
DRAFT STATUTORY INSTRUMENTS

2009 No.

The Offshore Funds (Tax) Regulations 2009

PART 3

**REPORTING FUNDS AND THE TREATMENT
OF PARTICIPANTS IN REPORTING FUNDS**

CHAPTER 6

**TRANSACTIONS BY CERTAIN REPORTING
FUNDS WHICH ARE NOT TREATED AS TRADING**

Conditions to be met by reporting funds for this Chapter to apply

Introductory

73.—(1) A reporting fund meets the conditions for this Chapter to apply in respect of a period of account if it meets—

- (a) the equivalence condition (see regulation 74), and
- (b) the genuine diversity of ownership condition (see regulations 75 and 76).

(2) In this Part a “diversely owned fund” means a reporting fund in respect of which the conditions mentioned in paragraph (1) are met for a period of account.

The equivalence condition

74.—(1) The equivalence condition is met if the fund meets condition A or B throughout the period of account.

(2) Condition A is that the fund is recognised by the Financial Services Authority within the meaning of section 264, 270 or 272 of FISMA 2000.

(3) Condition B is that the fund is a UCITS fund.

The genuine diversity of ownership condition

75.—(1) The genuine diversity of ownership condition is met if the fund meets conditions A to C throughout the period of account.

(2) Condition A is that the fund produces documents, available to investors and to HMRC, which contain—

- (a) a statement specifying the intended categories of investor,
- (b) an undertaking that interests in the fund will be widely available, and
- (c) an undertaking that interests in the fund will be marketed and made available in accordance with the requirements of paragraph (4)(a).

(3) Condition B is—

- (a) that the specification of the intended categories of investor do not have a limiting or deterrent effect, and
 - (b) that any other terms or conditions governing participation in the fund do not have a limiting or deterrent effect.
- (4) Condition C is—
- (a) that interests in the fund must be marketed and made available—
 - (i) sufficiently widely to reach the intended categories of investors, and
 - (ii) in a manner appropriate to attract those categories of investors, and
 - (b) that a person who falls within one of the intended categories of investors can, upon request to the manager of this fund, obtain information about the fund and acquire units in it.

The genuine diversity of ownership condition: further provisions

76.—(1) For the purposes of regulation 75(3) a limiting or deterring effect means an effect which—

- (a) limits investors to a limited number of specific persons or specific groups of connected persons, or
- (b) deters a reasonable investor falling within one of the intended categories of investor from investing in the fund.

(2) Condition C (see regulation 75(4)) shall be treated as being met even if at the relevant time the fund has no capacity to receive additional investments, unless—

- (a) the capacity of the fund to receive investments in it is fixed by the fund documents (or otherwise), and
- (b) a pre-determined number of specific persons or specific groups of connected persons make investments in the fund which collectively exhausts all, or substantially all, of that capacity.

(3) For the purposes of this regulation—

- (a) sections 993 and 994 of ITA 2007 (connected persons) apply in the case of a person chargeable to income tax, and
- (b) section 839 of ICTA(1) (connected persons) applies in the case of a person chargeable to corporation tax.

Clearances in relation to the equivalence and genuine diversity of ownership conditions

Who may apply for clearance

77.—(1) The following may apply for clearance that the fund meets the equivalence condition and the genuine diversity of ownership condition—

- (a) the manager of an eligible offshore fund;
- (b) the manager of a non-reporting fund who makes an application under regulation 52.

(2) If it is proposed to establish an offshore fund which, on its establishment, is to be an eligible offshore fund, the applicant may apply for clearance that the fund will meet the equivalence condition and the genuine diversity of ownership condition on its establishment.

(1) Section 839 was amended by paragraph 20 of Schedule 17 to the Finance Act 1995 (c. 4), paragraph 25 of Schedule 13 to the Finance Act 2006 (c. 25), paragraph 223 of Schedule 1 to the Income Tax Act 2007 (c. 3) and by S.I. 1988/745 and 2005/3229.

Procedure for obtaining clearance

78.—(1) The relevant person specified in regulation 77 (the “relevant person”) must apply in writing to HMRC for clearance that the fund meets the equivalence condition and the genuine diversity of ownership condition.

(2) A document submitted in accordance with paragraph (1) must be accompanied by the documents specified in regulation 75(2).

(3) HMRC may require the relevant person to provide further particulars if HMRC believe that full particulars of the fund have not been provided.

(4) HMRC must notify the relevant person within 28 days beginning with the day on which HMRC receive the documents mentioned in paragraphs (1) and (2) (or, as the case may be, the further particulars mentioned in paragraph (3))—

- (a) giving clearance that the fund meets the equivalence condition and the genuine diversity of ownership condition,
- (b) giving that clearance subject to conditions, or
- (c) refusing to give that clearance.

Circumstances in which clearance may not be relied upon

79.—(1) An offshore fund (and investors in that fund) may not rely on a clearance given under regulation 78 if any of conditions A to D is met.

(2) Condition A is that at the beginning of the first period of account of the fund to which the clearance relates (and at the beginning of each subsequent period of account), a relevant statement in the instrument constituting the fund or in its prospectus in issue for the time being is not in accordance with a relevant statement in the documents considered by HMRC before giving clearance.

(3) Condition B is that the fund is operated otherwise than in accordance with condition C of the genuine diversity of ownership condition (see regulations 75 and 76).

(4) Condition C is that the fund acts or is operated in contravention of a relevant statement in the instrument constituting the fund or in its prospectus.

(5) Condition D is that the documents specified in regulation 75(2) are materially amended.

(6) Condition D does not apply if the relevant person specified in regulation 77 has obtained a clearance given under regulation 78 which applies to the documents in their amended form.

(7) For the purposes of condition D, a material amendment is one that may reasonably be construed as causing, or likely to cause, the fund to fail to meet the equivalence condition or the genuine diversity of ownership condition in relation to any period of account.

Investment transactions carried out by diversely owned funds

Treatment of investment transactions carried out by diversely owned funds

80.—(1) This regulation applies if a diversely owned fund carries out an investment transaction in an accounting period.

(2) The investment transaction is treated as a non-trading transaction.

Meaning of “investment transaction”

81. For the purposes of this Part an “investment transaction” means—

- (a) any transaction in stocks and shares;

- (b) any transaction in a relevant contract (and see regulations 82 to 86);
- (c) any transaction which results in a diversely owned fund becoming a party to a loan relationship or a related transaction in respect of a loan relationship (and see regulation 87);
- (d) any transaction in units in a collective investment scheme (and see regulation 88);
- (e) any transaction in securities of any description not falling within paragraphs (a) to (d);
- (f) any transaction consisting in the buying or selling of any foreign currency;
- (g) any transaction in a carbon emission trading product (and see regulation 89).

Meaning of “relevant contract”: general

82.—(1) For the purposes of regulation 81(b) a relevant contract is—

- (a) an option,
- (b) a future, or
- (c) a contract for differences.

(2) For the purposes of this regulation an option, a future or a contract for differences which relates to land will only be a relevant contract where the option, the future or the contract for differences uses an index referred to in regulation 86(1)(b) and the index is—

- (a) publicly accessible,
- (b) comprised of a significant number of properties, and
- (c) not maintained by—
 - (i) the diversely owned fund,
 - (ii) the manager of the diversely owned fund, or
 - (iii) a person connected with the diversely owned fund or the manager of the diversely owned fund.

(3) For the purposes of this regulation—

- (a) sections 993 and 994 of ITA 2007 (connected persons) apply where the manager is a person other than a company, and
- (b) section 839 of ICTA(2) (connected persons) applies in the case of a diversely owned fund or where the manager is a person who is a company.

Meaning of “relevant contract”: options

83.—(1) For the purposes of regulation 82(1)(a) an “option” includes an instrument which entitles the holder to subscribe for shares in a company or assets representing a loan relationship of a company, and for these purposes it is immaterial whether the shares or assets to which the instrument relates exist or are identifiable.

(2) For the purposes of paragraph (1) the reference to a loan relationship of a company is to be construed in accordance with regulation 87 but with references in that regulation to “diversely owned fund” treated as references to “company”.

Meaning of “relevant contract”: futures

84.—(1) For the purposes of regulation 82(1)(b) a “future” is a contract for the sale of property under which delivery is to be made—

(2) Section 839 was amended by paragraph 20 of Schedule 17 to the Finance Act 1995 (c. 4), paragraph 25 of Schedule 13 to the Finance Act 2006 (c. 25), paragraph 223 of Schedule 1 to the Income Tax Act 2007 (c. 3) and by S.I. 1988/745 and 2005/3229.

- (a) at a future date agreed when the contract is made, and
 - (b) at a price so agreed.
- (2) For the purposes of paragraph (1)(b) a price is taken to be agreed when the contract is made—
- (a) notwithstanding that the price is left to be determined by reference to the price at which a contract is to be entered into on a market or exchange or could be entered into at a time and place specified in the contract, or
 - (b) in a case where the contract is expressed to be by reference to a standard lot and quality, notwithstanding that provision is made for a variation in the price to take account of any variation in quantity or quality on delivery.

Options and futures: further provisions

85.—(1) For the purposes of regulations 83 and 84 references to an option or a future do not include references to a contract whose terms provide—

- (a) that, after setting off their obligations to each other under the contract, a cash payment is to be made by one party to the other in respect of the excess, if any, and do not provide for the delivery of any property, or
 - (b) that each party is liable to make to the other party a cash payment in respect of all that party's obligations to the other under the contract and do not provide for the delivery of any property, or
 - (c) for the delivery of any property other than property a transaction in which would fall within any of regulations 80 to 89 where the property is delivered.
- (2) Nothing in paragraph (1) has effect to exclude, from references to an option or future, an option or future whose underlying subject matter is currency.
- (3) In paragraph (1) “underlying subject matter” means—
- (a) in relation to an option, the property which would fall to be delivered if the option were exercised, and
 - (b) in relation to a future, the property which, if the future were to run to delivery, would fall to be delivered at the date and price agreed when the contract is made.

Meaning of “relevant contract”: contracts for differences

86.—(1) For the purposes of regulation 82(1)(c) a “contract for differences” is a contract the purpose or pretended purpose of which is to make a profit or avoid a loss by reference to fluctuations in—

- (a) the value or price of property described in the contract, or
 - (b) an index or other factor designated in the contract.
- (2) But none of the following is a contract for differences—
- (a) a future;
 - (b) an option;
 - (c) a contract of insurance;
 - (d) a contract effected in the course of capital redemption business;
 - (e) a contract of indemnity;
 - (f) a guarantee;
 - (g) a warranty;
 - (h) a loan relationship.

(3) For the purposes of paragraph (2)—

“capital redemption business” means any business of a company carrying on insurance business in so far as it consists of the effecting on the basis of actuarial calculations, and the carrying out, of contracts under which, in return for one or more fixed payments, a sum or series of sums of a specified amount become payable at a future time or over a period;

“loan relationship” is to be construed in accordance with regulation 87, but with references to “diversely owned fund” in that regulation treated as references to “company”.

(4) For the purposes of paragraph (1)(b) an index or factor may be determined by reference to any matter and, for these purposes, a numerical value may be attributed to any variation in a matter.

Interpretation of regulation 81(c)

87.—(1) For the purposes of regulation 81(c) a diversely owned fund has a “loan relationship” where the fund stands (whether by reference to a security or otherwise) in the position of a creditor or debtor as respects any money debt and either—

- (a) that debt is one arising from a transaction for the lending of money, or
- (b) that debt is not one which arose from a transaction for the lending of money but is one—
 - (i) on which interest is payable to or by the diversely owned fund, or
 - (ii) in relation to which exchange gains or losses arise to the diversely owned fund, or
 - (iii) as respects which the conditions in paragraph (2) below are satisfied.

(2) The conditions referred to in paragraph (1)(b)(iii) are that—

- (a) the diversely owned fund stands in the position of creditor in relation to the money debt, and
- (b) the money debt is one from which a discount (whether of an income or capital nature) arises to the diversely owned fund.

(3) In this regulation “exchange gains or losses” means profits or gains or losses which arise as a result of comparing at different times the expression in one currency of the whole or some part of the valuation put by the diversely owned fund in another currency on an asset or liability of the diversely owned fund.

(4) For the purposes of this regulation a “money debt” is a debt which is, or has at any time been, one that falls, or that may at the choice of the debtor or of the creditor, fall to be settled—

- (a) by the payment of money,
- (b) by the transfer of a right to settlement under a debt which is itself a money debt, or
- (c) by the issue or transfer of shares in any company,

disregarding any other alternative exercisable by either party.

(5) Subject to paragraph (6), where an instrument is issued by any person for the purpose of representing security for, or the rights of a creditor in respect of, any money debt, then (whatever the circumstances of the issue of the instrument) that debt shall be taken for the purposes of this regulation to be a debt arising from a transaction for the lending of money.

(6) For the purposes of this regulation a debt does not arise from a transaction for the lending of money to the extent that it is a debt arising from rights conferred by shares in a company.

(7) For the purposes of this regulation so far as relating to exchange gains and losses, any currency held by the diversely owned fund shall be treated as a money debt.

(8) For the purposes of this regulation “money” includes money expressed in a currency other than sterling.

(9) For the purposes of regulation 81(c) a “related transaction” in relation to a loan relationship means any disposal or acquisition (in whole or in part) of rights or liabilities under that relationship.

Meaning of “units in a collective investment scheme”

88.—(1) For the purposes of regulation 81(d)—

“collective investment scheme” has the meaning given by section 235 of FISMA 2000,

“units” means the rights or interests (however described) of the investors in the collective investment scheme.

(2) In paragraph (1) a “investor”, in relation to a collective investment scheme, means a beneficial owner of units in the scheme, except where the units are held on trust (other than a bare trust) or are comprised in the estate of a deceased person, and in such a case the investor, in relation to the scheme, means the trustees of the trust, or, as the case may be, the deceased’s personal representatives.

Meaning of “transaction in a carbon emission trading product”

89.—(1) — For the purposes of regulation 81(g) a “transaction in a carbon emission trading product” means a transaction—

(a) in Community tradable emissions allowances, or

(b) in transferable units issued pursuant to the Kyoto Protocol,

where the transaction does not otherwise fall within any other paragraph of that regulation.

(2) For the purposes of this regulation—

“Community tradable emissions allowances” means transferable allowances which relate to the making of emissions of greenhouse gases, and are allocated as part of a system made for the purpose of implementing any community obligation of the United Kingdom relating to such emissions;

“the Kyoto Protocol” means the Kyoto Protocol to the United Nations Framework Convention on Climate Change signed at Kyoto on 11th December 1997⁽³⁾;

“units” includes assigned amount units, certified emission reductions, emission reduction units and removal units.

(3) The text of the Kyoto Protocol is available at www.unfccc.int/kyoto_protocol/items/2830.php.