

A fortnight to go: are you ready for the Criminal Finances Act 2017?

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In preparation for the UK's Criminal Finances Act 2017, and in particular the new corporate criminal offence of failing to prevent the facilitation of tax evasion which comes into effect on 30 September 2017, long-awaited guidance has been issued by the UK Government. The Guidance relates to the measures that corporations must put in place in order to demonstrate that they have "*reasonable prevention procedures*", and which would amount to a complete defence in the event that an "*associated person*" of the corporation (e.g. employee, contractor or subsidiary/parent providing services to the corporation) were, in the course of his/her employment/contract, to facilitate a third party in evading tax.

The main aim of the Guidance, is to '*help relevant bodies understand the types of processes and procedures that can be put in place to prevent associated persons from criminally facilitating tax evasion*'. The Guidance is not prescriptive and is only intended to be illustrative. Departing from the suggested procedures within the Guidance does not automatically mean that a corporation's stance in this area is deficient. Equally, simply complying with the Guidance does not amount to a safe-harbour, making a relevant body immune from prosecution.

The Guidance, should therefore be considered in a risk-based and proportionate way taking into account the size, nature and complexity of the relevant body; what is reasonable for a small business may not be reasonable for a large business. Offshore financial services businesses will automatically be considered high risk, and so corporations in this area should look to adopt an inclusive approach and to err on the side of caution. The procedures adopted should also be constantly kept under review – what was considered reasonable at one time will change as time passes on.

The onus will remain on the corporation where it seeks to rely on the defence of having '*reasonable prevention procedures*' in place to prove this. Ultimately it will be the Courts who will determine this question having taken into account the unique facts and circumstances of the particular case. Making sure that all steps have been properly recorded and documented is,

therefore, very important.

Recap of the offences under the Act

There are two offences that a relevant body can commit under the Act; the failure to prevent the facilitation of UK tax evasion; and the failure to prevent the facilitation of foreign tax evasion (the **Offences**). For further information on this please see our earlier briefing 'Facilitation of tax evasion: A new corporate offence'.

The Offences essentially reverse the normal burden of proof. Thus, corporate culpability will be assumed, unless the corporation can demonstrate that it had reasonable prevention procedures.

As a precursor, it is necessary for the prosecution to demonstrate that there has been underlying tax evasion by a tax payer and criminal facilitation of that tax evasion by the employee/contractor/subsidiary/parent. A formal conviction is not required in either case, only an indication that such a conviction would have been achieved if a prosecution had been brought.

Culpability for the UK tax evasion offence extends to any corporation anywhere in the world. So it has particular resonance offshore. Businesses will not be immune because of their location. The foreign tax evasion offence extends to any corporation that has a nexus with the UK (e.g. they have a UK branch or the offence takes place in the UK). So, again, it is potentially highly relevant.

What could amount to 'reasonable prevention procedures'

'Prevention procedures' are defined in the Guidance to mean both formal policies adopted by a corporation **and** practical steps taken to implement, enforcement and monitor those policies.

The Guidance suggests that procedures put in place by corporations should be informed by the following six principles:

1. Ensuring that a corporation is able to accurately assess the extent of its exposure to risk in this area, and that any risk assessment is documented and kept under review.
2. Ensuring that a corporation's risk-based prevention procedures are proportionate based upon the nature, scale and complexity of the corporation's activities.
3. Fostering a culture within the corporation that facilitating tax evasion is not acceptable nor tolerated.
4. Ensuring that a corporation applies due diligence procedures that are appropriate and risk based so as to mitigate identified risks.

5. Ensuring that a corporation's prevention policies and procedures are communicated, embedded and fully understood throughout the entire organisation which includes ensuring that adequate training is regularly provided.
6. Ensuring that the preventative procedures are constantly monitored and improved as and when necessary in light of new developments.

Whilst this is helpful, it is still generalised and high level. The question is what this means in practice for financial services businesses in Jersey and throughout the offshore world. In this regard, it may be prudent to consider the following:

1. **Proportionality** – as stated above, most financial services businesses in Jersey will be considered higher risk. This development cannot, therefore, be ignored. Advance planning is important, as HMRC will take into account procedures that were planned at the time any facilitation of tax evasion takes place (as well as those actually in place).
2. **Culture** – management should be visibly and tangibly engaged in this issue. Directors/partners should lead on both the communication and endorsement of the corporation's stance, as well as the development of new procedures. Now is the time to ensure your board is aware of, and progressing, the new requirements and that this is filtering down to others in your organisation.
3. **Risk assessment and due diligence** – corporations may wish to consider inter alia: (i) adequacy of resourcing/funding applied to this area; (ii) whether they have the right people with the right experience to deal with these new challenges; and (iii) the sources of information being used to assess risk in this area.

The spotlight should also be focused at an early stage on the profile of the business. Management should *"sit at the desks"* of their employees to consider areas of weakness that might be exploited and particular products/services that could be open to abuse.

Finally, in terms of ongoing risk assessment and due diligence the message coming across loud and clear is that so long as the risks of facilitating tax evasion are properly assessed, new procedures can form part of the broader package of financial crime prevention procedures a corporation may have. However, existing procedures must only be a springboard, they must not be a substitute. Paying lip service to the new obligations (e.g. nominally including the work "tax" without substantive assessment and change) will not suffice. That is perhaps the biggest trap for well-run organisations, who may feel that they already have all bases covered.

4. Communication and training – again, this can be incorporated into existing financial crime prevention training, although if an area is at particular risk then businesses may wish to consider bespoke training. Do your employees understand how tax evasion can take place, and how it might be facilitated? Are they aware of the warning signs, and do they know how to seek help and report concerns? Do they understand the corporation's policies in this area, why they are needed, and what the potential penalties are for both them and the corporation?

All of the above should be monitored and reviewed, with improvements made where necessary.

Comment

The Offences will have been on the radar of Jersey businesses for many months now, as the Act followed the well-trodden path from consultation to legislation. However, now that they are about to become a reality they merit immediate action.

Financial services businesses in Jersey will likely already adhere to many of the underlying principles and conduct themselves in accordance with best practice generally. The existing suite of regulatory requirements demands as such.

Nevertheless, the introduction of the Offences and the Guidance does mean that all financial services businesses are expected to have, and be able to demonstrate that they have, reasonable prevention procedures in place.

If your business has not yet grasped the nettle, between now and 30 September is an ideal opportunity to take the necessary steps.

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