

Draft Regulations

Paragraphs 2, 3 and 5 of Schedule 16 to FA 2008 amended section 127 FA 1995, paragraph 3 Schedule 26 FA 2003 and section 827 ITA 2007 to provide that, in each of those places, "investment transaction" means any transaction specified in Regulations made by the Commissioners for HMRC. The first draft of those Regulations, entitled *The Investment Manager (Specified Transactions) Regulations 2009*, has now been produced and a copy is enclosed with this letter. What follows is a brief commentary on the provisions making up those Regulations.

Regulation 1

The Regulations are draft and will come into force during 2009, on a date to be finalised following a period of consultation. They are subject to a streamlined legislative procedure, so will not be governed by the Parliamentary timetable and arrangements generally applying to secondary legislation made by Statutory Instrument; although they will have the same force. The Regulations will have effect for the tax year and accounting periods that are current when the Regulations come into force, and for subsequent tax years and accounting periods. For example, if the Regulations were to come into force on 31 March 2009, they will have effect for the whole of the tax year ending on 5 April 2009 (and subsequent tax years) and the whole of any accounting period ending on or after 31 March 2009 (and subsequent accounting periods)

Regulation 2

This regulation defines certain terms used in the Regulations.

Regulation 3

Regulation 3 specifies the transactions falling within regulations 4 to 6 and 8 to 11 of the Regulations for the purposes of the primary legislation listed at (a), (b) and (c) of regulation 3. Section 127(12) FA 1995, paragraph 3(3) Schedule 26 FA 2003 and section 827(2) ITA 2007, as substituted by Schedule 16 FA 2008, provide that "investment transaction" means any transaction specified in the Regulations; so the effect is that any transaction falling within regulations 4 to 6 and 8 to 11 is an "investment transaction".

Regulations 4 to 11

Each of the following categories of transaction is within the Regulations:

- Any transaction in stocks or shares (regulation 4);
- Any transaction in a "relevant contract" (regulation 5);
- Any transaction resulting in a non-resident person becoming party to a "loan relationship" or a "related transaction" in respect of such (regulations 6 and 7);
- Any transaction in units in a "collective investment scheme" (regulation 8) ;

- Any transaction in “securities” (regulation 9);
- Any transaction consisting in buying or selling foreign currency (regulation 10);
- Any transaction in defined carbon emission trading products (regulation 11).

Regulation 4 preserves the references in the existing legislation to shares and stock.

Regulation 5 is designed to encompass a very wide range of derivative contracts. For the purposes of regulation 5, a “relevant contract” is an option, a future, or a contract for differences; the definitions of which are widely drawn and, importantly, not limited by any accounting requirement. An option includes instruments falling within regulation 5(3); commonly referred to as warrants. A future is defined at regulation 5(5) and a contract for differences is defined at regulation 5(9).

Where a contract provides for cash settlement only and does not provide for the delivery of any property, it will not be an option or a future for the purposes of regulation 5; but such cash-settled derivative contracts will generally be contracts for differences within the meaning of the regulation.

Regulation 5(7)(c) provides that an option or future which provides for physical delivery will not be a relevant contract in circumstances where physical delivery takes place and the property is not itself of a type specified in the Regulations. Contracts providing for, but not resulting in, physical delivery are not excluded (whatever the underlying subject matter) and neither are contracts resulting in physical delivery of property transactions in which are specified in the Regulations (e.g. an option resulting in the delivery of shares).

Regulation 5(13) excludes from being a relevant contract an option, future or contract for differences relating to land, except where the option, future or contract for differences relates to an index and that index has the features set out at regulation 5(13)(a) to (c).

Regulation 6, read with regulation 7, is designed to encompass a very wide range of transactions in debt and debt instruments. The provisions are much more widely drawn than the equivalent provision in the existing legislation, which is limited to “the placing of money at interest”. Regulation 7 defines “loan relationship” to include all lending debts in relation to which the non-resident person stands as creditor or debtor, but the term is not limited to such arrangements. Regulation 7(1)(b) and (2) extends the definition to include non-lending, or “simple”, debts on which interest is payable to the non-resident, or in respect of which exchange gains or losses or a discount arises to the non-resident. And regulation 7(5) extends the definition to include all debts in relation to which an instrument is issued by any person representing security for or the rights of a creditor in respect of the debt. This would include debentures and other debts in note form.

A “related transaction”, in respect of a loan relationship, means any disposal or acquisition of rights or liabilities under that loan relationship, so the transactions within regulation 6 are not limited to those whereby the non-resident becomes party to a loan relationship as the original creditor or debtor (for example, by making a loan); transactions involving the acquisition or

disposal of existing debts to which the non-resident was not the original party are also included.

Regulation 8 admits transactions in units in a “collective investment scheme”. That term is defined in accordance with the widely-drawn section 235 FSMA 2000, the language of which is reproduced in regulation 8.

Regulation 9 admits transactions in “securities”, which is defined to mean “securities of any description not falling within regulations 4 to 6 and 8”. This preserves the reference to “securities of any description” in the existing legislation.

Regulation 10 preserves the reference in the existing legislation to transactions consisting in the buying or selling of any foreign currency.

Regulation 11 reproduces the provisions currently found in SI 2007/963 and SI 2007/964.