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Our ref: RFI 8519
7 October 2016

Dear [REDACTED]

REQUEST FOR INFORMATION: COPY OF CONSULTATION RESPONSE

Thank you for your request for information, which we received on 14 September. You asked for a copy of the Department's response to the HMRC 'Off-payroll working in the public sector: reform of the intermediaries legislation' consultation that closed on 18th August 2016. As you know, we have handled your request under the Freedom of Information Act 2000 (FOIA).

A copy of Defra's response is provided at **Annex C**.

It should be noted that the response is in two parts. The first half is the Core Department's view and the second part is the Environment Agency's view (the Core Department coordinated a joint response with the Environment Agency). These responses were valid as of August 2016 but may not reflect the current position. This is because HMRC are in continuous conversations with Government Departments about the reform of the intermediaries legislation and will continue these conversations through to its implementation in April 2017.

Information disclosed in response to this FOIA request is releasable to the public. In keeping with the spirit and effect of the FOIA and the government's Transparency Agenda, this letter and the information disclosed to you may be placed on GOV.UK, together with any related information that will provide a key to its wider context. No information identifying you will be placed on the GOV.UK website.

We attach Annex A, which explains the copyright that applies to the information being released to you.

We also attach Annex B giving contact details should you be unhappy with the service you have received.

If you have any queries about this letter please contact me.

Yours sincerely,

[REDACTED]

Information Rights Team
InformationRequests@defra.gsi.gov.uk

Annex A

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Annex B

Complaints

If you are unhappy with the service you have received in relation to your request you may make a complaint or appeal against our decision under section 17(7) of the FOIA or under regulation 18 of the EIRs, as applicable, within 40 working days of the date of this letter. Please write to [REDACTED] Head of Information Rights, Area 4C, Nobel House, 17 Smith Square, London, SW1P 3JR (email: InformationRequests@defra.gsi.gov.uk) and he will arrange for an internal review of your case. Details of Defra's complaints procedure are on our [website](#).

If you are not content with the outcome of the internal review, section 50 of the FOIA and regulation 18 of the EIRs gives you the right to apply directly to the Information Commissioner for a decision. Please note that generally the Information Commissioner cannot make a decision unless you have first exhausted Defra's own complaints procedure. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex C

Reform of the Intermediaries Legislation – Defra’s Response to Consultation

Below are the question posed by HMRC in black and Core Defra’s response / comments in italics.

Definition of the public sector

Question 1: Are there other easily understood definitions that work better than the FOI Act and the FOI (Scotland) Act?

No comments

Question 2: Are there any public sector bodies which are not covered by the FOI acts which should be included in the definition for the proposed rules?

No comments

Question 3: Should private companies carrying out public functions for the state be included in this definition? Why?

No. This would require a detailed definition of what work was in scope to be produced which would be difficult to do. The visibility of the workforce of the private company would not be obvious or of great concern to the public body. It may also be difficult to disaggregate the private body to identify the workers that were engaged in the work for the public body.

Question 4: Are there any public bodies caught by this definition who would face particular impacts which should be considered?

No comments.

Information

Question 5: Are rules needed to ensure that engagers have the information they need to make the decision? If so, what should they be?

Yes. The rule should be that all new and existing contracts must include a clause allowing the engager to request specific pieces of information from the agency about the worker. This would be in addition to the current contractual clause requiring a worker to supply suitable evidence to assess their IR35 status. Liability for who is ultimately responsible for completing the Online Tool should be stated (e.g. the agency closest to the PSC)

5% deduction

Question 6: How would accounting for the 5% allowance work in practice?

The rules should make it clear at what point the 5% is calculated. It could be the total cost to the engaging department. It could be the total remuneration the worker receives. It could even be ignored and left to the worker to reclaim it from HMRC. Alternatively the rules could be changed so that this 5% is no longer allowed and just revert to actual PS overheads being claimed.

Question 7: Are there business costs specific to PSCs that are covered by the 5% that aren't covered under the usual business expense rules?

No comments.

Making the decision

Question 8: Does the first part of the test work to quickly rule out engagements that are clearly out of scope?

Yes, it appears to do this.

Question 9: Are these the right questions in the right order of priority?

Yes, they appear to be.

Question 10: Are the questions simple to understand and use?

Yes, they appear to be. It is important to use plain English and supply supplementary information to give more details about the question, e.g. by clicking a '[?]' button.

Question 11: Do the two parts of the test give engagers certainty on day one of the hire? *Certainty is something that has been lacking in the existing intermediaries tests and rules. It seems that each worker's circumstances are different and there is scope for interpreting the rules in slightly different ways leading to differing outcomes. We think it is unlikely that the two tests will give certainty on day one as there will always be differing opinions. For example, whether the working practices allow substitution rather than what the contract says. Defra welcomes the decision that HMRC will stand by the outputs of the online tools if truthful information is supplied. This will remove human assessment, such as through the Ministry of Justice's Tax Centre of Excellence.*

Question 12: How can the organisation completing the tests ensure have the information to answer the questions?

Have a contractual clause with agency or at the very least a MoU. The clause would stipulate what type of information can be requested and the turnaround times. HMRC could mandate Government Departments to supply information relevant to the completion of the online tool in a timely manner.

Question 13: How could the new online tool be designed to be simple and straightforward to use?

An interface that steps you through each question in a clear and logical way. A way of downloading a pdf file summarising the evidence entered and the conclusion.

Transfer of liability

Question 14: Where should the liability for tax and National Insurance (and penalties and interest where appropriate) fall when the rules haven't been applied correctly?

The liability should sit with the body that did not apply the rules correctly or supplied incorrect information.

Question 15: Should the liability move to the PSC where the PSC has given false information to the engager?

Yes. The method for proving this and arbitrating decisions should be outlined. Likewise the appeals process should be outlined.

Costs

Question 16: What one-off and ongoing costs and burdens do you anticipate will arise as a result of this reform?

Defra has not yet made an accurate assessment of the one-off or ongoing costs of compliance. It is expected that the one-off set up costs will largely consist of staff time across Finance, Procurement, HR and Payroll. The ongoing costs should be minimal, but not negligible, as we carry out additional tracking of contractors, request and analyse additional information from our contingent labour suppliers and make alternations to payroll processes. The direct cost of paying employer NI contributions are an additional burden on the department.

Additional Question Posed by Defra

- Is it appropriate/allowed for Defra to pass on the cost of the employer NI National Insurance liability down the engagement chain to the worker?

Online Employment Status Indicator (ESI)

We have seen the draft flowchart of the ESI and wish to make the following points:

- We see that not providing a personal service is the most important question and can quickly lead to a determination that IR35 does not apply without looking at the other working practices.
- On the question 'Intermediary – payment or benefits', do we need to make it clear that benefits can be non-financial?
- On 'Intermediary type', do we need to include other categories of companies. E.g. does a LLP (limited liability partnership) fall under 'partnership' or 'neither'?
- On 'office holder – additional role' what is the warning message that appears?
- Could you expand on the nature of the 'further status questions' box?
- On 'intermediary – unrestricted right' we would suggest not rewording the question to include 'if the workers is unable or unwilling to...' as this narrows down the number of scenarios to which this is applicable. The broader question of 'could the worker send someone else ...' allows for a greater number of scenarios to be encompassed, e.g. on holiday for a week (but they are still willing and able to work but have chosen not to).
- On 'conditions of liability close company – limited company' some people may not know what a close company is. Does the question mark expand into a definition? If not, then suggest including a brief definition and reference Chapter 2 of Part 10 of the Corporation Tax Act 2010.
- On 'Office holder of the client' this seems an odd phrase that may not be easily understood. Could it be said in plainer English, e.g. employee or contracted to.
- On 'Contract Dates', what is the relevance of this. Is it so that it can be included in the pdf output and the result will stand for the duration of the contract? Could it be valid for a 10 year period? Defra has recently commenced six-monthly reviews of contractors' working practices and these could be negated if the ESI decision stands for the whole length of the contract. Do we need to advise that any extensions to the contract or change to working practices will render the ESI decision defunct and a new one will need creating?
- On the final screen titled 'employment status indicator' what does the '[why?]' button show when clicked? On the pdf output, is today's date included? It would also be beneficial to have the name and address of the contractor in question. If possible it would also be useful to include the job title and the name of the engager as well as

all of the intermediaries. This would mean all of the key information is on one document and it would clearly show that if any part of the engaging chain changed then a new ESI would be required.

Response from the Environment Agency

Overall

- The Environment Agency suggests that for some questions that as we follow different regulations (We engage our CLOne workers in line with Agency Worker Regulations, whereas others in the Defra Group don't). That are comments are included and not blended with the responses of the other members.
- There are/will be significant challenges with implementing this and therefore would request that an appropriate length of time is given to enable controls/systems to be put in place.
- In summary we are concerned about the flow of workers on any of the frameworks. There is also the potential for an exodus of staff from our frameworks to others that they feel are more attractive, so potential loss of knowledge and skill set. It would also be good to push for clarity around who is accountable for these individuals, our view is that it should be pushed to the supplier. In terms of EA we may have to look into individuals who may not be linked to specific frameworks to ensure they are compliant going forward.

Definition of the public sector

Question 1: Are there other easily understood definitions that work better than the FOI Act and the FOI (Scotland) Act?

No. This seems as good as any.

Question 2: Are there any public sector bodies which are not covered by the FOI acts which should be included in the definition for the proposed rules?

N/A – see above

Question 3: Should private companies carrying out public functions for the state be included in this definition? Why?

No opinion as we don't have any but as we would expect that our suppliers/frameworks follow the rules then, logically yes as it's an extension of the spirit of the rules but the same argument applies as regarding completion vs the private sector and would it put them at a disadvantage .

Question 4: Are there any public bodies caught by this definition who would face particular impacts which should be considered?

As the rules will remain unchanged in the private sector there is a serious concern over the shortage and quality of contingent labour. Suppliers have already indicated to us that they are really concerned that our supply of suitable contingent workers at the rates we wish to pay may reduce or in parts cease as they choose to work for the private sector instead who are yet to be subject to this legislation. What steps can be taken to ensure this does not happen? We suspect that Environment Agency will be affected in more senior specialist roles such as IT, Legal, Estates, Engineers and Project Managers and there is a risk that we could be competing against other public sector bodies for the same small talent pool, again which may push rates up. This is also constrained by the fact we have to

comply with Agency Worker Regulations and we are concerned about the differences in that and Pay Between Assignment rules that apply to other public bodies.

We will also see the effects of this across the frameworks we use such as WEM, NCMF as well as CLOne. We will expect to lose current contingent workers to the private sector as a result of the changes to legislation.

Information

Question 5: Are rules needed to ensure that engagers have the information they need to make the decision? If so, what should they be?

Yes – there should be a list of requirements for the provider to give that the engager the ability to follow the rules. This would ensure a speedier process and place the onus of the PSC to ensure it followed the rules too. It would make it easier to establish who is breaking the rules and establish an understanding over duty of care on the engager.

5% deduction

Question 5: How would accounting for the 5% allowance work in practice?

In practice this would be very difficult to ensure compliance with. It would require a large scale system change and new ways of accounting for payroll amounts. It is not clear how this 5% would be accounted consistently by both parties.

Question 6: Are there business costs specific to PSCs that are covered by the 5% that aren't covered under the usual business expense rules?

N/A – not aware

Making the decision

Question 7: Does the first part of the test work to quickly rule out engagements that are clearly out of scope?

If the information is required and provided by the PSC yes. We have a question (when we are operating as part of a framework or supplier) over who will complete the online, real time HMRC tool to check if the rules apply to a particular engagement? Is it the supplier or the EA as the hirer?

Question 8: Are these the right questions in the right order of priority?

Yes

Question 9: Are the questions simple to understand and use?

Yes

Question 10: Do the two parts of the test give engagers certainty on day one of the hire?

If the information is required and provided by the PSC - yes.

Question 11: How can the organisation completing the tests ensure have the information to answer the questions?

Either through HMRC requirements on PSC/engager which would place the responsibility of correct information on the contractor and the PSC.

Question 12: How could the new online tool be designed to be simple and straightforward to use?

Plain English simple questions with appropriate guidance for completers. This should be easily linked to other systems we have out there such as RTI, Fieldglass for CLOne, recruitment platforms on common platforms (SOP)

Question 13: Where should the liability for tax and National Insurance (and penalties and interest where appropriate) fall when the rules haven't been applied correctly?

Depends who is at fault and the ability for engagers to get clear decisions based on correct information

Question 14: Should the liability move to the PSC where the PSC has given false information to the engager?

Yes

Costs

Question 15: What one-off and ongoing costs and burdens do you anticipate will arise as a result of this reform?

There will be one off costs of implementing systems to cope with the change. This could be fundamental for some organisation, particularly those who require 3rd party involvement and multi-employer (same operating system) changes. There will be an increased resourcing requirement to train, understand and monitor the process.

Will we end up paying higher rates to account for the disadvantage that the new legislation brings as contingent workers still have an option to go to the private sector and find loop holes with the current 2000 legislation and continue with the potential for tax avoidance aimed by this legislation . In essence the public sector will still be 'paying' for this albeit in a different way, until the legislation is applied in the private sector too.