HM Revenue & Customs

Bank Payroll Tax

Technical Note, Draft legislation and Explanatory Notes

9 December 2009

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Introduction

This document explains the new bank payroll tax that applies, broadly, to banks and building societies on awards of bonuses over £25,000 to or in respect of certain of its employees in the period from 9 December 2009 to 5 April 2010.

If any further information is required about this new tax, banks and their advisers should contact their HMRC Customer Relationship Manager. Otherwise please contact pbr2009.taxteam@hmrc.gsi.gov.uk (telephone: 020 7147 0110)

Technical Note

Chapter 1

This Technical Note explains the new bank payroll tax that applies, broadly, to banks and building societies on awards of bonuses over £25,000 to or in respect of certain of its employees in the period from 9 December 2009.

On 9 December 2009, the Government announced measures to encourage change in the remuneration practices that contributed to excessive risk-taking by the banking industry. The Government wants to encourage the development of sustainable long-term remuneration policies that take greater account of risk and facilitate the build-up of loss-absorbing capital.

The bank payroll tax will encourage banks to consider their capital position and make appropriate risk-adjustments when settling the level of bonus payments this year. It is intended that in the longer term the remuneration practices will be changed as a result of corporate governance and regulatory reforms. The one-off bank payroll tax will apply until 5 April 2010, but the Government will consider extending the period of the charge so that the tax remains in place until the relevant provisions of the Financial Services Bill come into force.

Overview of legislation

The tax

For the purposes of the bank payroll tax, a "Taxable company" is:

- a bank;
- a UK resident investment company or UK resident financial trading company in a banking group;
- a building society;
- a UK resident investment company or UK resident financial trading company in a building society group; and
- a UK branch of a foreign bank or the UK branch of a foreign financial trading company in a banking group.

In broad terms, the legislation will ensure that a "a Taxable Company" (as defined above) operating in the banking sector that awards a bonus greater than £25,000 in value (or bonuses totalling more than £25,000 if more than one is awarded to an individual employee) in respect of employees is charged to tax ("the bank payroll tax") at a rate of 50% on the aggregate of the amounts by which each such bonus exceeds that limit. However, it will only apply to amounts awarded after the announcement of the measure on 9 December 2009, in respect of which no prior contractual obligation to pay or provide a fixed amount had arisen, and during the following period ending on 5th April 2010 ("the Chargeable Period").

Specifically, a Taxable Company will be charged to the bank payroll tax on the aggregate of the amounts of "Chargeable Relevant Remuneration" awarded to or in respect of its "Relevant Banking Employees" in the chargeable period at the rate of 50%. Chargeable Relevant Remuneration is the amount by which "Relevant Remuneration" awarded to or in respect of a Relevant Banking Employee exceeds £25,000.

The Commissioners of HM Revenue & Customs will be responsible for the collection and management of the bank payroll tax, which will become due and payable on 31 August 2010.

No deduction may be taken into account in calculating profits or losses for the purposes of corporation tax by any company in respect of any amount paid or payable as bank payroll tax.

Relevant Banking Employee

An individual will be a Relevant Banking Employee of a Taxable Company if that individual is employed by the Taxable Company in a "Banking Employment" and either the individual is resident in the United Kingdom in the tax year 2009/10 or performs duties of the Banking Employment at any time in that year wholly or partly in the UK.

For this purpose, Banking Employment means an employment which wholly or mainly involves duties that relate either directly or indirectly to activities that are "Relevant Regulated Activities".

If the individual is not employed by a Taxable Company, the individual may still be regarded as a Relevant Banking Employee. This would be the case if the individual personally performs "Banking Services" for a Taxable Company under arrangements involving another person, rather than under a contract directly between the individual and the Taxable Company, and the individual would be a Relevant Banking Employee of the Taxable Company if the Banking Services were provided under a contract directly between them.

For this purpose, Banking Services are services directly or indirectly concerned with activities that are "Relevant Regulated Activities".

Further provisions may be required to cater for circumstances where the banking employee is employed by a partnership rather than the taxable company partner and carries out it banking activities on behalf of the partnership. If necessary, draft clauses on this issue will be published as soon as possible after 9 December 2009.

Relevant Regulated Activities

The Financial Services Authority authorises financial institutions to carry out certain types of financial activities called 'regulated activities'. For the purposes of

these provisions certain regulated activities are prescribed as “relevant regulated activities”.

These are:

- Accepting deposits (in other words providing current accounts and deposit accounts to retail customers);
- Dealing in investment as principal (in other words trading in derivatives, bonds commodities etc. on their own account);
- Dealing in investments as agent (in other words trading in the above types of investments as behalf of clients);
- Arranging deals in investments;
- Safeguarding and administering investments on behalf of clients; and
- Regulated mortgage contracts (in other words carrying out retail mortgage lending).

Multiple Employments

Where an individual has more than one employment as a Relevant Banking Employee with the Taxable Company, or has employment as a Relevant Banking Employee with more than one Taxable Company, and those Taxable Companies are associated, the threshold of £25,000 will apply as an overarching limit. If an individual has more than one employment as a Relevant Banking Employee with the Taxable Company, the Chargeable Relevant Remuneration will be the amount by which the aggregate value of Relevant Remuneration awarded to or in respect of that employee exceeds £25,000. Alternatively, if an individual is a Relevant Banking Employee of two or more Taxable Companies that are associated the threshold of £25,000 will be divided by the number of Taxable Companies and allocated accordingly.

For this purpose, Taxable Companies will be associated if one of them is under the control of the other, or one of them is under the control of a third person who controls or who is under the control of the other.

Relevant Remuneration

The charge applies to “Chargeable Relevant Remuneration”. Chargeable Relevant Remuneration is “Relevant Remuneration” awarded to a Relevant Banking Employee to the extent that it exceeds £25,000.

Relevant Remuneration is anything that is either within the meaning of “earnings” set out at section 62 Income Tax (Earnings and Pensions) Act 2003 in relation to the employee’s employment by the Taxable Company as a Relevant Banking Employee or is a benefit provided by reason of that employment.

Relevant Remuneration will also include amounts that are regarded as Relevant Remuneration by virtue of being relevant loans, or are regarded as awarded as relevant remuneration by virtue of the making of an arrangement for future

payment. Amounts may be regarded as Relevant Remuneration in respect of either arrangements for future payments or involving a “Relevant Loan”.

For this purpose of determining whether or not something is Relevant Remuneration, the chargeability to income tax of the Relevant Banking Employee is irrelevant.

However, there is an exception for “Excluded Remuneration” and this will not count as Relevant Remuneration.

Excluded Remuneration

This exclusion has three parts. These are anything that is regular salary or wages or a regular benefit, anything for which a Contractual Obligation to pay or provide it arose before the beginning of the Chargeable Period and various share-related awards.

Regular salary or wages or regular benefits

In this context, “regular” means that the amount of salary, wages or benefits that does not vary according to either:

- the performance of the business of either the Taxable Company or a person connected with the Taxable Company;
- the contribution to that performance made by the employee;
- the performance by the employee of any of the duties of the employment; or
- any similar considerations.

Contractual Obligation

For this purpose, a Contractual Obligation to pay or provide something will not arise until either

- the amount to be paid or provided is either fixed or is capable of becoming fixed without the exercise of discretion by any person; or
- the total amount of things to be paid or provided to or in respect of a number of employees including the employee is fixed or is capable of becoming fixed without the exercise of discretion by any person.

However, a Contractual Obligation to pay or provide something will be taken to arise even if payment or provision of it depends on compliance with any conditions. This only applies in relation to contractual obligations entered into prior to the announcement on 9th December 2009; new contractual arrangements, even where they give rise to a fixed amount to be paid or provided, would not be Excluded Remuneration.

Share-related awards

For this purpose, any award of shares under an approved share incentive plan (within the meaning of section 488 ITEPA 2003) or any share option granted under a SAYE option scheme (within the meaning of section 516 ITEPA 2003) will be Excluded Remuneration.

Otherwise, any employment-related securities (within the meaning of section 421B ITEPA 2003) may be Relevant Remuneration.

Award of Relevant Remuneration

The charge applies to the aggregate of the amounts of Chargeable Relevant Remuneration awarded during the Chargeable Period. Chargeable Relevant Remuneration is the amount by which "Relevant Remuneration" awarded to a Relevant Banking Employee exceeds £25,000.

Relevant Remuneration will be awarded when, during the Chargeable Period, a Contractual Obligation to pay or provide Relevant Remuneration arises.

Otherwise, Relevant Remuneration will be awarded when it is paid or provided during the Chargeable Period without a Chargeable Obligation having arisen during that period.

In addition, Relevant Remuneration will be regarded as awarded during the Chargeable Period by reason of the employee's employment as a Relevant Banking Employee of a Taxable Company in the following circumstances.

Payments to intermediaries

Relevant Remuneration will be regarded as awarded in the circumstances where an individual is regarded as a Relevant Banking Employee by virtue of arrangements involving any other person and anything is done by that other person that would be regarded as the award of Relevant Remuneration during the Chargeable Period to or in respect of the individual (as a Relevant Banking Employee) by reason of the employee's employment as a Relevant Banking Employee.

Arrangements for future payments

Relevant Remuneration will also be regarded as awarded if arrangements are made during the Chargeable Period by reason of the employee's employment as a Relevant Banking Employee of a Taxable Company which:

- make provision under which money may be paid, or money's worth or other benefit provided to or in respect of the employee in accordance with the arrangements, and
- were the money paid, or money's worth or other benefit provided during the Chargeable Period, it would be Relevant Remuneration awarded to or in respect of the employee during the Chargeable Period.

For this purpose, the making of the arrangements will be regarded as the awarding of Relevant Remuneration to or in respect of the Relevant Banking Employee by reason of the employment.

Relevant Loan

A loan that is a Relevant Loan will be regarded as Relevant Remuneration awarded to or in respect of a Relevant Banking Employee by the Taxable Company during the Chargeable Period if:

- the loan is provided to or in respect of a Relevant Banking Employee of a Taxable Company during the Chargeable Period by reason of the employee's employment, or
- at any time during the Chargeable Period a Contractual Obligation to provide a loan arises by reason of that employment.

A loan is a Relevant Loan if the main purpose (or one of the main purposes) of providing (or undertaking to provide) it is the reduction or elimination of a liability to bank payroll tax.

For this purpose, a Contractual Obligation to provide a Relevant Loan is taken to arise even if provision of it is dependent on compliance by the Relevant Banking Employee with any conditions.

Amount

The charge applies to the aggregate of the amounts of Chargeable Relevant Remuneration awarded during the Chargeable Period. The amounts that will be taken into account as Relevant Remuneration in the calculation of the amount of Chargeable Relevant Remuneration will be:

Money

If the Relevant Remuneration is awarded as money, the amount will be the amount when awarded.

Money's worth

If the Relevant Remuneration is awarded as something that is within the meaning of "money's worth" then the amount will be the money's worth when awarded. For this purpose, "money's worth" has the meaning given by section 62(3) Income Tax (Earnings and Pensions) Act 2003.

Benefit not constituting earnings within the definition of S62 ITEPA 2003
If Relevant Remuneration is a benefit that does not constitute earnings, the amount of the Relevant Remuneration will be the cost of providing that benefit.

Contractual Obligation

If Relevant Remuneration is awarded to or in respect of a Relevant Banking Employee by virtue of a Contractual Obligation arising during the Chargeable Period but the amount is not fixed at the time that the Contractual Obligation arises, the amount of the Relevant Remuneration will be such amount that it is reasonable to assume would be its amount (depending on whether it will be money, money's worth or any other benefit) when it is paid or provided.

However, if the market value of anything that constitutes Relevant Remuneration exceeds (or would exceed) at the time it is actually awarded the amount (e.g. the money's worth) that would otherwise be regarded as the amount of Relevant Remuneration awarded, that market value will be the amount of Relevant Remuneration awarded. For this purpose, the "market value" has the same meaning it has for the purposes of the Taxation of Chargeable Gains Act 1992 by virtue of Part 8 of that Act.

Relevant Remuneration subject to restrictions

If anything that constitutes Relevant Remuneration is (or would be when awarded) subject to any "restriction" (or restrictions), which, for this purpose, means any condition, restriction or other similar provision that causes the value of the Relevant Remuneration to be less than it would otherwise be, the restriction (or restrictions) will be ignored when determining the amount of the Relevant Remuneration.

Arrangements for future payments

The amount that will be regarded as Relevant Remuneration awarded is the amount that it is reasonable to assume will be paid or in the case of money's worth or any other benefit will be provided in accordance with the arrangements made during the Chargeable Period.

Relevant Loans

The amount that will be regarded as Relevant Remuneration awarded is the amount that is loaned during the Chargeable Period or (if the amount of the loan is not fixed) the amount that it is reasonable to assume will be loaned.

Anti-avoidance rule

The bank payroll tax has a targeted anti-avoidance rule and various other provisions intended to ensure that banks cannot award bonuses and, at the same time, avoid the new charge. The anti-avoidance rule will ensure that, however the payment of a bonus (or an amount which in substance is a bonus) is structured, it will be chargeable to bank payroll tax if , but for stated aspects of that structure, it would otherwise have been so chargeable.

In particular, it will not be possible to avoid bank payroll tax by the use of loans which are in substance earnings or by channelling a bonus through an employee benefit trust or similar intermediary vehicle.

Collection and management

The current draft of the legislation does not include detail of collection and management. Future draft legislation will cover the following:

Reporting requirements

When the charge becomes due, banks will be required to report details of all bonuses over £25,000 awarded during the period 9 December 2009 to 5 April 2010, whether or not they believe that the bank payroll tax applies to them.

Record keeping

Banks will be required to keep full records of all bonus payments of over £25,000 awarded during the period, together with documents and other evidence necessary to demonstrate whether they fall within the scope of the bank payroll tax.

Where banks fail to retain relevant records, submit incorrect returns or fail to submit returns by the statutory date, penalties will apply.

Chapter 2 – Draft Legislation

This is the draft legislation on which this Technical Note is based.

SCHEDULE

BANK PAYROLL TAX

The tax

1 (1) This Schedule makes provision for taxable companies to be charged to a tax to be known as "bank payroll tax".
(2) Bank payroll tax is chargeable on the aggregate of the amounts of chargeable relevant remuneration awarded during the chargeable period to or in respect of relevant banking employees of the taxable company by reason of their employment as relevant banking employees.
(3) Relevant remuneration awarded during the chargeable period to or in respect of a relevant banking employee of a taxable company by reason of the employee's employment as a relevant banking employee is "chargeable" relevant remuneration only if and to the extent that its amount exceeds
£25,000.

Rate

2 Bank payroll tax is to be charged at the rate of 50%.

"Taxable company"

3 "Taxable company" means a company that-
(a) is a UK resident bank or a relevant foreign bank,
(b) is a company not within paragraph (a) that is a member of a banking group and-
(i) is a UK resident investment company or a UK resident financial trading company, or
(ii) is a relevant foreign financial trading company, or
(c) is a building society or is a UK resident investment company, or a UK resident financial trading company, that is a member of the same group as a building society.

"Relevant remuneration"

4 (1) "Relevant remuneration", in relation to a relevant banking employee of a taxable company, means anything that-
(a) constitutes earnings (within the meaning of section 62 of ITEPA 2003) in relation to the employee's employment by the taxable company as a relevant banking employee, or
(b) while not constituting earnings, constitutes a benefit provided by

reason of that employment.

(2) Whether or not the relevant banking employee is chargeable to income tax in respect of anything is irrelevant in determining whether or not it is relevant remuneration.

(3) Excluded remuneration is not relevant remuneration.

"Excluded remuneration"

5 (1) "Excluded remuneration" means-

(a) anything that is regular salary or wages or a regular benefit,

(b) anything in the case of which a contractual obligation to pay or provide it to or in respect of the employee concerned arose before the beginning of the chargeable period,

(c) any shares awarded under an approved share incentive plan (within the meaning of section 488 of ITEPA 2003), or

(d) any share option granted under an SAYE option scheme (within the meaning of section 516 of that Act).

(2) In sub-paragraph (1)(a) "regular", in relation to salary or wages or a benefit, means so much of the amount of the salary or wages or benefit as cannot vary according to-

(a) the performance of, or of any part of-

(i) any business of the taxable company concerned, or

(ii) any business of a person connected with the taxable company,

(b) the contribution made by the employee concerned to the performance of, or of any part of, any business within paragraph (a)(i) or (ii),

(c) the performance by the employee of any of the duties of the employment, or

(d) any similar considerations.

(3) For the purposes of sub-paragraph (1)(b) a contractual obligation to pay or provide something to or in respect of the employee does not arise until-

(a) the amount to be paid or provided is fixed or is capable of becoming fixed without the exercise of a discretion by any person, or

(b) the total amount of things to be paid or provided to or in respect of a number of employees including the employee is fixed or is capable

of becoming fixed without the exercise of a discretion by any person.

(4) A contractual obligation to pay or provide something is taken to arise for those purposes even if payment or provision of it is dependent on compliance by the employee with any conditions.

"Awarded"

6 (1) Relevant remuneration is "awarded" during the chargeable period if-

(a) a contractual obligation to pay or provide it arises during the chargeable period, or

(b) the relevant remuneration is paid or provided during the chargeable period without any such obligation having arisen during the chargeable period.

(2) Sub-paragraphs (3)(a) and (4) of paragraph 5 apply for the purposes of subparagraph (1) as for the purposes of sub-paragraph (1)(b) of that paragraph.

"Amount" of remuneration

7 (1) Subject to sub-paragraphs (2) to (4), the amount of any relevant remuneration is-

(a) if it is money, its amount when awarded,

(b) if it is money's worth, the amount of the money's worth when awarded, or

(c) if it is a benefit not constituting earnings, the cost of providing it.

(2) Where relevant remuneration is awarded to or in respect of an employee by virtue of paragraph 6(1)(a) and its amount is not fixed when it is awarded, its amount is such as it is reasonable at that time to assume would be its amount (in accordance with sub-paragraph (1)) if and when paid or provided.

(3) Where the market value of any relevant remuneration at the time it is awarded exceeds, or would exceed, what would otherwise be its amount, its amount is that market value.

(4) Where anything constituting relevant remuneration is or would be, when awarded, subject to any restriction or restrictions, the restriction is, or restrictions are, to be ignored in arriving at its amount.

(5) For this purpose "restriction" means any condition, restriction or other similar provision which causes the value of the relevant remuneration to be less than it otherwise would be.

"Relevant banking employee"

8 (1) An employee of a taxable company is a relevant banking employee of the taxable company if-

(a) the employment in which the employee is employed by the taxable company is a banking employment, and

(b) either-

(i) the employee is resident in the United Kingdom in the tax year 2009-10, or

(ii) the duties of the banking employment are at any time in that tax year performed wholly or partly in the United Kingdom.

(2) "Banking employment" means an employment the duties of which are wholly or mainly concerned (whether directly or indirectly) with activities to which sub-paragraph (3) applies.

(3) This sub-paragraph applies to activities that are-

(a) relevant regulated activities, or

(b) activities which are not relevant regulated activities but consist of the lending of money.

"Multiple employments"

9 (1) The threshold of £25,000 in paragraph 1(3) applies whether or not an employee has more than one employment as a relevant banking employee with a taxable company.

(2) If relevant remuneration is awarded during the chargeable period to or in respect of a relevant banking employee by reason of the employee's employment as such by a number of associated taxable companies, the threshold in paragraph 1(3) in relation to each of the taxable companies is £25,000 divided by the number of the taxable companies.

(3) For this purpose taxable companies are associated if-

(a) one of them is under the control of the other, or

(b) one of them is under the control of a third person who controls or is under the control of the other

Payments etc to intermediaries

10 (1) This paragraph applies where-

(a) an individual personally performs banking services for a taxable company,

(b) the banking services are provided not under a contract directly between the individual and the taxable company but under arrangements involving any other person ("the intermediary"), and

(c) the circumstances are such that, if the banking services were provided under a contract directly between the taxable company and the individual, the individual would be a relevant banking employee of the taxable company.

(2) The individual is to be regarded as a relevant banking employee of the taxable company.

(3) Anything done by the intermediary in relation to the individual which, if the banking services were provided under a contract directly between the taxable company and the individual, would be regarded as the award of relevant remuneration during the chargeable period to or in respect of the individual (as a relevant banking employee) by reason of the employee's employment as a relevant banking employee is to be so regarded.

(4) "Banking services" means services which are wholly or mainly concerned (whether directly or indirectly) with activities that are activities to which paragraph 8(3) applies.

Arrangements for future payments etc

11 (1) This paragraph applies where-

(a) arrangements are made during the chargeable period by reason of an employee's employment as a relevant banking employee of a taxable company,

(b) the arrangements make provision under which money may be paid, or any money's worth or other benefit provided, to or in respect of the employee in accordance with the arrangements, and

(c) were the money so paid, or the money's worth or other benefit so provided, during the chargeable period, it would be relevant remuneration awarded to or in respect of the employee during the chargeable period.

(2) The making of the arrangements is to be regarded as the awarding of relevant remuneration to or in respect of the relevant banking employee by reason of the employment; and the amount of the relevant remuneration is to regarded as the amount of any money which it is reasonable to assume will be paid, and any money's worth or other benefit which it is reasonable to assume will be provided, as mentioned in sub-paragraph (1).

Loans

12 (1) This paragraph applies where-

(a) a relevant loan is during the chargeable period provided to or in respect of a relevant banking employee of a taxable company by reason of the employee's employment as a relevant banking employee, or

(b) at any time during the chargeable period there arises a contractual
obligation to provide a loan to or in respect of the employee by reason of the employee's employment as a relevant banking employee of the taxable company.

(2) A loan is a "relevant" loan if the main purpose, or one of the main purposes, of providing it, or undertaking to provide it, is the reduction or elimination of a liability to bank payroll tax or any other tax or national insurance contributions.

(3) The loan is to be regarded as relevant remuneration awarded during the chargeable period to or in respect of the relevant banking employee by reason of the employee's employment as a relevant banking employee; and the amount of the relevant remuneration is to be regarded as the amount which is loaned or (where the amount of the loan is not fixed) the amount which it is reasonable to assume will be loaned.

(4) A contractual obligation or provide a relevant loan is taken to arise for the purposes of this paragraph even if provision of it is dependent on compliance by the relevant banking employee with any conditions.

Anti-avoidance

13 (1) This paragraph applies where-

(a) relevant arrangements are entered into by one or more persons during the chargeable period, and

(b) the main purpose, or one of the main purposes, of the person, or any of the persons, in entering into the relevant arrangements is a relevant tax avoidance purpose.

(2) "Relevant arrangements" means arrangements involving either or both of the following-

(a) the making of a payment of money, or the provision of any money's worth or other benefit, otherwise than during the chargeable period;

(b) the giving otherwise than in the form of relevant remuneration of any reward which equates in substance to relevant remuneration.

(3) A "relevant tax avoidance purpose" is the reduction or elimination of a liability to bank payroll tax which would exist if-

(a) in a case within paragraph (a) of sub-paragraph (2), the money were paid, or the money's worth or other benefit provided, during the chargeable period, or

(b) in a case within paragraph (b) of that sub-paragraph, the reward were given in the form of relevant remuneration.

(4) Liability to bank payroll tax is to be determined as it would have been if-

(a) in a case within paragraph (a) of sub-paragraph (2), the money were paid, or the money's worth or other benefit provided, during the chargeable period, or

(b) in a case within paragraph (b) of that sub-paragraph, the reward were given in the form of relevant remuneration.

"The chargeable period."

14 "The chargeable period" is the period-

(a) beginning with [the time of the announcement on] 9 December 2009, and

(b) ending with 5 April 2010.

Due date for payment

15 Bank payroll tax becomes due and payable on 31 August 2010.

No deduction in computing profits

16 No amount of bank payroll tax is to be taken into account in calculating the profits or losses of any company for the purposes of corporation tax.

Collection and management

17 The Commissioners are responsible for the collection and management of bank payroll tax.

Administration

18 (1) The Commissioners may by regulations make provision about the administration of bank payroll tax.

(2) Regulations under this paragraph may, in particular, include-

(a) provision requiring the provision of accounts, statements, reports and other information to officers of Revenue and Customs,

(b) provision about returns, assessment, collection, payment and recovery,

(c) provision for the publishing of details of deliberate defaulters,

(d) provision imposing penalties,

(e) provision for the charging of interest,

(f) provision conferring and regulating rights of review and appeal, and

(g) provision about priority of tax in cases of insolvency.

(3) Regulations under this paragraph may apply to bank payroll tax (with or without modifications) any enactment relating to any other tax.

(4) Regulations under this paragraph-

(a) may make different provision for different cases,

(b) may confer a discretion, and

(c) may include incidental, supplementary, consequential and transitional provision.

(5) Regulations under this paragraph are to be made by statutory instrument.

(6) A statutory instrument containing regulations under this paragraph is subject to annulment in pursuance of a resolution of the House of Commons.

"UK resident bank" and "relevant foreign bank"

19 (1) "UK resident bank" means a company-

(a) that is resident in the United Kingdom,

(b) that is an authorised person for the purposes of FISMA 2000 (see section 31 of that Act),

(c) whose activities consist wholly or mainly of relevant regulated activities or include the relevant regulated activity described in the provision mentioned in paragraph 20(1)(a),

(d) that carries on those activities or that activity wholly or mainly in the course of trade, and

(e) that is not an excluded company.

(2) "UK resident bank" also includes a company that-

(a) meets the conditions in sub-paragraph (1)(a) and (e), and

(b) is a member of a partnership that meets the conditions in sub-paragraph (1)(b) to (d).

(3) "Relevant foreign bank" means a company-

(a) that is not resident in the United Kingdom,

(b) that is an authorised person for the purposes of FISMA 2000 (see section 31 of that Act),

(c) that carries on a trade in the United Kingdom, through a permanent

establishment in the United Kingdom, that-

(i) consists wholly or mainly of relevant regulated activities, or

(ii) includes the relevant regulated activity described in the provision mentioned in paragraph 20(1)(a), and

(d) that is not an excluded company.

(4) "Relevant foreign bank" also includes a company that-

(a) meets the conditions in sub-paragraph (3)(a) and (d), and

(b) is a member of a partnership that meets the conditions in sub-paragraph (1)(b), (c) and (d).

"Relevant regulated activity" and "excluded company"

20 (1) "Relevant regulated activity" means an activity that is a regulated activity for the purposes of FISMA 2000 by virtue of any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544)-

(a) article 5 (accepting deposits);

(b) article 14 (dealing in investments as principal);

(c) article 21 (dealing in investments as agent);

(d) article 25 (arranging deals in investments);

(e) article 40 (safeguarding and administering investments);

(f) article 61 (regulated mortgage contracts).

(2) "Excluded company" means a company that is-

(a) an insurance company (within the meaning given by section 431(2) of ICTA),

(b) an investment trust (within the meaning given by section 842 of ICTA),

(c) an open-ended investment company (within the meaning of Part 17 of FISMA 2000 (collective investment schemes)),

(d) a society incorporated under the Friendly Societies Act 1992,

(e) a society registered as a credit union under the Industrial and Provident Societies Act 1965 or the Credit Unions (Northern Ireland) Order 1985 (S.I. 1985/1205 (NI 12)), or

(f) a building society.

(3) The Treasury may by order amend this paragraph.

(4) An order under this paragraph may be made so as to have effect in relation to any time after the beginning of the chargeable period.

(5) An order under this paragraph is to be made by statutory instrument.

(6) An order under this paragraph may not be made unless a draft of the instrument containing it has been laid before, and approved by a resolution of, the House of Commons.

"Member of a banking group"

21 (1) A company is a "member of a banking group" at any time if-

(a) it is within sub-paragraph (2) at that time, or

(b) it was within that sub-paragraph immediately before the chargeable period.

(2) A company is within this sub-paragraph if-

(a) it is a member of a group, and

(b) any of the following conditions is met.

(3) The first condition is that the principal company of the group is a UK resident bank or a relevant foreign bank.

(4) The second condition is that-

(a) the principal company of the group is a company-

(i) that is not resident in the United Kingdom,

(ii) whose activities consist wholly or mainly of the activities described in the provisions listed in paragraph 20(1) or include the activity described in paragraph (a) of that provision, and

(iii) that carries on those activities or that activity wholly or mainly in the course of trade, and

(b) any member of the group is a UK resident bank or a relevant foreign bank.

(5) The third condition is that-

(a) the principal company of the group is a company that is not resident in the United Kingdom and is a member of a partnership-

(i) whose activities consist wholly or mainly of the activities described in the provisions listed in paragraph 20(1) or include the activity described in paragraph (a) of that provision, and

(ii) that carries on those activities or that activity wholly or mainly in the course of trade, and

(b) any member of the group is a UK resident bank or a relevant foreign bank.

(6) The fourth condition is that-

(a) the principal company is the holding company of another company, and

(b) if that other company were the principal company of the group, the first, second or third condition would be met.

(7) For the purposes of this paragraph a company ("H") is a "holding company" of another company ("S") if-

(a) H is an investment company, and

(b) S is-

(i) an effective 51% subsidiary of H, and

(ii) not an effective 51% subsidiary of any company that is not an investment company.

(8) A company that is a member of a banking group ceases to be a member of a banking group when it ceases to be within sub-paragraph (2), but only if it ceases to be within that provision as a result of-

(a) an arm's length transaction undertaken for wholly commercial purposes, or

(b) following a recommendation of a relevant regulatory body.

(9) For the purposes of sub-paragraph (8) obtaining a tax advantage (within the meaning of section 840ZA of ICTA) is not a commercial purpose.

“Relevant regulatory body”

22 “Relevant regulatory body” means-

(a) the Financial Services Authority, or

(b) a body discharging functions under the law of a country or territory outside the United Kingdom corresponding to functions discharged by the Financial Services Authority.

“Investment company” etc

23 (1) “Investment company”-

(a) means a company whose business consists wholly or mainly of, and the principal part of whose income is derived from, the making of investments, and

(b) also includes any savings bank or other bank for savings.

(2) “UK resident investment company” means an investment company that is resident in the United Kingdom.

“Financial trading company” etc

24 (1) “Financial trading company” means a company that-

(a) is an authorised person for the purposes of FISMA 2000 (see section 31 of that Act), or

(b) is not within paragraph (a) but carries on a trade consisting wholly or partly in dealing in securities.

(2) “UK financial trading company” means a financial trading company that is resident in the United Kingdom.

(3) A “relevant foreign financial trading company” means a company that meets the following two conditions.

(4) The first condition is that the company-

(a) is not resident in the United Kingdom, and

(b) carries on a trade in the United Kingdom through a permanent establishment in the United Kingdom.

(5) The second condition is that, disregarding any activities of the company other than those carried out through that permanent establishment, the company is a financial trading company.

(6) In this paragraph “securities” includes-

(a) shares,

(b) rights of unit holders in unit trust schemes to which TCGA 1992 applies as a result of section 99 of that Act, and

(c) in the case of a company with no share capital, interests in the company possessed by members of the company.

Other interpretative provisions

25 (1) In this Schedule-

“arrangements” includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally

enforceable);
"benefit" includes a facility of any kind;
"building society" means a building society within the meaning of the Building Societies Act 1986;
"the Commissioners" means the Commissioners of Her Majesty's Revenue and Customs;
"control" has the meaning given by section 995 of ITA 2007;
"employment", "employee" and "employer" have the same meaning as in the employment income Parts of ITEPA 2003 (see sections 4 and 5 of that Act);
"enactment" includes an enactment or instrument (whenever passed or made);
"market value" has the same meaning it has for the purposes of TCGA
1992 by virtue of Part 8 of that Act;
"money's worth" has the meaning given by section 62(3) of ITEPA 2003;
"partnership" includes.

(a) a limited liability partnership, and
(b) an entity established under the law of a territory outside the United Kingdom of a similar character to a partnership (and "member", in relation to a partnership, is to be read accordingly).

"permanent establishment" has the meaning given by section 148 of FA 2003;
"the tax year 2009-10" (and "that tax year") has the same meaning as in the Income Tax Acts (see section 989 of ITA 2007).

(2) Section 170(2) to (11) of TCGA 1992 ("group", "principal company", "effective 51% subsidiary", "company" etc) has effect for the interpretation of this Schedule as for the interpretation of sections 171 to 181 of that Act.
(3) Section 993 of ITA 2007 (meaning of "connected person") applies for the purposes of this Schedule.

Chapter 3 – Draft Explanatory Notes

These are the draft Explanatory Notes for the draft legislation

SUMMARY

1. Schedule 1 imposes the charge to bank payroll tax and includes the relevant conditions, definitions and an outline of the administration.

DETAILS OF THE SCHEDULE

2. Paragraph 1 sets out the circumstances in which the charge to bank payroll tax arises.

3. Paragraph 1(1) sets out that this Schedule makes provision for "bank payroll tax".

4. Paragraph 1(2) provides that the charge to bank payroll tax arises on the aggregate of the amounts of chargeable "relevant remuneration" "awarded" during "the chargeable period" to or in respect of "relevant banking employees" of a "taxable company" by reason of their employment as relevant banking employees. The definition of these terms is provided in the Schedule.

5. Paragraph 1(3) provides that relevant remuneration is "chargeable" only to the extent that it exceeds £25,000.

6. Paragraph (2) sets the rate of the bank payroll tax at 50 per cent.

7. Paragraph (3) of the Schedule sets out the definition of taxable companies that will be within the scope of the bank payroll tax. Taxable companies will include banks resident in the UK and relevant foreign banks (defined in paragraph [19]) trading in the UK. Members of banking groups will also be taxable companies if they are investment companies resident in the UK or financial trading companies, as will building societies and UK resident investment companies or UK resident financial trading companies of a building society group.

8. Paragraph 4 defines "relevant remuneration".

9. Paragraph 4(1) provides that relevant remuneration includes anything that constitutes earnings under section 62 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) in relation to the employee's employment by the taxable company as a relevant banking employee or benefits which do not themselves constitute earnings provided by reason of that employment.

10. Paragraph 4(2) provides that it is irrelevant whether the employee is chargeable to income tax on anything for the purposes of determining relevant remuneration.

11. Paragraph 4(3) omits excluded remuneration from relevant remuneration.

12. Paragraph 5 sets out what is to be regarded as excluded from the definition of relevant remuneration.

13. Paragraph 5(1) defines excluded remuneration. It is any regular salary, wages or benefits; anything in the case of which a contractual obligation to pay or provide it to or in respect of the employee concerned arose before the beginning of the chargeable period; shares awarded under an approved share incentive plan (within section 488 of ITEPA (approved share incentive plans) and share options granted under a Save As You Earn (SAYE) option (within the meaning of section 516 of ITEPA (approved SAYE option schemes)).

14. Paragraph 5(2) defines the meaning of "regular" in relation to salary, wages or benefits. Regular means that amount of salary, wages or benefits that cannot vary according to the performance of, or any part of, the business of the taxable company or any person connected with the taxable company. It also means that it cannot vary because of any contribution made by the employee to the performance of the business, or any part of the business; or because of the performance by the employee of any duties of the employment or other or similar considerations.

15. Paragraph 5 (3) provides that contractual obligations entered in to prior to 9th December 2009 to pay or provide something to or in respect of the employee does not arise until the amount to be paid or provided is fixed or is capable of becoming fixed without the exercising of discretion of any person.

16. Paragraph 5 (4) provides that a contractual obligation is taken to arise even if payment or provision is dependent on compliance with any condition.

17. Paragraph 6 defines "awarded".

18. Paragraph 6(1) provides that relevant remuneration is awarded during the chargeable period when either of two events occurs. These are that a contractual obligation arises during the chargeable period to pay or provide it or the relevant remuneration is paid or provided during the chargeable period without any such obligation having risen.

19. Paragraph 6(2) applies paragraph 5(3) and 5(4) to sub-paragraph 6(1) for the purposes of sub-paragraph (1)(b).

20. Paragraph 7 defines the "amount" of remuneration.

21. Paragraph 7(1) provides that the amount of relevant remuneration is, where it is money, the amount when awarded; where it is money's worth, the amount of the money's worth when awarded or where it is a benefit not constituting earnings, the cost of providing it.

22. Paragraph 7(2) provides that, subject to sub-paragraphs 7(2) – 7(4), where relevant remuneration is awarded to the employee under a contractual obligation and its amount is not fixed when it is awarded, its amount is such as is reasonable at the time to assume would be its amount if and when paid or provided.

23. Paragraph 7(3) provides that where the market value of any relevant remuneration at the time of award exceeds or would exceed what would otherwise be the amount, its amount is the market value.

24. Paragraph 7(4) provides that where relevant remuneration is or would be, when awarded subject to any restriction or restrictions; the amount of remuneration is calculated as if the restriction or restrictions did not exist.

25. Paragraph 7(5) defines "restriction" as any condition, restriction or other provision that means that causes the value of the relevant remuneration to be less than it would otherwise be.

26. Paragraph 8 defines "relevant banking employee".

27. Paragraph 8(1) provides that an employee of a taxable company is a relevant banking employee if the employee is employed in banking employment and the employee is resident in the UK in the 2009-10 tax year, or the banking employment duties are performed wholly or partly in the UK in that year.

28. Paragraph 8(2) defines "banking employment". It is employment which is wholly or mainly concerned with activities that are in paragraph 8(3).

29. Paragraph 8(3) defines relevant regulated activities.

30. Paragraph 9 covers the situation where an employee has multiple employments.

31. Paragraph 9(1) provides that the £25,000 limit that applies to chargeable relevant remuneration applies whether or not the employee has more than one relevant employment with the taxable company.

32. Paragraph 9(2) provides that where relevant remuneration is awarded to a relevant banking employee during the chargeable period by a number of associated taxable companies the £25,000 threshold is divided by the number of taxable companies.

33. Paragraph 9(3) provides the circumstances in which companies are associated.

34. Paragraph 10 covers payments made to intermediaries.

35. Paragraph 10(1) provides that this paragraph applies where an individual personally performs banking services for a taxable company, the banking services are not provided under a contract directly between the individual and the taxable company but rather involve another person ("the intermediary") and the circumstances are such that if the banking services were provided under a contract directly between the taxable company and the individual, the individual would be a relevant banking employee of the taxable company.

36. Paragraph 10(2) provides that the individual is to be regarded as a relevant banking employee of the taxable company.

37. Paragraph 10(3) provides where the intermediary does anything in relation to the individual, which if it were done by the taxable company during the chargeable period would be regarded as the award of relevant remuneration, is to be regarded as such.

38. Paragraph 10(4) defines "banking services". They are services wholly or mainly concerned with relevant regulated activities, whether directly or indirectly to which paragraph 8(3) applies.

39. Paragraph 11 provides for arrangements for future payments.

40. Paragraph 11(1) set out the circumstances where arrangements for future payments have been made. The circumstances are: arrangements made during the chargeable period by reason of the employee's employment as a relevant banking employee of the taxable company; the arrangements make provision for the money to be paid or money's worth or other benefit provided to or in respect of the employee under the arrangements; and were the money paid or money's worth or other benefit provided, it would be relevant remuneration awarded to or in respect of the employee during the chargeable period.

41. Paragraph 11(2) provides that the making of arrangements is to be regarded as the awarding of relevant remuneration to or in respect of the relevant banking employee by reason of their employment and the amount of the relevant remuneration is to be regarded as the amount of money which it is reasonable to assume will be paid or money's worth or benefit which will be provided as set out in paragraph 11(1).

42. Paragraph 12 provides for loans.

43. Paragraph 12(1) applies where a "relevant loan" is provided to or in respect of a relevant banking employee or a contractual obligation arises to provide a loan during the chargeable period by reason of the employee's employment as a relevant banking employee of the taxable company.

44. Paragraph 12(2) defines “relevant loan” as one where the main purpose or one of the main purposes of providing the loan or undertaking to provide it is the reduction or elimination of a liability of bank payroll tax or any other tax or national insurance.

45. Paragraph 12(3) provides that the loan is to be regarded as relevant remuneration awarded to or in respect of a relevant banking employee by reason of the employee’s employment during the chargeable period; the amount of relevant remuneration is the amount loaned or if that is not fixed, the amount which it is reasonable to assume will be loaned.

46. Paragraph 12(4) provides that a contractual obligation to provide a relevant loan is taken to arise even if the provision is dependent on compliance by the relevant banking employee with any conditions.

47. Paragraph 13 sets out anti-avoidance provisions.

48. Paragraph 13(1) applies this paragraph where relevant arrangements are entered into by one or more persons during the chargeable period and the main purpose or one of the main purposes of the relevant arrangements is a relevant tax avoidance purpose.

49. Paragraph 13(2) defines “relevant arrangements”. These are arrangements comprising the payment of money or provision of money’s worth or another benefit or any loan otherwise than during a chargeable period, or otherwise the giving of any reward which equates in substance to relevant remuneration otherwise than in the form of relevant remuneration.

50. Paragraph 13(3) defines a “relevant tax avoidance purpose”. It is the reduction or elimination of a liability to bank payroll tax that would exist if money was paid or money’s worth or another benefit or loan during the chargeable period or the reward, as referred to in paragraph 13(2)(b), is given in the form of relevant remuneration.

51. Paragraph 13(4) provides that bank payroll tax is to be determined as if the payment of money or provision of money’s worth or another benefit or loan during the chargeable period or reward were given in the form of relevant remuneration.

52. Paragraph 14 provides the “chargeable period”. It begins with the time of the announcement on 9 December 2009 and ends on 5 April 2010.

53. Paragraph 15 provides that bank payroll tax is due on 31 August 2010.

54. Paragraph 16 provides that bank payroll tax is not deductible when computing profits or losses for corporation tax.

55. Paragraph 17 provides that the Commissioners of Her Majesty's Revenue and Customs (the Commissioners) are responsible for the collection and administration of bank payroll tax.

56. Paragraph 18 provides for the administration of bank payroll tax.

57. Paragraph 18(1) allows the Commissioners to make regulations about the management of bank payroll tax.

58. Paragraph 18(2) states the provisions which may be included in such regulations. These include, for example, how information shall be provided to HMRC, and the penalties and interest that can be charged.

59. Paragraph 18(3) provides that the regulations may apply enactments which relate to the administration of any other tax or duty for the purposes of bank payroll tax, with or without modification.

60. Paragraph 18(4) allows the regulations to confer a discretion or make incidental consequential and other provisions

61. Paragraph 18(5) provides that regulations shall be made by statutory instrument.

62. Paragraph 18(6) provides that a statutory instrument containing regulations under paragraph 18 is subject to annulment in pursuance of a resolution of the House of Commons.

63. Paragraph 19(1) defines "UK resident bank" as a company resident in the UK that is not an excluded company, is authorised by the Financial Services Authority to carry out regulated activities, and in the course of a trade carries out activities which consist wholly or mainly of certain "relevant regulated activities" (defined in paragraph 20) or include accepting deposits.

64. Paragraph 19(2) provides that "UK resident bank" also includes a company that is resident in the UK, is not an excluded company and is a member of a partnership (which includes LLPs – see paragraph 25(1)) that is authorised by the Financial Services Authority to carry out regulated activities and in the course of a trade carries out activities which consist wholly or mainly of certain "relevant regulated activities" (defined in paragraph 20) or include accepting deposits.

65. Paragraph 19(3) defines "relevant foreign bank" as a company not resident in the UK that is not an excluded company, is authorised by the Financial Services Authority to carry out regulated activities and in the course of a trade carried on through a permanent establishment in the UK undertakes activities which consist wholly or mainly of certain "relevant regulated activities" (defined in paragraph 20) or include accepting deposits.

66. Paragraph 19(4) provides that "relevant foreign bank" also includes a company that is not resident in the UK, is not an excluded company and is a member of a partnership (which includes LLPs – see paragraph 25(1)) that is authorised by the Financial Services Authority to carry out regulated activities and in the course of a trade carried on in the UK undertakes activities which consist wholly or mainly of certain "relevant regulated activities" (defined in paragraph 20) or include accepting deposits.

67. Paragraph 20 defines "relevant regulated activity" and "excluded company" which are terms used in defining UK resident bank and relevant foreign bank in paragraph 19. A building society will, therefore, not be within the definition of a UK resident bank or relevant foreign bank but a building society will, nevertheless, be a taxable company for the purposes of the bank payroll tax in accordance with paragraph 3(c). Paragraph 20 also provides that the Treasury may by order amend paragraph 20 to modify these definitions. Such an order may have effect for any time on or after 9 December 2009.

68. Paragraph 21 defines a "member of a banking group".

69. Paragraph 21(1) provides that a company is a member of a banking group at any time if it is a member of a group (or was so at 9 December 2009) and any one of three conditions are/were met at that time.

70. Paragraph 21(3) sets out the first condition: the principal company of the group is a UK resident bank or a relevant foreign bank.

71. Paragraph 21(4) sets out the second condition: the principal company of the group is not resident in the UK, its activities consist wholly or mainly of the activities set out in paragraph 20(1) or include accepting deposits and those activities or that activity are/is carried on wholly or mainly in the course of a trade and any member of the group is a UK resident bank or a relevant foreign bank.

72. Paragraph 21(5) sets out the third condition: the principal company of the group is a company that is not resident in the UK, is a member of a partnership whose activities consist wholly or mainly of those listed in paragraph 20(1) or include accepting deposits and which are carried on wholly or mainly in the course of a trade and any member of the group is a UK resident bank or a relevant foreign

73. Paragraph 21(6) sets out the fourth condition: the principal company is the holding company (defined in sub-paragraph (7)) of another company and if that other company were the principal company of the group one of the first, second or third conditions would be satisfied.

74. Paragraph 21(7) – (9) defines certain terms used in paragraph 21. Sub-paragraph (7) makes clear that the principal company is a holding company ("H"), for the purposes of these provisions, if a company ("S") is

an effective 51% subsidiary of H and is not an effective 51% subsidiary of any other company that is not an investment company (defined in paragraph 23).

75. Paragraph 22 defines "relevant regulatory body" for the purposes of paragraph 21(8).

76. Paragraph 23 defines "investment company" as a company whose main business is making investments and includes any savings bank or bank for savings.

77. Paragraph 24 defines "financial trading company".

78. Paragraph 24(1) defines "financial trading company" as a company that is an "authorised person" for the purposes of section 31 of the Financial Services and Markets Act 2000, or if not an authorised person, carries on a trade consisting wholly or mainly in dealing in securities (defined in sub-paragraph (6)).

79. Paragraph 24(3)-(5) defines a "relevant foreign financial trading company" as a company not resident in the UK that carries on a trade through a permanent establishment in the UK which would be a financial trading company if the only activity it carried on were that carried on by the permanent establishment.

80. Paragraph 25 provides interpretations.

81. Paragraph 25(1) defines a number of terms including "arrangements"; "benefit"; "building society"; "the Commissioners"; "control"; "enactment"; "employment"; "market value"; "money's worth"; partnership; "permanent establishment" and "tax year 2009 – 10".

82. Paragraph 25(2) provides that section 170 (2) to 11 of the Taxation of Chargeable Gains Tax Act 1992 applies to this Schedule in respect of the interpretation of terms used in connection with "group", "principal company", "effective 51% subsidiary", "company" etc, in the same way as it applies to sections 171 to 181 of that Act.

83. Paragraph 25(3) provides that section 993 of the Income Taxes Act 2007 applies to this Schedule in respect of the interpretation of connected persons.

BACKGROUND NOTE

84. This Schedule introduces a new tax called the bank payroll tax. The tax is payable by taxable companies, broadly banking groups, banking entities and building societies, on "relevant remuneration" as defined, awarded to, or in respect of certain banking employees.

85. The rate of the bank payroll tax is 50 per cent. It will be payable by a taxable company. The employees themselves will not be liable to pay the new tax.

86. The tax will be payable on the excess above £25,000 of the aggregate of all relevant remuneration (whether in the form of cash, shares or other benefits) awarded in respect of any "relevant banking employee" (as defined) in the period commencing immediately after the announcement on 9 December and ending at the end of 5 April 2010. Payment will be due on the 31 August 2010.

87. The tax is not payable on the following, none of which are "relevant remuneration": regular salary or wages or regular benefits; shares awarded or granted under certain specified share schemes; anything payable or to be provided by a contractual obligation that arose before the announcement on 9 December.

88. The Schedule includes anti-avoidance legislation to prevent avoidance of the bank payroll tax through the use of loans, multiple employments with the same employer and intermediaries. The Schedule also includes a general anti-avoidance provision.