

## EXPLANATORY MEMORANDUM TO

### THE PENALTIES FOR ENABLERS OF DEFEATED TAX AVOIDANCE (LEGALLY PRIVILEGED COMMUNICATIONS DECLARATIONS) REGULATIONS 2017

2017 No. 1245

#### 1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Revenue and Customs (“HMRC”) and is laid before the House of Commons by Command of Her Majesty.

#### 2. Purpose of the instrument

- 2.1 This instrument provides for the content of a declaration made under paragraph 44 of Schedule 16 to the Finance Act (No. 2) 2017. A relevant lawyer can make a declaration where the information needed to establish that a person is not liable to an Enablers penalty is legally privileged.

#### 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 Schedule 16 to the Finance Act (No. 2) 2017 introduces a new penalty for each person who has enabled another person to implement abusive tax arrangements that HMRC has defeated.
- 4.2 Paragraphs 8 to 12 of that Schedule describe the activities that constitute enabling as, designing, managing, marketing, participating in, or financing of tax arrangements. Those paragraphs include safeguards to ensure that a person that unwittingly enables abusive tax arrangements, or whose advice does not feature in the final design of the arrangements, is excluded.
- 4.3 Where a person would have to rely on a relevant lawyer’s legally privileged communications to establish that they do not fall within any of those descriptions, paragraph 44 provides that a person who is a relevant lawyer may make a declaration to that effect. Paragraph 44(6) defines relevant lawyer.
- 4.4 Paragraph 45 provides for a penalty where a person carelessly or deliberately gives any incorrect information in a declaration under paragraph 44.

#### 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 The government believes that all individuals and businesses have a responsibility to pay the tax they owe. It wants a level playing field for the majority of people who pay their tax, so that everyone pays their fair share. The government's objective is to influence and promote behavioural change in the minority of tax agents, intermediaries and others who design, market or facilitate the use of abusive tax arrangements, and who benefit financially from their use.
- 7.2 The measure provides for a penalty on each person who enabled another person to enter into abusive tax arrangements that HMRC defeats. The penalty is equal to the consideration received or receivable by that person for their activities as an enabler. In this way, enablers of defeated abusive tax arrangements are denied the opportunity to gain financially from such arrangements.
- 7.3 A particular issue arises where the information on which a person would have to rely in order to establish that they do not fall within the meaning of a person who enabled the arrangements is subject to legal professional privilege. The legislation therefore provides for a relevant lawyer to make a declaration to that effect in a way that does not cause them to breach privilege. Regulations are required to provide for the content of such declarations.

### *Consolidation*

- 7.4 This instrument does not amend or consolidate another instrument.

## **8. Consultation outcome**

- 8.1 The Government published a consultation document on 17 August 2016 entitled '*Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document*'. One of its proposals was for a penalty for those who enable others to enter into tax avoidance which HMRC later defeats. The consultation closed on 12 October 2016. More than 30 meetings were held with representative bodies, legal and accounting firms and other interested parties to discuss the proposals in detail. The consultation generated 91 written responses from those and other respondents. Further meetings were held with interested parties to discuss the detail of the draft legislation following its publication on 5 December 2016 and these regulations were shared in draft with key stakeholders in the legal profession. Those stakeholders agreed that the regulations provide for appropriate content of a declaration and provided some helpful suggestions, which have been considered and incorporated where appropriate.

## **9. Guidance**

- 9.1 Guidance will be published on how the enablers penalty regime operates and in particular how the declaration is intended to operate has been published in draft and will be finalised as soon as possible after the enablers penalty becomes law.

## **10. Impact**

- 10.1 The impact on business, charities or voluntary bodies is limited to those that engage in enabling others to enter into abusive tax arrangements.
- 10.2 There is no impact on the public sector.
- 10.3 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

## **11. Regulating small business**

- 11.1 The legislation applies to small business in so far as businesses of any size can develop, market or otherwise enable a person to enter into abusive tax arrangements. The Government expects this measure to have little, if any, impact on small businesses.

## **12. Monitoring & review**

- 12.1 HMRC will monitor the use of this provision and use that information to evaluate this measure and any future policy developments.

## **13. Contact**

- 13.1 Gary Coombs in the Counter-Avoidance Directorate of HM Revenue and Customs Tel; 03000 589577 or email: [gary.coombs@hmrc.gsi.gov.uk](mailto:gary.coombs@hmrc.gsi.gov.uk) can answer any queries regarding the instrument