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Our ref: ICAEW REP 47/12

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Dear Ms Woolley

**Workplace Pension Reform – Automatic Enrolment and European Employers**

ICAEW is pleased to respond to your request for comments on the above named consultation.

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

### WORKPLACE PENSION REFORM – AUTOMATIC ENROLMENT AND EUROPEAN EMPLOYERS

Memorandum of comment submitted in April by ICAEW, in response to DWP consultation paper *Workplace Pension Reform – Automatic Enrolment and European Employers* published in February 2012

<b>Contents</b>	<b>Paragraph</b>
Introduction	1
Who we are	2-4
Key point summary	5
General comments	6-13
Answers to consultation questions	14-17

## INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper [Workplace Pension Reform – Automatic Enrolment and European Employers](#) published by the Department for Work & Pensions on 20 February 2012.

## WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working 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 138,000 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. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

## KEY POINT SUMMARY

5. We welcome the proposal in the consultation document to exclude dual status workers from auto-enrolment which if implemented will be a truly deregulatory measure but are unclear as to why the condoc proposal is confined to the EEA and are concerned that a number of other cross-border issues remain to be clarified. For example, the guidance published by the Pensions Regulator does not seem to follow the legislation in Pensions Act 2008 and certain other impacts on cross-border employers and employees and of cross-border social security issues seem to be undefined to the extent that there remain uncertainties for employers as to how to comply and a potential danger of retaliation by other countries.

## GENERAL COMMENTS

6. We welcome the proposal in the consultation document to exclude dual status workers from auto-enrolment, which if implemented will be a truly deregulatory measure because this will ensure that employers will not have to auto enrol those individuals who have the status of both jobholder (ie a worker who is working or ordinarily works in Great Britain under the worker's contract) and qualifying person (an individual whose place of work under contract is sufficiently located in an EEA state other than the UK so that the relationship with the employer is subject to the social and labour law relevant to the field of occupational pension schemes of the other EEA state).
7. However there are other issues concerning cross-border employments which remain to be addressed, including the points below, some of which we have raised in the past including in meetings with the former Personal Accounts Delivery Authority.
8. We should welcome clarification of how auto enrolment will impact on those who are not covered by the proposal in the condoc, for example:

- individuals who are employed in other EEA states (eg Spain) but are assigned by their employer to work for a limited period in the UK;
  - individuals who are employed abroad in non EEA states (eg the USA) but are assigned by their employer to work for a limited period in the UK;
  - short term business visitors who spend various periods of time in the UK, albeit not having been formally assigned to work here;
  - individuals who are working partly outside the UK but not in an EEA country, eg the USA; and
  - inbound assignees who are members of both an existing foreign scheme (for example a USA 401K plan) as well as now needing to be a member of a UK qualifying auto enrolment pension plan.
9. We recommend that there should either be a blanket de minimis limit for international assignees and short term business visitors where someone is working in the UK only for a relatively limited amount of time, or an exemption for non-EEA dual status workers similar to that in the condoc, as absent this there will be uncertainty in many cases, resulting in additional time/effort being required of employers, additional costs and potential inadvertent non-compliance. We suggest that in the interests of harmonising with another employer duty, employees with NIC E101/ A1/ certificates of coverage should be treated as outside auto enrolment.
10. The use of ‘or’ in section 1(1)(a) Pensions Act 2008 which imposes the obligation to auto enrol on a ‘a worker ... who is working or ordinarily works in Great Britain ...’ seems to us to be the source of many difficulties. This is because it brings within the obligation to auto enrol any worker who works in Great Britain for any period, however short, with no exemption for an employee who is working in Great Britain only for a few days. Had the legislation used the word ‘and’ instead of ‘or’ then matters would be a lot clearer and the employee who works in Great Britain only for a few days would be exempt.
11. The Pensions Regulator’s (tPR) guidance [\*Assessing the workforce: how to Identify the different categories of workers\*](#) (accessible via tPR [detailed guidance webpage](#)) seems at pages 7-10 to be giving guidance as if the wording of s.1(1)(a) Pensions Act were different from what it is and we should welcome clarification of how the following points reconcile with the legislation.
- First the guidance refers to the UK, whereas the Pensions Act 2008 refers to Great Britain, which is a smaller area. Even if Northern Ireland has identical legislation, we consider that the guidance should distinguish between the two territories.
  - Secondly, the guidance refers to ‘wholly working in ...’ whereas the first leg of the legislation in s.1(1)(a) refers simply to ‘working’, which does not appear to us to impose a requirement to work anywhere ‘wholly’ either geographically or timewise. Para 28 of the guidance says ‘Where a worker is not wholly working in the UK, it will need to be established whether the worker “ordinarily works in the UK”’. We are unable to reconcile this with the wording of the legislation, as we can find no requirement therein to a worker having to work ‘wholly’ anywhere.
12. We should welcome clarification of the how in practical terms it will be possible to enforce the auto enrolment obligations and contributions liability on foreign-based employers. We note that the PR guidance says that employers should take into account the nationality of the employer and wonder whether this is acknowledgement of the fact that there is no ability to force non-British employers to comply.

13. We should also welcome clarification of how the following EEA social security issues are being covered off, and that consideration has been given to whether/how they apply outside the EEA:
- Are auto enrolment contributions regarded as a social security contribution in overseas countries? Provision of full pension benefits is a feature of some overseas social security systems. On that basis Great Britain would need to take account of exemptions via the E101/A1 procedures.
  - If the UK view is that these contributions are not part of the social security system a challenge is possible, as happened a few years ago when the French authorities tried to collect CSG and CRDS contributions from employees holding E101 certificates (France lost and were forced to return the contributions wrongly collected).
  - What do the various bilateral social security agreements say about auto enrolment contributions?
  - UK employees going to non-social security agreement countries are generally exempt from local pension arrangements. If the UK imposes liabilities then other countries may retaliate.
  - We note that the new EU social security provisions for aircrew are to define a home base for social security purposes which will give in many cases the opposite answer to what the DWP expect to happen for auto enrolment.

## **ANSWERS TO CONSULTATION QUESTIONS**

**Q1. Do you agree that all employers should be exempt from automatically enrolling dual-status workers into a workplace pension scheme?**

14. Yes we do because this will be a truly deregulatory measure.

**Q2. Do you agree with the estimates provided in summary form and in full in the Impact Assessment which accompanies this consultation of:**

- a. the number of dual-status workers likely to be affected by an exemption; and
- b. the average earnings of dual-status workers.

**If not, please provide estimates and supporting information.**

15. We have insufficient data to enable us meaningfully to answer this question.

**Q3. Can you provide any evidence relating to the number of firms (a) employing dual-status workers and (b) the size of such firms?**

16. We have insufficient data to enable us meaningfully to answer this question.

**Q4. Do you have any information or evidence:**

- on the current level of employer pension provision among dual-status workers; or
- to suggest that the administrative cost of auto-enrolling a dual-status worker would be disproportionately greater than the cost of enrolling a non dual-status worker?

17. We have insufficient data to enable us meaningfully to answer this question.

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