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Ian Clayton
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By email: treconresponse@bis.gsi.gov.uk

Dear Mr Clayton

Transforming Regulatory Enforcement: Freeing up Business Growth

ICAEW is pleased to respond to your request for comments on *Transforming Regulatory Enforcement: Freeing up Business Growth*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW REPRESENTATION

TRANSFORMING REGULATORY ENFORCEMENT: FREEING UP BUSINESS GROWTH

Memorandum of comment submitted in September 2011 by ICAEW, in response to the Department for Business Innovation & Skills consultation paper Transforming Regulatory Enforcement: Freeing up Business Growth published in June 2011

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper Transforming Regulatory Enforcement: Freeing up Business Growth published by the Department for Business, Innovation & Skills on 24 June 2011, a copy of which is available from this [link](#).

WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 136,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community, as well as other ICAEW technical and policy volunteer committees. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

MAJOR POINTS

5. We are pleased that the Government and BIS in particular, are examining regulatory enforcement, with a view to decreasing business burdens and freeing up business growth. We hope that this current exercise will be effective in promoting a more proportionate approach to their activities. However, much attention has already been taken in the attempt to deliver proportionate regulation in recent years – any remaining deficiencies are likely to be more a matter of effective implementation than in a need for further principles or codes.
6. Regulatory burdens on business are not only caused by regulation per se, but also by changes in regulation, with all the consequent need for re-examination and redesign of existing systems and retraining of staff. We recognise that these proposals are aimed at regulators rather than businesses directly, but this general principle still applies, since regulators' costs are ultimately borne by business, directly or indirectly, as well as the direct costs resulting from changes to businesses' relationships with their regulators. The current Regulators Compliance Code has been in place for less than five years, and was produced after detailed consideration and consultation with business organisations as well as other stakeholders. If it is not considered to be being effective, it may be more useful to consider ways in which it could be better promoted or enforced, rather than any but the most essential changes being made to it.
7. We are also concerned that the proposed principles for regulatory enforcement are inadequate as a replacement for the current Regulators Compliance Code. We do not consider that the proposed principles will be sufficient to promote a risk-based, proportionate and targeted approach to regulatory inspection and enforcement. While transparency and accountability are useful tools in promoting a proportionate regulatory system, we do not think that their presence should absolve regulators from direct requirements to provide proportionate regulation.
8. In particular, we believe that regulation should not be imposed at all, unless it is consistently and fairly enforced. The objectives of regulation should be to provide appropriate protection to the public, in the most cost effective way possible. The objectives of regulators should be to

ensure compliance with necessary regulation in the best way possible, and to advise Government on the amendment of regulatory requirements where they are unenforceable or unnecessary, with a view to amendment. Cost effectiveness should be judged taking into account the aggregate of costs of the regulatory authorities themselves; the compliance costs of the businesses which are regulated; and the costs (or other damage sustained) by those elements of the public that are damaged by the failure of regulation or lack of regulatory standards.

9. We are dismayed by an increasing tendency for public sector regulatory authorities to concentrate on the ex-post investigation and punishment of failure of businesses to comply with regulations, sometimes to the complete exclusion of less formal and less high profile advisory services to businesses - including those provided by monitoring or supervisory activities. The objective of regulators should be the protection of the public (not high visibility 'enforcement') and this can often most effectively be provided by ex-ante supervision and assistance to businesses to help them comply. While we understand the need to reduce public sector costs, these should not be made at the expense of increased costs on the general public or on private sector businesses, particularly where these exceed the costs saved in the public sector. Such actions would decrease, rather than increase, growth in the private sector.

RESPONSES TO SPECIFIC DISCUSSION THEMES

1: Proposed principles of regulatory enforcement

10. We agree that it is helpful to have a small number of principles of regulatory enforcement, on which all enforcement activity should be based, though we do not think that these should supersede or be separate from the Regulators Compliance Code. We note that currently the following regulatory enforcement principles are proposed:
- greater accountability;
 - recognising and promoting best practice; and
 - greater transparency.
11. While we agree that these principles may be useful, we do not think that they adequately encapsulate the main purpose of regulatory enforcement, which we believe to be to ensure that the purpose for which regulation has been put in place has been achieved, to the greatest extent possible within appropriate resource constraints. No regulation should be imposed on business unless it has clear objectives in terms of the protection of the public or another equally clear public interest outcome. Enforcement should be aimed at promoting the achievement of that outcome, fairly and proportionately. There is no other justification for either the regulation or its enforcement.
12. The least constructive of regulatory requirements are those which are complied with by businesses with the integrity and diligence to discover what they are and work to comply fully with them, but which are not enforced on businesses without that integrity or diligence. This not only fails to provide the public interest outcome which the regulatory burdens were intended to provide, but also seriously damages the economic environment and the integrity of business as a whole, by giving a competitive advantage to businesses without an appropriate level of integrity or diligence. For this reason, it is inappropriate to have a set of principles for regulatory enforcement which fail to address the effectiveness and independence of supervision and enforcement.
13. The current Regulators Compliance Code takes a more comprehensive approach to the principles that should be taken to regulation, adopting a holistic approach spanning all the work of regulators, in providing desirable regulatory outcomes. The Code was developed after a comprehensive exercise of consultation and consideration. If its application is inadequate, we

suggest that consideration of ways in which it could be better explained to, and imposed on, regulators may be more appropriate than changes to the Code itself.

14. For example, we note that the text of the discussion paper approaches the principle of 'accountability' in terms of ensuring that businesses have the opportunity to inform and help shape how enforcement is managed. This is clearly vital to effective and proportionate enforcement: businesses have the best experience of their service or product delivery and what underlies it, and hence on how its regulation may be most appropriately enforced in a way that is not replaceable in any other way. However, this is not the only way in which regulators should be accountable for their enforcement. Regulators also need to be accountable to those sectors of the public, or public service, whose interests are served by the regulation concerned. Where regulation is aimed at assisting a particular public service interest (such as HMRC or law enforcement authorities) enforcement activities should also be accountable to them. The general public may be less able to ensure that their direct interests are well served by regulatory enforcement, but their representative bodies and political representatives should have the necessary access to ensure that regulatory enforcement is accountable to their needs as well. The current Regulators Compliance Code's existing principle of 'accountability' spans this range more effectively than the explanatory text included in the Discussion Paper.
15. We agree wholeheartedly with the regulatory enforcement principle of recognising and promoting best practice. However, we suggest that this is, or should be, a constituent part of the Regulators Compliance Code requirements to take a risk based approach and for enforcement to be proportionate to the nature of the offence. Any inadequacies should be addressed more as a matter of improving compliance with existing requirements, than changing the requirements.
16. We also agree wholeheartedly with the regulatory enforcement principle of transparency. Businesses should easily be able to find out what their regulatory duties are, what compliance support they can expect, and how they can expect the enforcement system as a whole to be reviewed and reformed. Again, however, this is already a constituent part of the Regulators Compliance Code requirements and any inadequacies should be addressed by improving compliance with existing requirements.

2: Current experience of regulatory enforcement

17. ICAEW undertakes regulatory and professional enforcement through our disciplinary functions, with additional enforcement carried out on our members through the operating bodies of our oversight regulator the Financial Reporting Council (FRC) and in particular the Accountancy & Actuarial Discipline Board (AADB). If you would like further information on the ways in which we carry out our own disciplinary functions, and the ways in which we work with the FRC and AADB to try and minimise over-inspection, unfair regulatory action, and similar problems of regulatory enforcement, please let us know.
18. Our members inform us that they are experiencing an increasing tendency for regulators to take a very narrow approach to regulatory enforcement, where it is held to encompass the punishment of past compliance failures (including sometimes very substantial fines) rather than assisting businesses to comply, which can provide a much more cost effective means of protecting the public (albeit one which may be less high-profile). This is described by some regulators as taking an 'enforcement only' approach, which appears to be interpreted as precluding any resources used for monitoring or advisory activities. We do not believe this to be a productive or effective development.
19. In addition, our members report to us that one of the most counter-productive of regulatory enforcement mechanisms that they encounter is when they have to endure regulation by more than one regulatory authority covering broadly the same area, but where these authorities fail to cooperate with each other. An example of this is in the enforcement of the anti-money

laundering legislation, where ‘whole firm’ monitoring of some of our members is carried out by ICAEW, the FRC’s Audit Inspection Unit (AIU) and (where the firm has an investment business licence) from the Financial Services Authority (FSA). We suggest that wherever regulation is enforced by statute, provision is made with in that statute requiring different regulatory authorities to cooperate, and further requiring a ‘comply or explain’ approach to any duplication of regulatory inspection visits.

- 20.** We are also aware of an emerging area of potential regulatory duplication, and other unnecessary regulatory enforcement burdens, in the area of the development of multi-disciplinary practices (MDPs) set up as alternative business structures under the Legal Services Act. The Solicitors Regulation Authority (SRA) has stated that it expects to regulate all MDPs that it licenses ‘as law firms’ even where they are dominated by members of a different profession, with only a single solicitor or very low proportion of them. We are currently trying to ensure that we can work effectively with the SRA and its oversight regulator the Legal Services Board (LSB) to ensure co-operation, and that such firms are regulated according to the risks posed by accountancy firms (with a small number of lawyers providing client services) and not according to the risks posed by conventional law firms. Unnecessary dual regulation of such firms by legal services and accountancy regulators could also damage the development of freer markets in legal services which was one of the main objectives of the Legal Services Act.
- 21.** One particularly difficult area of regulatory enforcement is where difficult compliance decisions have had to be made because the needs of one regulatory authority are difficult to reconcile with those of another. An example of this are in enforcement of the requirements of the data protection legislation and the anti-money laundering legislation, where the tensions over decisions on how much personal data to collect or retain can sometimes involve difficult judgements. Needless to say, disagreements between regulatory authorities should never be allowed to adversely impact businesses subject to regulation by them both. Clear guidance should be provided to regulated businesses on how to reconcile differing compliance objectives and the consequent training and systems requirements, and regulatory enforcement should take this guidance into account.

3: Reviewing cumulative burdens and the scope to improve front line delivery

- 22.** We address various areas of potential or actual duplication, contradictory advice, confusion and excessive burdens at a number of points in this response.
- 23.** We would welcome the opportunity to participate in any initiatives to review regulatory burdens in those sectors where our members function, or which impact generally on business or the financial affairs of individuals. However, it should be noted that participation in such reviews should not be allowed to itself develop into a significant burden on the private sector. The main responsibility of ensuring that their regulatory burdens are not excessive should be on the regulatory authorities themselves.
- 24.** We are very concerned that the imposition of sunset clauses on new regulators, and the possible abolition of existing regulators should be carried out with care. As noted above, no regulation should be left in place for which there are no, or inadequate, enforcement mechanisms.

4: Providing local accountability to challenge delivery on the ground

- 25.** We have no problem with the proposal that there should be local accountability for local enforcement of regulation. However, this should not be allowed to replace national consistency or accountability.

5: Earned recognition for effective compliance measures

6: Increasing the scope for self-management through co-regulation

7: Increasing capability and industry ownership through professional standards

26. We agree that every effort should be made to ensure that regulators take into account compliance measures already taken into account by businesses, including private sector self-monitoring and other enforcement activities. As pointed out in the discussion paper, the accountancy professional bodies (and specifically ICAEW) already hold much of the responsibility for ensuring compliance with appropriate professional standards by our members. We believe this to be the most cost effective means of ensuring compliance. Occasional instances of regulatory failure are inevitable in any area of business which is not over-regulated, but we do not believe that the record of government regulatory authorities is better in terms of the avoidance of failure than the private sector. And private sector regulators do tend to be less burdensome than public sector regulators.

8: Setting clear requirements and supporting compliance through assured guidance

27. We agree with the proposal that regulators should encourage or undertake the development assured guidance, and that businesses should not be sanctioned where they have followed such guidance, but have fallen short of compliance in some other way. However, the full value of this approach does depend on the regulator being given sufficient resources that they are able to work effectively with the business to correct any shortcomings, rather than simply imposing a fine.

28. We have a good example of the value of assured guidance, in the development of sectoral guidance on compliance with the anti-money laundering requirements. Businesses in various parts of the regulated sector for AML purposes have been provided with guidance which is approved by HM Treasury ministers following a rigorous regime of public consultation, consultation with other AML supervisory bodies and with law enforcement authorities. AML approved guidance achieved almost universal approval, during the recent review of AML regulation. Please let us know if you would like further information on the AML guidance for the accountancy profession, or the procedures undertaken to develop it.

9: Setting clear standards of service for regulators and supporting capability

29. We agree that all public service regulators should have clear standards of service.

30. Enforcement officers should have access to all the skills and expertise appropriate to their own regulatory environment. This should encompass both:

- appropriate enforcement skills such as investigatory techniques and requirements for natural justice and civil liberties; and
- knowledge of the business which they are regulating, the risks of non-compliance and the public-interest damage that could result from non-compliance, as well as existing self-monitoring and other control techniques available in that business area.

31. Regulators should have sufficient resources to have easy access to (and ideally to themselves to employ) specialists in both these areas, where they are not available in a single individual.

32. We frequently refer to the Regulators' Compliance Code, and believe it to be a very useful document in holding public sector regulators to account in the undertaking of their regulatory activities.

33. We also believe the Regulators' Compliance Code to be useful to private sector regulators and professional bodies (such as ICAEW) in providing guidance and a benchmark for their

regulatory activities. However, we do not consider it either necessary or desirable for private sector regulators to be bound by the Code (as has recently been imposed on the private sector AML supervisory bodies) as this can impose unnecessary burdens on such bodies in its own right, the costs of which inevitably have to be passed on to the members of those bodies. Private sector regulatory authorities typically have the close involvement of their own members to ensure that they carry out their activities both effectively and cost effectively. The motivators of effectiveness are not only the desire of such members to preserve their common reputation but the threat of the imposition of public sector regulation if it is not effective.

10: Improving regulation for businesses by extending the benefits of the Primary Authority scheme

- 34.** We are pleased at the success of the Primary Authority scheme and agree that it should be extended and promoted. However, it should be extended in conjunction with a general requirement for all regulatory authorities (including local authorities) to cooperate with each other in their regulatory enforcement activities.
- 35.** For example, while we agree that a national chain of retail outlets should have a single primary authority responsible for their regulatory enforcement, this should not be allowed to result in very divergent regulatory standards developing in a single local authority area. A single-outlet local business should never be put in a position where they are held to very much higher regulatory standards than the branch of a national chain which is operating next door to them. Local authorities should be required to cooperate in ensuring broadly consistent standards across the whole country.

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