December 2014 memorandum on the proposals for Direct Recovery of Debts in the light of the Committee’s report on Budget 2014

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The expertise of our senior members and in-house technical experts allows ACCA to provide informed opinion on a range of financial, regulatory, public sector and business areas, including: taxation (business and personal); small business; pensions; education; and corporate governance and corporate social responsibility.
Comments on the proposals for Direct Recovery of Debts

1. The government announced at Budget 2014 that a new mechanism was to be proposed for recovery of debts directly from the accounts of delinquent taxpayers who refused to engage with HMRC. Following initial concern, the proposals were the subject of an HMRC document, “Direct Recovery of Debts”, which was itself subject to a degree of adverse feedback for failing to properly reflect the Cabinet Office Consultation Principles. A Summary of Responses was published on 21 November, further brief commentary on 3 December, and more detailed commentary, draft clauses and a TIIN on 10 December 2014.

2. ACCA has been engaged throughout, meeting with officials of HMRC, HMT and the government, and submitting a written response to the July consultation, which is available via the ACCA website at http://www.accaglobal.com/gb/en/technical-activities/technical-resources-search/2014/july/cdr1298.html This evidence builds on ACCA’s previous engagement and commentary.

3. The Committee has asked in particular for an examination of the detailed application of the safeguards operating on HMRC’s use of the power. While there are some draft clauses in the material published on 10 December, these cover only the powers for HMRC to implement the actual removal of funds (and hence the safeguards for joint account holders and deposit-takers). The remainder of the legislation, clarifying the precise terms under which targets for the measure will be identified and dealt with, are not due to be published until the spring of 2015.

Right of appeal

4. The one key safeguard in which the Committee has expressed an interest is the ability of the taxpayer or other affected parties to appeal to the county court in respect of the DRD process, and this is embodied in the draft clauses. Lack of any external appeal against the HMRC process was a key objection of many respondents to the consultation, including ACCA.
5. At Para 2:30 of the November Summary of Responses, HMRC set out its understanding of the objections, and the extent to which it feels that a right of appeal against a hold notice meets them. In HMRC’s words, the function of the right to appeal is “to embed independent review in the DRD process”.

6. The “hold notice” represents the second of three stages in the funds removal process. The first stage (once HMRC has identified a suitable target taxpayer) is an information notice to the deposit takers, to confirm account details. Secondly, the hold notice ‘freezes’ some or all of the account while HMRC try to engage in dialogue, and finally a deduction notice would be issued to the deposit taker, triggering transfer of the funds to HMRC.

7. Appeal to the county court under draft s10 would be against the “hold notice”, and would be available only against an HMRC affirmation of the hold notice – that is, the hold notice would have been applied, the affected party would have had to receive notification of a hold notice from the deposit-taker, make an “objection” against that notice (within 30 days) and receive a response from HMRC. No specific time limit is placed on HMRC’s provision of the response.

8. In addition, draft section 10, which sets out the process for county court appeals against the confirmed Hold Notice, incorporates specific mechanisms for the court, on application of the appellant, to suspend the effect of the hold notice thus releasing the funds back to the appellant (subject to adequate security being provided). ACCA welcomes the inclusion of this mechanism, and the appeal right generally.

9. However, incorporating a right to an appeal after funds have already been on hold is not quite the same thing as the independent oversight that many had called for. The oversight will be triggered only if one of the parties affected by the Notice objects to it, and an affected party then exercises the right of appeal the confirmed Notice. Independent oversight will be dependent upon at least one affected party understanding and having both the means and the motivation to exercise their rights at two separate points in the process.

10. It is a matter of particular concern to some commentators that one justification of HMRC’s acquisition of this new power is that launching a court action is often uneconomic and unduly time consuming in respect of the debts covered. While this is undoubtedly
true, it is nevertheless the case that £1,200 or £1,500 will be of considerably more marginal utility to a tax credit claimant than it will to HMRC.

11. There is in particular a perception of injustice in HMRC’s insistence on putting the taxpayer to the cost of a court action when by its own admission HMRC has created the situation precisely because court action is inappropriate.

12. If an affected party does exercise the right of appeal to county court under draft s10, then there is scope to have the hold notice temporarily disapplied. However, there is no equivalent mechanism for suspension of the hold notice pending HMRC consideration of an objection (under draft s8) to the initial hold notice. On the basis of the draft clauses the possibility therefore arises of an affected individual caught in a catch-22 situation – they can only afford to appeal to the county court using funds in the ‘held’ account, but can only access those funds once an appeal has been lodged.

13. The net effect is therefore that while the independent appeal will be heard before funds are actually withdrawn by HMRC, there will nevertheless have been a period while the hold notice will be in force and none of those affected by it will have been able to access the funds subject to the notice. While the explanatory notes state that the review will be carried out “promptly” there is no statutory reference to time frames.

**Joint accounts**

14. In respect of joint accounts, ACCA notes that the draft clauses impose upon the deposit taker (not HMRC) and obligation to treat joint accounts as if ownership is always in exactly equal proportions between all account owners. (The “appropriate fraction” at draft Para 5 (7), which is 1/n, n being the number of account holders). Many accounts are not held in equal proportions, and HMRC will often be aware of this where self-assessment taxpayers have notified them of such ownership in order to ensure tax is assessed appropriately.

15. ACCA is concerned that the draft clause contains no mechanism for HMRC to transmit knowledge of such varied beneficial ownership to deposit-takers, or for deposit takers to act upon such knowledge however they have become aware of it. It is not clear that the power under draft Para 4 (2) (b) to specify “amounts” which should be
disregarded for the purposes of the hold notice would operate either in law or as a matter of practical convenience to enable either HMRC or the deposit taker to give effect to unequal ownership proportions in respect of an account.

16. While draft Para 9 (3)(c) does appear to give HMRC the scope to revise the held amount to give effect to such ownership structures in the light of an objection it nevertheless introduces an additional step of requiring either the deposit-taker or other affected person to object. This would not be necessary were the initial calculation of the appropriate fraction subject to “special” calculation where the deposit taker knows the default 1/n formulation to be inappropriate.

**Identification of suitable cases**

17. ACCA was one of many respondents significantly concerned by the HRMC processes for identification of taxpayers in respect of whom direct recovery, or enforced deduction, would be an appropriate mechanism. The prospect of an HMRC process which required face-to-face communication between HRMC and the taxpayer, and confirmation by HMRC that the taxpayer does not fall within the category of vulnerable individuals who need support rather than deserving censure, would be a welcome safeguard.

18. The summary of responses devotes some time to discussing HMRC’s proposals for taxpayers to receive a face-to-face visit. While we believe HMRC’s intentions to be that this will involve at least some measure of unambiguous engagement by the taxpayer with HMRC, the passive nature of the taxpayer’s involvement (as described) does not absolutely require it.

19. Likewise, the nature of the safeguard for vulnerable taxpayers is that they “are not identified as vulnerable”. Again, this could theoretically include a simple failure by HMRC to appreciate the taxpayer’s situation and is not quite the same thing as “the taxpayer is identified as not being vulnerable”.

20. While the neutral language of the summary of responses may simply be a function of the draftsman’s natural style, it is nevertheless the case that more positive and affirmative language would have left less room for lingering concerns that the early stages of the process may be open to levels of unfettered operational discretion which could see the worst fears of commentators realised.
21. We have no doubt that the senior leadership of HMRC are determined that this measure strike a balance between efficiency and effectiveness which favours the protection of the vulnerable, as evidenced by the commitment to establish the vulnerable customers unit and engage with voluntary organisations and professional bodies in this area. ACCA would urge HMRC to do everything in their power to ensure that the binding statutory framework within which tax officers operate reflects that determination.

Interaction with insolvency

22. The Committee itself was concerned that the mechanism could “develop into a return to Crown preference by stealth.” (Para 244 of the Report on Budget 2014) ACCA shared those concerns, especially in light of the failure of the July consultation to address issues arising from insolvency. ACCA’s initial comments to HMRC were as follows:

23. “It is perhaps inevitable that HMRC will find itself in a position of potentially deploying its new power against businesses on the brink of collapse. HMRC have been keen to reassure ACCA that the new power is not designed as or intended to be a recreation of the historic advantage of Crown preference. However it is hard to see how that effective impact can be avoided without extensive due diligence verging upon supernatural prescience given the two year period for setting aside of vulnerable transactions.

24. “Once insolvency proceedings are under way, it will be open to an office holder to apply to the court for set aside of transactions which can be presented as amounting to an unfair preference, up to two years before the onset of insolvency. ACCA welcomes the informal assurances it has received that in any such case HMRC would look to return funds to the creditors pool in order to avoid any possible preference, and looks forward to the opportunity to comment on the draft legislative clauses which would be needed to give any such assurance the weight it deserves.”

25. ACCA further welcomes the HMRC response of November 2014: “The Government is clear that this is not the intention of DRD, but acknowledges respondents’ concerns that HMRC could inadvertently find itself in such a position. It is therefore committing to ensure that HMRC does not receive any advantage during insolvencies through its use of DRD. It will continue to work with experts to make sure the legislation achieves this outcome.”
26. ACCA would welcome such engagement, especially in the light of issues identified by our insolvency experts, including the silence on how partnerships will be dealt with. Partnerships can be subject to liquidation proceedings so potentially does that mean that a face to face meeting will not be offered to an affected partner. ACCA notes also that while the draft legislation does include a number of consequential amendments to the Insolvency Act, these relate to processes during insolvency (ss128, 130, 186, 346/7) rather than the clawback provisions (ss238/9 and 423).

27. HMRC have indicated that they would not typically expect the direct recovery process to operate in respect of companies, as the lack of engagement which would trigger an effective instance of the process is not consistent with typical corporate behaviour. However, in the absence of any legislative detail on selection of tax debts ACCA would urge that if the final provisions do not exempt companies from the scope of the process then they must incorporate sensible and practicable provisions to legislate for engagement with the directors of the company.

Broader concerns on application of the power

28. The concerns about the form and content of procedures for triggering the statutory procedures embodied in the draft clauses extend beyond simply the identification of corporate personalities, and cover all aspects of the initial taxpayer selection process. The current HMRC leadership and government have been very clear that the policy is to be targeted on the “can pay, won’t pay” sector, and that direct recovery should not become a business as usual measure.

29. ACCA would note in this context that the detailed analysis of the costing measures in our July response, which indicated prospective yields more in line with a ‘business as usual’ measure than a highly effective deterrent measure, is not materially affected by the revisions to costings in the Autumn Statement 2014 Table 2.1. We would value greater detail on how those figures have been established.

30. We will not be in a position to comment in detail on the safeguards surrounding taxpayer identification and protection of the vulnerable until the relevant draft legislation and/or guidance is published. We do warmly welcome the creation of the vulnerable taxpayer unit, and hope that the unit is a permanent feature of HMRC operations. The Summary of Responses (at 1.5) is potentially
ambiguous as to whether the unit’s focus is on the early days of DRD, or whether the initial focus of the unit will be DRD.

31. ACCA notes with approval also the incorporation of the affirmative resolution procedure for Statutory Instruments into the draft clause 1 where such instrument would directly affect primary legislation.

32. It is however crucial to note that the Schedule simply sets out the process for enforced deduction. It does not offer any detail as to the identification of taxpayers in respect of whom a ‘relevant debt’ may have arisen beyond Condition C of draft Para 2 (4), “HMRC is satisfied that the person is aware that the sum is due and payable...”.

33. Thus the safeguards within the draft clauses are procedural, and while they correctly include the right of appeal against enforcement by deduction once commenced, it may in fact be more appropriate that independent oversight of the broader application of the power be implemented at an earlier stage, during the establishment of HMRC’s satisfaction that the debt is due and payable.

34. ACCA is concerned that a situation does not arise whereby the mechanism for enforced deduction becomes available for use in respect of a far wider class of taxpayers. Currently Condition C does not contain any reference to the avowed intent of the measure, which is to target the deliberate non-payer who will not respond to HMRC’s contact.

35. As it stands, Condition C could comfortably cover the taxpayer who has submitted to HMRC a self-assessment tax return (whichever head of tax that may relate to) indicating an outstanding liability and in respect of which amendment deadlines have expired. Where the reason for that subsequent non-payment is the same “won’t pay” attitude that the “silent non-payer” demonstrates, then enforced deduction may be a reasonable and efficient course of action. But where the reason for non-payment is some misfortune that has prevented the taxpayer from implementing their own intentions, enforced deduction would be inappropriate.

36. The wording of the processes and safeguards set out in the subsequent regulations will need detailed and extensive examination to ensure that they do not allow for the extension of enforced
deduction to a “business as usual” measure without specific parliamentary consideration and confirmation of that change in policy.

37. In summary, ACCA welcomes the revised safeguards, as far as they go. However, much remains to be done. In particular, it must be noted that the current draft clauses create for HMRC a power with potentially wide ranging application. While we expect the forthcoming draft secondary legislation to set out clearly prescribed circumstances in which HMRC would exercise the power in respect of “non-engaging” taxpayers, it is nevertheless the case that anything short of primary legislation confirming that Condition C is met “if and only if” those conditions are met would leave scope for future creation of other situations meeting Condition C which could significantly expand the availability of the power, contrary to the intention of those involved in the current consultations.