Introduction

We are pleased to have this opportunity to respond to the HM Revenue & Customs consultation document entitled ‘Securing Compliance with Real Time Information – Late Filing and Late Payment Penalties’ published on 14 June 2012.

We are concerned that RTI compliance needs to be considered against a background that there is a large level of non-compliance with PAYE by employers across the UK. In the agricultural sector, for example, it is not uncommon for there to be abuse. Gang masters do not operate PAYE properly and there are often concerns that the national minimum wage is not respected. Many businesses employ, illegally, workers who should not be employed and who, for example, do not have valid national insurance identities. It is widely known that particular labour intensive sectors do not have anything like full employer compliance. For example, the home removal sector is infamous for temporary recruitment of individuals to assist in carrying loads, where those individuals are often not declared but receive cash in hand and continue to draw unemployment benefit.

Before penalties are introduced for non-compliance with RTI, we believe that HMRC should be required to confirm that they do actually ensure that all employers operate full and proper PAYE compliance. Without that, we think it inappropriate that those businesses which currently comply with PAYE should be forced to face penalties for RTI, when it is blatantly clear that there are other businesses which are non-compliant and outside the system and will continue to remain outside the system and not operate RTI when reporting information to HMRC.

To introduce a note of transparency about the scale of the perceived problem, we recommend that HMRC be obliged to issue full reports on the results of their recent PAYE task force activity. For example, we understand that task force activity in the restaurant sector in London and Edinburgh has identified significant non-compliance in the catering sector, with serving staff often not employed under proper terms and often paid off record. These off record payments are, we understand, particularly prevalent in larger businesses which cater for functions and use temporary casual staff for this purpose. Similarly, we think that HMRC should report on the results of their task force activity on the fast food sector as we understand that there has been considerable disclosure of off record employment, and illegal employment of people who do not have the appropriate national insurance identity. The starting date for late filing penalties should only be established once HMRC can confirm that there is a level playing field and that those previously not compliant in respect of PAYE have now been identified and sorted.

Another issue is that of employment status. The integrity of Universal Credit will only work if the DWP receives information which is correct and complete. We would suggest that at present HMRC is incapable of determining employment status, and that there are probably several million people working, allegedly as self-employed, when in fact their supposedly self-employed status is either artificial or not even tenable and they are really employees. Decisions such as Autoclenz in the House of Lords in 2011 demonstrate that this problem of status is widespread. We believe that HMRC should not consider levying RTI penalties on otherwise compliant payroll operators until they are satisfied that the status of workers has been determined satisfactorily across the working population of the UK.

We have previously expressed our serious concerns about the over-ambitious timetable for introducing RTI. The timescale should have taken into account the need for employers to invest in hardware, software and training to make RTI work and therefore comply with the stringent new requirements. We feel that it would be instructive for HMRC to commission an independent research project to establish how long it has taken HMRC in similar situations to introduce new hardware, software and staff skills that have enabled them to provide robust support to taxpayers. We think there would be numerous examples demonstrating that HMRC often take many years to achieve this, yet they expect taxpayers (in this case employers) to introduce new procedures with investment in hardware, software and training on a timescale which HMRC themselves could never manage.

We are also concerned that HMRC have earned criticism as a result of their incorrect interpretation of ‘reasonable excuse’ and their failure to respect ECHR Article 6(3)(a). In fairness to HMRC, in March 2012 they announced a new notification procedure for employer
end-of-year filing penalties, and this was welcome. However, the evidence indicates that HMRC had failed to operate penalties in a reasonable and fair manner. In these circumstances we think that they should not be given any new penalties until such time as they are able to demonstrate that they can operate the system fairly and evenly across the board.

As far as financial impact goes, it is naïve of HMRC to consider that RTI is going to make things easier for employers or result in a cost-neutral scenario. The work involved in checking a P35 once a year is going to be multiplied by the number of times an employer is required to submit a Full Payment Submission. For some employers (such as large pension providers) this will be daily and for others it may be weekly, fortnightly, monthly, quarterly, half-yearly or annually, or a combination of these. For employers already participating in the RTI pilot, it is evident that the preparation for RTI is taking them approximately 2-6 months on average. Training of staff, additional payroll bureaux costs, software and information capture costs as well as, in some cases, accountancy and legal advice and Senior Accounting Officer issues, all carry a cost. To say that there is no anticipated cost impact is very far from the truth.

HMRC have commented that RTI will lead to a reduction in error and fraud, but it is hard to see upon what basis this theory has been conceived. We understand that RTI, and the over-ambitious timescale for implementing RTI, have been forced on HMRC by the DWP and Ministers. We have seen no evaluation of potentially fraudulent steps that non-compliant employers might try to take under RTI. We are concerned that the tight timescale may not have allowed HMRC to consider properly what unintended consequences RTI might have, or how they should be ameliorated.

**Our responses to HMRC’s consultation questions**

**Question 1**

*Do you have any comments on RTI and error penalties that will help us support businesses and promote timely filing under RTI?*

Employers deserve to know immediately that HMRC considers a penalty position to have arisen. There is strong support for this in recent Tribunal decisions which have criticised HMRC for delaying the issue of PAYE penalty notices.

We recommend that HMRC should issue a late filing penalty online to an employer immediately the late filing is submitted. We assume that this would be possible because the Government Gateway and EDI systems would know when a payment has been submitted late from the information contained in the Employer Payment Summary (EPS).

For the purposes of the late payment penalty, if no payment or partial payment is received, then we assume that HMRC will know about this by reference to the FPSs submitted each pay period. If the total paid falls short of the aggregate of the payments expected, a late payment penalty notice should be issued online immediately so the employer can address it without delay.

We strongly believe that HMRC will achieve a greater degree of success in procuring timely filing under RTI if employers are made aware immediately of failures. This would promote greater awareness amongst employers that HMRC know, in real time, that they have defaulted in some way.

Simplicity is also key to success. The penalty notices should be kept simple and should refer to the default that has just happened so employers can refer back to their own records easily.

We believe that there should be a soft landing, with no penalties charged for any late filings or late payments under RTI up to 5 April 2014. Penalties should then start from 2014/15. This would allow employers to become fully conversant with the new regime, and give their new systems and procedures (and those of HMRC) time to bed down. This soft landing would follow the precedents set on the introduction of other new regimes – e.g. VAT online filing, CIS, iXBRL etc.
There are other questions we feel should be asked:

- Have HMRC considered the high volume of appeals they may receive, not only in the early stages of RTI but also once the new regime is up and running properly, for both late filing and late payment?

- Have HMRC set up a review panel for appeals and allocated specific funds and other resources to handling appeals, which are bound to be of a significantly higher volume than they are under the current regime?

- HMRC have stated that they want RTI to be "cost effective for HMRC to operate", and we appreciate that all Government spending needs to be seen as efficient and effective, but have HMRC considered the inequities that could arise and the additional costs and administrative burdens that could fall on employers in the absence of a comprehensive appeals procedure if, for example, employers right to appeal might be prejudiced by encouragement from HMRC to object by phone instead?

**Question 2**

*How best can we support employers in understanding their obligations under RTI and implementing the new system?*

HMRC can best support employers by giving them as much advance notice as possible of RTI and what it means for them by way of workshops, seminars and public awareness campaigns. HMRC needs to invest money in advertising to increase awareness as at the moment many employers (and many of their advisers) either have not heard of RTI at all or have heard of it but have no idea of what they need to do to prepare.

The information available on RTI seems inadequate even for businesses taking part in HMRC’s RTI pilot. It is significant, for example, that we know of cases where businesses volunteering to take part in the pilot have received no contact from HMRC offering specific advice on RTI, but have been approached by an independent survey company employed by HMRC asking for their reactions to the RTI project. This seems to be a case of HMRC giving their public relations image priority over their primary duty to administer taxes.

**Question 3**

*Is there a better or a simpler way, than banding by potential filing defaults, of recognising the size of the employer but also the amount and regularity of the information to be supplied under RTI?*

All employers, whatever their size, need to be compliant with the RTI process. Banding penalties which are more severe for those who employ more people is the traditional way of doing things. Employers have come to expect this and we see no reason to change it.

**Question 4**

*Are there particular adjustments that should be considered to take account of more frequent payments?*

We are not sure we have correctly understood the question, since the due dates for payment of tax and NICs to HMRC are staying the same as before. If an employer wishes to submit payments to HMRC more frequently than they are due, then this would be their choice, but we see no reason to make any additional concessions for this. Simply put, the only thing that should matter is that an employer pays the right amount of tax and NICs by the deadline.

**Question 5**

*Should a penalty be charged as soon as a return is late, or would employers prefer penalties to be changed later, perhaps each quarter?*

It is vital that, if penalties are to be charged at all, they are notified to the employer and charged immediately, as soon as a default occurs. Issuing penalty notices later would not
encourage early compliance; it would undoubtedly lead to confusion and give rise to additional administrative burdens for both employers and HMRC.

We would compare this to the current situation regarding P11D penalties, where HMRC wait for four months before notifying an employer that there is something wrong. Many employers are unaware that they have inadvertently forgotten to submit the P11D(b), and they only discover this four months later when a penalty of £400 is received. Had they been notified when the penalty was £100, they could have corrected their mistake immediately and paid the penalty at that time.

The purpose of the penalty regime should be to encourage timely compliance, and to ensure that any default is corrected as swiftly as possible after it arises. It would be highly irresponsible of HMRC to allow penalties to accrue once they are aware that a default has occurred. It would be totally unacceptable for them to leave penalties to accumulate for a 12 week period or longer before notifying the employer of an outstanding penalty liability.

We strongly recommend that penalty notices are issued by electronic means rather than by post. This would save HMRC money in terms of time and other resources. It would also ensure that they are received immediately, are more secure and are not delayed or mislaid in the post. If, for whatever reason, a penalty notice is issued electronically to an employer and it then becomes apparent to HMRC that it has not been received, communication could be made by automated telephone messaging or, as a last resort, by post to the last known address of the employer. To guard against this possibility, HMRC should obtain at least two email addresses from each employer, to be used in order of preference for issuing penalty notices. If one email address fails for whatever reason, the system can default to the other one.

**Question 6**

*Do you agree that only one late filing penalty should apply to each PAYE scheme each month, regardless of how many returns are late that month?*

No. If a penalty regime is meant to be fair and to "reassure the compliant majority", then a penalty regime should ideally mean that a penalty should be imposed for each return that is late. Otherwise, employers with only one return to submit are being treated unfairly compared with other employers who have two or more returns to make. Such a system would do little to encourage compliance by employers with multiple returns to make.

To say that issuing separate penalty notices for every RTI return containing an error “would be unnecessarily burdensome for employers...” is highly divisive. What HMRC surely must mean here is that they do not wish to put resources into charging penalties as and when the need arises. Unfortunately, if HMRC wish to implement a fair, accurate and easily understood penalty regime, they must be prepared to invest in the resources to issue penalties and handle appeals flowing from the issue of those penalties.

HMRC has stated that for those employees in receipt of Universal Credit, HMRC “would expect them to bring delays or errors to the attention of their employer”. Many employees would not wish to do this for fear of repercussions, including the risk of losing their jobs – especially in the low paid sectors such as blue collar and part time work. It should be the responsibility of the DWP to alert employers (via HMRC) to late or missing returns which are likely to affect Universal Credit claimants, so that employers become aware of the situation and what is causing it. Individual employees may choose to bring the matter up with their manager, HR department or trades union representative. However, it is not fair of either the DWP or HMRC to expect employees to do this. HMRC and DWP have the collective power to tackle non-compliant employers and should not be involving workers in this process. There is in reality very little an individual worker could do to change the situation and he could be at risk of losing his job.
Question 7

Should the RTI late filing penalties include a further penalty if a return is outstanding at the 6 and 12 month points?

To fall in line with other penalty regimes this should apply by default, to encourage compliance. However employers should be told this when they receive their very first and each subsequent penalty notices, to give them a chance to comply in full knowledge of what will happen if they do not.

We are not in favour of penalties being levied unless there is a clear purpose to be achieved by charging them. However, the question of whether an employer still needs to file a return for month 1 by the time they have filed the return for month 2, which will contain year to date information and therefore supplant the month 1 return, is in our view irrelevant if the whole point of Real Time Information is to supply information at the point of payment for DWP/Universal Credit purposes and to inform HMRC contemporaneously of the level of debt owed to them. If penalties are not to be followed up by HMRC simply because a return has been superseded by a subsequent return, this would quickly encourage employers to believe that RTI returns can be omitted with impunity. It would allow them to behave in a way that makes a mockery of the RTI system, and would be grossly unfair to those employers who wish to comply fully.

Question 8

What are the benefits and downsides of phasing the introduction of automatic late filing penalties for RTI along the lines set out above?

We recommend that HMRC defer all penalties until April 2015 to give all employers the opportunity to operate under RTI for a full year, including the first and last submissions of that year. This would give employers and HMRC the chance to become accustomed to RTI, and allow time for their new software and procedures to bed down, before penalising employers for non-compliance. Any other way of phasing in penalties would be unnecessarily complicated and confusing.

Size-dependent penalties would only be fair if they are based on the number of employees in the business such as the current bandings of 50 for P11Ds.

Question 9

Should consideration be given to including a default that does not attract a penalty along any of the lines set out above?

We have considered whether the penalty regime might be better designed to focus on employers who habitually fail to comply, rather than on those who encounter one-off difficulties. For example, within any period of 12 months, an employer’s first default might attract no penalty, the next three defaults might attract penalties of £100 each, the next three £150 each, and any further defaults £200 each. This could be implemented easily as a computerised system and might serve a useful purpose by concentrating on habitual defaulters, but at the cost of making the penalty regime more complicated and more difficult for employers to understand.

Question 10

We would be grateful for comments on the detailed design options set out above. In particular, how should we encourage employers to use the nil return facility where there is no information to be returned? Is any additional incentive or sanction needed over and above the fact that a late filing penalty may be issued if an expected return is not received?

HMRC have suggested that they will not introduce legislation to require filing of a nil return where no payments are due to be made. We welcome the saving in administration which this would provide, but we question whether it would provide HMRC and the DWP with all the information which they would require – e.g. for Universal Credit purposes. Wouldn’t they need to know for certain that no payments are being made?
In the same way as already operates for CIS and PAYE, an employer could make a declaration to say they are not expecting to pay anyone for the next six months (like CIS) or three months (like PAYE). To reduce administrative burdens, six months is our preferred option. An employer should be able to submit such a declaration online, by a simple tick box process, and this would rid them of the need to submit nil returns for the ensuing months unless something changed during that period.

‘Stagger periods’ are too complicated, and many employers need to be able to pay their way as they go, not in large sums on a quarterly basis. There are also groups of companies with several PAYE references, which might have different stagger periods, and this could impose an onerous management task for those involved in the maintenance of payroll and RTI.

The penalty cap is a good idea, as penalties cannot simply accrue ad infinitum. The online appeals process is also a good idea, as is the proposal to object to penalties by telephone to provide a reasonable excuse, as long as (a) such a telephone service is readily accessible and swiftly answered, and (b) HMRC are prepared to set out the criteria for reasonable excuse clearly.

The suggestion to suspend penalties which fail to reach £500 in a 12-month period could be worth exploring further. The complexity of this would need to be examined, but the issue of easing pressure on HMRC resources should not be a consideration in this context. If HMRC and the DWP wish to implement a penalty regime for RTI, then the resources should be available to afford employers a fair and level playing field.

**Question 11**

*What are the pros and cons of charging penalties for late filing and late payment at the same time?*

These two matters should be kept separate, as they are separate issues. Payment is due on 19th/22nd of each month and this cannot be linked to when a return is due, which can be at any time of the month.

**Question 12**

*We would be grateful for comments on these models, or any combination of the elements included in the models. We would especially welcome ideas to simplify them, but which still support and encourage compliance with the RTI information obligation.*

We are concerned that the onerous burdens placed on employers by PAYE have become inappropriate and are in danger of violating ECHR Article 4(2). This provides that no one shall be required to perform forced or compulsory labour but then it provides an exclusion for any work or service which forms part of normal civic obligations. The development of RTI has little to do with taxation and everything to do with making available information to assist in the operation of Universal Credit, and is not currently an obligation which would be viewed as normal. In effect, what RTI is attempting to do is to introduce a new civic obligation obliging employers to invest in hardware, software and operator training to supply information to the Government for Universal Credit.

Against this background, we feel that the Government should introduce a positive incentive to encourage employers to comply with RTI, rather than placing such a strong emphasis on penalising those who encounter difficulties in meeting the stringent requirements of the new regime. For example, where an employer has a 100% submission record for FPSs and payments in the year, then on submitting the final FPS for the year and paying on time they should be awarded a credit towards the following year’s PAYE. If set at an appropriate level, this could provide a positive encouragement to comply.

Penalties should be incurred for every FPS received late but certainly not for every employee for whom a default occurs as suggested at 5.4 of the consultation document. Penalties for incorrect returns could then be considered if it is subsequently discovered that employees are missing from an FPS.
Basing late filing penalties on an incremental number of employees is also sensible and is along the lines of what employers are already accustomed to, so they would be unlikely to find this too complicated to understand. The Schedule 55 model should remain as this is the least complicated of the models suggested.

**Question 13**

We welcome comments on these proposals. *(This refers to the changes to the existing late payment penalty model).*

We do not disagree in principle with any of the proposals in 7.1 to 7.12.

**Question 14**

*Should we consider charging late payment penalties quarterly?*

No. All penalties should be notified to the employer and charged immediately, as soon as a default occurs. Issuing penalty notices later would not encourage early compliance; it would undoubtedly lead to confusion and give rise to additional administrative burdens for both employers and HMRC.

**Question 15**

*Should we consider allocating employers to a quarterly stagger period for both late payment and late filing penalties under RTI?*

‘Stagger periods’ are too complicated, and many employers need to be able to pay their way as they go, not in large sums on a quarterly basis. There are also groups of companies with several PAYE references, which might have different stagger periods, and this could impose an onerous management task for those involved in the maintenance of payroll and RTI.

Quarterly payment of late payment and late filing penalties should only be considered as part of debt management arrangements, where employers say that they cannot pay the amounts on time.

**Question 16**

*Are there any particular easements that we should consider for new employers?*

All new employers should be given 12 months free of penalties from the date on which they take on their first employee, to accustom themselves not only to RTI but also to all aspects of PAYE.

**Question 17**

*Do you have any views on applying interest to late payment and late filing penalties under RTI?*

Interest should apply to late payments of PAYE as it does to other taxes. Late payment and late filing penalties should be set at rates which are judged sufficient to deter non-compliance, and there should be no need to charge interest on those penalties.

**Question 18**

*Do you have any views on applying a late payment penalty as well as interest where further sums become due for a period?*

If it becomes clear that a further amount of PAYE and/or NICs has become due in the period, the question should be asked whether the additional liability was missed previously as a result of an honest mistake, or whether it was deliberate but not concealed, or deliberate and concealed. This should determine the level of penalty exigible. However, the most important thing is that HMRC should immediately notify the employer that a penalty *may* become due.
and offer them the chance to explain the circumstances in which it the understatement has arisen. If reasonable excuse fails, then it stands to reason that HMRC should reserve the right to impose a penalty to discourage less compliant employers from habitually making such understatements.

Conclusion

RTI penalties should not be introduced until it is clear that the integrity of the PAYE system is intact and until there is a level playing field. Employers who are currently non-compliant in regard to PAYE should become compliant before those who are otherwise compliant should have to face a new penalty regime.

In any event no RTI penalties should be charged for any defaults occurring before April 2015.

About ICAS

ICAS is the world’s oldest professional body of accountants, having received its Royal Charter in 1854. Since then ICAS has played a leading role in the accountancy profession. The Institute’s main objective is to uphold the integrity and standing of the profession of chartered accountancy in the interests of society and the membership. We have approximately 19,000 members spread throughout the world and many chartered accountants hold key positions in commerce, industry, the public sector and private practice.