

Client Update

UK Government Issues Guidance on Corporate Offence of Failure to Prevent Facilitation of Tax Evasion

OVERVIEW

On 1 September 2017, HM Revenue & Customs (“HMRC”) issued its final guidance on the corporate offence of failure to prevent the criminal facilitation of tax evasion (the “Guidance”). This offence, the key features of which are outlined below, was introduced by the Criminal Finances Act 2017 (the “Act”) in April and will come into force on 30 September.¹ The Guidance will be the primary resource for all companies and partnerships seeking to enhance their policies and procedures in order to avoid falling foul of the new offence: an organisation will have a defence if it can demonstrate that it has implemented “*such prevention procedures as it was reasonable in all the circumstances to expect*”. The Guidance contains no major changes from the draft guidance issued by HMRC in October 2016.

FAILURE TO PREVENT FACILITATION OF TAX EVASION OFFENCE

As has been widely reported, the Act creates a further strict liability corporate offence under UK criminal law, this time of failing to prevent associated persons from facilitating tax evasion by third parties, with wide extraterritorial application. The main elements of the offence are:

- criminal tax evasion by a taxpayer under existing law;
- criminal facilitation of that tax evasion by an individual acting in the capacity of an ‘associated person’ of the company—this can be an employee, agent or “*any other person who performs services for or on behalf of*” the company; and
- failure by the company or partnership (“company” will be used below as a shorthand for both) to prevent its associated person from committing the criminal facilitation.

¹ Please see our earlier client update on the Criminal Finances Act 2017:
<http://www.debevoise.com/insights/publications/2017/05/uk-criminal-finances-act-2017>

For the offence of failure to prevent the facilitation of overseas tax evasion, the following additional elements must also be established:

- the company must have a sufficient nexus to the UK—it is either incorporated or conducts business in the UK, or its associated person carried out the criminal facilitation in the UK; and
- the conduct of both the taxpayer and the associated person must be recognised as criminal both in the UK and in the jurisdiction to which the foreign tax evasion relates.

SIX GUIDING PRINCIPLES FOR PREVENTION PROCEDURES

Risk Assessment

The Guidance indicates that companies should first identify the nature and extent of their exposure to the risk of associated persons facilitating tax evasion offences. This will need to be documented, periodically reviewed and updated. The Guidance outlines some types of risk which should form part of such a risk assessment, including country, customer and product risk.

Proportionate Risk-Based Procedures

Having identified and prioritised the risks they face, companies should develop policies and procedures that are proportionate to those risks and to the nature, scale and complexity of their activities. The Guidance clarifies that burdensome procedures attempting to deal perfectly with every conceivable risk are not required and that businesses should implement reasonable prevention procedures designed to mitigate identified risks.

Top Level Commitment

Senior management are expected to foster a culture in which actions intended to facilitate tax evasion are always considered unacceptable. The Guidance encourages a company's senior management to be actively involved in overseeing the risk assessment, developing prevention procedures and communicating the company's stance on compliance.

Due Diligence

Companies will also need to conduct due diligence on customers, intermediaries and other third parties in order to ascertain the risk of facilitating tax evasion through their dealings with those parties. The due diligence procedures that are required will depend on factors such as the company's level of control and supervision over any third parties acting on its behalf.

Communication and Training

Internal and external communication and training will help ensure that a company's policies and procedures are embedded and understood throughout the organisation. These should

include a confidential means for employees to raise questions or concerns about the services they are providing.

Monitoring and Review

Since the nature of the risks faced by a company will change over time, monitoring, reviewing and enhancing its prevention procedures will be important.

ANALYSIS

The six key principles set out in the Guidance should be familiar to companies from the Ministry of Justice's guidance on the UK Bribery Act 2010. However, companies will not simply be able to add some wording to their existing compliance policies and procedures to cover tax evasion on the assumption that their procedures will thereby be deemed 'reasonable'.

One small but important difference from the Bribery Act guidance is the promotion of risk assessment to the top of the list of principles, emphasising that businesses should start with this before developing and implementing their procedures. Companies should carefully consider which organisations and individuals provide services to them and the risk of those services facilitating tax evasion in the UK or overseas. Companies should plan to formulate separate policies, procedures and training tailored to their tax evasion risks. While the UK authorities will initially allow companies a period of transition and leeway, the availability of deferred prosecution agreements to make enforcement of the new offence more straightforward makes it imperative for companies to implement effective prevention procedures as soon as possible.

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Please do not hesitate to contact us with any questions.

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