



CHANGES ON TAX ABUSE USING COMPANY INSOLVENCIES (DRAFT FINANCE BILL 2019-2020)

Issued 5 September 2019

ICAEW welcomes the opportunity to respond to the **draft Finance Bill 2019-20 legislation** consultation on **tax abuse using company insolvencies** published by HMRC on 11 July 2019.

This response of 5 September 2019 has been prepared by ICAEW's Business Law Department and reflects input from variety of experts, including from ICAEW's Insolvency Committee and Tax Faculty.

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EXECUTIVE SUMMARY

1. We responded to the original consultation on this proposal and were among several bodies to raise significant concerns. Please see our response ICAEW [Rep 72/18](#) for more detail.
2. We are not convinced that government has considered the potential ramifications of the proposal beyond increasing tax-take sufficiently, in particular as regards the possible impact on enterprise (including company restructuring). The proposed legislation gives HMRC draconian powers that may make doing business through UK incorporated companies significantly less attractive.
3. If there are gaps in company or insolvency law, they might better be addressed through reform of those laws rather than increasing the powers of HMRC, which already has extensive powers not available to ordinary creditors. Further consideration or guidance may be required regarding any implications for office holders of insolvent companies where HMRC might recover as a creditor of the company, but also have rights of recovery against individuals under this legislation.
4. We do not believe that individuals should be made liable as a result of certain circumstances arising absent some wrongdoing on their part. In particular, paragraph 3 of the regulations makes individuals jointly and severally liable if they have a 'relevant connection' in the previous five years merely by being directors, participators, members, shadow directors or shadow members of the companies (or LLPs) referred to. In the case of participators in particular, there is no requirement for them to be involved in or responsible for the behaviour of the companies that has led to insolvency etc. Similar concerns arise in relation to paragraph 5.
5. There seem to be a number of drafting shortcomings in the provisions on rights of review and appeal, but as the overall impact is to extend powers to HMRC in ways that we do not support, we do not comment on those matters of relative detail here.
6. While we believe that the legislation could benefit from further consultation and review generally, we have provided some detailed comments below. These largely relate to definitions; it is essential that the powers are closely defined to provide maximum certainty to business and minimise risk of unintended consequences.

SPECIFIC COMMENTS

7. **Para 1(1).** This uses the expression "potential insolvency" of a company, but this is inconsistent with the operative provisions which refer to "serious possibility" of a company becoming subject to an insolvency procedure (Paras 2(3)(b), 5(3)(b)). This latter phrase needs to be properly defined. If it is intended to encompass events already defined in company/insolvency law, then it would be preferable to use those terms. If not, it would be helpful if guidance could be provided to explain the distinction.
8. **Paras 2(4)(a), 3(10), 5(4).** The term "participator" as defined in s454 of CTA includes individuals who are shareholders and lenders. It might be an appropriate term in the context of close companies, but it seems to be too wide in this context where liability may arise without any fault on the part of an individual. For instance, most of the population invests in listed companies. We suggest this needs to be removed as a "relevant connection" or redrafted to apply only to shareholders in close companies or those with controlling shareholdings.
9. **Para 2(6).** Condition D includes cases where "there is likely" to be a tax liability referable to tax avoidance. We believe that this is too open ended (and it is unclear whether it refers to a liability that may or may not exist or to the likelihood that an existing liability is referable to the avoidance).
10. **Para 2(7).** Condition E is that there is a serious possibility that some or all of the relevant tax liability will not be paid. We believe that further guidance will be required as to how this would be established.

11. **Para 3(2).** This requires HMRC to issue a notice within two years after it first became aware of facts sufficient for them reasonably to conclude that conditions A to D are met. We believe that the time should run from the time HMRC “ought to have been aware” of the facts if earlier, to be equitable with provisions applying to individuals.
12. **Para 3 (3)(b)(and para 8).** We suggest that Members’ Voluntary Liquidations (‘MVL’) (ie, solvent liquidation) should be excluded from the definition of ‘insolvency procedure’.
13. **Para 3(4).** This condition provides that the new company must be carrying on a business “similar to” that of the old companies. Further explanation of what is meant by this would be useful. Also, if a person is “participator” merely through investing in, say, listed companies, this may still be too broad just to catch “phoenix” companies (which we assume was the intent).

SUGGESTED AMENDMENT

14. Delete clause and Schedule.