EXPLANATORY MEMORANDUM TO

THE NATIONAL INSURANCE CONTRIBUTIONS (APPLICATION OF PART 7 OF THE FINANCE ACT 2004) (AMENDMENT) REGULATIONS 2008

2008 No. 2678

1. This explanatory memorandum has been prepared by the Commissioners for Her Majesty's Revenue and Customs on behalf of the Treasury and is laid before Parliament by Command of Her Majesty.

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

2. Description

2.1 The National Insurance Contributions (Application of Part 7 of the Finance Act 2004 (Amendment) Regulations 2008 ("the amendment regulations") amend the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 (S.I. 2007/785) ("the principal regulations").

2.2 The principal regulations make provisions requiring, or relating to, the disclosure of information in relation to notifiable contribution arrangements. Those provisions correspond to or apply, with certain modifications, provisions requiring, or relating to, the disclosure of information in relation to notifiable income tax arrangements.

2.3 The amendment regulations correspond or apply changes to the legislation relating to notifiable income tax arrangements contained in the Finance Acts 2007 and 2008, and in subordinate legislation in 2007 and 2008.

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

None

4. Legislative Background

Income Tax

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

4.2 Section 306 of the Act provides that the schemes required to be notified are those which:

- fall within any description prescribed by the Treasury;
- enable, or might be expected to enable, any person to obtain a tax advantage in relation to any tax that is so prescribed in relation to arrangements of that description, and

- are such that the main benefit, or one of the main benefits that might be expected to arise from the arrangements is the obtaining of a tax advantage.

4.3 "Tax" is defined in section 318 of the Act as income tax, capital gains tax, corporation tax, petroleum revenue tax, inheritance tax, stamp duty land tax, or stamp duty reserve tax.

4.4 The powers to prescribe arrangements in relation to income tax (and capital gains tax and corporation tax) have been exercised in The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (S.I. 2006/1543) which came into force on 1 August 2006.

4.5 When a scheme is notified to the Commissioners they may allocate a scheme reference number ("SRN") and notify it to the person who has made the notification. A promoter who receives a SRN must pass it to their clients, and the clients must identify themselves as users of the scheme by reporting it back to the Commissioners when the scheme is implemented.

4.6 Where there has been a failure to fulfil the obligation to notify the Commissioners may seek to impose a penalty. A person who fails to disclose a scheme is liable to an initial penalty of up to a maximum of £5,000. Where after this initial penalty is imposed the failure continues then a further daily penalty of up to a maximum £600 per day will be imposed. Promoters who fail to give a reference number to their client are also liable to a maximum penalty of £5,000. Initial penalties are determined by the Special Commissioners and there is a right of appeal against the imposition of the penalty. Scheme users who fail to show scheme reference numbers on tax returns are liable to an initial penalty of £100 rising to £500 for a second failure and £1,000 for third and subsequent failures.

4.7 The Finance Act 2007 introduced powers for the Commissioners to investigate non-compliance by promoters with the duty to notify schemes. The Commissioners may by notice require promoters to explain why a scheme is not notifiable and may apply to the Special Commissioners for orders to provide further information, or for orders that a scheme is or is to be treated as notifiable. Penalties are increased where non-compliance continues after a notifiability order has been made.

4.8 The Finance Act 2008 introduced provisions improving the SRN system and the identification of users of schemes. The co-promoter rule (which obviates duplicate notifications of the same scheme) is amended to ensure that all promoters receive a SRN and are required to pass them to clients; and clients are required to pass SRNs to other users of the scheme.

National Insurance Contributions

4.9 Section 7 of the National Insurance Act 2006 inserted section 132A Social Security Administration Act 1992.

4.10 Section 132A provides that the Treasury may make provisions requiring, or relating to, the disclosure of information in relation to any notifiable contribution arrangements or notifiable contribution proposal.

4.11 Subsection (3) of section 132A defines "notifiable contribution arrangements" and "notifiable contribution proposal" for arrangements. "Notifiable arrangements" are those which:

- enable, or might be expected to enable, any person to obtain an advantage in relation to a contribution; and
- are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage.

4.12 The only provisions which may be made under section 132A are provisions applying, with or without modification, or corresponding to, relevant tax provisions requiring, or relating to, the disclosure of information in relation to income tax avoidance arrangements.

4.13 The principal regulations corresponded to or applied the tax provisions as they stood in May 2007. The amendment regulations update the principal regulations in respect of changes made to the tax regime in 2007 and 2008.

5. Territorial Extent and Application

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

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

7.2 One of the features of the tax and contributions systems that provides avoidance schemes breathing space is the existence of information gaps. HMRC generally has powers to open enquiries into returns, but not to enquire into schemes in themselves. The filing date for PAYE returns is 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.

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

- To discourage employers from using schemes. This includes a critical appraisal of all new legislation to reduce the potential for 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 and or contributions at stake is particularly large.

8. Impact

8.1 The explanatory note to this Instrument explains that:

"A full and final Impact Assessment has not been produced for this instrument as a negligible impact on the private or voluntary sectors is foreseen."

This is because the accepted Government practice is that no IA will be published for HMRC and HMT tax measures for which:

- The total effect of the changes across all UK businesses is less than £100,000 of administrative burden costs/savings and/or £3m of compliance in total; and

- The Department's Better Regulation and Policy team has confirmed that

    - there are no disproportionate impacts on any business or sector; and

    - there are no other issues which might make publication of an IA advisable

This is such a measure.

8.2 A regulatory impact analysis has been prepared in relation to the provisions of the Social Security Administration Act 1992 dealing with avoidance schemes in relation to national insurance contributions which is available on HM Treasury's website at http://www.hmrc.gov.uk/ria/ria-nicbill05.pdf.

8.3 Impact Assessments have also been prepared in relation to the provisions of the Finance Act 2008 identifying users of disclosed tax avoidance schemes and the provisions of the Finance Act 2007 ensuring compliance with the disclosure regime. Both are available on HM Treasury's website at http://www.hmrc.gov.uk/ria/users-disclosed-tax-avoid-schemes.pdf and http://www.hmrc.gov.uk/ria/ria-tax-avoid-disc.pdf

Regulating Small Business

8.4 This legislation mirrors existing tax legislation which applies to small businesses.

8.5 A main purpose of the legislation is to provide enhanced information and penalty powers for HMRC to investigate instances where a promoter of a tax avoidance schemes is suspected of not complying with the requirement to disclose information about the scheme. A further purpose of the legislation is to ensure that the reference number issued by HMRC to a promoter who discloses a scheme is transmitted to the end user who must report it back to HMRC.

8.6 The reasons for not exempting small businesses are:

- revenue protection. Small businesses may promote avoidance schemes where the tax at risk is significant and disproportionate to the size of the promoter;

- fairness. Avoidance puts compliant businesses, large and small, at a disadvantage and distorts competition.

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.