Chartered Institute of Taxation
Excellence in Taxation

Criminal Finances Act 2017 (the Act):

Corporate offences of failure to prevent the criminal facilitation of tax evasion (the Offences)

Introductory note issued on 9 August 2017

FOREWORD

This is an introductory note only to the Offences; **it is not comprehensive**. It includes basic information and some specific material relating to referrals to other firms of advisers and the COP9 process.

It is not stand alone guidance and members should refer to HMRC's guidance for further detail (see below).

This is a complex area which interacts with other penalty legislation and if you are uncertain about how it might apply to your business you should seek specialist advice.

While every care has been taken in the preparation of this guidance, it does not purport to be a comprehensive statement of the relevant law. The CIOT, the ATT and all those involved in the preparation and approval of this guidance shall not be liable for any direct or indirect loss, consequential loss, loss of profits or loss of reputation occasioned by reliance on the aforementioned documents.

1. The Offences

The corporate Offences of failure to prevent the criminal facilitation of tax evasion are contained in the Criminal Finances Act 2017 (the Act) which come into force on 30 September 2017.

In summary the Offences cover both UK and foreign tax evasion and there are separate offences for UK tax evasion facilitation and for foreign tax evasion facilitation. Three elements are required in order for the offences to apply:

• Fraudulent tax evasion by a taxpayer (either an individual or a legal entity) under existing law [1]

• The criminal facilitation of the tax evasion by a person associated with the corporate, acting in that capacity (referred to as a 'relevant body') who is acting in that capacity

• The relevant body failed to prevent the person associated with it from committing the criminal facilitation act

The relevant body has a defence if:

• It has put in place 'reasonable prevention procedures' to prevent its associated persons from committing tax evasion facilitation offences; or

• It is unreasonable to expect the relevant body to have such procedures in place

'Relevant body' means incorporated bodies and partnerships (ie not individuals)

'Associated persons' means a person who is an employee, agent or other person who performs services for or on behalf of the relevant body. The associated person can be an individual or an incorporated body.

2. Guidance

Under the Act

'The Chancellor of the Exchequer ('the Chancellor') must prepare and publish guidance about procedures that relevant bodies can put in place to prevent persons acting in the capacity of an associated person from committing UK tax evasion facilitation offences or foreign tax evasion facilitation offences.'

That guidance can be found here HMRC guidance on corporate offence of failure to prevent criminal facilitation of tax evasion. Members should refer to that for more comprehensive guidance.

1 Strict liability offences, such as the new offences under ss106B-H Taxes Management Act 1970 are not covered.

3. Overlap with the Bribery Act and the Anti-Money Laundering (AML) requirements

There is considerable overlap with existing AML policies and procedures (and some overlap with Bribery Act procedures because that legislation includes a similar 'associated person' framework). However it is important that members familiarise themselves with the Act to ensure they are compliant with it, and that the reasonable prevention procedures they have or put in place reflect the particular risks of facilitation of tax evasion.

4. The need to make preparations and consequences of failure to comply with the Act

The Offences will come into force on 30 September 2017 so members need now to assess what steps they need to take to enable them to comply with the legislation. In particular members should focus on having appropriate prevention procedures in place. In order to do this, it is necessary for the relevant body to first conduct a risk assessment to identify the risk of facilitation of tax evasion by its associated persons. The risk assessment should be documented. The consequences for breaching the Act are severe and include unlimited financial penalties, confiscation orders, serious crime prevention orders, regulatory issues and reputational damage.

5. No 'grace period' but….

It seems that some latitude may be given in the early days of the new legislation but that period is not open ended and 'rapid implementation' is expected. HMRC say in their guidance:

'The prevention procedures that are considered reasonable will change as time passes. What is reasonable on the day that the new offences come into force will not be the same as what is reasonable when the offence has been in effect for a number of years. The Government accepts that some procedures (such as training programmes and new IT systems) will take time to roll out, especially for large multinational organisations. HMRC will therefore take into consideration the prevention procedures that were in place and planned at the time that the facilitation of tax evasion was committed. At the same time the Government expects there to be rapid implementation, focusing on the major risks and priorities, with a clear timeframe and implementation plan on entry into force. In addition, HMRC expects reasonable procedures to be kept under regular review and to evolve as a relevant body discovers more about the risks that it faces and lessons are learnt.'

6. What do you need to do?

Your business needs to have in place and operate a system of 'reasonable prevention procedures that identifies and mitigates its tax evasion facilitation risks'. This provides a sound defence against prosecution.

In order to protect your business it is strongly advised that your business has written policies and procedures as without such documents it is very much more difficult to demonstrate you had reasonable prevention procedures in place. It is also very important that they are observed in practice as well as in principle and that they genuinely reflect the particular risks faced by your business.

7. Proportionality of reasonable prevention procedures

One size will not fit all. Reasonable prevention procedures will be proportionate to the risk your business faces taking in to account factors such as the size of the business and the nature of the work undertaken.

A key part of this will be the risk assessment.

8. Risk assessment and identifying risk areas

HMRC suggests that you 'sit at the desk of employees, agents and those who provide services for you or on your behalf and ask if they have motive, opportunity and means to criminally facilitate tax evasion.'[1] In drawing up your procedures consider the points in 9 – 12 below

9. Identifying risk areas

Points to consider include

• Nature of work undertaken eg for tax advisers basic compliance service work will generally be lower risk than complex planning involving multiple corporate structures and trusts

• Overseas involvement eg working with jurisdictions which do not have similar or equivalent standards and laws to the UK in respect of AML, anti-terrorist finance, bribery etc, high tax jurisdictions (so higher incentive to evade tax)

• Clients – for example are any clients Politically Exposed Persons? High Net Worth? Non UK resident? Clients who place a great value on secrecy? etc

10. Opportunity

Consider what opportunity is there for facilitating tax evasion. For example:

• How and when could staff/associates have the opportunity to facilitate tax evasion?

• Is their work monitored?

• Is there a 4 eyes review policy?

• How likely is it that they will be caught?

• How likely do they think they will be caught?

• How effective are the policies and procedures in deterring staff and associates?

1 See Chapter 9 of Professional Conduct in relation to Taxation entitled Tax evasion

11. Motive

Consider what motives might exist and how those might be tackled. For example:

• Financial reward can be a strong motivation for a member of staff or associate to facilitate tax evasion. Take care that reward packages do not encourage poor behaviour. For example, a remuneration package which includes a bonus for every new client could encourage staff to take on clients without properly checking the client's honesty, integrity and approach to tax compliance.

• What are the consequences of wrongdoing and are staff/associates aware of these?

12. Means – how could it be done?

Below are some illustrations how tax evasion could be facilitated:

• Hiding disallowable expenditure in a category which HMRC are unlikely to question, for example, personal expenditure which has not been declared on the individual's P11D as a benefit in kind. Inaccurately describing the services provided in a client's fee note to minimise the client's tax bill.

• Intentional manipulation of documents, for example, falsifying dates on dividend documents and the board minutes to alter the tax year in which tax would become due.

• The submission of a tax return which includes a claim which the adviser knows is without any justifiable basis. (Note this is distinct from submitting a claim where the entitlement to the relief may genuinely be in doubt and all the relevant facts are fully disclosed to HMRC). Be aware of the possibility that an adviser who has failed to advise the client properly in the first instance may submit such a claim in order to reduce the risk of being sued by the client.

• Knowing that a client wants to set up a structure to try to hide income, gains or assets from a tax authority and continuing to help the client to facilitate that structure.

•Being asked and agreeing to send a bill to a different person than the work was done for (eg to the company rather than the director, a non-UK affiliate rather than the UK client) or to the wrong address (eg to an offshore address) and/or with a misleading description of the services provided (eg 'fees for advice' rather than 'fees for compliance with the director's personal tax obligations'). In each case there could be an acceptable explanation and the tax liabilities could be correctly returned, but there is a risk that the client intends to achieve a better tax position (usually VAT, income tax or corporation tax) that is not consistent with the true facts.

Tax evasion is implicit in all these transactions and the relevant body runs the risk of being charged with the Offences unless it has proper policies and procedures in place and is complying with those.

Notwithstanding the Offences a member must never knowingly be involved in tax evasion and should not act for a client who engages in tax evasion. Members should be aware of their obligations under the Money Laundering legislation and under Professional Conduct in relation to Taxation (PCRT).

13. Top level commitment

Key to the success of the reasonable prevention procedures is strong buy-in from senior management. They should send a strong message both internally and externally that facilitation of tax evasion will not be tolerated in any form and make clear the consequences if staff and associates do not observe the firms policies and procedures. Consider whether contracts of employment and engagement need to be updated to make your business's approach to this Offence clear.

14. Associated persons and due diligence and referrals

As part of the reasonable prevention procedures the business should apply due diligence procedures in respect of 'persons who perform or will perform services for or on behalf of the business'. These should be proportionate to the risk assessed.

One area of particular relevance to tax advisers is referrals to other firms and the degree to which the referred firm can be considered to be an associate.

In discussion with HMRC we discussed the following points

•How far does the responsibility to carry out due diligence extend?

Example 1

Your firm acts for a client which is undertaking a major project. There are certain specialist elements which your firm cannot provide and you engage the services of another specialist firm on a sub contract basis. Your firm however remains in overall control of the project.

In such a case the subcontract firm would be seen as an associated person and should be subject to due diligence.

Example 2

The situation is as above but instead of engaging a subcontractor you advise the client that your firm is unable to assists with certain elements and instead provide the names of some firms which could. Your firm retains no further involvement in those aspects (other than to be updated on progress and receive a copy of the advice given). The control of that part of the project has passed to the firm(s) giving the advice.

In such a case the other firms would not be seen as associated persons and as such there would be no need to carry out due diligence.

•In Example 1 above does it make any difference whether the subcontractor bills the client direct or invoices your firm?

HMRC's view is that it does not. The determining factor is that as your firm remains in overall charge of the project the subcontractor is seen as 'performing services for or on behalf of' your firm and as such is an associated person.

•What safeguards could you put in place as part of the risk based due diligence process?

You could ask the associated person or business to confirm that they have broadly similar policies and procedures in place to minimise the risk of facilitation of tax evasion to your firm, or include such a requirement in your terms and conditions of business. Depending on the outcome of your initial risk assessment you may want to see a copy of the policy and ask for written confirmation that the policies are enforced and that they will not knowingly facilitate tax evasion nor work with anyone who does. You may also wish to ask those you are subcontracting with to report to you directly any incidents of fraud in their workforce that may relate to your business.

•If the policy documents referred to above are not in English do I have to pay for a translator to translate the documents?

It would be prudent to be in a position to understand a summary of the policies. HMRC suggest when in doubt as to what steps are appropriate it is worth asking the question 'What would the jury think?' if you were called upon to defend your actions in court. Would a jury expect you to have had at least had the executive summary translated?

•How often should the due diligence be reviewed and updated?

You should remain alert to the possibility of facilitation of tax evasion at all times. Documents and due diligence should be reviewed periodically to ensure they are still relevant and have not changed. For example, the associate could be asked to state whether there have been any significant changes annually or at the start of a new project.

15. Importance of training and record keeping

It is essential that all staff and associates are clearly told that facilitation of tax evasion will not be tolerated in any circumstances. The consequences of failing to comply with this policy should be communicated clearly to both staff and other associated persons.

Training on the prevention policies and procedures will form an important part of this. Records should be kept of training provided and consider asking staff to sign to confirm they have undertaken and understood the training.

A record should also be kept of any situations where there was knowledge or suspicion of facilitation of tax evasion and the rationale for any decisions reached.

The firm may also wish to consider a statement of zero tolerance towards the facilitation of tax evasion.

16. Contractual Disclosure Facility (CDF) COP 9

A number of issues arise in connection with cases where HMRC suspect tax fraud, in particular CDF COP9 cases.

If a **pre-existing** client of a relevant body falling within the Act is placed under CDF investigation, the relevant body has to consider whether it could act for that client in the CDF process. If the client accepts the CDF offer and admits tax fraud, as required within the 60 day CDF response period, the relevant body would need to consider whether it has potential exposure under the Offences because one of its employees, directors or partners (the 'adviser') was complicit in that admitted fraud when acting as an 'Associated Person' for the relevant body (in the case of the involvement of formal directors and partners, the relevant body might also be exposed as a primary offender because the director or partner was acting as its 'directing mind and will'). Even if that adviser was excluded from involvement in running the CDF (or had been dismissed), the potential for a conflict of interest arises.

In particular, it is worth noting that the client is entitled to a reduction in the amount of their liability to a penalty for the tax fraud (deliberate) offence by providing information on those who assisted or enabled them in committing their tax fraud, which could include the adviser. Best representation of a client requires this avenue to be investigated. This would in effect amount to a self-investigation by the relevant body since if the adviser were complicit this might also give rise to criminal liability for the relevant body.

The relevant body and adviser may also have exposure under the civil 'enabler' penalty regime (Section 162 and Schedule 20 of the Finance Act 2016) where similar considerations might apply.

HMRC have not made it clear within their guidance how any investigation into the adviser or the relevant body would

It may well therefore be advisable for the client to be referred to a third party specialist to assist in the CDF investigation and that the three parties involved – client, adviser and relevant body –consider taking independent legal advice on their particular situations.

Although the issue is at its most acute where HMRC initiate the CDF COP9 process, which involves HMRC commencing an investigation based on a specific allegation of fraud against the taxpayer, it is not uncommon for HMRC to allege during the course of a routine enquiry or other intervention that the facts suggest that the taxpayer has engaged in 'deliberate' behaviour for the purposes of the penalty legislation and assessment time limits. Where such an allegation is made, the same potential conflict of interest issues may arise where the taxpayer is a pre-existing client of the firm assisting with the enquiry or intervention.

17. Conclusion

As noted at the outset this is a basic introduction only to a complicated subject. It is important you refer to the HMRC guidance for a more comprehensive commentary and seek specialist advice if you are in doubt about the application of the law in this area.