



Chartered
Institute of
Taxation

Excellence in Taxation

**Proposed secondary and tertiary legislation on Income Tax and VAT
affecting Making Tax Digital for businesses
Response by the Chartered Institute of Taxation (CIOT)**

1 Introduction

1.1 The primary legislation introducing Making Tax Digital (MTD) for businesses (Income Tax and VAT) is in Clauses 60, 61 and 62, and Schedule 14 Finance (No 2) Bill 2017 which is currently going through Parliament, and which is likely to receive Royal Assent later this month. The CIOT has recently submitted its comments¹ on the Finance Bill clauses.

1.2 The proposed secondary and tertiary legislation on Income Tax and VAT was published for comment on 13 September 2017.² Our comments are set out as follows:

Section 3 – our comments on the *Income Tax (Digital Requirements) Regulations*.
Section 4 – our comments on the *Draft Income Tax Notice: Retail Sales, Update Information, End of Period Information and Partnership Information*.

We have no comments on *The Income and Corporation Taxes (Electronic Communications) (Amendment) Regulations*.

We are sending our comments on the *Making Tax Digital for VAT: legislation overview* to HMRC under separate cover.

1.3 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it; taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

¹ Making Tax Digital: Submission to Public Bill Committee from the Chartered Institute of Taxation

<https://www.tax.org.uk/sites/default/files/Finance%20Bill%202017-19%20CIOT%20PBC%20Submission%20Making%20Tax%20Digital%20FINAL.pdf>

² <https://www.gov.uk/government/consultations/making-tax-digital-reforms-affecting-businesses>

2 Executive summary

- 2.1 The amount of legislation that is being delegated to secondary legislation is unprecedented in our experience, and is completely inappropriate for legislation that is going to bring in the most fundamental changes to the tax system in decades. It is delegating not only matters of detail but also matters of principle. When other significant changes to the tax system have taken place (such as the introduction of Self-Assessment in the 1990s), substantive provisions were set out in primary legislation and subject to the appropriate Parliamentary scrutiny.
- 2.2 By delegating key details to secondary legislation, and using the negative procedure (rather than the affirmative procedure) it is more or less inevitable that they will receive little if any Parliamentary scrutiny. At some places, it appears that material delegated to secondary legislation can then be further delegated to directions and notices. This is giving HMRC extremely wide powers to make provisions without any scrutiny at all.

3 The Income Tax (Digital Requirements) Regulations

3.1 *Reg 2 – Interpretation*

- 3.1.1 This section seems incomplete, and there seems to be an inconsistency in whether items are defined actually in the interpretation section, or in the regulations themselves, which is confusing. For example, ‘account end date’, and ‘stagger update’ are defined within the regulations. Why not in the interpretation section? Some other definitions are in Schedule A1 which is being added to TMA 1970. This might be normal practice, but again it adds to the confusion.
- 3.1.2 Some of the language is confusing. For example, reference is made to ‘update notices’ (Reg 8) and ‘end of period notices’. These sound like things which are given to specific taxpayers, when in fact it looks, from reading further into the regulations, like they are intended to be references to the public notices containing rules about these things.

3.2 *Reg 3 – requirement to use functional compatible software*

- 3.2.1 *Preservation of records* – we note that the requirement to preserve digital records will match existing business record keeping obligations in s12B TMA 1970. While it makes sense not to introduce a different set of obligations, we think that given that MTD for Income Tax will not be mandated before April 2020 there is time for a period of consultation on whether it is appropriate to read s12B across into MTD. We also note that the record-keeping provisions in paragraph 11 new Schedule A1 are loosely defined and do not exactly reflect s12B (see our comments made on the draft legislation on 28 February 2017³).
- 3.2.2 *Record keeping penalty* – of particular importance is the penalty for not keeping adequate records which is to be a figure not exceeding £3,000 (para 12(3) new Schedule A1 which is similar to s12B (5)). The Association of Taxation Technicians

³ Digital reporting and record-keeping for business: income tax - CIOT comments (paras 3.21 – 3.23)
https://www.tax.org.uk/system/files_force/file_uploads/170228%20Digital%20reporting%20and%20record-keeping%20for%20business%20-%20income%20tax%20-%20CIOT%20comments.pdf?download=1

has commented on this recently in its written evidence to the Finance Bill Committee.⁴ We endorse their views.

3.3 **Reg 4 – Digital Start date**

3.3.1 We are not entirely clear how this works for ongoing trading businesses. If we assume YYYY is 2021, then it means that any person in business before 6 April 2021 (unless a new business – see Reg 4(7)) is caught by Reg 4(2). If we assume an existing business has a 30 April year end, 4(3) (c) presumably means that accounts have been drawn up to a date on or after 5 April 2020 [YYYY-1], so 30 April 2020, and so the digital start date is the date after the accounts end date, so 1 May 2020. This is after April 2020 so is consistent with the announcement by the Government in July 2017 that businesses will not be asked to keep digital records or to update HMRC quarterly for Income Tax until at least 2020.

However, if we assume YYYY is 2020, then 4(2) is referring to ongoing businesses as at 6 April 2020. If we assume a business has a 30 April year end, 4(3)(c) presumably then means that accounts have been drawn up to a date on or after 5 April 2019 [YYYY-1], so 30 April 2019, and so the digital start date is the date after the accounts end date, so 1 May 2019. That is not April 2020 at the earliest.

Para 4(4) then adds to the confusion by referring to 5 April YYYY (not YYYY-1), and before 6 April YYYY+1, which is a later tax year than that referred to in 4(3). If we assume an existing business has a 30 April 2020 year end but then decides to change its accounting reference date and draw up accounts to 31 December 2020, 4(5) would not seem to apply unless YYYY is 2020, which seems to suggest that 4(3) (c) should be YYYY not YYYY-1.

We wonder if the solution is that the date in 4(3) (c) should simply be YYYY, not YYYY-1?

3.3.2 Instead of using the word ‘first’ in 4(4), the word ‘earliest’ might be better. Similarly with 4(8).

3.3.3 For new trading businesses, reg 4(7) says that the digital start date is the first day of the accounting period which commences after the end of the next account end date after 5 April. If we assume YYYY is 2020 and the business starts on 1 September 2020 (ie after 6 April 2020 - reg 4(6)), and draws its first accounts up for the year to 31 August 2021 (which is after 5 April immediately following the business start date (reg 4(7) (c)), the digital start date would appear to be 1 September 2021 (ie the date after the account end date). This raises a number of points:

- a) It appears that reg 4(7) means that the business does not need to keep digital records during its first accounting period because that falls before the digital start date (reg 5(1)). If we have understood this correctly, this is helpful in some respects as it will give the business time to choose how to keep its digital records, but it will be essential that HMRC provide sufficient information to the business to ensure it knows what its obligations are, and from what date.
- b) This example would also seem to work with the existing obligation to notify chargeability for a new business within six months following the end of the

⁴ Written evidence submitted by the Association of Taxation Technicians (ATT) Finance Bill 2017-19: Clause 60 <https://www.att.org.uk/sites/default/files/171013%20Written%20evidence%20from%20the%20Association%20of%20Taxation%20Technicians%20-%20MTD%20Record%20Keeping%20Penalty%20-%20Final.pdf>

year of assessment (s7 TMA 1970). Under that provision, the business in our above example would need to notify HMRC of its chargeability to income tax by 5 October 2021 to avoid a penalty for failure to notify (ie 6 months after the end of the tax year 2020/21) – ie 3 months before its first obligation to submit a quarterly update to HMRC (end of December 2021). However, it is not clear that it would work if the business had started trading after 5 April 2020 and had chosen an accounting period end such as 30 April 2021. In this example we think the digital start date would be 1 May 2021 and the first quarterly update would be due at the end of August 2021, which is before 5 October 2021.

- c) It is unclear how reg 4(7) operates for a new business which draws its first set of accounts up to a date before 5 April immediately following the business start date. Using the above example, if we assume YYYY is 2020 and the business starts on 1 September 2020 (ie after 6 April 2020 - reg 4(6)), and draws its first accounts up for the seven month period to 31 March 2021 (which is before 5 April immediately following the business start date (reg 4(7) (c)), then 4(7) does not appear to provide a mechanism to determine what the digital start date should be. The same position seems to occur if YYYY is 2021. Or perhaps 4(9) is intended to apply in this circumstance but in that case what would be the logic of using 6 April as the digital start date? Likewise, we are not sure how this situation would interact with the obligation to notify chargeability in s7 TMA 1970.

- 3.3.4 It appears that existing property businesses/landlords may become obliged to keep digital records from 6 April 2020 (if YYYY is 2020) but not until 6 April 2021 (if YYYY is 2021) (reg 4(5)). Clarification is required over what year YYYY is referring to.
- 3.3.5 However, new property businesses/landlords do not need to keep digital records until the start of the tax year after the business commences (reg 4(9)). Our comments above apply in relation to new landlords as they do to new unincorporated trading businesses.
- 3.3.6 We would be pleased to discuss the above points in more detail with HMRC. It is going to be important that the rules around when businesses must first enter MTD are clearly understood.

3.4 **Reg 5 – Keeping and recording digital records**

- 3.4.1 This regulation requires digital records to have been maintained, even if no (or a late) quarterly update has been made. This is probably relevant if penalties are to be applied for not keeping records in the prescribed format. However, as we do not yet know what the MTD penalty regime will look like it is difficult to understand the consequences of failing to record the digital record by the dates in these regulations.

3.5 **Reg 6 – Digital records**

- 3.5.1 6(1) (b) requires a business to record transactions according to the accounting basis used by the entity, so either the cash or accruals basis. But some elections can / will be made at later dates, so it is unclear how this will work in practice. How will businesses report to HMRC if they 'rewrite' the records onto a different basis after the end of the accounting period? Will the original records be considered incorrect / inadequate?
- 3.5.2 It is not clear how these regulations interact with the VAT regulations, which are likely to require (see Annex 1 of the legislation overview) records to be maintained in accordance with the VAT basis being used. It is quite possible, for example, that a

business could be using the cash basis for VAT purposes, but not for income tax, or vice-versa.

- 3.5.3 Reg 6(2) indicates that HMRC will publish an 'update notice' saying what should be in digital records (see our comments below on the draft Income Tax Notice), and if the notice changes then the digital records must change accordingly. How will HMRC communicate this to businesses (via all software packages?) to ensure that the update reaches its target audience? There is also a concern that HMRC will change notices without proper consultation and scrutiny, which could have a detrimental impact on businesses, eg by increasing the amount of data needed to be recorded in digital records.

3.6 ***Reg 7 – quarterly updates***

- 3.6.1 Reg 7(4) defines the quarterly deadline as the date which is one month after the end of the quarterly period to which the quarterly update relates. Presumably this means the **calendar** month, eg if the quarter ends on 30 June, the information must be supplied by 31 July.

- 3.6.2 It is not apparent that there is any mechanism to change the quarterly period schedule, for example, if the business changes its accounting period end. Similarly will there be a facility to make Income Tax and VAT quarters the same if a business wishes them to be coterminous? We imagine that many businesses may wish to do this in order to reduce the number of occasions during the year when they will need to make quarterly updates to HMRC.

3.7 ***Reg 8 – Update notices***

- 3.7.1 It is concerning that HMRC can specify in a notice (rather than regulations) what information must be provided within a quarterly update. This provides little control over what type and amount of information HMRC might decide to ask businesses to provide. It is apparent from our recent discussions that HMRC do not seem to understand how much data is captured and the difficulties in capturing additional information.
- 3.7.2 It is not clear whether the 'update information' means that cumulative figures should be provided to HMRC each quarter, or just the data for that particular quarter. It would make sense to use cumulative figures, as in RTI, so each submission can also act as an update to the previous period, if more information has been obtained or errors found. We assume this is the purpose of Reg 19(3b).
- 3.7.3 8(2) (e) [and 15(1) (d)] requires identifying the properties within a property rental business, but that does not seem to be included in either the designatory information or quarterly update information in the notices. In any event, this could be onerous to do quarterly.

3.8 ***Reg 11 – Early provision of update information for quarterly periods***

- 3.8.1 This regulation permits a business to provide its quarterly update early, but no earlier than 10 days before the end of the quarterly period. Does this refer to 10 calendar days or 10 working days? We would support 10 working days or even a longer period than this, to accommodate (say) seasonal businesses or extended holidays to enable businesses to comply early if they wish / need to.

- 3.9 ***Reg 12 – Provision of end of period statements and Schedule A1 partnership returns***
- 3.9.1 Reg 12 (2) (1) explains that the end of period statement must include a declaration by the taxpayer. It is not clear what the position will be if an agent submits the statement on behalf of the taxpayer. Will similar regulations be introduced to those in respect of other online submissions made by an agent? Agents are authorised to file individual clients' personal tax returns online, for example, subject to conditions as to authorisation of the agent by the client, authentication of the information by the client and use of HMRC approved software.
- 3.10 ***Regs 13, 14 & 15 – End of period / Schedule A1 partnership notices***
- 3.10.1 Again, it is concerning that HMRC can specify in a notice (rather than regulations) what information must be provided within both the end of period notice and the Schedule A1 partnership notice.
- 3.11 ***Reg 16 – Commencement and cessation of requirements under Part 4***
- 3.11.1 We note that there is already a requirement to notify cessation of the business in the last quarterly update (Reg 9(3)). Regs 16(4) and 16(8) are therefore possibly superfluous.
- 3.12 ***Reg 17 – Retailers – elections***
- 3.12.1 With regard to Reg 17(3), it is not clear how a disagreement between HMRC and a businesses would be handled or resolved over whether it is reasonable to expect the relevant entity to keep digital records other than as specified in the notice. Is there a right of appeal, etc?
- 3.13 ***Reg 18 – digital records in relation to retail sales***
- 3.13.1 Again, it is concerning that HMRC can specify in a notice (rather than regulations) what information must be provided by a retailer within digital records.
- 3.14 ***Reg 19 – corrections and omissions***
- 3.14.1 In 19(1) 'as soon as possible' is vague. Either this needs defining, or say 'in accordance with paragraph X' etc.
- 3.14.2 If data is submitted on a cumulative basis then presumably corrections and omissions will flow through automatically on subsequent updates. This assumes that updates in year are going to provide cumulative data, but this does not appear to be explicitly stated anywhere in the regulations.
- 3.14.3 The regulation needs to make it clear that corrections and omissions must usually be corrected within the same accounting period, but there should also be provision for situations where errors are detected after the end of year statement has been submitted.
- 3.15 ***Reg 20 – End of period statements – correction by relevant persons***
- 3.15.1 This seems to be saying that an end of period statement for the relevant tax year cannot be corrected once the person has effectively submitted it to HMRC. This does not sound correct. Can HMRC confirm that the existing rules on the timeframes for tax return corrections and amendments, whether by the taxpayer or their agent, will

continue to apply to the figures in an end of year statement - s 9ZA and 9ZB TMA 1970?

3.16 **Reg 21 – End of period statements – correction by HMRC**

3.16.1 See above regarding corrections.

3.17 **Reg 23 – nominations and revocations of nominations by relevant partnerships**

3.17.1 Can a person appeal / object to being nominated by HMRC? If so, how?

3.18 **Reg 24 – Exemption for the digitally excluded**

3.18.1 We endorse the comments made regarding the exemption for the digitally excluded in the submission made by our Low Incomes Tax Reform Group.

3.18.2 It is not clear when the notice in 24(1) (b) must be given to / by HMRC. Is it before each information period, or can it be during or after it?

3.19 **Reg 25 – Income exemption: persons / Reg 26 – Income exemption: partnerships**

3.19.1 Reg 25(3) and Reg 26(3) refer to ‘income’ and ‘qualifying income’ rather than ‘turnover’ when specifying that there will be an exemption that will be based on an income threshold. Neither ‘income’ nor ‘qualifying income’ are defined in the regulations, so it is not clear whether they refer to ‘gross’ or ‘net’ income. We had understood that the threshold would be based on ‘gross’ income / turnover.⁵

3.19.2 Since Reg 25(3) states that the exemption depends upon the amount of qualifying income for the tax year that ended two years earlier, the situation could arise where the person’s income was above the threshold at that time but has since fallen below the threshold, and could potentially never increase above the threshold again – yet they must still enter MTD. We question whether this is what is intended.

3.19.3 It seems that there is no provision for the situation where a person’s qualifying income is close to £ [], with it dipping below the threshold in some years and above in others. It might not be practical for such a person to move in and out of MTD. Such a scenario needs to be accommodated in the regulations.

3.19.4 The VAT registration rules have mechanisms for dealing with scenarios similar to 3.19.2 and 3.19.3 above and might be a useful point of reference.⁶

3.19.5 Further, the interaction between Reg 25 and Reg 4 (digital start date) is unclear, particularly for new businesses. Indeed, the income exemption would appear to defer the digital start date for new businesses because the qualifying income for the tax year which ended two years before the tax year in which the relevant period ends will be nil.

⁵ The Government’s Making Tax Digital Policy Paper of 8 March 2017 stated that “Businesses, self-employed people and landlords with turnovers under £10,000 are exempt from these requirements”.

<https://www.gov.uk/government/publications/making-tax-digital-for-business/making-tax-digital-for-business>

⁶ See Schedule 1 to the VAT Act 1994, paragraph 1(3).

3.20 **Reg 27 – Large partnership exemption**

- 3.20.1 It seems that there is no provision for the situation where a partnership's qualifying income is close to £10 million, with it dipping below the threshold in some years and above in others. It would not be practical for such a partnership to move in and out of MTD, so such a scenario needs to be accommodated in the regulations.
- 3.20.2 It appears that if two 'small' partnerships were to merge to become one partnership, and that merged partnership has turnover above £10 m, it will not be able to look back and be exempt in the year of merger because it does not have historic turnover [TY- x] above £10m. Presumably it could claim exemption in the following year.
- 3.20.3 See above (Reg 26) with regard to the definition of 'income' and 'qualifying income' and whether this is referring to 'gross' income / turnover or not.

3.21 **Reg 28 – Election not to be exempt**

- 3.21.1 It is not clear that the regulations deal with a situation where a person or partnership is exempt because of the income thresholds, but actually participates in MTD without making an election not to be exempt. What would be the consequences, for example would the person be liable to a penalty for failing to provide an update on time even though they are exempt?

3.22 **Reg 29 – Non-resident company exemption**

- 3.22.1 Excluding non-resident companies chargeable to income tax from MTD is a welcome move given that the rules may change so such companies become chargeable to corporation tax in the near future.

4 **Draft Income Tax Notice: Retail Sales, Update Information, End of Period Information and Partnership Information**

- 4.1 This is clearly a very rough draft, but there are large parts of boxed text which have the force of law. Our concern is whether some of this detail should be in the Regulations, rather than in a Notice. HMRC will be able to change the Notice with very little, if any, external scrutiny.

4.2 **Part 4 – information to submit**

- 4.2.1 As mentioned above, there is nothing in here to say that what is required is cumulative data.

4.3 **Table 2**

- 4.3.1 Under '*Business Designatory Data*' it asks for basis period details. A business may not understand what this means. We presume that MTD compliant software will provide a 'help' facility to assist businesses in completing the boxes in the software correctly.
- 4.3.2 Under '*Business Designatory Data*' it asks whether the business accounts for income tax using the cash basis. What if the business does not know, or wants to change bases later, etc. An election for cash basis does not currently have to be made until after the end of the year (usually by ticking a box on the Self-Assessment Tax Return), so we presume that ticking the box in the MTD software will not be binding if

the business owner wishes to change its mind before the deadline? It would be helpful if this could be clarified.

4.3.3 This also seems relevant to Table 4 and the End of Period Statement – see ‘*Trade Profits (income chargeable to Part 2 of ITTOIA)*’.

4.4 **Table 3**

4.4.1 This table replicates categories on the current SA103 word for word but this seems a missed opportunity to update them for the 21st century. Very few businesses still use faxes, for example, and there is no mention of software costs.

4.4.2 It might be an idea to separate out the most common tax disallowable costs onto a separate line to help taxpayers identify them easily, eg entertaining, fines, gifts – and anything with private use elements, eg telephone, motoring costs. Or perhaps software is intended to do this?

4.4.3 Tables 3 and 4 – there does not appear to be a requirement to provide a balance sheet even in the end of period statement which seems another step away from formal accounts and double entry safeguards, and from the information that is requested on the current SATR (although a balance sheet is optional). Will a balance sheet be optional under MTD too?

4.4.4 Given, for example, the loan interest complexities within the Property Cash Basis it seems odd that HMRC are not encouraging taxpayers to keep balance sheets.

4.5 **Table 4**

4.5.1 It is not clear where end of year accounting adjustments are to be made. 5.9 just refers to summary totals from the quarterly updates.

5 **Acknowledgement of submission**

5.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

6 **The Chartered Institute of Taxation**

6.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 18,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation
10 November 2017