

## Quick Guide

Part Three of The Criminal Finances Act 2017 (**CFA 2017**) introduces two new corporate criminal offences:

- The failure to prevent facilitation of *UK* tax evasion offences
- The failure to prevent facilitation of *foreign* tax evasion offences

Both “failure to prevent” offences can be committed by a body corporate or any partnership (a **relevant body**) and both enter into force on 30 September 2017.

It is a defence to both offences, however, if a relevant body can prove that it has implemented reasonable **prevention procedures**. Prevention procedures are procedures designed to prevent any employee (or agent) of, or any other person who acts for (or on behalf of), the relevant body (**associated persons**) from committing a tax evasion facilitation offence.

CFA 2017 makes it significantly easier to criminally prosecute relevant bodies in circumstances where tax evasion has taken place. The new offences are strict liability offences – that is, the absence of knowledge or intention is no defence. Bodies corporate and all partnerships are strongly advised to act quickly to both:

- Review their existing procedures and identify any risk of exposure under CFA 2017
- Design and implement comprehensive prevention procedures to prevent associated persons, in the UK and around the globe, from facilitating tax evasion

## What are the new offences?

### Failure to prevent facilitation of *UK* tax evasion offences

A relevant body will be guilty of the offence of a failure to prevent facilitation of *UK* tax evasion whenever an associated person (acting in their capacity as an associated person) commits a *UK* tax evasion facilitation offence.

The UK offence, therefore, will be committed where three conditions are met. There must be:

- Fraudulent evasion of UK tax by another person
- Criminal facilitation of that tax evasion by an associated person (acting in that capacity)
- A failure, by the relevant body, to prevent that associated person from criminally facilitating the fraudulent evasion of tax

### Failure to prevent facilitation of *foreign* tax evasion offences

A relevant body will also be guilty of the offence of a failure to prevent facilitation of *foreign* tax evasion whenever an associated person (acting in their capacity as an associated person) commits a *foreign* tax evasion facilitation offence.

Although the same three conditions applicable to the UK offence (albeit in relation to a foreign tax) apply equally in relation to the foreign offence, the following additional two conditions must also be met:

- Either:
  - The relevant body must be incorporated in the UK (or carry on a business in the UK), or
  - The associated person commits some part of the criminal tax evasion facilitation offence in the UK; and
- Both the evasion of the foreign tax and the facilitation of that tax evasion must be:
  - A criminal offence in the foreign jurisdiction, and
  - Would be considered by a UK court to be fraudulent evasion

## What Are the Penalties?

A relevant body found guilty of an offence will be liable to potentially unlimited fines.

In addition, in certain circumstances, a guilty relevant body could also be faced with other serious regulatory sanctions, including confiscation or serious crime prevention orders and restrictions on the ability of the entity to obtain public contracts.

The reputational damage of being found guilty of committing an offence relating to the criminally fraudulent evasion of tax should not be underestimated either.

## Is There a Defence?

A relevant body will not be guilty of either “failure to prevent” offences if, at the time the fraudulent evasion of tax takes place, it has reasonable prevention procedures in place.

## What Are Reasonable Prevention Procedures?

A relevant body should put in place procedures to prevent associated persons from committing a UK (or foreign) tax evasion facilitation offence.

As required by statute, the government has published guidance about the nature of such procedures.

Although there is some clear overlap and similarity with the rules relating to combatting money laundering and bribery, it is important to stress that it will not be sufficient to rely on any existing policies and procedures since such policies and procedures will not be accepted as being reasonable prevention procedures in relation to the 'failure to prevent' offences.

In essence, the published guidance sets out six guiding principles that a relevant body should follow when designing, implementing and reviewing appropriate prevention procedures. The six principles are:

- **Risk assessment** – Carrying out a risk assessment is an essential step in designing reasonable prevention procedures. It should be used to determine the type and extent of prevention procedures that need to be implemented. The risk assessment must be documented fully accurately and should identify all:
  - Relevant bodies (within a group) and associated persons
  - Internal structures or procedures that might be considered to enhance the risk (the example given in the guidance is a "bonus culture" that incentivises the taking of risks)
  - Tax evasion offences that an associated persons could facilitate
- **Proportionality and risk-based** – The prevention procedures implemented by a relevant body should be based on the risks identified by the risk assessment and should be measures necessary and proportionate to addressing those risks.
- **Management commitment** – HMRC will expect the engagement of management within a relevant body from the top-level down. Senior management should:
  - Be involved in developing preventative measures
  - Have designated responsibility to implement the prevention procedures
  - Communicate and endorse such procedures
- **Due diligence and contractual terms and conditions** – Conducting appropriate reviews of existing, and suitable due diligence of any new supply chains and contractual relationships will also be essential. The review and due diligence processes should be supported by the inclusion of appropriate terms and conditions in any existing or new contractual relationship. A relevant body is also expected to demand that its contractual counterparties adopt a similar approach under its own contracts within the supply chain.
- **Internal and external communication** – Internal and external communications should clearly represent an organisation's stance on tax evasion. Any formal statement should include articulate the entity's principled rejection of:
  - Providing of any services that could be used to facilitate the criminal evasion of tax
  - Using (or recommending the use of) the services of others who do not have reasonable prevention procedures in place.

Internal training, and any appropriate communication with any associated person, does not need to cover the underlying technical law but should instead focus on when and how to seek advice or report any concerns or suspicions.

- **Monitoring, review and updates** – Regular, periodic, reviews of prevention procedures will also be necessary. To remain reasonable, prevention procedures should always reflect the nature of a relevant body's business operations, customer base and the jurisdictions in which the entity has a presence.

## How we can help

The new "failure to prevent" offences represent a significant expansion of corporate *criminal* liability.

With the new offences coming into force from 30 September 2017, it is crucial that all relevant bodies move to implement appropriately targeted, reasonable prevention procedures and processes as soon as possible.

We can help you to comply with the new regime by supporting you to create and adopt appropriate prevention procedures. This could include assisting you to:

- As a first step, conduct a comprehensive risk assessment
- Draft appropriately targeted, proportionate, prevention policies, procedures and controls
- Conduct due diligence of existing contractual terms and conditions and negotiate appropriate amendments with all relevant counterparties (as necessary)
- Draft internal communications, update staff handbooks and policies and deliver appropriate employee training as required
- Draft appropriate external communications and public statements
- Establish a timetable for the regular and periodic review of the effectiveness of your prevention policies and procedures

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