EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY CONTRIBUTIONS (INTERMEDIARIES) (MISCELLANEOUS AMENDMENTS) REGULATIONS 2021

2021 No. 308

1. Introduction

1.1 This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs (HMRC) and also on behalf of Her Majesty's Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument implements in social security legislation further amendments to Chapter 10 of Part 2 of the Income Tax (Earnings and Pensions) Act 2003 (c. 1) (ITEPA 2003) in Finance Bill 2021 for the purpose of National Insurance contributions (NICs). These amendments address an unintended widening of the conditions where an intermediary is a company for the purposes of determining whether the off-payroll working rules apply, in order that the scope of the legislation is aligned with the policy intent. They also introduce a supplementary Targeted Anti-Avoidance Rule (TAAR). The amendments will also improve the operation of the rules by extending the requirement for a worker to provide certain information to include the worker's intermediary and by extending the consequences of providing fraudulent information to apply to all United Kingdom-based parties in the labour supply chain.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

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

6. **Legislative Context**

6.1 Current law is included in Part 2 of ITEPA 2003 for tax and in the Social Security Contributions (Intermediaries) Regulations 2000 (S.I. 2000/727) and the Social Security Contributions (Intermediaries) (Northern Ireland) Regulations 2000 (S.I. 2000/728) (the Intermediaries Regulations) for NICs. The primary legislation was amended by the public sector reform introduced in April 2017 by way of the Finance Act 2017. The relevant secondary legislation was amended by the Social Security (Miscellaneous Amendments No. 2) Regulations 2017 (S.I. 2017/373) and the Social Security (Miscellaneous Amendments No. 3) Regulations 2017 (S.I. 2017/613). The reform will be extended to medium and large-sized client organisations in the private and voluntary sectors from April 2021 by way of the Finance Act 2020 and the Social Security (Intermediaries) (Miscellaneous Amendments) Regulations 2020 (S.I. 2020/1220) (the 2020 Regulations). The 2020 Regulations also introduced provisions into the Social Security (Contributions) Regulations 2001 (S.I. 2001/1004). Amendments to the reformed legislation are included in Finance Bill 2021 and in this instrument.

6.2 This instrument makes a technical change to the Intermediaries Regulations to ensure that the legislation operates as intended from 6 April 2021 for engagements where an intermediary is a company. The change addresses an unintended widening of the conditions of an intermediary, which went beyond the intended scope of the policy. A commitment to make a technical change to the legislation was announced by the Financial Secretary to the Treasury in a Written Ministerial Statement on 12 November 2020.

6.3 In view of including this provision, the procedure for free issue of these Regulations has been applied and they are being issued free of charge to all known recipients of the 2020 Regulations. HMRC has consulted the SI Registrar.

6.4 This instrument also introduces a TAAR to target potential future avoidance arrangements, which seek to get around the conditions for a company or partnership intermediary in order to obtain a NICs advantage. This instrument amends provisions providing for the recovery of a deemed employer NICs debt in the Social Security (Contributions) Regulations 2001 so that these cannot be applied when the TAAR applies.

6.5 This instrument also amends the Intermediaries Regulations to improve the rules regarding the provision of information within the labour supply chain to ensure they operate effectively. The requirement to confirm whether the conditions of an intermediary are met is extended to apply to the intermediary, where the worker has not provided confirmation.

6.6 This instrument further amends the Intermediaries Regulations to improve the operation of the rules by extending the provisions relating to fraudulent information. This now includes fraudulent information provided by any United Kingdom-based party in the labour supply chain, rather than just the worker or someone connected to them.

6.7 Equivalent changes will be made to the primary legislation through Finance Bill 2021.

7. **Policy background**

What is being done and why?

7.1 The off-payroll working reform is being introduced to improve fairness in the tax system by ensuring that individuals working like employees, but through their own intermediary, such as a personal service company (PSC), pay broadly the same income tax and NICs as individuals who are employed directly.

7.2 To address non-compliance, in April 2017 the government reformed the way in which the rules operate in the public sector. The reform moved responsibility for determining whether the off-payroll working rules apply from the worker's intermediary to the public bodies engaging them.

7.3 At Budget 2018 the government announced the reform would be extended to medium and large-sized organisations in all other sectors but would not apply to engagements with the 1.5 million smallest businesses. To give people and businesses time to prepare, it was announced that this change would not be introduced until April 2020. Following Spring Budget 2020, the government announced that the introduction of the reform would be delayed until 6 April 2021 to avoid businesses having to implement the changes during the initial impacts of coronavirus (COVID-19).

7.4 Legislation extending the reform was introduced in the Finance Act 2020, amending ITEPA 2003, and in the 2020 Regulations, amending the Intermediaries Regulations.

7.5 A technical change to the off-payroll working rules is being made to ensure the legislation operates as intended from 6 April 2021 for engagements where an intermediary is a company. The change will address an unintended widening of the conditions of an intermediary, which went beyond the intended scope of the policy.

7.6 The conditions of a company intermediary were amended in Finance Act 2020 and in the 2020 Regulations to prevent avoidance of the off-payroll working rules by workers diluting their shares in the intermediary so that they do not have a material interest (for example, having a shareholding of less than or equal to 5%). This would have meant that the off-payroll working rules did not apply. The scope of this condition was wider than the policy intent, as it would have caught any arrangement where the worker operates through a company, even if the full payment had already been taxed as employment income (such as where the worker is operating as an employee of an umbrella company).

7.7 The technical change in this instrument will limit the scope of this condition to only cases where the worker has a less than material interest in the intermediary and the payment received by the worker for the services provided is not already taxed wholly as employment income. This change will remove from the legislative scope of the rules organisations who were not intended to be within the scope of the conditions of a company intermediary and therefore the off-payroll working rules. This change will not affect those organisations who were intended to be within the scope of the rules and have been preparing for the reform on this basis.

7.8 The instrument also introduces a TAAR that will target any arrangements where the main purpose, or one of the main purposes, is to gain a NICs advantage by circumventing the conditions of a company or partnership intermediary and taking the engagement out of scope of the off-payroll working rules.

7.9 The extension of the requirement to confirm whether the conditions of an intermediary are met recognises that the intermediary will sometimes be better placed than the worker to confirm whether this is the case. This change should make it easier for parties in the labour supply chain to confirm whether the worker is potentially subject to the off-payroll working rules.

7.10 The extension of the provisions relating to fraudulent information will prevent client organisations or deemed employers from facing a liability where they have been provided with fraudulent information by another party in the chain.

7.11 The reform of the off-payroll working rules has generated public interest since its announcement. It is the subject of regular articles in specialist press and occasional national coverage. HMRC has proactively engaged with various groups of stakeholders to discuss the changes. Stakeholders agree that legislative change is needed to implement the technical change and agree that the approach this instrument takes achieves this.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 There are no plans to consolidate these regulations, which reflect new provisions inserted into the existing Intermediaries Regulations.

10. Consultation outcome

10.1 The government has not held a formal consultation on the changes this instrument introduces or on the text of the instrument itself, due to time constraints. The policy intent of the reform and the existing legislation implementing this intent have been the subject of numerous consultations in the past. The outcome of a consultation on the implementation of the reform of the off-payroll working rules is available on the website at https://www.gov.uk/government/consultations/off-payroll-working-rules-from-april-2020. The government also held a consultation on the 2020 Regulations, which implement the wider reform for NICs. This instrument seeks to preserve the policy intent by addressing an unintended widening of the legislation and by making two further related changes to improve the operation of the rules.

10.2 Following the Financial Secretary to the Treasury's Written Ministerial Statement announcing the government's intention to make the technical change on 12 November 2020, there would not have been sufficient time to develop the technical solution and run a formal consultation process. However, HMRC have engaged key external stakeholders in the development of the changes on an informal basis, as set out above at paragraph 7.11.

11. Guidance

11.1 HMRC has published detailed guidance on the changes in the form of updates to the Employment Status Manual, which can be found here: https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10000.

11.2 HMRC continues to provide extensive support, education and guidance to help organisations implement the reform and apply it correctly. This includes factsheets and communications resources for organisations and workers, together with one-to-one engagement, workshops and webinars being provided to those affected by the changes. HMRC also developed an enhanced version of the Check Employment Status for Tax tool, which was relaunched together with guidance in November 2019.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies, outside of the impacts already identified for the wider reform.

12.2 There is no, or no significant, impact on the public sector, outside of the impacts already identified for the wider reform.

12.3 A Tax Information and Impact Note covering this instrument will be published on the website at https://www.gov.uk/government/publications/technical-changes-to-make-sure-off-payroll-working-legislation-operates-as-intended.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 The basis for the final decision on what action to take to assist small businesses was taken on the basis that the impact on small businesses and mitigations to assist small businesses were considered as part of the wider reform of the off-payroll working rules from April 2021. This instrument makes a technical change which will restore the original policy intent of the off-payroll working rules. The further changes will improve the operation of the legislation, but will not have any additional impacts on small businesses other than those already identified for the wider reform of the off-payroll working rules. Under the wider reform, small businesses are not required to determine whether or not a worker providing their services through an intermediary (such as a limited company or PSC) is subject to the off-payroll working rules.

14. Monitoring & review

14.1 The measure will be monitored through information collected from tax returns, ongoing communications with affected taxpayer groups and through commissioning external research into the impacts of the wider reform six months after implementation.

14.2 The regulation does not include a statutory review clause. None is required under Section 28(3)(a) of the Small Business, Enterprise and Employment Act 2015 because the power by which this instrument is made is being exercised so as to make or amend provisions imposing, abolishing or varying any tax duty, levy or other charge or provisions in connection with such provisions.

15. Contact

15.1 Philip Staton (email: philip.staton@hmrc.gov.uk) and Jon Couzens (email: jon.couzens@hmrc.gov.uk) at HMRC can be contacted with any queries regarding the instrument.

15.2 Christopher Simons, Deputy Director for Off-Payroll Working Programme, at HMRC can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt Hon Jesse Norman MP, Financial Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.