

NATIONAL INSURANCE CONTRIBUTIONS BILL

Memorandum from HM Treasury to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the National Insurance Contributions Bill ("the Bill"). The Bill was introduced in the House of Lords on 7 September 2021. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. It is proposed that the Bill will contain the following measures: -
 - (i) From April 2022, an employer National Insurance contributions (NICs) relief for Freeport employees. This will mean that Freeport employers will not have to pay employer NIC's for up to 3 years on earnings up to a new Upper Secondary Threshold for qualifying Freeport employees in Great Britain, with provisions for Northern Ireland Freeports to be made in regulations (as described below);
 - (ii) From April 2022, an employer NICs relief for employers of Her Majesty's armed forces veterans. This will mean that employers will not have to pay employer Class 1 NICs for the first 12 months of a veteran's civilian employment on earnings up to the Upper Secondary Threshold. From April 2022 employers will claim this relief in real time. For earnings in the 2021-22 tax year, employers will be able to claim this relief retrospectively from April 2022 onwards;
 - (iii) Exempting Test and Trace Support Payments from self-employed (Class 2 and 4) NICs. These are payments made to individuals who have been told to self-isolate because of coronavirus (COVID-19) and cannot work from home. Effective from the 2020-21 tax year, this means these payments will not be included in profits liable to Class 2 and 4 NICs. This aligns the treatment of these payments with that of employees for the purposes of Class 1 NICs; and
 - (iv) Disclosure of Tax Avoidance Schemes (DOTAS) legislation was introduced in 2004 and seeks to provide HMRC with early information about new tax avoidance schemes, how they work and those who use them. Changes included in Finance Bill 2021 will ensure that HMRC can act decisively where promoters fail to provide information on their avoidance schemes and make taxpayers aware at an earlier stage where it suspects a tax avoidance scheme is being sold. The NICs Bill is intended to include changes to an existing regulation making power in the Social Security Administration Act 1992 so that regulations can be made mirroring changes to tax legislation included in Finance Bill 2021.

C. DELEGATED POWERS

3. The Bill contains several new delegated powers in relation to the new employer NICs relief for employers in Freeports and the new Employer NICs relief for employers of veterans. The legislation intended to exempt Test and Trace Support

Payments from self-employed NICs contains a delegated power for the Treasury to designate further schemes to be exempted from this power (not required to be by way of statutory instrument). The Bill also extends an existing power in relation to DOTAS legislation.

Employer NICs relief for Freeport employees

Part 1, clause 1(5) – Zero-rate contributions for employees at freeport tax sites: Great Britain: power to define cases where this relief does not apply until the tax year has ended

- ***Power conferred on: the Treasury***
 - ***Power exercised by: Regulations***
 - ***Parliamentary procedure: negative resolution***
4. Class 1 NICs is administered in real time through PAYE and Real Time Information (RTI) returns. Employers use NICs category letters that apply the relevant rates of NICs against earnings. In a very small number of cases where the earner qualifies for multiple NICs categories, HMRC may not be able to provide the relief in real time. This does not change the amount of Freeport NICs relief the employer is ultimately entitled to.
5. Clause 1(5) provides the Treasury with the power to specify cases where this relief does not apply until the tax year has ended. In these circumstances, the employer will be required to pay secondary Class 1 NICs as if this relief did not apply. Then, at the end of the tax year, the employer will be eligible to claim the relief against the secondary Class 1 NICs that would have otherwise been relieved in the previous tax year. This power will allow HMRC to deliver a relief that is beneficial to both employers and wider taxpayers. This only affects a very small number of employers and does not change the amount of relief employers can receive only the timing that the relief can be claimed. Further, this power ensures that employees are not disadvantaged when both the employee and employer qualify for non-standard rates of NICs. The power is subject to the negative procedure as it does not affect the calculation of the relief nor the total amount an employer can receive. Clause 1(6) allows the conditions at clause 2(1)(c) and (d) to be modified as needed in light of the relief being claimed at year end rather than in real time.

Part 1, clause 3(1) – Freeport conditions: supplementary: power to extend the period for which the relief applies until 5 April 2031

- ***Power conferred on: the Treasury***
 - ***Power exercised by: Regulations***
 - ***Parliamentary procedure: negative resolution***
6. Clause 2(1)(a) specifies that a Freeport employment must begin on or after 6 April 2022 but may not begin later than 5 April 2026. The power in clause 3(1) enables the Treasury to extend the period for which this relief applies by amending the

date of 5 April 2026, by which a Freeport employment must begin, to a date no later than 5 April 2031, which is the limit imposed by clause 2(6)(b).

7. This power may amend primary legislation. The power is considered appropriate so that primary legislation is not required to extend the period for which the scheme may operate. This provision applies to Great Britain.
8. The power is subject to the negative procedure. In view of the restriction in clause 2(6)(b) and that the power may only be used to extend the relief rather than reduce the period for which the scheme may operate, we consider the negative procedure is appropriate.

Part 1, clause 3(2) – Freeport conditions: supplementary: power to make provisions about circumstances in which a condition is to be treated as met

- ***Power conferred on: the Treasury***
 - ***Power exercised by: Regulations***
 - ***Parliamentary procedure: negative resolution***
9. Clause 3(2) provides that regulations may make provisions about circumstances in which a freeport condition (contained in clause 2) is to be treated as being met.
 10. Clause 3(5) provides that regulations under clause 3(2) may make provision by reference to sectors of the economy or to descriptions of employer, earner or employment and clause 3(6) provides that they may amend, repeal or otherwise modify Part 1 of the Bill.
 11. The Government may wish to use this power to treat the condition in clause 2(1)(d), that an earner must spend 60% of their employed time in the Freeport, as being met in particular circumstances. An example where the power might be used is in the case of certain groups with protected characteristics (such as disabled earners who may not be able to meet the 60% rule due to reasonable adjustments allowing them to work from home). In this example, the effect of the power would be to extend the relief to more eligible employees to the benefit of employers.
 12. The effect of treating a condition as being met is that the relief applies where it would not otherwise apply so this power is wholly relieving, and therefore subject to the negative procedure.

Part 1, clause 3(3) – Freeport conditions: supplementary: power to modify Freeport employment conditions

- ***Power conferred on: the Treasury***
- ***Power exercised by: Regulations***
- ***Parliamentary procedure: draft affirmative***

13. Clause 2 sets out the Freeport conditions, which are the eligibility conditions for claiming this relief. Clause 3(3) provides that the Treasury may by regulations make changes to the Freeport conditions that it considers appropriate. Such changes may add, remove or alter the employment conditions. Subsections (4) to (6) set out in further detail what the power includes.
14. Clause 3(4) provides that regulations under clause 3(3) may among other things:
 - treat a condition as not being met in certain circumstances;
 - add conditions relating to accounts or other records; and
 - add conditions requiring a person to take steps specified in the regulations.
15. Clause 3(5) provides that regulations under clause 3(3) may make provision by reference to sectors of the economy or to descriptions of employer, earner or employment.
16. Clause 3(6) provides that regulations made under clause 3(3) may amend, repeal or otherwise modify Part 1 of the Bill.
17. The Government may wish to specify additional criteria that an eligible freeport employer may need to satisfy in order to claim the relief. The effect of specifying additional criteria could be to reduce the amount of relief that employers may qualify for or the number of employers that may qualify for the relief. The eligibility criteria are set against the background of current economic considerations and the Government may wish to amend the criteria to reflect changing circumstances.
18. Following its departure from the EU, the UK has international subsidy control obligations under the UK-EU Trade and Co-operation Agreement and the Northern Ireland Protocol (NIP). The Department for Business, Energy & Industrial Strategy is currently designing the domestic subsidy control regime that will apply in the UK, which will need to be compliant with the UK's international obligations. This power will also enable the Government to amend the Freeport conditions should that be necessary to make the relief compliant with the future subsidy control regime or the NIP. An example could be additional record keeping requirements for employers.
19. Consequently, were this power not included in the Bill, the effect would be that the relief could not be operated in compliance with the UK's subsidy control obligations until the changes are implemented through primary legislation in a future Bill. Implementation of the relief may need to be delayed which would cause disruption to businesses who have prepared for implementation in April 2022. As the power may add to or alter the applicable conditions, it is considered that the affirmative procedure is appropriate. This provides the appropriate level of parliamentary scrutiny and affords each House of Parliament the opportunity to debate the statutory instrument. A broadly similar power is included in section 5 of the National Insurance Act 2014 (power to amend the Employment

Allowance) and has been used to amend that Act¹. Equivalent powers² are also included in Finance Bill 2021 for the Freeports capital allowances and stamp duty land tax measures.

***Part 1, clause 5 – Zero-rate contributions for employees at freeport tax sites:
Northern Ireland***

- ***Power conferred on: the Treasury***
- ***Power exercised by: Regulations***
- ***Parliamentary procedure: draft affirmative***

20. Clause 5 specifies that the Treasury may by regulations make provision corresponding or similar to provisions made for the purposes of clauses 1 to 4 in relation to Northern Ireland.

21. This power is included in the Bill as the Government believes that secondary legislation is appropriate to set out the scheme in relation to Northern Ireland rather than additional primary legislation solely to cater for the introduction of a zero-rate of Secondary Class 1 NICs for freeport employees in Northern Ireland. The Government believe it is suitable to take powers in this Bill that will allow it to legislate for this relief so that it is available as soon as possible to employers setting up in Northern Ireland Freeports, whilst allowing the Government to establish the details of policy design once there is sufficient clarity on the most appropriate approach to delivering Freeports policy in Northern Ireland. The Government is working with the Northern Ireland Executive to ensure a suitable model for a Northern Ireland Freeport is developed; one that meets the Government's international obligations in Northern Ireland (such as the NIP), the needs of the ports, businesses, and communities of Northern Ireland.

22. The Government's intention is that the employer NICs relief for Freeports employers is in place by 6 April 2022 throughout the UK. The power is circumscribed in that it can only make provision corresponding to or similar to the provisions that will apply to Great Britain. As the power may add to or alter the applicable conditions should the Government's international obligations require or for any other reason, it is considered that the affirmative procedure is appropriate.

Employer NICs relief for employers of armed forces veterans

Part 1, Clause 6(6) – Zero-rate contributions for armed forces veterans: power to amend primary legislation to extend the period for which the relief is available

¹ This power has been used to introduce The Employment Allowance (Care and Support Workers) Regulations 2015 (SI 2015/578), The Employment Allowance (Excluded Companies) Regulations 2016 (SI 2016/344) and The Employment Allowance (Excluded Persons) Regulations 2020 (SI 2020/218).

² Parts 1 and 2 of Schedule 21 to the Finance Bill 2021 include new sections 45P and 270BNC to be inserted into the Capital Allowances Act 2001. Schedule 22 to the Finance Bill 2021 includes new Schedule 6C, Part 5 to be inserted into the Finance Act 2003.

- ***Powers conferred on: the Treasury***
- ***Power exercised by: Regulations***
- ***Parliamentary procedure: negative resolution***

23. Clause 6(1)(b) and (4) specify that the zero-rate will operate for the tax years 2022-23 and 2023-24. Clause 6(5) specifies that the zero-rate will apply to earnings in the 2021-22 tax year but the relief will only be available to employers in respect of that tax year from 6 April 2022 onwards.
24. Clause 6(6) provides a power to extend the period for which the relief is available. The power enables regulations to be made by the Treasury to amend clause 6(4) to add one or more tax years to those specified in this subsection.
25. This power may amend primary legislation. The power is considered appropriate so that primary legislation is not required to add to the number of tax years that the scheme may operate.
26. The power is subject to the negative procedure. In view of the restriction described above; that the power may only be used to add to the number of tax years that the scheme may operate, we consider the negative procedure is appropriate.

Part 1, clause 6(8) – Zero-rate contributions for armed forces veterans: power to define cases where this relief does not apply until the tax year has ended

- ***Powers conferred on: the Treasury***
- ***Power exercised by: Regulations***
- ***Parliamentary procedure: negative resolution***

27. Class 1 NICs is administered through PAYE and RTI returns. Employers use NICs category letters that apply the relevant rates of NICs against earnings. In a very small number of cases where the earner qualifies for multiple NICs categories, HMRC may not be able to provide the relief in real time. This does not change the amount of the NICs relief the employer is ultimately entitled to.
28. Clause 6(8) provides the Treasury with the power to specify cases where this relief does not apply until the tax year has ended. In these circumstances, the employer will be required to pay secondary Class 1 NICs as if this relief did not apply. Then, at the end of the tax year, the employer will be eligible to claim the relief against the secondary Class 1 NICs that would have otherwise been relieved in the previous tax year. This power will allow HMRC to deliver a relief that is beneficial for both employers and wider taxpayers. This only affects a very small number of employers and does not change the amount of relief employers can receive only the timing that the relief can be claimed. Further, this power ensures that employees are not disadvantaged when both the employee and employer qualify for non-standard rates of NICs.
29. The power is subject to the negative procedure as it does not affect the calculation of the relief nor the total amount an employer can receive.

Part 1, Clause 8 – Upper secondary threshold for earnings: power to specify an upper secondary threshold for every tax year to limit the earnings to which the zero rate Secondary Class 1 contributions for freeport employees or veterans applies

- ***Powers conferred on: the Treasury***
- ***Power exercised by: Regulations***
- ***Parliamentary procedure: draft affirmative***

30. Clause 8 provides for setting an upper secondary threshold (UST) for each of the zero rates of contributions for freeport employees and eligible veterans. Clause 8(1) provides a power to specify an upper secondary threshold for every tax year for which each relief applies.
31. Earnings paid to or in respect of eligible freeport employees or veterans which exceed that upper secondary threshold are liable to the secondary percentage, which is currently 13.8%, rather than the zero rate.
32. Clause 8(2) provides that the threshold is to be an amount specified for that year by regulations made by the Treasury.
33. Clause 8(3) specifies that the threshold can be set for the 2021-22 and 2022-23 tax year retrospectively. This is necessary as the veterans relief at clause 5 is available on earnings from April 2021. The tax year 2022-2023 is included as a precaution in case Royal Assent is later than anticipated, leaving insufficient time to set an upper secondary threshold for both freeports and veterans before the start of that tax year.
34. Clause 8(4) specifies that section 5(4) to (6) of both the Social Security Contributions and Benefits Act 1992 (SSCBA 92) and the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (SSCB(NI)A 92) will also apply to regulations made under clause 8. Section 5 of both Acts confers a power to prescribe an equivalent of the secondary threshold for earners paid other than weekly.
35. As the level of an upper secondary threshold will be used to determine to what extent the zero rate will apply to the earnings of freeport employees or veterans, the Government may wish to alter the level at which a threshold is set to reflect changing circumstances. The Government believes this is an appropriate use of secondary legislation rather than requiring primary legislation each time the threshold is changed.
36. In so far as it represents a decrease to an upper secondary threshold previously set, the use of the power will limit the amount of earnings to which the zero-rate for freeport employees or veterans will apply and mean that employers will be liable to pay the higher secondary percentage rate on more earnings. It is therefore considered that the draft affirmative procedure provides the appropriate level of parliamentary scrutiny, affording each House of Parliament the opportunity to debate the level at which an upper secondary threshold is set.

Exempting Test and Trace Support Payments from self-employed (Class 2 and 4) NICs.

Part 2, Clause 10(2)(d) – treatment of self-isolation support scheme payments: power to designate corresponding or similar schemes to those specified in clause 10(2)(a) to (c)

- ***Powers conferred on: the Treasury***
- ***Power exercised by: Designation***
- ***Parliamentary procedure: none***

37. Clause 10(2)(d) provides that the Treasury may designate new schemes in relation to any part of the United Kingdom that are corresponding or similar to the schemes specified in clause 10(2)(a) to (c). Payments under schemes designated in that way will benefit from the exemption in clause 10(1) and will not be taken into account for the purposes of computing the amount of profits in respect of which Class 4 contributions are payable under section 15 of SSCBA 92 or SSCB(NI)A 92.

38. The power is not subject to any Parliamentary procedure and does not require the making of a statutory instrument. The justification for this is that the power is wholly relieving and that the schemes to be designated must correspond or be similar to those specified in clause 10(2)(a) to (c). This limits the powers to corresponding or similar schemes which would need to make payments to people who cannot work as a result of self-isolation.

Disclosure of Avoidance

Part 3, Clause 11 – Disclosure of contributions avoidance arrangements: amendment to section 132A(1) Social Security Administration Act 1992 (SSAA 92)

- ***Powers conferred on: the Treasury***
- ***Power exercised by: Regulations***
- ***Parliamentary procedure: negative resolution***

39. Clause 11 amends section 132A(1) of the SSAA 92 to extend the Treasury's power to obtain disclosure of information in relation to 'notifiable contributions arrangements' or 'notifiable contributions proposals' (both as defined in s132A(3)) to cover arrangements which HMRC reasonably suspect are notifiable contributions arrangements or notifiable contributions proposals.

40. The DOTAS regime requires promoters of tax and NIC avoidance schemes to disclose details of the schemes to HMRC to enable them to formulate a response

to the avoidance. Regulations made under section 132A SSAA 92 apply to England and Wales, Scotland and Northern Ireland.

41. Section 132A(2) of the SSAA 92 restricts the scope of the power provided by subsection (1). The regulations can only operate by applying to NICs (with or without modification) or making provision for NICs corresponding to primary or secondary legislation relating to the disclosure of information in relation to income tax avoidance arrangements in Part 7 Finance Act 2004.
42. The existing power is subject to the negative procedure. In view of the restriction described above we consider the negative procedure remains appropriate.

HM Treasury