THE INSTITUTE OF CHARTERED ACCOUNTANTS
IN ENGLAND AND WALES

17 November 2009

Our ref: ICAEW Rep 115/09

Your ref:

By email
FAO Jason Yianni
Workplace-pension.reform-consultation@dqp.gsi.gov.uk

Dear Jason

WORKPLACE PENSION REFORM FROM 2012: DRAFT REGULATIONS BATCH 2

The Institute of Chartered Accountants in England and Wales is pleased to respond to your request for comments on Workplace Pension Reform from 2012: Draft Regulations Batch 2.

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

Yours sincerely

Liz Cole
T +44 (0)20 7920 8746
F +44 (0)20 7920 8400
E liz.cole@icaew.com

THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

ICAEW REPRESENTATION

ICAEW REP 115/09

Workplace Pension Reform From 2012: Draft Regulations Batch 2

Memorandum submitted in November 2009 by The Institute of Chartered Accountants in England and Wales in response to a consultation paper '*Workplace Pension Reform: Completing The Picture*' published on 24 September 2009 by the Department of Work and Pensions

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INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales ('ICAEW') welcomes the opportunity to comment on the consultation paper '*Workplace Pension Reform: Completing The Picture*' published on 24 September 2009 by the Department of Work and Pensions at http://www.dwp.gov.uk/docs/workplace-pension-reform-completing-the-picture-consultation240909.pdf with an impact assessment at http://www.dwp.gov.uk/docs/workplace-pension-reform-ia-sept09.pdf. We note that our response to the consultation on the first batch of regulations '*The Pensions (Automatic Enrolment) Regulation 2009*', is available at http://www.icaew.com/index.cfm/route/166085/, and that the government's response has been published[1].

WHO WE ARE

2. The ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.

3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.

4. The Tax Faculty of the ICAEW's Ten Tenets for a Better Tax System which we use as a benchmark are summarised in the Annex.

MAJOR POINTS

5. We remain concerned about the administrative burdens, implementation and compliance costs that these reforms will impose on employers, which will not even be counterbalanced by any guarantee that contributors will get back what they have paid in. We note our recommendation in our response to PADA's investment consultation, in which we suggest deferred index-linked annuities for the default fund, which we believe would provide more simple and certain, if modest, returns[2].

6. We consider that a better – and far simpler – method of providing additional pensions for workers would be for the calculation and collection of contributions to be based on the existing national insurance contributions regime. We accept that the current demographic trend in the worker/pensioner ratio suggests that a pay-as-you-go system for pensions may, in the long term, be unsustainable. However, collecting contributions by aligning their calculation with existing NIC earnings bands and collecting them using the existing NIC machinery, with such additional amounts used to fund additional (ring-fenced) pensions, would avoid some of the administration issues that the proposed reforms will introduce. Enforcement would also be easier. It would also reduce the work needed on the government side. We suspect that at present HMRC systems would not be able to cope with real time ring-fencing (including transfer of monies and data to PA schemes) of monies collected that would be needed to fund an additional pension regime but consider that it would cost UK plc considerably less overall to adequately fund a NIC collection system capable of processing contributions collected in this way than the current proposals of establishing a whole new level of bureaucracy.

[1] http://www.dwp.gov.uk/docs/pae-regulations-2009-govt-response-sept09.pdf.
[2] ICAEW REP 83/09, available at http://www.icaew.com/index.cfm/route/167093/.

7. We consider that, if the reforms are to go ahead as proposed (auto-enrolment into personal accounts, with staged employer registration and contribution rate increases), the obligations set out in the regulations are on the whole commensurate with what would be needed satisfactorily to run such a regime. However, the compliance costs will be considerable and we fear the additional employer burden (simply in administrative terms, ie ignoring the cost of employer contributions) will act as a real barrier to business growth, which is unlikely to be helpful to the recovery of the UK economy. As we explain below, we consider the impact assessment to be totally unrealistic, as the implementation and administration costs will be much greater than indicated.

8. The short consultation period – only half of the twelve weeks recommended in the Cabinet Office Code of Practice on Written Consultations – is unacceptable given the volume of documentation and the government's own estimate of the cost on British business.

9. In view of the compliance complexities for employers, we consider that the penalty regime should be operated with a light touch until the new regime has bedded in, and that this should be reinforced by way of a Ministerial announcement.

GENERAL POINTS

10. The sheer size of this consultation document (215 pages), the enormous number of complex regulations that it contains, which are not complete, (47 pages) and the impact assessment (65 pages) by themselves underline the substantial administrative compliance and cost burdens that these reforms will impose on employers and the government departments charged with implementing and operating this new pensions savings regime.

11. Complications that will affect all employers include:

    - auto-enrolment and triennial re-enrolment of employees,
    - registration and triennial re-registration of employers,
    - calculating and paying over contributions (and conducting appropriate reconciliations),
    - dealing with refunded contributions in respect of opt-outs,
    - lower earners who fluctuate above and below the lower limit,
    - staged contribution rates and implementation dates, neither of which coincide with the payroll year end, and
    - possible annual changes in the qualifying earnings threshold and changes to the national minimum wage rate.

12. Compliance will be difficult, time-consuming and therefore costly for employers. Mistakes will be easy to make, so the government and/or the pensions regulator will need to publish detailed and easy-to-follow guidance to enable employers and pension fund trustees correctly to apply the rules and employees to understand their entitlements (and the development and distribution of such guidance will, in itself, be a costly exercise). This guidance must be made available *in final form* at least twelve months before any of the requirements comes into force, so as to allow time for software development, testing and implementation.

13. In view of the compliance complexities for employers, we consider that the penalty regime should be operated with a light touch during the staging in period and for new employers, and that this policy should be confirmed by way of a Ministerial announcement. We also think that DWP/PADA/tPR should run courses/roadshows for employers to explain the new regime and what employers need to do to comply.

14. Added to this, because the contributions of those for whose benefit this regime is stated to be intended are being invested on a money purchase basis, there is no guarantee that employees will get back even the value of the contributions that have been paid in; that is to say, even

though this a scheme that has been established at the government's behest, employees will bear the investment and longevity risks. We feel that this should be made clear for the benefit of the less sophisticated investor at whom this regime is aimed. We refer to our recommendation in our response to PADA's investment consultation (see above), in which we suggest deferred index-linked annuities for the default fund, which we believe would provide simple and certain, if modest, returns.

15. As we have said previously, a simpler way of achieving the government's stated objective of encouraging those who do not presently save for their retirement do so, and do so in an environment that makes people feel that they will not run the risk of being cheated and/or over-charged, would be to introduce an additional deduction from earnings that is worked out on the same basis as national insurance contributions and use the money collected, which would be ring-fenced, to fund additional pensions, perhaps using deferred index-linked annuities as a default. This would not only enable employees who are paid at least either the NIC lower earnings limit or (according to the design chosen) the primary, ie, employees, earnings threshold to save for their retirement but would obviate the creation of extensive additional work – and the need to learn extensive new rules – for employers. A similar voluntary system could be set up for the self employed.

16. We are disappointed that the Cabinet Office Code of Practice on Written Consultations (the 'CoP') dated November 2000 has not been followed on this important and substantial consultation, with only six weeks being allowed for interested parties to submit responses instead of the 12 weeks recommended in Criterion 5 of the CoP. We have been told that this is to enable specifications to be provided as early as possible to suppliers. However, as we have said previously in other fora, we consider that it is important to ensure that new rules are right from the start, and can be operated in practice without unnecessary burden, and therefore we are disappointed that delay in issuing the consultation document has resulted in such a short response period for such an important (and vast) consultation.

17. It would have saved time for respondents if the consultation document had included page cross references between the narrative, questions and regulations. We have included our own, below.

18. Some detailed points on the regulations:
    (i) More regard needs to be had to the payroll year: employer staging, staging of re-auto enrolment, changes in contribution rates, et al need to be able to be aligned with payroll years or other periods more convenient to employers, at least once the initial employer registration date has passed.
    (ii) Obliging employers to re-register with tPR every three years is unreasonable.

19. We also wonder if sufficient thought has been given to some of the issues, eg expatriates, irregular earnings, deemed employees, mariners, etc, raised in our paper[3] submitted to PADA in December 2008 on employer burdens, the solution to some of which lies in the national insurance contributions legislation, although we acknowledge that there is still time for some of these to be included in further batches of regulations. Similarly, the UK needs to ensure that this new regime complies with EU legislation (eg pensions Directives and social security regulations) and treaty obligations.

20. The costs in the impact assessment are substantially under estimated. For example, it is suggested in Table 1.5 that the average administrative cost for a micro firm (1-4 employees) will be £100 in year 1 and £10 per year in future years. The £10 in successive years implies that it will cost such employers 83.33 pence per month to work out the qualifying earnings, calculate employers' and employees' contributions based on the bandings, record these in the payroll, make payment to the scheme manager with a payslip showing how much is attributable to each employee and deal with any new employees, auto enrolments, etc.

[3] ICAEW REP 145/08, available at http://www.icaew.com/index.cfm/route/162535/

Assuming a charge-out rate for a payroll clerk of £50 per hour (which would perforce include overheads etc) that means he can spend exactly one minute on these tasks per month. If the employer has four employees that means one quarter of a minute per employee per month ignoring any other relevant tasks such as dealing with new employees, leavers, et al. This is totally unrealistic.

21. Many small employers do not run businesses. Those employing carers or nannies and gardeners etc will also be compelled to auto-enrol their employees. 'Accidental' employers such as the elderly and disabled who are being given budgets to arrange their own carers are likely to find it difficult enough to cope with being an employer, let alone having to understand and operate a new workplace pensions regime. The impact assessment needs to take account of such employers who are likely to have to pay someone to deal with their payrolls especially once they come within the personal accounts regime.

22. Something else not covered in this consultation is the manner in which employers will be expected to communicate with PADA, tPR, scheme providers, etc. We understand that electronic communication will be preferred. HMRC has been making compulsory e-filing of employer end-of-year returns and in-year returns. If consideration is being given to outlawing paper in connection with these workplace pension reforms, it should be borne in mind that there is a sizeable minority of employers who do not yet have access to the internet, or where they do, have no access to broadband. HMRC's research report: *'The Extent and Nature of the use of Computerised Accounting by Businesses to meet their VAT and Corporation Tax Obligations'* published in December 2008 states that 10% of businesses do not have access to a computer. Alternative access using an internet café or library carries security risks and raises confidentiality issues. Whilst it is arguable that such employers could use an agent to e-file on their behalf, this will necessitate their having to pay for this service, which again needs to be taken into account in the impact assessment.

23. Specific comment has not been invited on the proposal in paragraph 11 that 50 employers are randomly selected to be subject to the employer compliance laws ahead of schedule. This is fundamentally unfair and the stated reason of allowing the regulatory authorities to prepare for full implementation does not justify it. A test-check group of volunteering employers with the administrative burdens funded by the authorities, and no legal obligation to comply, is the appropriate method for testing the authorities' abilities.

RESPONSES TO SPECIFIC QUESTIONS

Employers' Duties (Implementation) Regulations 2010

Staging (see pages 12, 21 *et seq* and 106 *et seq)*

Q.1 (Regulation 2) – The staging duty date needs to specify on which date in a particular month an employer needs to auto-enrol. Should this be the first day of the month regardless of which day that falls? Alternatively, should it be the first working day of the month, or the first Friday of the month?

24. We consider that employers should be permitted to auto-enrol employees on the first day of their first pay period following the date on which the employer's duty to auto-enrol arises (the employer's staging date). This will obviate the need for employers to calculate contributions based on a proportion of pay due in the pay period.

25. Where some employees are weekly paid and some monthly, then this will mean that the date from which the weekly paid employees are enrolled will perforce differ slightly from that for monthly paid employees by a few days. We do not see this as a problem and that the alternative of splitting pay periods would unreasonably increase burdens on business.

26. Para 20 of the consultation says that employers who are running more than one PAYE scheme will have a common staging date for all schemes. We suggest that DWP liaises with HMRC to find out which PAYE schemes are run by the same employer. We should also welcome clarification of the position for groups of companies – we consider that it should be left to such entities to decide when they will start (ie groups should have the flexibility to manage the alignment of staging dates within their group of companies).

Q.2 (Regulation 3) – If an employer wants to volunteer to bring forward their automatic enrolment date, tPR needs to be confident that the employer has allowed themselves enough time to get their scheme in place. A missed automatic enrolment date will trigger enforcement activity, which is not in the interests of employers or tPR. How should tPR establish that the employer will be ready? For example, should an employer be required to have a scheme in place before applying? Or should they be able to sign a declaration that they are confident they will be able to discharge their duties?

27. We consider that employers should be able simply to sign a declaration that they are confident that they will be able to discharge their duties.

The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010

Automatic enrolment processes (see pages 39 *et seq* and 109 *et seq)*

Q.3 (Regulation 4) – This regulation is designed to ensure that workers without qualifying earnings who may, exceptionally earn enough to gain jobholder status for isolated normal pay periods, but will not earn over the threshold of the qualifying earnings band for the whole year (accidental jobholders) do not fall under automatic enrolment. Does it inadvertently apply to workers with a zero hours contract?

28. We assume that by 'zero hours contract' you mean a contract in which the employee only gets paid if he is called out to work.

28. We think that the answer to this question depends on what would be the normal pay periods for such individuals, which would depend on the terms of their employment contract and what happens in practice. For example, we should imagine that in the normal case, the jobholder would submit a timesheet and be paid as part of the weekly/monthly payroll like everyone else so would have a weekly/monthly pay period. However, some zero hours workers may work and be paid sporadically. There are NIC rules that cover odd pay periods which might repay DWP consideration (although we acknowledge that the NIC regime is not straightforward in this area and is dependent on individual circumstances)[4].

29. We consider that, for workers whose earnings fluctuate above and below the lower limit, the policy should be 'once they are in they stay in, but if they opt out they stay out', by which we mean:
    - once a worker has qualifying earnings in any given pay period, if they do not opt out, they should remain eligible and (in respect of any pay periods where they earn above the lower limit) pay contributions, but
    - those who opt out (when they first have qualifying earnings in any given pay period) need not then be auto-enrolled if they subsequently dip below and then later earn more than the lower limit, at least until the next re-auto-enrolment date (the employer can decide whether keeping a record of the opt-out is easier than re-enrolling). A key point is that for 'recurring employees

[4] The national insurance contributions ('NIC') rules can be found in the early part of Part 2, Social Security (Contributions) Regulations 2001 (SI 2001/1004), explained in *Tolley's National Insurance Contributions 2009-10* Chapter 34 *Earning Periods – Pay Patterns*.

who are employed and then re-employed by the same employer (eg students working holidays or working mums working term times) an opt-out should be permitted to last for a succession of employments with the same employer.

30. It would make sense for workers who may earn above the lower limit to have the ability to opt out in advance, eg to lodge a 'standing order opt out' with their employer, to avoid the complication of refunding contributions.

Q.4 (Regulation 15) – In the special circumstances outlined in sections 6(3) and 6(4) where a third party has taken action that either results in the jobholder no longer being an active member or results in the scheme ceasing to qualify, the regulations require employers to re-enrol jobholders immediately. Are there any circumstances where action could be taken by a third party to achieve these outcomes without the employer knowing about it in advance? We welcome your views on the timescales for re-enrolment in these scenarios.

31. We should welcome clarification from the DWP of the circumstances in which such a scenario might apply.

Scheme quality (see pages 46 *et seq* and 119 *et seq)*

Defined benefit schemes

Q.5 (Regulation 27) - The test scheme is one that re-values its pensions, in accordance with the final salary method set out in section 84(1) of the Pension Schemes Act 1993. We would welcome your views on the extent to which a career average scheme should be required to provide for revaluation? For example, should schemes that provide only discretionary revaluation be able to qualify provided the discretion is exercisable by the trustees or managers of the scheme or if the scheme makes provision for discretionary revaluation in the statement of funding principles or in some other way for schemes that are not required to have statements of funding principles.

32. We are not commenting on this question, which we believe is more a matter for the Society of Pension Consultants and the actuarial profession.

Q.6 (Regulation 29) - Changes to State Pension Age mean that it will gradually increase to 68. Should the appropriate age in the test scheme similarly increase over time and if so how should the increase be applied? We would welcome views on our proposal in regulation 29.

33. We agree that, in the interests of simplicity, the test age should gradually increase from 65 to 68 over three decades so that it keeps pace with State Pension Age. We consider that it should not take account of any particular individual's state retirement date, owing to the complexity and associated administrative burden and costs for employers of keeping track of retirement age for each employee on the basis of each employee's date of birth.

Hybrid schemes

Q.7 (Regulation 32) - We are keen to maximise the contributions made to schemes in which the member accrues a lump sum with which to secure an annuity or pension. We would welcome views on how we can ensure that a member's pension fund maintains its value over time? Our first proposal, would require annual accruals of 16% and annual increases linked to prices and capped at 2.5 per cent - as already required by Chapter 2 of Part 4 of the Pension Schemes Act 1993. (see regulation 28). Our alternative second proposal would require annual accruals of 8 per cent of qualifying earnings and increases equivalent to 3.5 per cent over and above those that are already required under regulation 28. Which is the

right approach? If you disagree with both, how should the value of the fund be inflation-proofed?

34. We are not commenting on this question, which we believe is more a matter for the Society of Pension Consultants and the actuarial profession.

Please note the additional consultation questions in the defined benefit and hybrid guidance, Annex G [page 155].

35. We are not commenting on these questions, which we believe are matters to be considered by the Society of Pension Consultants and the actuarial profession.

Non-UK schemes

Q.8 (Regulation 38) – We would welcome your views on the extent to which non-UK pension schemes will be able to participate as qualifying schemes for the purposes of the Act.

36. As a general point, DWP needs to take into account EU law and treaty obligations as the UK cannot discriminate against schemes established in any other EEA member state.

37. The Personal Accounts contributions are to attract 1% tax relief, and whilst a criterion for the participation of non-UK schemes might be that they can participate on the same basis as UK schemes provided they are approved by HMRC as eligible for UK tax relief, this is unlikely to be possible with many overseas schemes, which are for example Registered Overseas Pension Schemes or Employer-Funded Retirement Benefit Schemes.

Q.9 (Regulation 38) – We are keen to ensure individuals who are automatically enrolled into non-UK schemes are protected from risks which may be higher with such schemes. These risks could include fraud, excessive charges, inappropriate or reckless investments, and difficulty accessing entitlements on retirement or on a transfer. Do the provisions of this regulation provide adequate protection for individuals being automatically-enrolled into non-UK schemes? What other safeguards might help? Would draft guidance on the use of these schemes be helpful and if so what should its scope be?

38. As a general point, EU law prohibits discrimination. Consideration needs to be given to bilateral social security treaties that have non-discrimination clauses. There are several EU directives on cross-border pensions.

39. Fraud, excessive charges and inappropriate investments are all risks with UK schemes. There is a substantial body of law, including the Pensions Act 2004, governing EU cross-border schemes and, generally, they are permitted as long as they are regulated in their home member state.

Q.10 (Regulation 38) – One option for restricting the use of non-UK schemes to safeguard jobholders would be to allow schemes to qualify only if they are eligible for a form of UK tax relief. This would mean that in most cases these schemes could only be qualifying rather than automatic enrolment schemes, because UK tax relief is available only to migrants who were both resident outside the UK when they joined and also members of the non-UK scheme when they became UK residents. We would welcome your views on this.

40. As in the answers to the previous two questions, account will have to be taken of the UK's EU obligations. In addition, it's not just the tax relief that needs to be considered – non-UK employers are not subject to UK law unless they have a presence here.

Q.11 (Regulation 38) – When a scheme does not qualify for UK tax relief, the total contributions are potentially less than the full 8 per cent of qualifying earnings which will be the standard for defined contribution schemes. We would welcome your views on how we can ensure jobholders receive the full amount.

41. As part of the automatic re-enrolment cycle, the managers of schemes in this situation could be required to submit formal certification setting out the rates of contributions made. Allowance would of course have to be made for the effects of lost tax relief.

Postponement (see pages 53 *et seq* and 124*)*

Q.12 (Regulation 40) – We are keen to ensure that short term workers do not miss out on pension saving through employers' use of postponement. We propose that postponement may only be used for jobholders who will achieve active membership of a qualifying scheme. In other words, the employer must expect the jobholder still to be in post beyond the postponement period. Does this change provide sufficient protection for short term workers? Are there circumstances where short term workers could still miss out on pension saving due to postponement? If so, how might these be addressed?

42. We agree that there should be a legitimate expectation that the employee will still be in post on the conclusion of the postponement period (and that employees in respect of whom this is not the case should be auto-enrolled into the personal accounts scheme). We suggest that there should be a maximum period for the postponement period, and further suggest that this should be twelve months.

Information to individuals affected by transitional period (see pages 55 and 126*)*

Q.13 (Regulation 41) – Jobholders whose employer decides to make use of the transitional period to gradually adjust to the reforms will be given information about the scheme and date when they will become scheme members and, the right to opt in earlier if they wish. Should this information be required within one month rather than the two months prescribed in the regulations?

43. We think that the two months prescribed in the regulations is appropriate.

Q.14 (Regulation 41) – We would also welcome views as to whether there are any other key pieces of information which should be given to these individuals?

44. There are no other pieces of information that employers should have to provide. The main thing that is needed is a (one sheet at most) government/scheme provider-produced handout for employers to provide to employees setting out from where they can obtain guidance.

Certification (pages 57 *et seq* and 127 *et seq)*

Q.15 (Regulations 47- 51) - We would welcome views on the detailed operation certification process.

45. Regulation 48 (3)(c) - A certificate should remain in force potentially until the employer ceases contributions or the scheme winds up. The decision to wind up a scheme may be made some time before contributions cease or winding up actually commences.

46. Regulation 49 (5) - We suggest replacing the words '*a reasonable indication*' by '*reasonable assurance*'

47. Regulation 50 - The certification process is important for employers as it allows the employer and scheme not to go back and rectify for trivial underpayments or timing errors. The parameters set out in this regulation are really complicated. The parameters mean that very small underpayments would make it difficult for schemes to adopt this approach.

48. It would give much greater flexibility to have prescribed the minimum contribution limits outside the legislation, enabling the DWP to provide guidance setting out how the various tests could be complied with (but permitting insignificant, short-lived shortfalls provided they are rectified going forward).

Please note the additional consultation questions in the certification guidance, Annex G [page 155].

49. The guidance sets out the test and paragraph 23 sets out the shortfall rules. The appendix on sampling should be revisited as the sample sizes could be deemed to be too high and some schemes may have very strong internal controls which could mean that employers would feel justified in reducing their sample size to below that suggested in the DWP guidance paper. We should welcome a meeting with the DWP to discuss the proposed guidance in detail.

Rules for Hybrid Schemes

Q.16 Rules for hybrid schemes. We would welcome views on whether:

- **we have captured all of the possible permutations of hybrid schemes; and**
- **the descriptions accurately reflect the type of hybrid schemes that we are trying to capture and the proposed quality requirements set out in the rules and guidance are workable for them.**

50. We are not commenting on this question.

Employers' Duties (Registration and Compliance) Regulations 2010

Registration (pages 79 *et seq* and 138*)*

Q.17 (Regulation 3) – In general, does the proposed registration process achieve the right balance between minimising additional burden and enabling tPR to check compliance effectively? Will the process work for small and large employers, employers with existing provision and those encountering pensions for the first time? Will it work for employers being staged in and new employers who set up afterwards?

51. The registration process itself is not unreasonable for employers. The main problem is the timing. Payrolls work on a 6 April to 5 April basis. Mid-year start and change dates will create burdens on employers. An initial non-April implementation date albeit unwelcome and disruptive will be just about acceptable on the basis that it is a one-off. Retaining the non-April date for employer re-registrations (if these are retained, see answer to Q21) and auto re-enrolments et al will create an ongoing burden, as well as mismatches for quality equivalence certification, payroll tax reconciliations and other employer payroll procedures which are presently cost-effectively undertaken as one operation as part of the employers start and end-of-payroll year routine. We have been told and accept that PADA, tPR and scheme providers are unlikely to have the operational capacity to process all new entrants and deal with employer and employee queries if the initial implementation date for all employers is on the same date but consider that the impact on government departments and scheme providers of bunching triennial auto-re-enrolments may be over estimated (as jobholders who have opted

out are unlikely to change their original decisions). We therefore believe that employers should have the option of changing the date for all auto-re enrolments (and re-registrations if these are retained – see above) to be effective, for example, from the start of April triennially (see paragraph 53 below).

52. We also think that staging in the rates of employer and employee contributions is likely to create enough confusion and potential for innocent mistakes on its own and this will be exacerbated by the change dates being set in mid-year. Ease of application will be key to making the new regime work and different rates starting on different dates does not sit happily with minimising compliance burdens. Again, if it is wished to stage the contribution rates then the change date should be the start of the payroll year. The October date favoured by government departments which was intended as a means of helping businesses know when new legislation comes into force is not appropriate to the payroll cycle.

53. We therefore suggest that employers should be able to change their anniversary 'staging' dates, in the same way as companies can change their accounting reference dates, in order that they can on an ongoing basis carry out their PA obligations using a more convenient timetable. Many employers are likely to want to change to the tax/payroll year, but others with existing pension schemes might want to align their PA year with their existing pension scheme year to facilitate their quality equivalence obligations, and yet others might wish to align with their financial reporting year or their remuneration year. Anti-avoidance measures should be able to prevent abuse (eg in relation to accounting reference dates, restrictions provide that, broadly, periods must exceed 6 months, be less than 18 months, and the date can more easily be brought forward than postponed – see section 392 of the Companies Act 2006).

Q.18 (Regulation 3) – We propose requiring a number of pieces of information during registration. Is there any information that does not appear to be relevant?

54. The information required for registration does not seem unreasonable.

Q.19 (Regulation 3) – We propose requiring registration 9 weeks after the auto-enrolment date. Is this workable?

55. We think that this is workable.

Q.20 (Regulation 3) – We propose requiring new businesses to register 3 months after paying PAYE income in respect of their first worker. Will this work in practice? Will employers have a PAYE scheme number in time?

56. Three months is not unreasonable. However, the question of whether employers will have a PAYE scheme number in time should be directed to HMRC as (although the current position appears to be satisfactory) there have in the past been delays in employers receiving PAYE scheme numbers from HMRC, and employers registering within the three months should not be in technical breach of the legislation (let alone be penalised by tPR) if they are unable to provide a PAYE scheme number through no fault of their own.

57. Where the receipt of new PAYE scheme numbers is delayed there is a practical issue that we suggest DWP will need to consider if the registration process is to be computer-based and dependent on a PAYE scheme number, viz, if the employer has not received a PAYE scheme reference number, he will be unable to register online.

Q.21 (Regulation 4) – We propose asking employers to re-register every 3 years to enable tPR to check compliance with automatic re-enrolment. Does this seem reasonable?

58. It is unreasonably onerous to oblige employers to re-register with tPR once they have registered initially, particularly as tPR is not a body with whom the employer is likely to be in regular contact. A duty to undertake something every three years on a date that does not coincide with the payroll year end date will easily be forgotten. [We consider that it should be sufficient for employers to notify changes in details to their scheme provider, from whom tPR can obtain up to date employer details as and when necessary, for example if it wishes to undertake a review.] tPR should also be able obtain information from HMRC.

59. It is our view that the obligation to check compliance and monitor schemes should remain firmly with tPR and no additional burdens and costs should be imposed on employers.

Record-keeping (pages 82 *et seq* and 142*)*

60. As a general point on record keeping, we note that (as a result of the review of HMRC Powers), the required period to retain records for tax purposes reduces to 4 years from [April 09], which wil therefore differ from the 6 year limit proposed in Regulation 8 (at p144).

Q.22 (Regulations 6 and 7) – In general, does the proposed set of record-keeping requirements seem reasonable? Will there be particular difficulties in maintaining these records for certain types of employers or schemes, or in particular industries? Are there any that are in your view unnecessary and if so why?

61. We think that the requirements in regulation 6 (p142) are overly prescriptive, and go against the move towards a more principles based approach. We consider the regulations should require sufficient records to be kept, with the detail set out in guidance.

Q.23 (Regulations 6 and 7) – Are there records other than those set out here that you think should be included?

62. We have not identified other records which should be included.

Q.24 (Regulation 7) – We would like schemes to keep records of opt-outs in order to support enforcement action in relation to issues such as inducements. Schemes would only need to record instances of opting out or ceasing membership for each employer. Does this seem reasonable?

63. Yes it does. It is not clear as to whether the policy intention is that opt-outs would transfer to a new employer where TUPE applies. This would affect who would be the appropriate record-keeper.

Payment failures (pages 85 *et seq* and 144*)*

Q.25 (Regulation 9) – For the purposes of unpaid contributions notices we are proposing that tPR use a due date of the 19th of the month following the month in which contributions were deducted, or when employer contributions were due. This is intended to minimise the need for tPR to get detailed information from individual schemes. We propose an exception for defined benefit schemes, and the defined benefit components of hybrid schemes, where it is common for the employer due date to be longer than the 19th day of the following month. Are there any other categories of schemes which typically may have longer employer due dates in their schedules?

64. We consider that in order to help employers to pay on time, the HMRC due date of payment of PAYE and NIC should be adopted, which is 19th of the month for cheques and cash payments and 22nd for electronic payments.

65. We also reiterate our suggestion to align pensions pay periods (calendar month) with those for tax (5th of the month). This will be administratively easier for employers (especially those without their own scheme) and easier for tPR to monitor against HMRC information. We note that employers with existing schemes will be a small minority post-2012, and the situation of such employers should not be given disproportionate consideration. We also believe that this would give rise to a (one-off) transitional administration burden for such employers, which we do not believe would be as costly as requiring all employers going forward to operate with two different bases for pay periods.

Q.26 (Regulation 10) – We have proposed that tPR cannot include in a compliance notice or unpaid contributions notice a requirement to pay both employer and worker contributions until a "prescribed period" of three months have passed. Would limiting in this way tPR's ability to use this specific discretionary power strike the right balance between protecting the savings of individuals and not having a disproportionate impact on employers?

66. We consider that three months is a reasonable period as it is broadly consistent with that for occupational pension schemes. However, the Code of Practice threshold for schemes is 90 days, and it would be helpful if the two limits were aligned.

Q.27 (Regulation 11) – We have proposed that where tPR requires an employer to calculate and pay interest on contributions, that this be calculated at 4.9% + RPI. Does this measure of interest provide fair and appropriate restitution? If not, what would be a better approach?

67. We assume that the seemingly odd figure of 4.9% has been selected as this is the long term equity rate. However, we think that there is greater merit in keeping the rate simple so would recommend a straight 10% fixed component only and the addition of the words 'per year'.

Penalties (see pages 88 *et seq* and 146)

68. As a general comment on penalties, the new regime is going to be tricky for employers, especially smaller ones with little expertise in payroll, let alone pensions. We consider that in view of the difficulties that employers will face in complying with the enormous amount of new legislation, the penalty regime should be operated with a light touch until employers have had time to become familiar with their obligations and that the Minister should make a Parliamentary Announcement to this effect.

Q.28 (Regulation 13) – We propose a flat-rate fixed penalty of £500 for non-compliant employers. In most cases, this will have been preceded by informal contact from tPR and a statutory compliance notice. Escalating penalties are also available to tPR for very serious or persistent non-compliance. Does the proposed level of fixed penalty seem proportionate?

69. £500 will seem high to a micro employer, for example someone who employs a nanny, in contrast to a large employer. DWP might like to consider the penalty regime recently introduced by HMRC for mandatory e-filing for employers where in the first year, the penalty for non-compliance for very small employers is £nil.

Q.29 (Regulation 13) – We could offer a discount on the fixed penalty level for those who pay the penalty promptly. However, it is not practical to tie this to whether the underlying non-compliance has been rectified, given the range and type of behaviours that could be required to achieve compliance with the employer duties. Is it desirable and reasonable to offer such a discount? Would it be likely to increase rates of compliance with the employer duties or only would it only affect compliance with the requirement to pay a penalty?

70. We feel that a discount is likely to encourage speedier payment. We recommend that it be kept simple, as for parking fines. Consideration should be given to following the model being introduced by HMRC for penalties where penalties can be suspended and cancelled after a certain time if behaviour is addressed and compliance improved.

Inducements (see pages 91 and 149)

Q.30 (Regulation 18) – We propose that tPR can look back over 12 months when investigating inducements where a complaint has not been received. There may nevertheless be cases where persuasive evidence emerges only after 12 months. Is this a reasonable limit or should tPR be able to take compliance action over a longer period where it uncovers evidence of a breach of the inducements prohibition?

71. We are content with the proposal that the time limit be 12 months.

The Occupational and Pensions Schemes (19 Day Rule) (Amendment) Regulations 2010 (see p93-98 and 152)

Q.31 (Regulation 2) – We are proposing to lengthen the due date for contributions deducted during the joining window and opt out period by approximately one month to minimise costs involved in making refunds to those who opt out. Would this change significantly increase risk to members' benefits? If so, is this risk justifiable in relation to the cost/burden saving achieved for employers and schemes?

72. We note with approval that this approach would be optional – employers may take advantage of the longer period or choose not to and then use the refund approach, depending on which is better suited to their systems.

Q.32 (Regulation 2) – Payment schedules would need to be updated to reflect the new due dates where a jobholder was auto-enrolled. How costly would it be to make these changes, as well as initial system changes? Are the costs likely to be outweighed by the savings from reduced refunds?

73. Regarding the revision of payment schedules, this is a straightforward exercise and unlikely to cost much. However, what is going to be very expensive is changing deeds and rules and scheme literature.

E peter.bickley@icaew.com and liz.cole@icaew.com

ANNEX

THE TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.

2. **Certain:** in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.

3. **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.

4. **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.

5. **Properly targeted:** when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.

6. **Constant:** Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.

7. **Subject to proper consultation:** other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.

8. **Regularly reviewed:** the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.

9. **Fair and reasonable:** the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.

10. **Competitive:** tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as **TAXGUIDE 4/99**; see http://www.icaew.co.uk/index.cfm?route=128518.