EXPLANATORY MEMORANDUM TO

THE PROMOTERS OF TAX AVOIDANCE SCHEMES (PRESCRIBED CIRCUMSTANCES UNDER SECTION 235) (AMENDMENT) REGULATIONS 2021

2021 No. 1010

1. Introduction

1.1 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.

2. Purpose of the instrument

2.1 This instrument amends the Promoters of Tax Avoidance Schemes (Prescribed Circumstances under Section 235) Regulations 2015 (SI 2015/130). The background to Promoters of Tax Avoidance Schemes (known as POTAS), and the relevant legislation is further explained in sections 6 and 7. The legal effect of the instrument is to ensure that a person who, by reason of being connected to a promoter of tax avoidance schemes would be defined as carrying on a business as a promoter under section 235(1A) of the Finance Act 2014, is unable to qualify for the special treatment provided for by the Promoters of Tax Avoidance Schemes (Prescribed Circumstances under Section 235) Regulations 2015, to certain persons involved only in the design of tax avoidance schemes.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 Not applicable.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 Part 5 of the Finance Act 2014 introduced the Promoters of Tax Avoidance Schemes regime to enable HMRC to take action against promoters of tax avoidance schemes who display high risk behaviour. A promoter is a person who designs, markets, organises, or manages arrangements or proposals for arrangements which enable, or might be expected to enable, a person to claim a tax advantage and that tax advantage is at least one of the main benefits of those arrangements. The objectives of the regime

are to change the behaviour of promoters and to deter the development and marketing of tax avoidance schemes.

6.2 Regulation 3 of the Promoters of Tax Avoidance Schemes (Prescribed Circumstances under Section 235) Regulations 2015 excludes certain persons involved in the design of arrangements or proposed arrangements from being treated as promoters for the purposes of Part 5 of the Finance Act 2014 where specified conditions are met. The conditions are broadly that (a) the person does not provide tax advice in connection with the arrangements or proposed arrangements, or (b) the person could not reasonably be expected to know that the arrangements or proposed arrangements were relevant arrangements or proposed arrangements for the purposes of the POTAS legislation.

6.3 Schedule 30 to the Finance Act 2021 made amendments to Part 5 of the Finance Act 2014 which have the effect that, from 10 June 2021 (the date of Royal Assent), persons fall to be treated as promoters for the purposes of Part 5 of the Finance Act 2014 if they are a member of a promotion structure within one of the cases described in new Schedule 33A to that Act. A person is a member of a promotion structure if their activities are structured to avoid the rules by for example, splitting their activities between several promoters who are often non-resident or are under the control of another promoter.

6.4 This instrument provides that regulation 3 of the Promoters of Tax Avoidance Schemes (Prescribed Circumstances under Section 235) Regulations 2015 does not apply to exclude a person from being treated as a promoter for the purposes of Part 5 if they are a member of a promotion structure at the time they meet any of the conditions - the meeting of which would otherwise exclude them from being treated as a promoter. The amendments apply prospectively from 30 September 2021.

7. Policy background

What is being done and why?

7.1 The Promoters of Tax Avoidance Schemes legislation (POTAS) was introduced in Part 5 of Finance Act 2014 to enable HMRC to tackle promoters of tax avoidance schemes who display high-risk behaviour. The objectives of the regime are to change the behaviour of promoters and to deter the development and availability of tax avoidance schemes. The legislation gives promoters a chance to change their behaviour voluntarily or to face an escalating series of sanctions.

7.2 Changes proposed to legislation were first announced in December 2019 as part of the government's response to Lord Morse's Independent Review of the Loan Charge. In that response the government announced that it would take further measures to tackle promoters of tax avoidance schemes that would reduce the scope for promoters to market tax avoidance schemes. At Budget 2020 the Government announced that these measures would be taken forward in Finance Bill 20/21, which became Finance Act 2021. These proposals were also described in the 'Promoter Strategy' published by HMRC in March 2020.

7.3 On 21 July 2020, the government published the "Tackling Promoters of Tax Avoidance" consultation which included details of changes to the definition of a person carrying on a business as a promoter.

7.4 Changes introduced by the Finance Act 2021 tackle promoters who rearrange how they carry out their activities to frustrate HMRC's challenge or to avoid their

obligations under the POTAS legislation. These changes operate prospectively from Royal Assent on 10 June 2021.

7.5 The existing conditions in the Promoters of Tax Avoidance Schemes (Prescribed Circumstances under Section 235) Regulations 2015 remain in place, for persons that are not part of a promotion structure, so that a person is not considered a promoter in certain specific circumstances (see paragraph 6.2 for details on the circumstances and conditions).

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 There are no current plans to consolidate the changes made to the Promoters of Tax Avoidance Schemes (Prescribed Circumstances under Section 235) Regulations 2015. These are just consequential amendments required because of the amendments to the primary legislation.

10. Consultation outcome

10.1 The government consulted on the changes introduced by the Finance Act between 21 July 2020 and 15 September 2020. A summary of responses was published on 3 March 2021 and can be found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966003/Promoters_of_tax_avoidance_summary_of_responses.pdf.

10.2 This instrument was published in draft for consultation on 17 May 2021. The consultation ran for four weeks and closed on 13 June 2021. The publication on GOV.UK was brought to the attention of external stakeholders via email and the actual publication invited general comments. No comments were received on the draft regulations.

11. Guidance

11.1 HMRC published draft guidance on the changes to the regime on 23 March 2021 at Tackling promoters of tax avoidance draft guidance - GOV.UK (www.gov.uk). The final guidance will be available, as soon as is practicable, after the instrument comes into force.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A Tax Information and Impact Note covering this instrument was published on 21 July 2020 alongside the Finance Bill 2021 and is available on GOV.UK at https://www.gov.uk/government/publications/new-proposals-for-tackling-promoters-and-enablers-of-tax-avoidance-schemes. It remains an accurate summary of the impacts that apply to this instrument.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 The basis for the final decision on what action to take to assist small businesses is that the impact on them is an inevitable consequence of their doing business in this area, which is justified by the wider public interest in ensuring that HMRC tackle promoters who rearrange their activities to avoid their tax obligations.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that HMRC will monitor the impact of the legislative changes introduced by this instrument on a continuing basis using information collected from its internal systems and processes, as well as regular engagement with affected stakeholder groups.

14.2 No review clause is required as the instrument is not made by a Minister of the Crown.

15. Contact

15.1 Leroy Wilson at HMRC Telephone: 03000 513499 or email: leroy.wilson@hmrc.gov.uk can answer any queries regarding this instrument.

15.2 Angela Walker, Deputy Director for Counter Avoidance Policy, at HMRC Telephone Number: 03000 586965 or email: angela.walker1@hmrc.gov.uk can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt Hon Jesse Norman MP, Financial Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.