

## **EXPLANATORY MEMORANDUM TO**

### **THE SOCIAL SECURITY (CONTRIBUTIONS) (AMENDMENT NO. 3) REGULATIONS 2007**

#### **2007 No. 1175**

1. This Explanatory Memorandum has been prepared by HM Revenue and Customs and is laid before the House of Commons by Command of Her Majesty. This Memorandum contains information for the Joint Committee on Statutory Instruments.
  
2. **Description**
  - 2.1 The Social Security Contributions and Benefits Act 1992 (SSCBA 1992) and its Northern Ireland equivalent contain provisions to enable an employer to pass on their future secondary or employers National Insurance Contributions (NICs) liability on certain types of employment-related shares and securities to the employee. However, provisions in the National Insurance Contributions Act 2006 (NI Act 2006) ensure a backdated liability to secondary NICs on employment-related shares and securities, which may be brought into effect by regulations made under the powers in that Act, cannot be transferred to the employee.
  - 2.2 These Regulations reinforce the provisions in Sections 5 and 6 of the NI Act 2006 by requiring an insertion of an additional statement in a joint NICs election. The additional statement will make clear to both the employee and employer entering into an election that the terms of the election to transfer secondary NICs liability cannot extend to backdated NICs liability.
  
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 It is very much regretted that this Statutory Instrument is laid in breach of the convention requiring laying of an instrument subject to annulment 21 days before it comes into force (“the 21 day rule”).
  - 3.2 The timing of the making of these Regulations is dependent on the approval of the Social Security (Contributions) (Amendment No.2) Regulations 2007 by both Houses of Parliament. The relevant debates took place on 13 March 2007 in Committee in the House of Commons and on the 20 March 2007 in the House of Lords. These Regulations also needed to be formally approved on the floor of the House of Commons, which did not occur until 27 March 2007 and must come into force on the 6 April 2007. The breach of the 21 day rule was therefore an inevitable consequence of the Parliamentary timetable.

#### **4. Legislative Background**

- 4.1 The ability to transfer secondary employers' NICs liability on certain types of share remuneration (share options) to the employee was introduced in 2000 by the Child Support, Pensions and Social Security Act 2000 (CSPSSA 2000).
- 4.2 The CSPSSA 2000 amended Schedule 1 to SSCBA 1992 and SSCBA (NI) 1992. Schedule 1 contains the primary provisions to transfer the secondary NICs liability on employment-related securities either by way of Agreement (Paragraph 3A) or by an Election (Paragraph 3B). The detail of what a NICs Election must contain is provided in Schedule 5 to the Social Security (Contributions) Regulations 2001.
- 4.3 The facility to transfer secondary employers' NICs liability was further extended in 2004 by amendments made to Schedule 1 to SSCBA 1992 by the National Insurance Contributions and Statutory Payments Act 2004. Employers are now able to transfer the future secondary NICs liability on earnings from employment-related securities options, restricted securities and convertible securities awarded to employees.
- 4.4 Whenever payments are treated as earnings from employment-related securities retrospectively using the powers at 4B of SSCBA 1992 and SSCBA (NI) 1992, any backdated secondary NICs liability on those earnings cannot be transferred to the employee. These Regulations make minor amendments to Schedule 5 in the principal Social Security (Contributions) Regulations 2001 relating to National Insurance elections. The change provides for an additional statement to be contained in a joint NICs Election.

#### **5. Extent**

- 5.1 These Regulations apply throughout the United Kingdom.

#### **6. European Convention on Human Rights**

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

#### **7. Policy Background**

- 7.1 Where NICs Regulations are introduced to mirror backdated anti-avoidance tax changes that take effect on or after 2 December 2004, it would be unfair to allow employers to pass on their own National Insurance liabilities on employment-related shares and securities that they have tried to avoid, to their employees.
- 7.2 The NI Act 2006 will prevent the use of NICs Elections and Agreements over shares and securities that have been targeted by backdated National Insurance Regulations made under this Act. This ensures the use of NICs Elections and Agreements is limited to their

original intended purpose which is to help companies deal with future unpredictable secondary employers' NICs liabilities that arise on certain awards of employment-related securities, for example, on the exercise of a share option.

- 7.3 In accordance with assurance provided by Ministers these Regulations were published in draft on 16 August 2006 for consultation. These Regulations come into effect on 6 April 2007 and are not retrospective in effect. No significant comments were received on these Regulations. A summary of the comments received and HMRC's response is published on the HMRC website:  
<http://www.hmrc.gov.uk/employers/nicbill05.htm>

## **8. Impact**

- 8.1 The Department has conducted a Regulatory Impact Assessment on the measures contained National Insurance Contributions Bill which became the National Insurance Contributions Act 2006. The assessment concluded that the impact of the Act would be minimal.
- 8.2 The Regulatory Impact Assessment is available on the H M Revenue and Customs website: **[hmrc.gov.uk/ria/ria-nicbill05.pdf](http://hmrc.gov.uk/ria/ria-nicbill05.pdf)**.

## **9. Contact**

- 9.1 Hasmukh Dodia  
Her Majesty's Revenue and Customs  
G49  
100 Parliament Street  
London  
SW1A 2BQ  
Tel: 0207 147 2839  
Email: [hasmukh.dodia@hmrc.gsi.gov.uk](mailto:hasmukh.dodia@hmrc.gsi.gov.uk)