Corporate offence: failing to prevent the facilitation of tax evasion

Implementing reasonable procedures
As part of the Government's targeted campaign to crack down on tax evasion, a new corporate criminal offence for businesses that fail to prevent the facilitation of tax evasion is due to commence in 2017.

The draft legislation within the Criminal Finances Bill sets out a defence of having reasonable procedures in place to prevent the facilitation of tax evasion. The defence is akin to the Bribery Act 2010, which set out a similar defence of adequate procedures, and the actions that businesses will take are likely to be similar to those which followed the introduction of the Bribery Act in 2010.

**Overview of domestic and foreign tax evasion facilitation offences**

Stage 1
- UK or overseas criminal evasion of tax by a taxpayer (E) (either a legal or natural person) under the existing law.

Stage 2
- Criminal facilitation of the tax evasion by an associated person (P) of the relevant body (B) under the existing law.
  - ‘Associated person’ is defined as an employee, agent or any other person who performs services for or on behalf of the relevant body.

Stage 3
- The relevant body (B) failed to put in place reasonable procedures to prevent the associated person (P) from committing a tax evasion facilitation offence.
  - ‘Relevant body’ is defined as any body corporate or partnership, wherever established.

**Defence**

Under the draft legislation, there would be a defence against a criminal penalty if the relevant body can evidence that:

- It had put in place reasonable procedures to prevent associated persons from facilitating tax evasion; or
- It was not reasonable to have expected the relevant body to have any prevention procedures in place

Reasonable procedures that are to be put in place should be based on the six principles as stated in HMRC’s guidance:

1. Risk assessment
2. Proportionality of risk-based prevention procedures
3. Top-level commitment
4. Due diligence
5. Communication (including training)
6. Monitor and review

**Implications of the new legislation**

The legislation is currently proposed to apply to all taxes and there is no restriction on business size or industry sector. It is however recognised that what constitutes reasonable procedures will depend on the nature, scale and complexity of the activities undertaken by the business.

The proposed penalty under this legislation is a criminal conviction for the relevant body which gives rise to an **unlimited fine** and a public record of the conviction.

**Why does this matter?**

HMRC expects that businesses will have a documented plan for implementation of enhanced procedures by September 2017. This leaves little time to assess the current state of the risk framework and implement improvements. The scope of the legislation is very broad, with businesses needing to consider all of their activities, both inside and outside of the UK, which could potentially facilitate the tax evasion of a third party and ensure that reasonable procedures are in place and fully functioning.
How we can help

We have built a multi-disciplinary team comprising of specialists in tax risk management, financial crime and the Bribery Act to help businesses to respond appropriately to the new legislation.

We deliver a tailored approach appropriate for the needs of the business; taking into account the maturity, size, complexity and risk profile of the business. Examples of how we can help are as follows.

### Phase 1

<table>
<thead>
<tr>
<th>Reasonable procedure</th>
<th>How we can help</th>
</tr>
</thead>
</table>
| Risk assessment      | We can support clients with a facilitated workshop enabling organisations to identify the potential impact of the legislation by determining:  
  ► Associated persons in scope and tax evasion facilitation risks inherent in their activities  
  ► The extent to which existing procedures and policies and (e.g., compliance, anti-money laundering, Know Your Customer, Tax) address the inherent risks associated with tax evasion  
  ► Where new enhanced proportionate procedures may be required (gap analysis) and how existing procedures may be leveraged to minimise additional compliance burden  
  ► The extent to which new and existing business relationships impact the risk through appropriate due diligence  
  We will bring our industry knowledge, understanding of HMRC’s expectations, and the use of our international network to provide insight and benchmarking of your tax risks and controls environment.  
  Following the workshop we will produce a report of the findings to support you in the assessment of whether reasonable procedures are in place and whether any further work is required. |

The Phase 1 workshop will enable the organisation to identify if there are any additional risks and gaps in its current procedures. Where there are any gaps, we have outlined some of the potential issues that might be focused on in Phase 2.

### Phase 2

<table>
<thead>
<tr>
<th>Reasonable procedure</th>
<th>How we can help</th>
</tr>
</thead>
</table>
| Proportionality of risk-based prevention procedures | Once risks are identified as a result of the initial risk assessment, organisations will need to consider how to implement new procedures or amend existing ones to mitigate the identified risks, document the process and review proportionate procedures in place.  
  We can provide assistance with procedure design, and implementation support and varying levels of testing as appropriate. We can also perform varying levels of testing to ensure the procedures are reasonable in this context. |

| Top-level commitment | We can help in communicating the scope and consequences of the new offence to UK and global stakeholders as well as assisting with any policy statements on the organisational approach. One of the first steps is to determine the team in the business that will develop the response to the legislation. The team might include individuals from the risk and compliance team as well as from the tax team. |

| Due diligence | We have extensive experience helping organisations to design and execute a global rollout of preventative measures programmes, due diligence and related training. We can provide assistance with determining the appropriateness of existing due diligence procedures and guidance on the design and implementation of new procedures, if required. |

| Communication (including training) | We can provide varying levels of assistance, from providing guidance to co-development or full outsourcing of your training programme launch, with the aim of ensuring the organisation’s prevention policies and procedures are communicated, embedded and understood throughout the organisation. We aim to provide practical recommendations that can be readily implemented. |

| Monitor and review | Working with you, we can design and perform varying levels of testing to provide insight into:  
  ► How well the prevention procedures are integrated into the business  
  ► Whether the escalation channels for exceptions or areas of concern are working  
  ► What improvements need to be made to make the programme more effective  
  By working with the business’ existing testing programmes, including internal audit and compliance, we can help you meet your objectives. |
What questions do businesses need to consider?

► Who in the organisation will take ownership of compliance with the legislation, for example tax, compliance, legal or a combination of these functions?

► What does reasonable mean in the context of the size and industry sector of the business?

► Who are the associated persons of the business?

► Where are the highest risk roles, divisions or geographies in the organisation?

► Are whistle-blowing systems in place and, if so, are they sufficient?

► How will any allegations of the facilitation of tax evasion be assessed and investigated?