



## STRENGTHENING THE PENSIONS REGULATOR'S POWERS: CONTRIBUTION NOTICE AND INFORMATION GATHERING POWERS REGULATIONS 2021

Issued 29 April 2021

ICAEW welcomes the opportunity to comment on the Strengthening The Pensions Regulator's Powers: Contribution Notice and Information Gathering Powers Regulations 2021 published by Department of Work and Pensions on 18 March 21, a copy of which is available from this [link](#).

This ICAEW response of 29 April 2021 reflects consultation with the Business Law Committee which includes representatives from public practice and the business community. The committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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## KEY POINTS

1. We have strong reservations about the DWP's proposed 'employer resources test' for Contribution Notices. In particular, we are concerned that key elements of the test are to be determined by a subjective judgement of the Regulator, which itself is then the body taking disciplinary action if the test is met and therefore we fear this could give rise to human rights claims and undermine confidence in the Regulator.
2. We also have some more detailed concerns about the proposed approach (see Q2 below), including a lack of apparent verification and foreseeable difficulties in applying the approach in different company circumstances.
3. We acknowledge that there is no easy alternative approach - valuing a company is not an exact science and can be a volatile exercise. This complexity means that it would be more appropriate, in our opinion, for the subjective tests to be made by independent experts or, if this would be disproportionately costly, the subjective tests could be replaced with factual tests for which evidence can be tested by those facing disciplinary action.

## ANSWERS TO SPECIFIC QUESTIONS

### CHAPTER 1: THE EMPLOYER RESOURCES TEST

#### ***Question 1. Do the draft regulations achieve the stated policy aim?***

4. We have strong reservations about the DWP's proposed 'employer resources test' for Contribution Notices (see more detail below). We are also concerned that key elements of the test are items which are conclusively determined by a subjective judgement of the Regulator, which itself is then the body taking disciplinary action if the test is met (See draft regulation 2(3)). This is not a normal allocation of power in a legal test with significant consequences and may give rise to human rights claims against the Regulator. Challenges to the Regulator on such grounds may be time-consuming and may divert its resources from its regulatory functions. Losing such a case is likely to undermine confidence in the Regulator.

#### ***Question 2. Can you see anything that means that these draft regulations will not work?***

5. Our more detailed concerns regarding the DWP's proposed approach are as follows:
  - there seems to be a flaw (unintended omission?) as it takes one year's 'normalised' profits and compares it with the NAPBT for a subsequent period. The calculation requires the application of a multiple in both cases to arrive at an enterprise value, or difference therein, which is a measure of available resources.
  - it is stated that under the approach 'the value of the resources of the employer is to be determined, calculated and verified'. It is not clear though how verification occurs.
  - Stage 1 will give results that are not meaningful such as in these circumstances:
    - A business with a large asset base or high net assets and low/no profitability (Property, Agricultural land...)
    - A high-growth business with low/no profits.
    - A business whose solvency is guaranteed by other/ group companies, or shareholders.
    - A business with existing leverage at very low interest rates – that business' NAPBT will be only slightly affected.
  - It is not clear why tax is not taken into account - it's not exceptional or non-recurring.
  - At Stage 1, adjustments due to COVID-19 will potentially be numerous and significant.

- An impact assessment should at least show whether the number and value of CNs are expected to be more or less than at present.

***Question 3. Do you foresee any unintended consequences in this approach, if so please provide details?***

6. See Q1 above regarding potential human rights claims against the Regulator, drains on the resources of the Regulator possible undermining of confidence in the Regulator.

***Question 4. If the approach is not workable, please provide your views on what would be an appropriate alternative approach?***

7. We acknowledge that there is no easy alternative approach - valuing a company is not an exact science and can be a volatile exercise. This complexity means that it would be more appropriate, in our opinion, for the subjective tests to be made by independent expert advisers. Should the Regulator's exploration of the use of expert valuation indicate that it would be disproportionately costly, or, if this is deemed unduly costly it could consider replacing the subjective tests with by factual tests for which evidence can be tested by those facing disciplinary action.

**CHAPTER 2: THE PENSIONS REGULATOR (INFORMATION GATHERING POWERS AND MISCELLANEOUS AMENDMENTS) REGULATIONS 2021**

***Question 5. Do you agree that the requirements in draft regulation 3(1) cover all the essential information that the interviewee should be made aware of? If not, please indicate which additional items of information you consider should be included.***

8. No comment.

***Question 6. Do you think that the draft regulations ensure that The Pensions Regulator has the same inspection powers under section 73(6)(d) to (f) regarding any employer of a multi-employer scheme as it has where there is only a single employer?***

9. No comment.

***Question 7. Do you agree that £400 is an appropriate level for a fixed rate penalty under new section 77A of the Pensions Act 2004?***

10. No comment.

***Question 8. Do you agree it is appropriate that the fixed penalty under section 77A is aligned with the fixed penalty under section 40(1)(d) of the Pensions Act 2008 for failure to comply with similar information gathering requirements in connection with Automatic Enrolment?***

11. No comment.

***Question 9. If not, please state the level you think would be appropriate and why.***

12. No comment.

***Question 10. Do you agree that £200 is an appropriate level for an escalating penalty to be imposed on an individual under section 77B?***

13. We are concerned that the draft legislation on escalating fines leaves open two contradictory interpretations and would prefer this to be clarified definitively. The current

draft uses the term 'daily rate' in the table. But does the daily rate apply to each day for the period where the period extends to the length specific in column one, or does each day have a daily rate as at the date it is imposed. If a person failed to comply for 4 days, is the penalty:

(1) £500 for day 1, £1000 for day 2, £1500 for day 3 and £2000 for day 4, total £5000;

or

(2) 4 x £2000 because that is the daily rate on day 4, total £8000.

14. If it is (1) then we would suggest that in draft regulation 6(4), 'when' is replaced with 'specified in the first column on which', so it would read as follows:

*'(4) The second column of the table shows the daily rate payable in respect of each day specified in the first column on which the notice is in force.'*

15. If it is (2) then we would suggest that in draft regulation 6(4) adding 'in the total period' after 'each day' and combining the last row of the table so it applies to day 20 'and each subsequent day', so regulation 6(4) would read as follows:

*'(4) The second column of the table shows the daily rate payable in respect of each day in the total period when the notice is in force.'*

**Question 11. Do you agree it is appropriate that the escalating penalty for an individual under section 77B is aligned with the escalating penalty under section 41(1)(d) of the Pensions Act 2008 for failure to comply with similar information gathering requirements in connection with Automatic Enrolment?**

16. See Q10 above for our comments on the proposed escalating penalty regime.

**Question 12. If not, please state the level you think would be appropriate and why.**

17. See Q10 above for our comments on the proposed escalating penalty regime.

**Question 13. Do you agree that the escalating penalty regime proposed is appropriate for persons who are not individuals who continue to fail to comply with The Pensions Regulator's requests for information? If not, please indicate the level of penalty you think is appropriate and why. If you think a different approach for non-individuals is more appropriate, please give details along with your reasons.**

18. No comment.