

EXPLANATORY MEMORANDUM TO
THE TAX AVOIDANCE SCHEMES (INFORMATION)(AMENDMENT)
REGULATIONS 2011

2011 No. 171

1. This explanatory memorandum has been prepared by 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. **Purpose of the instrument**

- 2.1 The instrument amends the Tax Avoidance Schemes (Information) Regulations 2004 (S.I. 2004/1864) ("the Information Regulations") to extend the administrative framework for the Disclosure of Tax Avoidance Schemes (DOTAS) regime to disclosable Inheritance Tax (IHT) schemes.

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

- 3.1 The instrument is accompanied by a Taxes Information and Impact Note rather than a regulatory Impact Assessment with which the Select Committee will be familiar. The proposed introduction of a new Taxes Impact Assessment was announced in the June Budget and confirmed in a response document published by the Treasury on 9 December 2010. This can be found at http://www.hm-treasury.gov.uk/d/tax_policy_making_response.pdf.pdf

- 3.2 The accompanying Taxes Information and Impact Note covers a wider range of impacts than the regulatory Impact Assessment and addresses particular concerns raised by interested parties at consultation stage; notably that the published Impact Assessment did not cover the impact on individuals (as distinct from businesses).

4. **Legislative Context**

- 4.1 The instrument amends the Information Regulations so that they apply to disclosable IHT schemes. The Information Regulations provide the administrative framework for main DOTAS regime and specify the type of information that has to be disclosed or notified and the means and time limits for doing so.

4.2 Whilst they apply most of the existing provisions to IHT arrangements, these regulations provide specific requirements in relation to users of disclosed IHT schemes and arrangements.

4.3 This instrument is made at the same time as the Inheritance Tax Avoidance Schemes (Prescribed Description of Arrangements) Regulations 2011 (S.I. 2011/170). That instrument describes the types of IHT schemes or arrangements that must be disclosed.

5. Territorial Extent and Application

5.1 This instrument applies to all of 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

7.1 The Disclosure of Tax Avoidance Schemes (DOTAS) regime was introduced in Part 7 of the Finance Act 2004 (FA 2004) and associated regulations. It came into effect on 1 August 2004 and applied initially to income tax, corporation tax and capital gains tax (“the main regime”). The regime has subsequently been revised and extended. In particular, it was extended to Stamp Duty Land Tax in 2005 and National Insurance Contributions in 2007.

7.2 There are two main objectives of the DOTAS regime. Firstly to provide HMRC with early information about the detail of tax avoidance schemes, allowing those schemes to be risk-assessed and, where appropriate, to inform anti-avoidance legislation; secondly to identify users of those tax schemes. The regime requires certain persons, normally the promoter of a scheme, to provide HMRC, within strict time limits, with information about how the scheme is intended to work. Users of schemes must also notify HMRC when they first implement the scheme.

7.3 The primary legislation in FA 2004 includes IHT but the regime does not currently apply to it because the instruments required to implement the regime have not yet been made in respect of IHT.

7.4 IHT is a donor-based tax and is charged on those (or their personal representatives) who pass on an asset rather than on those who inherit it. The charge arises when there is a chargeable transfer and this can occur in one of two ways:

- (i) On death. A deceased person’s estate is treated as being transferred to another person immediately before their death and includes anything transferred into a trust by their will.

- (ii) During an individual's lifetime, when property is transferred into certain types of trust (known as 'relevant property trusts'). This is known as the 'entry charge'.

7.5 In Pre-Budget Report 2009 legislation was announced to close two IHT avoidance schemes involving the use of trusts. At the same time, there was an announcement that HMRC would look into "wider solutions" to the problem of avoidance of IHT charges associated with trusts. Some informal discussions were held with representative bodies and other interested parties in January 2010.

7.6 The Government announced in June 2010 Budget that they would consult on bringing IHT, as it applies to transfers of property into trust, within the DOTAS regime. The consultation and draft instrument was published on 27 July 2010.

7.7 As in the main regime, on disclosure HMRC may issue the promoter (or other person making the disclosure) with a Scheme Reference Number (SRN). The promoter is required to pass that SRN to users, who in turn have to use it to notify HMRC when they first implement the scheme. The time limit for doing so for users of disclosable IHT schemes is twelve months from the end of the month in which they first implement the scheme or arrangements. Users must provide the SRN in an IHT return, if they are required to submit such a return within that time limit. Otherwise they must provide the SRN on a standalone form.

7.8 There have been several amendments to the Tax Avoidance Schemes (Information) Regulations 2004 SI 2004/1864 since they came into force in 2004 and HMRC is looking to consolidate all the amendments in new information regulations.

8. Consultation outcome

8.1 A first draft of this instrument was published for comment on 27 July 2010. The consultation closed on 20 October 2010. A summary of responses can be found at:

http://irscot.inrev.gov.uk/budget10/main22June/00notices/updates/20101206_IHT_response_FINAL.pdf

8.2 The drafting of this instrument reflects the comments made by respondents to the consultation.

9. Guidance

9.1 Guidance will be published by HMRC for scheme promoters, users and IHT practitioners. HMRC is also working with certain representative bodies to develop a list of existing schemes and arrangements that do not need to be disclosed.

10. Impact

10.1 The impact on business, charities or voluntary bodies is limited to those that engage in tax avoidance schemes

10.2 The impact on the public sector is nil.

10.3 An Impact Assessment is available from the HMRC website at <http://www.hmrc.gov.uk/ria/index.htm#full>. It has been updated by a Tax Information and Impact Note which is also annexed to this Explanatory Memorandum and available on www.legislation.gov.uk

11. Regulating small business

11.1 The legislation applies to small business.

11.2 Businesses of any size may develop and market avoidance products. The objective of obtaining early notification of schemes precludes excepting small businesses from the disclosure requirement. HMRC does not expect it will have a significant effect on small businesses, either in absolute terms or proportionately.

12. Monitoring & review

12.1 Operational staff will keep this matter under review to ensure that the changes made by these instruments achieve their aims.

13. Contact

Chris Bara at Her Majesty's Revenue and Customs Tel: 020 7147 2756 or email: chris.bara@hmrc.gsi.gov.uk .

Disclosure of Inheritance Tax Avoidance

Who is likely to be affected?

This measure will primarily affect promoters of certain Inheritance Tax (IHT) avoidance schemes and individuals who use them. Promoters include accountants, solicitors, banks and financial institutions, and specialist scheme providers. Also practitioners providing routine IHT planning advice will need to be aware of the measure in order to consider whether it applies to the advice they give.

General description of the proposal

Regulations will be laid early in 2011 to extend the existing Disclosure of Tax Avoidance Schemes provisions (DOTAS) to IHT as it applies to transfers of property into trust.

They will create an obligation for avoidance scheme promoters to disclose such schemes to HMRC within strict time limits. Promoters will also have to pass on any Scheme Reference Number (SRN), issued by HMRC following disclosure of the scheme, to clients. In certain circumstances, users may have to disclose the scheme, for example if there is no promoter.

Promoters will have to provide HMRC with quarterly lists identifying clients to whom they are required to issue a SRN.

A client who is an intermediary and not the user of the scheme (i.e. the person expecting to obtain the IHT advantage) will have to pass the SRN to the actual user(s).

Users of a scheme will have to notify HMRC by providing the SRN within twelve months of the end of the month in which they first implement it.

Policy objective

This measure supports the Government's objective for a fairer tax system. Its purpose is to extend the DOTAS regime to a targeted area of IHT to enable HMRC to better target its compliance activity to the highest risk areas.

Development of this measure

- At the 2009 Pre-Budget Report, legislation was announced to close two known IHT avoidance schemes involving trusts. At the same time it was announced that consideration would be given to addressing IHT avoidance more generally.
- HMRC held informal discussions with representative bodies and other interested parties in January 2010, which included the extension of the DOTAS regime to IHT.
- In the June 2010 Budget, the Government announced it would consult on extending DOTAS to IHT and publish draft legislation.

- The consultation and draft legislation were published on 27 July 2010 and the period of consultation ended on 20 October. A summary of consultation responses was published on 6 December.

Detailed proposal

Operative date

The legislation will take effect on 6 April 2011.

From this date the existing notification requirements and time limits of the main regime will apply to schemes and arrangements that seek to mitigate or avoid an IHT charge on transfers of property into trust.

Promoters will have to disclose details of new and innovative schemes and arrangements. The regulations will not apply to existing schemes and arrangements. In certain circumstances, for example where the promoter is outside the UK, this obligation will fall on the scheme user.

Where HMRC provides a SRN in respect of a disclosed scheme, the promoter will have to pass it to users and, as the case may be, any intermediaries who then pass it to end users.

Scheme users will have an obligation from this date to notify HMRC of any SRN given to them in respect of a disclosed IHT scheme.

Current law

IHT is a donor-based tax and is charged on those (or their personal representatives) who pass on an asset rather than on those who inherit it. The charge arises when there is a chargeable transfer and this can occur in one of two ways:

- On death under section 4 Inheritance Act 1984 (IHTA). A deceased person's estate is treated as being transferred to another person immediately before their death and includes anything transferred into a trust by their will.
- During an individual's lifetime under section 3 IHTA, when property is transferred into certain types of trusts (known as 'relevant property trusts'). This is known as the 'entry charge'.

Charges are subject to various exemptions and reliefs.

Schedule 1 to IHTA provides the current rates and thresholds applicable to IHT:

Rate (%)	Threshold (£)
0	0-325,000
40 *	Over 325,000

* transfers into trust are chargeable at half this rate, i.e. 20%, except where the transfer is within seven years of the transferor's death

There is also a 6% charge every 10 years under section 64 IHTA on trustees of relevant property trusts, on the value of the property above the 0% rate band (known as the nil rate band), and exit charges under section 65 IHTA when assets are transferred out of trust.

Section 3A IHTA provides that most lifetime gifts, other than transfers into relevant property trusts and subject to certain other exemptions, will be 'Potentially Exempt Transfers' (PETs). PETs attract no charge to IHT when they are made and they become totally exempt from any charge to IHT if the donor survives for more than seven years after the gift is made.

DOTAS was introduced by sections 306 to 319 Finance Act 2004, which provide the relevant definitions and general framework for the regime. Further regulations are required to implement the regime in respect of specific taxes. They provide the descriptions of the type of schemes or arrangements which have to be notified and the administrative procedures for doing so.

The main regulations are:

- The Tax Avoidance Schemes (Information) Regulations 2004 – SI 2004/1864, (the 2004 information regulations). These set out what information has to be disclosed and the time limits for doing so.
- The Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004 – SI 2004/1865. These provide definitions of persons who are not to be treated as promoters.
- The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 – SI 2006/1543, (the 2006 description regulations). These provide the generic descriptions of schemes and arrangements concerning income tax, capital gains tax or corporation tax that have to be disclosed and also some specific ones that are aimed at particular types of scheme.

When the regime was first introduced it applied in relation to income tax, corporation tax and capital gains tax. It has since been extended to cover Stamp Duty Land Tax (SDLT) in 2005 and National Insurance Contributions in 2007. SDLT has its own descriptions and so the 2006 description regulations do not apply to it. The 2004 information regulations have been amended to take account of the reporting requirements due to the nature of SDLT.

Broadly, DOTAS requires certain persons, normally the promoter of the scheme or arrangements, to provide HMRC with information about how they are intended to work, normally within five days of the promoter beginning to market the scheme. Where there is no promoter, the promoter is outside the UK, or the promoter is a lawyer who cannot disclose the information as it is legally privileged, responsibility for disclosure rests with the user.

For the main regime, a Scheme Reference Number (SRN) is normally allocated by HMRC to each disclosed scheme. This number is issued to the promoter, who in turn passes it to clients it becomes aware have implemented the scheme. If the client is merely an intermediary, it must pass on the SRN to the end user. End users are required to provide the SRN to HMRC, usually in their annual tax return.

With effect from 1 January 2011 promoters are required to provide HMRC with periodic lists containing the names and addresses of clients to whom they have become required to issue a SRN. The lists cover a calendar quarter and are due within 30 days of the end of the quarter. So the first client lists will be due by 30 April 2011.

Proposed revisions

The extension of DOTAS to IHT as it applies to transfers into trust will be made by way of regulations. The primary legislation, in particular section 318 Finance Act 2004, already provides for the regime to apply to IHT but no regulations have yet been laid to give effect to this.

The new legislation consists of two sets of regulations:

- Inheritance Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2011, (the IHT description regulations)
- The Tax Avoidance Schemes (Information)(Amendment) Regulations 2011, (the IHT information regulations)

The IHT description regulations provide the description of the type of scheme or arrangements that has to be disclosed. They apply only where property is, at some stage of the scheme or arrangements, transferred into trust and the IHT entry charge on such transfers is extinguished, reduced or delayed. They contain a 'grandfathering' rule, which exempts existing schemes from disclosure and so it is only new and innovative schemes that have to be disclosed. The generic descriptions in the 2006 description regulations will not apply to IHT.

HMRC is working with representative bodies to develop a list of existing schemes and arrangements that do not require disclosure. This will help practitioners identify whether the regulations apply to their planning advice.

The IHT information regulations amend the existing 2004 information regulations so that they by and large apply to IHT as they do to other taxes. In particular the existing requirements and time limits for promoters (or, where appropriate, users) to disclose schemes and provide users (or, where appropriate, intermediaries) with SRNs will apply to IHT.

However, certain modifications have been made to the obligations users have, to provide HMRC with a SRN when they implement a disclosed scheme. Broadly speaking, users will have to notify within twelve months of the end of the month in which they first implement the scheme or arrangements. This time limit corresponds to the normal IHT reporting requirement. If the trigger coincides with a reportable transfer of value for IHT purposes, the user will notify using the IHT return, which will be amended appropriately. Where this is not the case, users will have to notify using a designated, standalone form.

Summary of impacts

Exchequer impact (£m)	2011-12	2012-13	2013-14	2014-15	2015-16
	+/- 0	+/- 0	+/- 0	+/- 0	+/- 0
	This change is expected to reduce the future use of IHT avoidance schemes, which currently present a risk to the Exchequer.				
Economic impact	This measure is not expected to have significant economic impacts.				

Impact on individuals and households

The base of estates that fall within charge to IHT is fairly small (in 2008-09 there were approximately 16,000 estates left on death paying IHT, representing 3% of the total). Lifetime transfer charges form a small proportion when compared to charges arising on death. As a result the numbers of schemes and users are likely to be low though the individual charges that the schemes potentially avoid may be significant.

Individuals with the larger estates are the most likely to consider using schemes to mitigate potential IHT liability. HMRC has therefore assumed all estates with a liability of £200,000 or more will be affected. This amounts to around 3,000 estates (about 0.5% of deaths). This is not meant to suggest that every such individual seeks to use a scheme but takes into account the fact their adviser may need to check whether the planning advice they give needs to be disclosed.

There is a direct impact on individuals where they use a scheme which has been disclosed by a promoter. As users they will have to notify HMRC when they first implement such a scheme. Where they notify using an IHT return, the additional information they will have to provide is the SRN, given to them by the scheme promoter, and the tax year in which they expect to obtain the tax advantage. Where they notify using a standalone form, in addition to the foregoing details they will also have to provide their name and address, and, where appropriate, their National Insurance number and any other tax reference. The time limit in either case is 12 months from the end of the month when the first step is taken to implement the scheme.

The proposed measure would not create any new criminal or civil penalties. However, the extension of the regime would increase the number of users liable to the existing penalty for failing to report an SRN within the time limit.

There is also an indirect impact on individuals. IHT practitioners, acting as agents for individuals, will need to familiarise themselves with the new regime to ensure that their planning advice complies with the regulations.

These initial costs are more likely to affect certain lawyers providing IHT advice as they may not have been exposed to DOTAS before. Costs will include staff training and adapting risk management processes and procedures. On the basis of representative body estimates that up to 10,000 practitioners will need three hours training, this will be in the region of £3 million. Although not directly chargeable on individuals, these initial costs will ultimately influence fee charging policies.

	<p>Many practitioners may also be unaware of the schemes and arrangements that have already been made available. In order to reduce the administrative burden, HMRC is developing a list of existing schemes and arrangements that do not have to be reported, which should reduce the number of unnecessary disclosures.</p> <p>The costs of checking the HMRC list is likely to be low but affect all individuals seeking IHT planning advice. Changes to revised terms of business and advice to scheme users on their responsibilities regarding notification will all fall on the individual clients.</p>
<p>Equalities impacts</p>	<p>From earlier <u>research</u>, we expect that 80% of the individuals affected will be males with higher levels of wealth, with the majority over the age of 50.</p> <p>It has not been possible to break down further the total number of individuals affected by ethnicity, disability, caring responsibilities, religion or belief and sexual orientation. However, it is not expected that the policy would adversely or disproportionately impact on any of these equality groups.</p>
<p>Impact on business including third sector</p>	<p>The impact here is on businesses which develop and promote prescribed IHT schemes. HMRC believes that most avoidance schemes are likely to be developed by a fairly small number of promoters, in the region of 50 to 60 with around 25 of those notifying a scheme in any one year.</p> <p>Businesses of any size may develop and market avoidance products. The objective of obtaining early notification of schemes precludes exempting small businesses from the proposed measure. HMRC does not expect it will have a significant effect on small businesses, either in absolute terms or proportionately. Although the consultation stage impact assessment specifically encouraged responses from small businesses which may be affected, none of the responses addressed any issues with regard to this customer grouping. It is not anticipated that it will distort competition.</p> <p>The regulations will require disclosure of the following:</p> <ul style="list-style-type: none"> • the promoter's name and address; • details of the regulations by virtue of which the scheme is notifiable; • a summary of the scheme and its name; • information explaining each element of the scheme; and • the statutory provisions on which the tax advantage is based.

Where there is no promoter (for example where the scheme is developed in-house), where the promoter is not treated as such for the purposes of the regime (for example a lawyer who cannot make a disclosure without revealing legally privileged information), or where the promoter is overseas, it is usually the user who must provide the information.

Promoters are normally issued with a SRN by HMRC within 30 days. A promoter who receives a SRN would then be required to pass it on to the client within 30 days. If the client is an intermediary rather than the end user of the scheme, he or she would have to pass on the SRN to the end user within 30 days of first becoming aware of any transaction forming part of the notifiable scheme.

Promoters are likely to be familiar with DOTAS and so learning costs will be low. Operational costs will be limited to making disclosures and providing clients with SRNs, issued by HMRC. These annual, ongoing costs have been assessed through the 'Standard Cost Model', an activity-based costing model which identifies what activities a business has to do to comply with HMRC's obligations, and which estimates the cost of these activities, including agent fees and software costs.

The cost has been estimated on the basis of a cost of notifying a scheme of around £4,400 per scheme and assuming 25 schemes are notified to HMRC each year. Using these assumptions the administrative burden has been estimated to be £110,000 in current prices.

Promoters will also have to provide quarterly lists of clients using prescribed schemes. The costs associated with this are negligible in view of the small number of likely promoters.

Certain one off costs relating to IHT practitioners, who are not promoters, have been included in the 'Impact on individuals' section above.

	Cost	Time Period (yrs)
Compliance Costs		
One-off Costs	negligible	1
Average Annual Costs	£110,000	1
Total Costs (PV)	£110,000	1
Compliance Benefits		
One-off Benefit	£ nil	1

	Average Annual Benefit	Unknown	
	Total Benefit (PV)	Unknown	
	Net Benefit (NPV)	Unknown	
	Impact on Administrative Burden		
	Increase	Decrease	Net Impact
	£110,000	£nil	+£110,000
Impact on public sector	<p>The main impacts on HMRC are:</p> <ul style="list-style-type: none"> • amendments to secondary legislation, • updating guidance on how to comply with the new requirements, • an increase in schemes to be reviewed, • an increase in notification of SRNs, • adapting the existing IHT account form (form IHT100) and developing a standalone form for users to notify HMRC of the SRN , and • additional compliance activity. <p>Disclosing schemes will use existing processes though the supporting IT systems will need to be adapted.</p> <p>The associated costs will be absorbed within existing budgets and resources. IHT risk assessment already prioritises risks in order to deploy resources efficiently and effectively. The resource costs relating to any additional compliance activity will be offset by a reduction in costs currently incurred on trying to identify schemes and users with insufficient information.</p> <p>Similarly any additional work resulting from reviewing and analysing disclosed schemes will be offset by a better targeted approach to anti-avoidance.</p>		
Other impacts	<p>As an extension of anti-avoidance information gathering obligations these changes will have no impact on wider areas, such as privacy, carbon assessment, health impact assessment, rural proofing or other environmental issues. The impacts on sustainable social and economic development are negligible, as per the evaluation above on Economic impacts. The impacts for small businesses are covered in the evaluation above on Business Impacts.</p>		

Monitoring and evaluation

The policy will be monitored through monitoring of disclosures of new avoidance schemes and through regular communication with taxpayers and practitioners affected by the measure.

Further advice

If you have any questions about this change, please send an email to ihtandtrustsconsult.car@hmrc.gsi.gov.uk or contact Chris Bara on 020 7147 2756.