

March 2007

(With effect from 1st May 2007)

GUIDANCE

**DISCLOSURE OF
NATIONAL INSURANCE
AVOIDANCE SCHEMES**

HM Revenue & Customs

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1. Introduction

1.1 What is this guidance about?

This guidance is about what to do if you promote or use arrangements (including any scheme, transaction or series of transactions) that will, or are intended to, provide an advantage in relation to National Insurance contributions when compared to a carrying on a different course of action (“NI contribution arrangements”).

1.2 Using this guidance

The rules covered by this guidance are intended to be a seamless adjunct to parallel rules concerning the promotion or use of schemes that will, or are intended to, provide an income tax, corporation tax and capital gains tax advantage.

Whilst there are some detailed differences, as explained in this guidance, many of the concepts are shared. To the extent that the rules and concepts are the same, the relevant parts of the guidance *Disclosure of tax avoidance schemes* (June 2006 edition) should be followed, as should any relevant extant amendments to that guidance. A copy of that guidance can be found by clicking on the link on the Anti-Avoidance Group website at <http://www.hmrc.gov.uk/aiu/index.htm>

1.3 The status of this guidance

This guidance is not a substitute for the relevant legislation. Whilst you can rely on this guidance as an accurate explanation of how HMRC will apply the legislation, it does not cover every possible issue that may arise.

1.4 Effective date

This guidance comes into effect on 1st May 2007.

1.5 What law does this guidance cover?

This guidance covers:

- Section 132A of The Social Security Administration Act 1992; and
- The National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 (SI 2007/785).

1.6 Terminology

Arrangement: This includes any scheme, transaction or series of transactions.

Disclosable: The requirement to provide prescribed information to HMRC.

Hallmarks: The descriptions prescribed for the purpose of SI 2007/785, regulation 4 by the Tax Avoidance Schemes (Prescribed Description of Arrangements) Regulations 2006.

Hallmarked NI contribution scheme: A “NI contribution arrangement” (q.v.) that also meets all of the tests at section 4.

NI contribution arrangement: Any arrangement that will, or is expected to, provide the user with an advantage in relation to National Insurance contributions when compared to adopting a different course of action.

Scheme: With the exception of paragraph 5.1.1 (where the normal meaning applies), the term “scheme” is used in subsequent sections as an alternative to or shorthand for “arrangement”, “NI contribution arrangement”, or “hallmarked NI contribution scheme” as context dictates.

1.7 Help and advice

If you are concerned about any tax or contribution arrangement being marketed to you, or you would like to discuss any aspect of these guidance notes, you can contact us by post at the following address:

Anti-Avoidance Group (Disclosure and Risk)
HM Revenue & Customs
1st Floor South, 22 Kingsway
London
WC2B 6NR

Alternatively you can:

- telephone us on 020 7438 6733
- email us at aag@hmrc.gov.uk, or
- make general enquiries by clicking the ‘General Enquiries’ link on the Anti-Avoidance Group website at <http://www.hmrc.gov.uk/aiu/index.htm>.

2. Objectives and effect of the disclosure rules

2.1 Objectives

The disclosure rules covered by this guidance are intended to parallel similar rules that apply to income tax, corporation tax and capital gains tax with the aim of obtaining:

- early information about NI contribution arrangements and how they work; and
- information about who has used them.

2.2 The effect of disclosure

On its own the disclosure of a NI contribution arrangement has no effect on the NI position of any person who uses it. However, a disclosed arrangement may be rendered ineffective by Parliament, possibly with retrospective effect.

Under the rules, disclosure may need to be made of NI contribution arrangements that HMRC are already aware of or are not considered to be avoidance. However, in order to keep the burden to a minimum, a NI contribution arrangement is only to be disclosed where:

- it will, or might be expected to, enable any person to obtain a NI contribution advantage;
- that advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement; and
- it is a NI contribution arrangement that falls within any description (the “hallmarks”) prescribed in the relevant regulations – see sections 4 to 6.

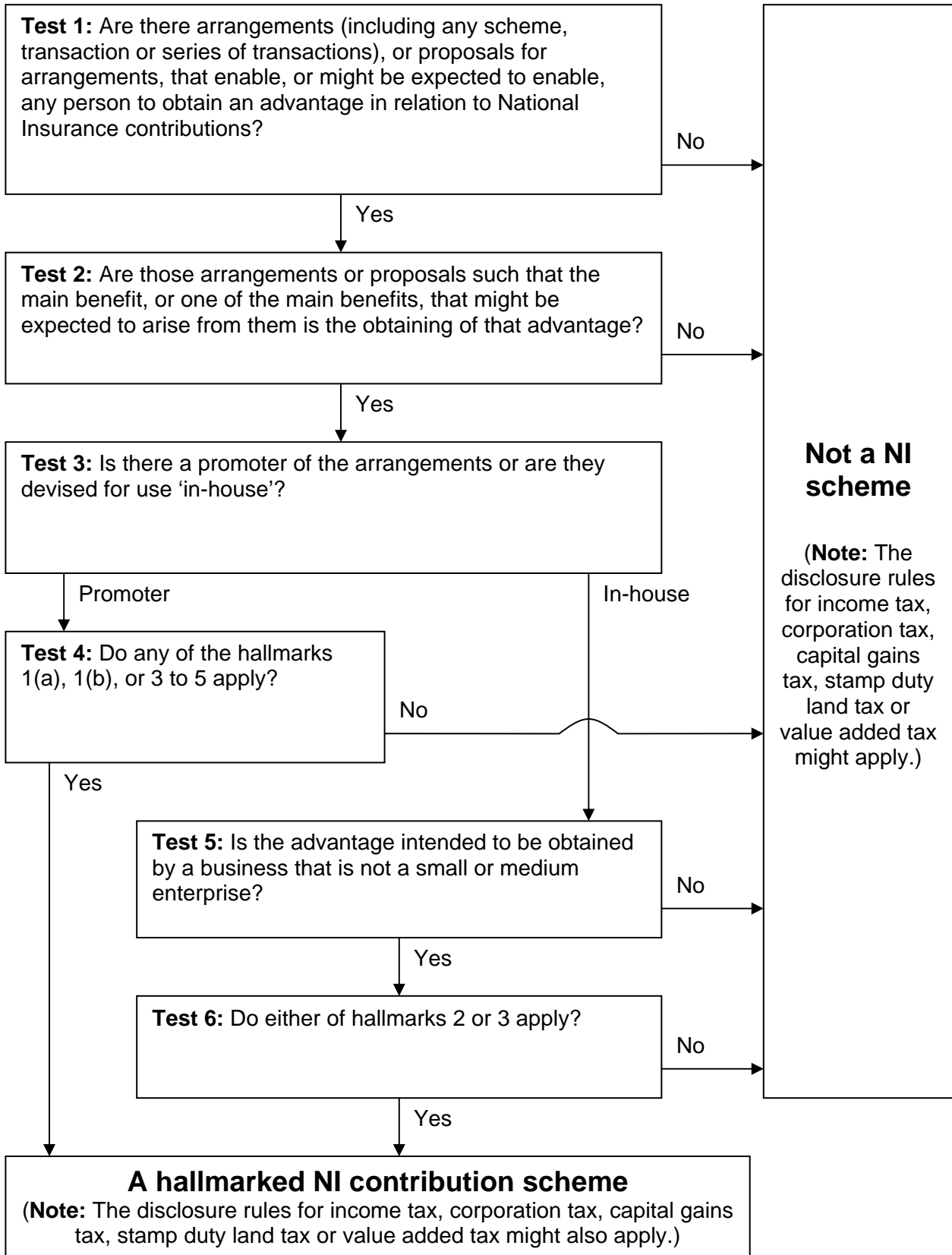
3. Who discloses NI contribution schemes?

The duty to disclose a NI contribution scheme is the same as for income tax, corporation tax and capital gains tax and normally falls on the scheme promoter. However, special rules apply where:

- a non-UK based promoter fails to comply with any disclosure obligation – here the client of the promoter is required to disclose the scheme.
- the promoter is a lawyer and legal and professional privilege prevents him from providing all or part of the prescribed information to HMRC – here the lawyer's client must disclose the scheme.
- there is no promoter (i.e. the scheme is devised 'in-house' for use within that entity or a corporate group to which it belongs) – here the scheme is disclosed by the scheme user, which in the case of an NI contribution scheme will be the employer.

Section 3 of the guidance *Disclosure of tax avoidance schemes* (June 2006) applies in the same way for NI contribution schemes as it does for tax schemes.

4. Determining a hallmarked NI contribution scheme – Flow chart



5. Determining a hallmarked NI contribution scheme – The tests

5.1 Test 1: Are there arrangements that enable a NI contribution advantage be obtained? (SI 2007/785, Regs. 4 and 5)

5.1.1 Meaning of arrangements (SSAA 1992, s.132A(7))

The definition of “arrangements” is widely defined in the primary legislation to include any scheme, transaction or series of transactions.

5.1.2 Meaning of NI contribution advantage (SSAA 1992, s.132A(7))

“NI contribution advantage” means:

- the avoidance or reduction of a liability for that contribution, or
- the deferral of the payment of that contribution.

The definition is widely drawn and potentially applies to all classes of National Insurance. However, in practice, it is likely that disclosed schemes will only arise in respect of Class 1 primary (employees) and secondary (employers), and Class 1A contributions.

5.2 Test 2: Is the advantage a main benefit of the arrangements? (SI 2007/785, Regs. 4 and 5)

Section 5.2 of the guidance *Disclosure of tax avoidance schemes* (June 2006) applies in the same way for NI contribution schemes as it does for income tax, corporation tax and capital gains tax schemes.

5.3 Test 3: Is there a promoter of the arrangements? (SI 2006/1543, reg. 5(3))

Section 5.3 of the guidance *Disclosure of tax avoidance schemes* (June 2006) applies in the same way for NI contribution schemes as it does for income tax, corporation tax and capital gains tax schemes.

5.4 Test 4: The hallmarks for arrangements where there is a promoter

When there is a promoter of the arrangement, it is a hallmarked scheme when any one of the following hallmarks apply:

- Hallmark 1(a): Confidentiality from other promoters – see paragraph 6.2
- Hallmark 1(b): Confidentiality from HMRC – see paragraph 6.2
- Hallmark 3: Premium fee – see paragraph 6.4

- Hallmark 4: Off-market terms 6.5
- Hallmark 5: Standardised national insurance contributions product – see paragraph 6.6

5.5 Test 5: Is the person intended to obtain the advantage a large business? (SI 2006/1543, regs. 3 and 4)

If you devise a tax arrangement for use ‘in-house’, you need only consider if it is a hallmarked scheme (and disclose it to HMRC) if the person intended to obtain the tax advantage is a business that is not a small or medium enterprise.

“Businesses” are:

- companies;
- partnerships; and
- any other person whose profits are charged to income tax as trading or property income.

Guidance on whether a business is a small or medium enterprise for the purposes of the 2003 EC Recommendation tests is at CIRD91400. See in particular the flow chart at CIRD92850.

5.6 Test 6: The hallmarks for ‘in-house’ arrangements

When the arrangement is designed ‘in-house’, it is a hallmarked scheme when either of the following hallmarks apply:

- Hallmark 2: Confidentiality from HMRC – see paragraph 6.3
- Hallmark 3: Premium fee – see paragraph 6.4

6. The hallmarks

6.1 About the hallmarks

The legislation sets out a number of descriptions of arrangements that are collectively referred to as ‘hallmarks’ in this guidance.

Some of these are designed to capture new and innovative NI contribution arrangements. However, others are designed to capture areas of specific concern. These may include schemes that are well known or commonly used.

The hallmarks are not mutually exclusive – an arrangement may be a hallmarked scheme by virtue of one or more of the hallmarks.

It is expected that the range of hallmarks will change over time, such as to test perceived changes in the avoidance market place or the effectiveness of an anti-avoidance measure.

The absence of a hallmark should not be regarded as an indicator that NI contribution arrangements not caught constitute practices that are acceptable to HMRC.

Conversely, we do not regard all NI contribution arrangements that include or meet a hallmark description as practices that are unacceptable to us – whilst we have tried to keep burdens to a minimum, you may have to tell us about schemes that may not be considered to be avoidance.

Note For the purpose of disclosure of NI contribution schemes, only 5 hallmarks apply. Further hallmarks can potentially apply for the purpose of disclosure of income tax, corporation tax and capital gains tax schemes.

6.2 Hallmarks 1(a) and (b): Confidentiality where promoter involved

6.2.1 The legislation

Hallmarks 1(a) and (b) are prescribed at regulation 6 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543) (as modified by regulation 16 to the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 (SI 2007/785) (“NIC Regulations”)):

Regulation 6

- (1) Arrangements are prescribed if they satisfy—
 - (a) Conditions 1 and 2; or
 - (b) Conditions 1 and 3.
- (2) The Conditions are as follows.

Condition 1

Any element of the arrangements (including the way in which the arrangements are structured) gives rise to the advantage expected to be obtained under the arrangements.

Condition 2

It might reasonably be expected that a promoter would wish the way in which that element of those arrangements secures an advantage to be kept confidential from any other promoter at any time in the period beginning with the opening date and ending with the appropriate date.

Condition 3

The promoter would, but for the requirements of these Regulations, wish to keep the way in which that element secures that advantage confidential from Her Majesty's Revenue and Customs for some or all of the period beginning with the opening date and ending with the appropriate date, and a reason for doing so is to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

(3) In a case where—

- (a) by virtue of regulation 6 of the Promoters Regulations, no person is to be treated as the promoter in relation to the arrangements, or
- (b) by virtue of regulation 8(1) of the NIC Regulations (duty of person dealing with promoter outside United Kingdom), a user of the arrangement has a duty to provide prescribed information,

paragraph (2) shall have effect as if for Condition 3 there were substituted

“Condition 3

The user of the arrangements wishes to keep confidential from Her Majesty's Revenue and Customs the way that element secures that advantage for some or all of the period beginning with the opening date and ending with the appropriate date.”.

(4) In this regulation—

“the appropriate date” has the meaning given in regulation 8(1) of the Information Regulations, and the provisions of regulation 8 of those Regulations (prescribed information regulation 12 of the NIC Regulations: timing and manner of delivery) apply for the purposes of determining that date; and

“the opening date” means the date of the first transaction forming part of the arrangements.

6.2.2 Hallmark 1(a): Applying the hallmark

Section 6.2 of the guidance *Disclosure of tax avoidance schemes* (June 2006) applies in the same way for NI contribution schemes as it does for income tax, corporation tax and capital gains tax schemes.

6.3 Hallmark 2: Confidentiality where no promoter involved

6.3.1 The legislation

Hallmark 2 is prescribed at regulation 7 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543) (as modified by regulation 16 to the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 (SI 2007/785) (“NIC Regulations”)):

Regulation 7

Arrangements are prescribed if—

- (a) no person is a promoter in relation to them;
- (b) the intended user of the arrangements is a business which is not a small or medium-sized enterprise;
- (c) any element of the arrangements (including the way in which the arrangements are structured) gives rise to the advantage expected to be obtained under the arrangements;
- (d) the user of those arrangements wishes the way in which that element is expected to secure an advantage to be kept confidential from Her Majesty’s Revenue and Customs for some or all of the period—
 - (i) beginning with the day on which he enters into the first transaction forming part of the notifiable arrangements, and
 - (ii) ending with the latest time at which he would first have had to provide Her Majesty’s Revenue and Customs with information under regulation 12 of the NIC Regulations in accordance with regulation 8 of the Information Regulations or otherwise include information about the arrangements in a return; and
- (e) a reason for the user’s wishing to keep that element confidential from Her Majesty’s Revenue and Customs is to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

6.3.2 Applying the hallmark

Section 6.3 of the guidance *Disclosure of tax avoidance schemes* (June 2006) applies in the same way for NI contribution schemes as it does for income tax, corporation tax and capital gains tax schemes.

6.4 Hallmark 3: Premium fee

6.4.1 The legislation

Hallmark 3 is prescribed at regulation 8 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543) (as modified by regulation 16 to the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 (SI 2007/785) (“NIC Regulations”)):

Regulation 8

(1) Arrangements are prescribed if they are such that it might reasonably be expected that a promoter or a person connected with a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements to disclose information under these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

But arrangements are not prescribed by this regulation if—

- (a) no person is a promoter in relation to them; and
- (b) the advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.

(2) For the purposes of paragraph (1), and in relation to any arrangements, a “premium fee” is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the advantage expected to be obtained arises; and which is—

- (a) to a significant extent attributable to that advantage, or
- (b) to any extent contingent upon the obtaining of that advantage.

6.4.2 Applying the hallmark

Section 6.4 of the guidance *Disclosure of tax avoidance schemes* (June 2006) applies in the same way for NI contribution schemes as it does for income tax, corporation tax and capital gains tax schemes.

6.5 Hallmark 4: Off market terms

6.5.1 The legislation

Hallmark 4 is prescribed at regulation 9 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543) (as modified by regulation 16 to the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 (SI 2007785) (“NIC Regulations”)):

Regulation 9

- (1) Arrangements are prescribed if—
- (a) the advantage expected to be obtained under the arrangements arises, to more than an incidental degree, from the inclusion in those arrangements of one or more financial products;
 - (b) a promoter, or a person connected with the promoter, becomes party to one or more of those financial products; and
 - (c) the price of the financial product or products differs significantly from that which might reasonably be expected to apply in the open market upon its being, or their being, made available to the other party when compared with a product that is, or products that are, the same as, or substantially similar to, the product or products in question.
- (2) For the purpose of paragraph (1) a financial product is—
- (a) a loan;
 - (b) a contract which—
 - (i) is a derivative contract for the purposes of Schedule 26 to the Finance Act 2002;
 - (ii) would be such a derivative contract if paragraph 4 of that Schedule (contracts which are excluded by virtue of their underlying subject matter) were omitted; or
 - (iii) would be a derivative contract falling within sub-paragraph (i) or (ii) if it were a contract of a company;
 - (c) an agreement for the sale and repurchase of securities of the kind described in paragraphs (a) to (c) of subsection (1) of section 730A of ICTA 1988;
 - (d) a stock lending arrangement within the meaning given by section 263B(1) of the Taxation of Chargeable Gains Act 1992;
 - (e) a share; or
 - (f) a contract, not being one of the above, which, whether alone or in combination with one or more other contracts (including any of the above), in substance represents the making of a loan, or the advancing or depositing of money, whatever its form and falls to be accounted for on that basis.

This paragraph is subject to the following qualifications.

- (3) This regulation does not apply if the only financial products involved in the arrangements are assets held within an account which satisfies the conditions in the Individual Savings Accounts Regulations 1998.
- (4) For the purposes of this regulation a contract, or a combination of

contracts, falls to be accounted for as a loan, or as the advancing or depositing of money, if the person entering into the arrangements—

- (a) is, in accordance with generally accepted accounting practice, required to treat the contract, or the combination of contracts, as a loan, deposit or other financial asset or obligation, or
- (b) would be so required if the person were a company to which the Companies Act 1985 applied.

This is subject to the following qualification.

(5) Anything which is a finance lease for the purposes of generally accepted accounting practice does not fall to be accounted for as a loan for the purposes of this regulation.

(6) In this regulation “generally accepted accounting practice” has the meaning given by section 50 of the Finance Act 2004.

6.5.2 Applying the hallmark

Section 6.5 of the guidance *Disclosure of tax avoidance schemes* (June 2006) applies in the same way for NI contribution schemes as it does for income tax, corporation tax and capital gains tax schemes.

6.6 **Hallmark 5: Standardised national insurance contributions product**

6.6.1 The legislation

Hallmark 5 is prescribed at regulations 10 and 11 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543) (as modified by regulation 16 to the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007 (SI 2007/785) (“NIC Regulations”)):

Regulation 10

(1) Arrangements are prescribed if the arrangements are a standardised national insurance contributions product.

But arrangements are excepted from being prescribed under this regulation if they are specified in regulation 11.

- (2) For the purposes of paragraph (1) arrangements are a product if—
 - (a) the arrangements have standardised, or substantially standardised, documentation—
 - (i) the purpose of which is to enable the implementation, by the client, of the arrangements; and
 - (ii) the form of which is determined by the promoter, and not tailored, to any material extent, to reflect the circumstances

of the client;

- (b) a client must enter into a specific transaction or series of transactions, and
 - (c) that transaction or that series of transactions are standardised, or substantially standardised in form.
- (3) For the purpose of paragraph (1) arrangements are a national insurance contributions product if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain an advantage.
- (4) For the purpose of paragraph (1) arrangements are standardised if a promoter makes the arrangements available for implementation by more than one other person.

Regulation 11: Arrangements excepted from [hallmark] 5

- (1) The arrangements specified in this regulation are—
 - (a) those described in paragraph (2); and
 - (b) those which are of the same, or substantially the same, description as arrangements which were first made available for implementation before 1st August 2006.
- (2) The arrangements referred to in paragraph (1)(a) are—
 - (a) arrangements which consist solely of one or more plant or machinery leases (see regulation 14);
 - (b) an enterprise investment scheme (Chapter 3 of Part 7 of ICTA 1988 and Schedules 5B and 5BA to TCGA 1992);
 - (c) arrangements using a venture capital trust (see section 842AA of, and Schedule 15B to, ICTA 1988 and Schedule 5C to TCGA 1992);
 - (d) arrangements qualifying under the corporate venturing scheme (see Schedule 15 to the Finance Act 2000);
 - (e) arrangements qualifying for community investment tax relief (see Schedules 16 and 17 to the Finance Act 2002);
 - (f) an account which satisfies the conditions in the Individual Savings Account Regulations 1998;
 - (g) an approved share incentive plan (see Chapter 6 of Part 7 of, and Schedule 2 to, ITEPA 2003);
 - (h) an approved share option scheme (see Chapter 7 of Part 7 of, and Schedule 3 to, ITEPA 2003);
 - (i) an approved CSOP scheme (see Chapter 8 of Part 7 of, and Schedule 4 to, ITEPA 2003);

- (j) the grant of one or more qualifying options which meet the requirements of Schedule 5 to ITEPA 2003 (enterprise management incentives)—
 - (i) together only with such other steps as are reasonably necessary in all the circumstances for the purposes of facilitating it, or
 - (ii) which fall to be notified to the Board in accordance with Part 7 of that Schedule;
- (k) a registered pension scheme (see section 150(2) of FA 2004);
- (l) an overseas pension scheme in respect of which tax relief is granted in the United Kingdom under section 615 of ICTA 1988 (exemption from tax for superannuation payments in respect of persons not resident in the United Kingdom or in respect of trades carried on wholly or partly outside the United Kingdom);
- (m) a pension scheme which is a relevant non-UK pension scheme within the meaning given by paragraph 1(5) of Schedule 34 to FA 2004;
- (n) a scheme to which section 731 of ITTOIA 2005 applies (periodical payments of personal injury damages).

6.6.2 Applying the hallmark

Section 6.6 of the guidance *Disclosure of tax avoidance schemes* (June 2006) applies in the same way for NI contribution schemes as it does for income tax, corporation tax and capital gains tax schemes.

Note A NI contribution scheme is exempt from disclosure under this hallmark if it relates to a scheme that is of the same, or substantially the same, description as an arrangement which was first made available for implementation before 1st August 2006.

7. When to disclose a NI contribution scheme

7.1 General

Section 10 of the guidance *Disclosure of tax avoidance schemes* (June 2006) applies in the same way for NI contribution schemes as it does for income tax, corporation tax and capital gains tax schemes.

In broad terms, where the scheme “promoter” is required to make the disclosure it must be made within 5 days of the earlier of the date on which he:

- makes the scheme available for implementation by another person; or
- becomes aware that the scheme has been implemented by a transaction taking place that forms part of it.

Where the scheme user is required to make the disclosure as a result of the scheme being marketed by an offshore promoter or by a lawyer who is unable to make a disclosure because of legal professional privilege it must be made within 5 days of entering into the first transaction forming part of the scheme.

However, where there is no promoter, such as with “in-house” schemes, the scheme user must disclose within 30 days of entering into the first transaction forming part of the scheme.

Warning:

Penalties can apply if a scheme is not disclosed accurately and at the right time (see section 10).

The Anti-Avoidance Group in HMRC works closely with compliance teams to ensure that schemes discovered by our ongoing compliance activity have been disclosed properly. Anyone likely to have a liability to disclose a scheme should ensure that effective identification and reporting arrangements exist.

7.2 Arrangements that provide both a NI contribution advantage and a tax advantage

A single arrangement may provide both a NI contribution advantage and a tax advantage. In such cases each advantage is subject to its own disclosure considerations.

Where both advantages are required to be disclosed, it is anticipated that the timing rules will always require them to be disclosed at the same time. For administrative ease, combined disclosures can be made. This is explained further at paragraph 8.4.

7.3 Transitional rules (SI 2007/785, reg. 1)

Disclosure of a NI contribution arrangement is not required when either of the following circumstances apply:

- the obligation to disclose the arrangement falls before 1st May 2007; or
- the obligation to disclose the arrangement falls after 30th April 2007, the arrangement is the same or substantially the same as a tax arrangement that has been notified to HMRC in compliance with the disclosure of tax avoidance scheme rules, and the liability for disclosing that tax arrangement (but not necessarily the due date for doing so) falls before 1st May 2007.

8. How to make a disclosure

8.1 The forms to complete

There are four different forms available for use in the following circumstances:

- AAG 1 – Notification of scheme by promoter
- AAG 2 – Notification of scheme by user where the promoter is off-shore
- AAG 3 – Notification of scheme by user in other circumstances (e.g. where legal privilege applies or the scheme is devised for use ‘in-house’)
- AAG 5 – Continuation sheet

8.2 How to obtain and submit the forms

You can make an online disclosure by clicking the relevant links on the Anti-Avoidance Group website at <http://www.hmrc.gov.uk/aiu/index.htm>.

You can obtain PDF and WORD versions of the forms by clicking the relevant links on the same web page, or by contacting the Anti-Avoidance Group (Disclosure and Risk) within HMRC at the address shown at paragraph 1.7. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should then be sent by either post or e-mail to the Anti-Avoidance Group (Disclosure and Risk) at the address shown at paragraph 1.7.

8.3 The information to be provided (SI 2004/1864, reg. 3 (as modified by SI 2007/785, reg. 17))

Briefly, the regulations prescribe that the following information must be provided:

- The name and address of the promoter or other person required to make the disclosure.
- Details of the provisions, in the Prescribed Description of Arrangements Regulations that make the scheme disclosable.
- A summary of the proposal/arrangements and the name by which it/they are known.
- Information explaining the elements and how the expected NI contribution advantage arises.
- The statutory provisions on which that advantage is based.

Section 11 of the guidance *Disclosure of tax avoidance schemes* (June 2006) applies in a similar way for NI contribution schemes as it does for tax schemes.

8.4 Arrangements that provide both a NI contribution advantage and a tax advantage

A single arrangement may provide both a NI contribution advantage and a tax advantage, each of which is subject to its own disclosure considerations.

Where both advantages are required to be disclosed, the arrangements need only be disclosed on one form. However, the scheme description must make it clear that there is both a NI contribution and a tax advantage and explain how both of those advantages arise.

The effect of the above on scheme reference numbers is explained at paragraph 9.6.

9. Scheme reference numbers relating to NI contribution schemes

9.1 General

The Anti-Avoidance Group in HMRC (see paragraph 1.7) issues a unique scheme reference number for each disclosure of a NI contribution scheme it receives. The number is issued within 30 days of the Anti-Avoidance Group receiving the disclosure.

The reference numbers are 8 digits in length and are issued to either scheme promoters or, where they have the liability to make disclosure, the scheme user.

9.2 Promoters of NI contribution schemes (SI 2007/785, reg. 11)

Promoters are required to provide the reference numbers allocated by the Anti-Avoidance Group to clients who use their schemes. Promoters may find it more convenient to issue the number to their clients when it is received although the strict statutory requirement does not require this. Promoters should ensure that they inform their clients of their obligation to include the reference number on form AAG 4 (see paragraph 9.3 below).

Warning:

A promoter can incur a penalty for failing to provide the user of a hallmarked scheme with the reference number (see section 10).

9.3 Users of NI contribution schemes (SI 2007/785, reg. 12)

Employers using NI contribution schemes are required to notify HMRC that they have used or are using it.

As it is most likely that users of these schemes will be employers, the employer should make a disclosure on form AAG 4 within the following time limits:

- Arrangements relating to Class 1 contributions – by the filing date of the PAYE return that relates to the earnings period in which the advantage is first expected to arise (i.e. by 19th May)
- Arrangements relating to Class 1A contributions – by the filing date of the P11D(b) return that relates to the tax year in which the advantage is first expected to arise (i.e. by 6th July)

If a scheme involves both Class 1 and 1A contributions, the employer should submit the disclosure by 19th May.

Employees are not required to disclose use of NIC schemes where this is done by the employer.

Warning:

A scheme user can incur penalties for failing to disclose the scheme reference number on form AAG 4 (see section 10).

9.4 How to obtain and submit form AAG 4

You can obtain and submit form AAG 4 online by clicking the relevant links on the Anti-Avoidance Group website at <http://www.hmrc.gov.uk/aiu/index.htm>.

You can obtain PDF and WORD versions of the forms by clicking the relevant links on the same web page, or by contacting the Anti-Avoidance Group (Disclosure and Risk) within HMRC at the address shown at paragraph 1.7. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should be sent by either post or e-mail to the Anti-Avoidance Group (Disclosure and Risk) at the address shown at paragraph 1.7.

9.5 Is a small and medium enterprise (SME) exempt from notifying reference numbers?

No. Employers are required to notify use of a scheme even if they are an SME.

9.6 Arrangements that provide both a NI contribution advantage and a tax advantage

A single arrangement may provide both a NI contribution advantage and a tax advantage, each of which is subject to its own disclosure considerations.

Where both advantages are required to be disclosed, the intention is that HMRC will issue a single scheme reference number that will apply to both advantages.

10. Penalties

10.1 Penalties for non-compliance by scheme promoters (SI 2007/785, regs. 14 and 15)

Promoters are liable to a penalty if they fail to comply with their obligations. The penalties are described in section 98C (1) of the Taxes Management Act 1970.

A penalty may be charged where a promoter fails, without reasonable excuse, to:

- make a disclosure to the Anti-Avoidance Group in HMRC when required to do so; or
- advise the scheme user of the reference number issued by the Anti-Avoidance Group when required to do so.

In both instances there is an initial penalty and a daily penalty. The maximum initial penalty for failing to disclose when required to do so is £5,000 for each failure. If the failure continues after the initial penalty has been imposed then an additional penalty of £600 per day can be imposed.

The Special Commissioners are responsible for imposing any initial penalty and there is a right of appeal.

HMRC can impose the further daily penalty or penalties where the promoter fails to comply after the Special Commissioners have imposed an initial penalty.

10.2 Penalties for non-compliance by scheme users (SI 2007/785, regs. 14 and 15)

Scheme users may be liable to a penalty where, without reasonable excuse, they fail to:

- disclose a scheme when required to do so (i.e. when a non-UK based promoter fails to comply with any disclosure obligation; the promoter is a lawyer and legal and professional privilege prevents him from providing all or part of the prescribed information to HMRC; or the scheme is devised for use 'in-house') – see section 3; or
- declare on their tax return the scheme reference number

These are described in section 98C(3) of the Taxes Management Act 1970.

10.2.1 Failure to disclose a scheme

The penalty is the same as for promoters – i.e. an initial penalty of £5,000 and daily penalties of £600 per day for continued failure.

10.2.2 Failure to declare a scheme reference number

The penalty will increase for each failure as follows:

- 1st failure penalty £100
- 2nd failure penalty £500
- 3rd and subsequent failure penalty £1000

There is a right of appeal against the penalty to the Special Commissioners and onwards to the High Court on a point of law.

It is important to note that the penalty is per failure and not per year.

10.3 Reasonable excuse

No penalty will be charged where the promoter or user (as applicable) has a reasonable excuse and the failure to comply is remedied within a reasonable time after the excuse ceased. Consideration of reasonable excuse will include whether the promoter or user has clearly followed current guidance or has otherwise made a reasonable judgement in determining whether or not a disclosure is required.

10.4 Failures involving disclosable NI contribution arrangements and disclosable tax arrangements (SI 2007/785, reg 14(6))

No penalty will be charged for a failure to disclose a NI contribution arrangement if the arrangement, or substantially the same arrangement, is also a disclosable tax arrangement and a penalty has been imposed for failing to disclose that arrangement.

The same principle applies for failures to declare a scheme reference number.