# EXPLANATORY MEMORANDUM TO

# THE TAX AVOIDANCE SCHEMES (INFORMATION) (AMENDMENT) (NO. 2) REGULATIONS 2007

## 2007 No. 3103

**1.** This explanatory memorandum has been prepared by the Commissioners for Her Majesty's Revenue and Customs (HMRC) and is laid before the House of Commons by Command of Her Majesty.

This memorandum contains information for the Select Committee on Statutory Instruments.

## 2. Description

2.1 The above regulations come into force on 20th November 2007.

2.2 The Tax Avoidance Schemes (Information) (Amendment) (No. 2) Regulations 2007 ("the amendment regulations") amend The Tax Avoidance Schemes (Information) Regulations 2004 (SI 2004/1864) ("the principal regulations"). The principal regulations prescribe the information to be provided when a person is required to notify arrangements under Part 7 Finance Act 2004, and the time limits for providing that information.

2.3 The amendment regulations prescribe the time after which an increased daily penalty applies under Section 92C(2B) of the Taxes Management Act 1970 (as amended by Finance Act 2007), in cases where the Special Commissioners have made an order under Section 314A.

## 3. Matters of special interest to the Select Committee on Statutory Instruments

None

## 4. Legislative Background

4.1 Part 7 of Finance Act 2004 (sections 306 – 319) provides for the notification to the Commissioners of certain tax arrangements and proposals for those arrangements (hereafter referred to as "schemes")

4.2 Disclosure requires certain persons, usually the promoter, to disclose information about schemes falling within certain descriptions. The promoter must explain how the scheme works within 5 days of the scheme being made available for implementation or implemented.

- Section 306 defines "notifiable arrangements" and "notifiable proposals" which fall within certain descriptions prescribed by regulations made by the Treasury.

- Section 307 defines "promoter" in relation to "notifiable arrangements" and "notifiable proposals".

- Section 308 requires the promoter to provide prescribed information to HMRC within prescribed time limits.

- Section 315 inserted new Section 98C into the Taxes Management Act 1970, providing for penalties for failure to comply with obligations under Part 7 of Finance Act 2004. In particular, where promoters fail to notify a scheme within the prescribed time limit they are liable to an initial penalty of up to £5,000, imposed by the Special Commissioners and, if the failure continues after the imposition of the initial penalty, HMRC can impose daily penalties of up to £600 per day.

- Section 317 concerns secondary legislation, in particular that regulations made under Part 7 are subject to the "negative" annulment procedure.

- Section 318 defines terms used in Part 7, in particular "prescribed" means prescribed in regulations made by HMRC.

4.3 Section 108 of Finance Act 2007 amended Part 7 of the Finance Act 2004 introducing five new information powers in relation to the disclosure of tax avoidance schemes. These new information 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. For explanatory purposes, these are listed below in the order in which these new powers may be used:

- Section 313A provides for HMRC to require promoters, suspected of failing to disclose a scheme, to give reasons explaining why they think they are not required to disclose. A promoter must comply with this requirement within a period to be prescribed, or longer period as directed by HMRC.
- Section 313B provides for HMRC to apply to the Special Commissioners for an order requiring the promoter to provide further supplementary information or documents to explain or support the reasons why the scheme is not notifiable. The promoter must comply with this requirement within a period to be prescribed, or longer period as directed by HMRC.

- Section 306A provides for HMRC to apply to the Special Commissioners for an order designating the scheme as notifiable in circumstances 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, subject to limited exceptions, the promoter has a duty to disclose the scheme under section 308. Section 306A provides for the prescribed period within which to comply with section 308 to be varied where the duty arises as a consequence of an order under section 306A.

- Section 314A provides for HMRC to apply to the Special Commissioners for an order designating the scheme as notifiable. The Special Commissioners can make such an order only if satisfied that the scheme is notifiable under the existing law. The effect of an order under section 314A is that, subject to limited exceptions, the promoter has a duty to notify the scheme under Section 308.

- Section 308A provides for HMRC to apply to the Special Commissioners for an order requiring the promoter to provide further information or documents in circumstances where the promoter has purported to comply with the obligation to provide information under section 308 but where HMRC believe the information to be incomplete. This requirement is treated as part of the promoter's duty under Section 308(1) or (3).

Finance Act 2007 also amended the penalty provisions of section 98C TMA 1970 providing in particular:

- for the Treasury to make regulations increasing the level of daily penalty for failure to notify a scheme where that failure continues after an order has been made using the new information powers;

- for HMRC to make regulations prescribing the period after which the increased penalty level shall apply after an order under section 314A. It is provided that these regulations are subject to the "negative" annulment procedure;

- that where an order is made under section 314A, doubt as to notifiability will cease to be a "reasonable excuse" for continued non-compliance after the period prescribed for the application of the increased penalty.

Regulations amending the daily penalty were approved, in draft, by the House of Commons on 29th October 2007, were made on 30th October 2007 and will come into effect on 20th November 2007.

4.4 These amendment regulations provide that the time after which the **increased penalty** is to apply after the making of an order under Section 314A to disclose a scheme is to be 10 days.

4.5 Commencement of these new timing provisions shall be on 20th November 2007.

## 5. Extent

This instrument applies to all of the United Kingdom.

## 6. European Convention on Human Rights

The Financial Secretary, the Rt. Hon. Jane Kennedy MP, has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

I am satisfied that The Tax Avoidance Schemes (Information) (Amendment)(No.2) Regulations 2007 do not amend primary legislation and are not subject to approval by the House of Commons. Accordingly, no statement of compatibility is required.

## 7. Policy background

7.1 Tackling avoidance is a key element of the Government's tax policy Strategy, which is aimed at making it easier for businesses to comply with their tax obligations whilst tackling those who abuse the system.

7.2 The Commissioners' anti-avoidance strategy has four main elements:

- To discourage taxpayers from using schemes. This includes a critical appraisal of all new legislation to reduce the potential for tax avoidance as well as publicising successes in closing down avoidance schemes.
- To identify as early as possible schemes that are being used.
- To challenge avoidance schemes by contesting returns and, where necessary, pursuing the matter through the Courts.
- To produce legislative changes that will close down avoidance schemes where litigation is not appropriate or where the amount of tax at stake is particularly large.

7.5 Part 7 of Finance Act 2004 and instruments made under it are intended to achieve early identification of avoidance schemes.

7.6 Part 7 applies across all of the direct taxes. However, the Government has targeted the disclosure rules 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 or capital gains tax; and
- Stamp Duty Land Tax on non-residential property

7.7 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.

7.8 Disclosure requires certain persons, usually the promoter, to disclose information about schemes falling within certain descriptions. The promoter must explain how the scheme works within 5 days of the scheme being made available for implementation or implemented.

7.9 Most promoters comply with their obligations to disclose, but a minority do not. Finance Act 2007 introduced five new information powers (outlined above) aimed at tackling non-compliant promoters of tax avoidance schemes and provides for HMRC to enquire into the reasons why a promoter has failed to disclose a scheme.

7.10 Finance Act 2007 also provides that the time limits for complying with these new information powers are prescribed by regulations, details of which are also outlined above.

7.11 Finance Act 2007 also provides for daily penalties for non-compliance in the Taxes Management Act 1970, to be increased in certain cases where the new powers have been used, in some cases after a period to be prescribed by regulations.

## 8. Impact

A full Regulatory Impact Assessment has been prepared for this Measure and has been placed on the HM Revenue and Customs website (www.hmrc.gov.uk).

## 9. Contact

David Easton at HM Revenue and Customs Tel: 0207 147 2418 or e-mail: David.Easton@hmrc.gsi.gov.uk can answer any queries regarding the instrument.

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