

**Securing Compliance with Real Time Information – Penalties
HM Revenue & Customs consultation and draft legislation
for inclusion in Finance Bill 2013**

Response by the Low Incomes Tax Reform Group

1 Executive summary

- 1.1 The Low Incomes Tax Reform Group (LITRG) welcomes the opportunity to respond to the consultation document ‘Securing compliance with Real Time Information – penalties’ and the draft legislation set out in the draft Finance Bill 2013.
- 1.2 We support HM Revenue & Customs’ (HMRC’s) stated aim which is to encourage compliance, to ensure non-compliant employers do not gain a significant advantage and to not create needless burdens for compliant employers and HMRC.
- 1.3 Although there are many points to be welcomed, it is very disappointing that one of the key concerns LITRG raised during the consultation that closed on 6 September 2012¹ has not been listened to. The legislation in respect of the late filing and late payments penalties will mainly take effect from 6 April 2014; the legislation in respect of inaccuracy penalties will take effect from the date of Royal Assent to Finance Bill 2013. This means that although

¹ ‘Securing Compliance with Real Time Information – Late Filing and Late Payment Penalties’, HM Revenue and Customs (June 2012), see http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PRO D1_032115

most employers will have one complete tax year's experience of Real Time Information (RTI) when the penalties for late filing and late payment take effect, they will only have six months experience of RTI alerts of defaults (commencing October 2013). In addition, most employers, ie the majority that have not participated in the pilot, will have less than one full year in RTI before inaccuracy penalties commence. LITRG had asked for there to be at least one year without penalties for all employers and ideally a start date of 6 April 2015.

- 1.4 Certain groups of employers will not join RTI until April 2014, for example, care and support employers and practising members of religious societies or orders whose beliefs are incompatible with the use of electronic communication. There is insufficient detail at this point to know whether all penalties will apply to such employers from April 2014. We would hope that employers in these groups are not subject to penalties for late filing, late payment and inaccuracy until April 2015.
- 1.5 LITRG is particularly concerned about paper filers (allowed to file on paper by statute) and the digitally excluded. It is likely that penalties will be applied manually for paper filers. We would have expected to see more detail on the operation of manual penalties at this stage of the process.
- 1.6 LITRG welcomes the fact that there is a digital exclusion group for RTI, and that it is considering issues for the digitally excluded. It is however worrying that these discussions have not yet produced anything firm (as far as we can tell), given that late filing and late payment penalties are going to be introduced from April 2014 (and even earlier for inaccuracies). As a result, we remain concerned that there are genuinely digitally excluded employers, who might still fail to get online. There clearly is no point in penalising people for failure to do the impossible and any such action by HMRC will result in reputational damage.
- 1.7 LITRG welcomes the relative simplicity of the system now suggested. LITRG is pleased, for example, that there is one date of introduction for late filing and late payment penalties for all employers (rather than a phased introduction across different classes of employer), as this will make the penalty framework and its introduction easier for employers to understand. The only exception we would suggest is for those employers who will not join RTI until April 2014 (see para 1.4 above). We would have liked to see inaccuracy penalties in respect of RTI only being applied from the same date, ie from April 2014 at the earliest.
- 1.8 While emphasising the new penalties for late filing, it is equally as important to remind employers of their obligations with regards to accuracy. Otherwise, there is a danger that employers could receive the message (even if that is not the message HMRC wishes to send out) that it is more important to submit returns on time than for them to be accurate. Nevertheless, the decision to levy inaccuracy penalties from the date of Royal Assent to Finance Bill 2013 may be a step too far in the opposite direction. There is a danger that this may encourage employers to delay submissions to ensure accuracy, defeating the object of introducing RTI.
- 1.9 There is little detail on the channels that will be used for notifications of defaults and penalties. We reiterate that any move to make notification of penalties and consequent

appeals an online process must be optional for employers and not mandatory. We recommend that employers should have to opt in to purely online communications rather than opt out. This is an essential safeguard for the digitally excluded and for those who do not regularly check the online system or access emails.

2 Introduction

2.1 *About us*

2.1.1 The LITRG is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of disabled people and carers, low income workers, pensioners, migrants and students.

2.1.2 It is often thought that the tax and financial affairs of those on low incomes are simple. This is far from the truth. A combination of complex laws and administrative systems not designed with the low income user in mind often make life difficult for those we try to help.

2.1.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

2.2 *General Comments*

2.2.1 Our particular concern is that HMRC processes adequately cater for two groups: those who are permitted to file RTI on paper under statutory exemptions; and those, often small employers, who are digitally excluded but otherwise willing to comply with tax obligations.

2.2.2 The latter group must not be penalised for failing to file electronically if to do so is virtually impossible or excessively difficult for them¹.

On or before

2.2.3 As we have noted in previous RTI submissions, we fear that the burden of RTI and the threat of penalties may force some employers (often those who engage typically low-paid workers

¹ When looking to introduce or alter the obligations of citizens relating to tax administration the government should bear in mind the concepts of 'virtual impossibility' or 'excessive difficulty' established at an EU level in respect of various areas of domestic legislation. It has been used in a number of cases in connection with the principle of effectiveness and rights of taxpayers, mostly in relation to repayments of tax.

such as cleaners and catering staff) into non-compliance; or into seeking other ‘schemes’ of forcing staff to work through service companies for example to shift the compliance burden away from themselves. This is clearly undesirable and has potentially disastrous consequences for the employees.

Impact Assessment

- 2.2.4 It is HMRC’s view that there will be ‘no impact on compliant employers ... as penalties only affect those who fail to comply with their legal obligations’. This fails to take into account the differing reasons for non-compliance; the nature of RTI means that previously compliant employers may become non-compliant (see the section on Digital exclusion below). We seriously question whether the impacts and costs have been assessed thoroughly.

Digital exclusion

- 2.2.5 We reiterate the comments made in our consultation response of September 2012.¹

3 Securing Compliance within RTI

- 3.1 LITRG is disappointed that the new late filing and late payment penalties will be introduced as soon as April 2014, as this means that although most employers will have been within RTI for one year before these penalties start to apply, they will only have experienced six months (from October 2013) of notifications of defaults without penalties prior to the introduction of penalties. LITRG suggested that there should be a full year of notifications without penalties to ensure the new regime is as educational as possible. The current proposals mean employers will only have six months of the ‘educational phase’ during which to refine their systems instead of a full year.
- 3.2 LITRG raised the concern that the late filing penalties should not force employers to place the timely submission of returns above their accuracy. HMRC have acknowledged this point,² but we are concerned that the introduction of inaccuracy penalties from the date of Royal Assent to Finance Bill 2013 may encourage employers to delay submissions to ensure accuracy, defeating the object of introducing RTI for the first year. It would be better to

¹ Securing Compliance with Real Time Information – Late Filing and Late Payment Penalties – LITRG Response – LITRG (September 2012), para 2.2.7 – 2.2.21, see http://www.litr.org.uk/Resources/LITRG/Documents/2012/09/120906_LITRG%20Response_RT%20Penalties_final.pdf

² Securing Compliance with Real Time Information – Late Filing and Late Payment Penalties – HM Revenue & Customs (December 2012), Ch. 3, para 4, see http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PRO_D1_032465

implement late filing, late payment and inaccuracy penalties simultaneously, ie from April 2014 at the earliest.

- 3.3 In particular, we are concerned that inaccuracy penalties will be applied in the tax year ending 5 April 2014, when in essence, there has been a timing error by the employer, caused by lack of familiarity with the on or before requirement. For example, an employer might inadvertently miss the FPS for an *ad hoc* overtime payment. The following FPS for routine salaries goes ahead as normal, but does not take account of the *ad hoc* payment. In the subsequent FPS, the oversight is noticed and the cumulative figures are corrected to take account of the *ad hoc* payment. We would hope that in a situation like this, where the inaccurate FPS is a result of a timing error, caused by the employer not being used to the on or before requirement, HMRC would not enforce inaccuracy penalties. We believe it would be better to delay the introduction of inaccuracy penalties to coincide with the commencement of the late filing and late payment penalties.
- 3.4 We welcome the decision that the first late return per PAYE scheme will not incur a penalty, as this will assist employers as they adjust to the new system.
- 3.5 We welcome the decision to notify employers monthly if they default, even though penalties will only be charged quarterly. It is important that HMRC let employers know quickly that they have defaulted. This enables them to put system errors right more quickly and helps to educate them.
- 3.6 HMRC advise in the Summary of Responses document¹ that penalties for employers filing paper returns are likely to be applied manually, and that it is likely that penalties will be notified and charged in-year. LITRG believes it is essential that employers filing paper returns are assisted effectively to meet their obligations; this means that defaults must be notified monthly as for online filers. We would have hoped to see more information on the manual system for paper filers at this stage.
- 3.7 We welcome the setting up of a group by the RTI Programme to look into issues for the digitally-excluded.

¹ Securing Compliance with Real Time Information – Late Filing and Late Payment Penalties – HM Revenue & Customs (December 2012), Ch. 3, para 13, see http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PRO D1_032465

4 Penalty Design Principles

- 4.1 HMRC advise in the Summary of Responses document that they have a “comprehensive strategy in place” for communication of RTI to employers.¹ LITRG is concerned that HMRC’s message about RTI and its introduction for most employers from April 2013 is not getting through. There is evidence of a significant lack of awareness about RTI, in particular, among smaller employers.² Given it is now February 2013, it is essential that HMRC redoubles their efforts to ensure the message reaches all employers. LITRG is for example surprised that there has been little overt promotion of RTI on the HMRC website. It would have been reasonable for there to have been information about RTI on the main home page for a few months now, but that has not been the case.
- 4.2 Although HMRC advises that many lines of communication and support are already part of their plans, or are being considered, it would be helpful to have more precise information about these services, for example, details of the telephone helpline that will hopefully be provided.

5 Areas for Consideration

- 5.1 We welcome the proposal to charge only one penalty per month, and the decision to base the size of the penalty on the number of employees within a PAYE scheme. This is a relatively simple model, which should therefore be straightforward to understand for all employers so long as it is properly explained in guidance materials. This model is to be welcomed as it less discriminatory against employers that have to file several returns in one month than a model of one penalty per default, and who therefore may find it more burdensome to comply with the ‘on or before’ requirement. It should be recognised that an employer that makes four returns a month has more opportunities to make a late submission than a monthly-filer, and therefore there is still a degree of inequality built into this model. The use of banding is supported by LITRG as it is fairer for smaller schemes.
- 5.2 LITRG welcomes the decision to notify defaults monthly but to only charge penalties quarterly, allowing time for the employer to submit a reasonable excuse claim when

¹ Securing Compliance with Real Time Information – Late Filing and Late Payment Penalties – HM Revenue & Customs (December 2012), Ch. 3, para 36, see http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PRO D1_032465

² A survey carried out by the Federation of Small Businesses (FSB) found a quarter of small businesses were unaware of RTI, see <http://www.payrollworld.com/article/14507/magazine/quarter-of-small-businesses-oblivious-to-rti>. A survey carried out by DTE Business Advisers found that the majority of small businesses are unaware of how to prepare for RTI, see <http://www.payrollworld.com/article/14754/magazine/staggering-lack-of-rti-awareness-among-smes>

appropriate before the issue of a penalty. This is also helpful in terms of reducing administration. The main concern with this system is the importance of making the difference between a default notification and a penalty notice clear. Not only must the two types of notice look different, there must be effective communication and education about this aspect of the penalty regime.

- 5.3 Although we would have preferred different start dates as we have argued elsewhere in this response, the decision not to phase in the introduction of late filing and late payment penalties is welcome. This means that the regime will have one, clear start date, which is the simplest and best option. We still query the lack of consistency with the starting date of the inaccuracy penalties, and would favour having one exception to the main rule – that is to give a full year of participation in RTI for care and support employers (who do not join RTI until April 2014) before any penalties are levied.
- 5.4 We welcome the proposal for there to be an annual un-penalised default. From an educational perspective, LITRG believes it is important that there is at least one un-penalised default allowed each year, and this option has the virtue of simplicity. Other easements suggested by LITRG, such as the use of suspended penalties, have not been developed.¹
- 5.5 We are pleased that HMRC have decided not to mandate nil returns, as this would have been an unnecessary addition to the regime.
- 5.6 LITRG is disappointed that there is to be no penalty cap. This is a key protection against penalties becoming disproportionate. We understand HMRC's point that they do not think a cap is necessary as the penalties will not be disproportionate to the offence, but LITRG believes such protections should always be present.
- 5.7 LITRG notes that HMRC do not intend to charge late filing and late payment penalties together, so that the different nature of the penalties are clear to employers. LITRG pointed out the possibility of confusion if the two types of penalty were charged together and is pleased that HMRC have taken note of the comments and the importance of clarity for the employer.

6 Late Payment Penalties

- 6.1 There will be a similarity of treatment between these and the late filing penalties, with monthly notification of defaults, quarterly charging of penalties and no use of stagger periods for both types of penalty. We think this is a sensible decision, to ensure simplicity.

¹ Securing Compliance with Real Time Information – Late Filing and Late Payment Penalties – LITRG Response – LITRG (September 2012), see http://www.litrg.org.uk/Resources/LITRG/Documents/2012/09/120906_LITRG%20Response_RT1%20Penalties_final.pdf

- 6.2 LITRG welcomes the decision to ring-fence each penalty, so that earlier penalties do not have to be recalculated if there are further defaults in a tax year.

7 Draft Legislation

- 7.1 It is not clear from the draft legislation how a monthly penalty for a late submission will be calculated if there is more than one late submission in the month. If there are different numbers of employees for each submission, then which late submission will the penalty be based on – the first one or an average?
- 7.2 We note that the late filing penalty will “be calculated in accordance with regulations made by the Commissioners.”¹ These regulations must be made available for consultation prior to their publication.
- 7.3 We welcome the provision that is made in the draft legislation at Schedule 1 paragraphs 7 and 14 to enable HMRC to amend an assessment if the liability on which it is based is found to be excessive.

LITRG
6 February 2013

¹ Securing compliance with real time information: penalties – HM Revenue and Customs (December 2012) Schedule 1, para 6C(4), see http://www.hm-treasury.gov.uk/d/draft_clauses_and_ens_for_finance_bill_2013.pdf