HM Revenue & Customs

Employee Share Schemes: NIC elections

Consultation document
Publication date: 20 April 2016
Closing date for comments: 13 July 2016

Subject of this consultation:	A NIC election is the means of legally transferring to the employee the Employer's Class 1 NIC obligation on the occasion of chargeable events in connection with employment-related securities options, and with restricted or convertible employment-related securities.
Scope of this consultation:	This consultation is designed to gather views and evidence from companies with non tax-advantaged share schemes about whether there is a need for the continued availability of a NIC election. NIC agreements will continue to be available.
Who should read this:	Accounting and legal advisers of companies which offer non tax-advantaged share schemes, particularly multinational companies with UK employees.
Duration:	20 April to 13 July 2016
Lead official:	Tom Rollinson, HMRC
How to respond or enquire about this consultation:	Responses should be sent by email to: shareschemes@hmrc.gsi.gov.uk or by post to Employee Shares & Securities Unit, HM Revenue and Customs, Room G53, 100 Parliament Street, London SW1A 2BQ Enquiries can be made to the email and postal address above.
Additional ways to be involved:	As the issues are largely technical, it is expected that those wishing to respond will do so in writing or electronically. HMRC will also consider requests for meetings as part of this consultation. Any such requests should be made to the email or postal address above.
After the consultation:	A summary of responses will be published following the consultation. This will set out the next steps, including any proposed changes to the availability of NIC elections.
Getting to this stage:	NIC elections were established under the Social Security Contributions and Benefits Act 1992.
Previous engagement:	HMRC has previously discussed the requirement for NIC elections with stakeholders. However this is the first formal consultation on this issue.

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1. Introduction

Background

1.1 When an employee makes a gain on exercise of an employment-related securities option, or realises some other chargeable event under section 479 Income Tax (Earnings and Pensions) Act 2003 (ITEPA), this is treated as earnings liable for Class 1 National Insurance Contributions (NICs) under section 4(4)(a) Social Security Contributions and Benefits Act 1992 (SSCBA). There will be a liability to pay both a primary and secondary Class 1 NIC. For simplicity, the terms ‘employee’ and ‘employer’ are used, whereas the law stipulates these to be the ‘earner’ and ‘secondary contributor’ respectively. A primary Class 1 contribution is payable by the employee with a secondary Class 1 contribution payable by the employer. There are occasions however, when the employee meets the secondary Class 1 NICs liability. At present, under section 481 ITEPA there are two routes for the secondary Class 1 NICs liability to be met by the employee by either:

- a NIC agreement; or
- a NIC election

1.2 Schedule 1 paragraph 3A SSCBA provides for the employer and employee to enter into a “NIC agreement”.

1.3 Schedule 1 paragraph 3B SSCBA provides for the employer and employee to enter jointly into a “NIC election”. Unlike a NIC agreement, a NIC election constitutes the legal transfer of liability for payment of secondary Class 1 NICs from the employer to the employee. The law requires that any such election must be approved by HMRC.

1.4 The provisions for NIC elections and agreements also extend to cover post-acquisition charges on restricted securities (ITEPA Chapter 2 Part 7 s428A) and convertible securities (ITEPA Chapter 3 Part 7 s442A). This consultation document will focus on NIC elections as they relate to employment-related securities options, but should also be read as encompassing elections in connection with restricted and convertible securities.

Aim and scope of this consultation

1.5 The purpose of this consultation is to gather views and evidence as to whether there is still a need for NIC elections. It also seeks views on the potential consequences of removing the ability to make NIC elections. There are no plans to change the availability of NIC agreements, as stakeholders have told us that there is a clear demand for their use. NIC agreements are therefore outside the scope of this consultation.

1.6 Details of how to respond to this consultation can be found in Chapter 5.

After this consultation

1.7 A summary of responses will be published following this consultation. This will set out the next steps, including any proposed changes to the availability of NIC elections.

2. Continued availability of NIC elections

Policy objective

2.1 Against a background of its digital strategy, HMRC is examining the need for existing paper-based processes. The legislation requires any NIC election to be approved by HMRC. This approval is a paper-based process and HMRC reviews around three elections per week. If it was decided that NIC elections were no longer necessary and that NIC agreements (which do not require HMRC approval) were an appropriate alternative this would mean a saving of HMRC staff resource.

2.2 Since it would not be economically efficient to develop a digital process to approve NIC elections, removal of NIC elections would also be in line with one of the elements of HMRC's digital strategy by removing a paper-based process.

2.3 Removal would also represent a minor simplification of the complex rules which govern the tax treatment of employee shares and share options.

Accounting benefit of NIC elections

2.4 It has been suggested by some stakeholders that NIC elections were introduced in July 2000 because at that time they provided a means of avoiding unwelcome accounting issues in connection with share-based remuneration; but that this rationale no longer applies because of subsequent changes in accounting rules. The key aim of the consultation is to determine whether current accounting rules for companies that operate in the UK mean that there is a case for retaining NIC elections; or if there are any other reasons which would justify their retention. If there are no longer any accounting or other benefits then it is hard to see the justification for their continued retention, provided NIC agreements continue to be available.

Other benefits of NIC elections

2.5 In theory NIC elections provide companies with more certainty than NIC agreements, because NIC elections legally transfer the secondary Class 1 NICs liability to the employee.

2.6 No such transfer of secondary Class 1 NICs liability occurs with a NIC agreement: if the employee, following a NIC agreement does not pay the secondary Class 1 NICs, then HMRC will continue to enforce against the person legally due to pay the NICs – the employer. Legislation at Schedule 1 paragraph 3A(2) & (2B) SSCBA would allow the employer to recover the secondary Class 1 NICs from the employee's earnings through the payroll where the employee agrees.

Question 1 – are there any continuing accounting or other advantages to companies of NIC elections as opposed to NIC agreements? If so, what are they?

Question 2 – are secondary Class 1 NIC liabilities in connection with securities options usually handled through the payroll?

Question 3 – Should the ability to make NIC elections be removed?

Question 4 – What are the benefits in retaining a NICs agreement only? Would this create any problems for the employer and/or employee?

Question 5 – Do you have any comments on the assessment of impacts set out in Chapter 3 of this document, and in particular the equality impacts?

3. Assessment of Impacts

This consultation will inform the final impact assessment.

Summary of Impacts

Exchequer impact (£m)	2016-17	2017-18	2018-19	2019-20	2020-21
	-	nil	nil	nil	nil
	This measure is not expected to have an Exchequer impact				
Economic impact	Changes to the current rules on the availability of NIC elections are not expected to have any significant economic impacts.				
Impact on individuals, households and families	Changes to the current rules on the availability of NIC elections, provided NIC agreements continue to be available, are not expected to have any impacts on individuals, households and families.				
Equalities impacts	Employees receiving shares under non tax-advantaged schemes are likely to be employees of above average income. However it is not expected that changes to the availability of NIC elections will have any disproportionate impacts on those protected equality groups represented in this population.				
Impact on businesses and Civil Society Organisations	Provided NIC agreements continue to be available, and if there are no continuing advantages to NIC elections, then we expect there to be no additional compliance burden imposed by their removal. There will be a negligible one-off cost to businesses as they familiarise themselves with the changes. Removal of NIC elections would represent a minor simplification of the rules governing the tax treatment of employee shares and share options.				
Impact on HMRC or other public sector delivery organisations	Saving of the time taken to review three NIC elections per week. This equates to approximately 225 person hours per year. Fulfils HMRC's Digital Strategy				
Other impacts	Other impacts have been considered and none have been identified.				

4. Summary of Consultation Questions

1. Are there any continuing accounting or other advantages to companies of NIC elections as opposed to NIC agreements? If so, what are they?

2. Are secondary Class 1 NIC liabilities in connection with securities options usually handled through the payroll?

3. Should the ability to make NIC elections be removed?

4. What are the benefits in retaining a NICs agreement only? Would this create any problems for the employer and/or employee?

5. Do you have any views on the assessment of impacts set out in Chapter 3 of this document, and in particular the equality impacts?

5. The Consultation Process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

Stage 1 Setting out objectives and identifying options.

Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.

Stage 3 Drafting legislation to effect the proposed change.

Stage 4 Implementing and monitoring the change.

Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 2 of the process. The purpose of the consultation is to seek views on the detailed policy design and a framework for implementation of a specific proposal, rather than to seek views on alternative proposals.

How to respond

A summary of the questions in this consultation is included at chapter 4.

Responses should be sent by 13 July 2016, by e-mail to shareschemes@hmrc.gsi.gov.uk or by post to: Employee Shares & Securities Unit, HM Revenue and Customs, Room G46, 100 Parliament Street, London SW1A 2BQ

Please do not send consultation responses to the Consultation Coordinator.

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from HMRC's GOV.UK pages. All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentially can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs (HMRC).

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Principles

This consultation is being run in accordance with the Government's Consultation Principles.

The Consultation Principles are available on the Cabinet Office website: http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

If you have any comments or complaints about the consultation process please contact:

John Pay, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

Please do not send responses to the consultation to this address.

Annex: List of stakeholders consulted

Baker Tilly

Abbiss Cadres

Eversheds

Simmons & Simmons

Macfarlanes

DIAGEO/CBI

Thomson Reuters Practical Law

EY

Freshfields

Pett Franklin

Traverssmith

Wolters Kluwer

ICAEW

Baker & McKenzie

Deloittes

Grant Thornton

PwC

Pinsent Masons

Linklaters

Freshfields

Mishcon de Reya

Gabelle

Ashurst

Nabarro