regulations are made by the Treasury and set out what is meant by “additional information” for the reductions for disclosure paragraphs as required by the new paragraph 9(1C) of Schedule 24, paragraph 12(2C) of Schedule 41 and paragraph 14(2C) of Schedule 55 (inserted by Schedule 21). These Regulations require a person (“P”) seeking reduction of a relevant penalty to tell HMRC if there is a person (“the enabler”) who encouraged, assisted or otherwise facilitated the conduct by P that gave rise to the penalty in question and whether P is the sole or a joint beneficial owner of an asset situated or held in a territory outside the United Kingdom that is held on behalf of P by another person. The Regulations require further information to be provided if either (or both) of those cases apply.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 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 HMRC may charge non-compliant taxpayers a tax geared penalty (a penalty that is a percentage of the tax involved) where income, gains and chargeable transfers of assets etc. are not declared or notified to HMRC. The standard and minimum penalty chargeable are set out in the legislation. Penalties start at the standard rate and the level of penalty ultimately charged then depends on the extent to which the taxpayer discloses the non-compliance to HMRC and how much they co-operate during any investigation to help HMRC quantify the correct amount of tax due.

- 7.2 Schedule 21 introduces a new requirement for a person liable to a penalty in relation to an offshore matter or offshore transfer under the penalty Schedules to provide “additional information” as part of any disclosure to HMRC in order to obtain any reduction in the penalty allowable. The additional information aims to provide HMRC with a greater level of insight into how the tax non-compliance occurred as well the parties and non-UK territories involved. As well as helping to tackle the tax non-compliance by the taxpayer, the additional information will provide valuable information about the advisers etc. assisting non-compliant taxpayers. This will help HMRC to take further action to tackle tax non-compliance.
- 7.3 By virtue of the “additional information” set out in these Regulations HMRC will now, where appropriate, require a person seeking a reduction in a penalty relating to an offshore matter or offshore transfer to provide information about:
- any person (enabler) who encouraged, assisted or otherwise facilitated the conduct giving rise to the penalty in question;
 - information about assets held in territories outside the UK and any nominees or entities used to hold those assets on behalf of the person subject to the penalty.
- 7.4 If a person’s tax affairs do not involve an enabler or the person has no assets located outside the UK held by another person, telling HMRC accordingly will fulfil the requirement to provide additional information.

Consolidation

- 7.5 This instrument is not amending another instrument so consolidation is not necessary.

8. Consultation outcome

- 8.1 The consultation ran from 16 July 2015 until 8 October 2015. Nine groups of stakeholders provided their views at face to face meetings, and 18 stakeholders sent in written responses. The respondents included The Law Society, the “Big 4” accountancy firms, Scottish Courts and Tribunal Service, Society of Trust and Estate Practitioners, Oxfam GB and other representative bodies for accountants.
- 8.2 Responses were split between those for and against requiring further information to give maximum penalty reductions. Respondents noted that requiring this information would provide HMRC with a greater level of insight into how evasion takes place and the behaviours behind this.
- 8.3 The full consultation summary of responses was published in December 2015 as “Tackling offshore tax evasion: Strengthening civil deterrents for offshore evaders” and can be accessed on Gov.UK:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483368/Strengthening_civil_deterrents_for_offshore_evaders_-_summary_of_responses_M7009.pdf

9. Guidance

- 9.1 HMRC’s Compliance Handbook, which is available to the public on WWW.GOV.UK, is being updated so that the new measure and how it works in practice will be clear to HMRC operational staff, taxpayers, advisors and other stakeholders. This will include the definition of “additional information” and examples of “additional information”.

10. Impact

- 10.1 There are no impacts on compliant businesses, charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 A Tax Information and Impact Note covering this instrument was published on 9th December 2015 on the website at <https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins>.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 No specific action is proposed to minimise regulatory burdens on small businesses.

12. Monitoring & review

- 12.1 This measure will be monitored through information collected during compliance work to ensure the legislation operates as intended.

13. Contact

- 13.1 Bruce Marsh at the Centre for Offshore Evasion Strategy Telephone: 03000 542484 or email: bruce.marsh@hmrc.gsi.gov.uk can answer any queries regarding the instrument.