STEP BRIEFING NOTE: Criminal Finances Act 2017 and 'Failure to prevent the facilitation of tax evasion'

The Criminal Finances Act 2017\(^1\) received Royal Assent on 27 April 2017. The Act contains the new corporate criminal offence of 'Failure to prevent the facilitation of tax evasion' ss44-52, which came into effect on 30 September 2017. It was inspired by the Section 7 of the Bribery Act 2010.

The legislation creates two new offences:

- Section 45: Failure to prevent the criminal facilitation of a UK tax evasion offence.
- Section 46: Failure to prevent the criminal facilitation of an overseas tax offence.

The new legislation will create a liability on the 'relevant body' for the actions of its employees and associated persons who knowingly facilitate any tax evasion. A 'relevant body' is defined as 'any body corporate or partnership' which includes companies, LLPs, partnerships and charities and only these legal entities and not individuals can be charged with the offence.

The company must prevent the criminal facilitation of tax evasion otherwise it may be liable for the behaviour of its 'associated persons'. An associated person is someone providing services for or on behalf of the company. The definition of 'associated person' is very wide in scope and will include employees, partners, consultants and also agents and anyone performing services for or on behalf of the company, although a company cannot sub-contract out of its liability.

The company will be liable for criminal facilitation if the behaviour of the associated person is proven to have been deliberate and dishonest. HMRC has confirmed that the legislation does not include accidental or negligent behaviour or even tax avoidance by an associated person.

If a UK tax offence is committed then it is irrelevant if the company or associated persons are not UK-based. In accordance with the new legislation, the offence will have been committed and can be tried in the UK courts. This stance reinforces the UK’s position that any individual can be guilty of a UK tax evasion offence, regardless of their location, if they assist someone else to evade UK tax. If non-UK tax is evaded then the company will be liable for the offence if they have a place of business in the UK, or if any of the facilitation took place in the UK.

**Why has this new offence been introduced?**

The new offence has been designed to streamline the law across smaller and larger organisations and to incentivise internal reporting. Even though tax evasion and facilitation of tax-related crimes are already criminal offences, it has previously been difficult to pin these offences on a company or partnership such as a law firm.

The Act does not alter what is criminal but who should be liable for the criminal act.

**What is determined as 'failure to prevent the facilitation of tax evasion'?**

There are three stages to the new offence:

1. **The criminal UK or non-UK tax evasion by a taxpayer under the current law**
   There must be a criminal offence committed at the taxpayer level in order to initiate the

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criminal process. Non-compliance that does not result in fraudulent activity being committed will not be determined as ‘failure to prevent the facilitation of tax evasion’. The provisions make it an offence to dishonestly ‘take steps with a view to’ or ‘be knowingly concerned in’ the evasion of the tax, however it is not necessary for any tax to have been successfully evaded to be prosecuted.

2. The criminal facilitation of this offence by an ‘associated person’ acting on behalf of the company

For this corporate offence to be committed there must be evidence of criminal facilitation of tax evasion by an ‘associated person’. This person must have intentionally and dishonestly taken steps to facilitate the tax evasion. If a professional such as an accountant, solicitor or trust advisor deliberately and dishonestly facilitates the commission of revenue fraud by a client then that professional has also committed a crime. For the corporate offence to be committed there must be criminal facilitation of the taxpayer evasion by a person acting in the capacity of a person associated with the relevant body. If there is only evidence that the associated person has ‘accidentally, ignorantly or even negligently facilitated’ the tax evasion offence then it will not be determined as having been committed by the relevant body.

3. The company failed to prevent the associated person from committing the criminal act at stage two

There will be a defence available if the employer has put in place reasonable prevention measures, but otherwise the offence is strict liability. If stages one and two have both been committed then the employer may face:

- Criminal prosecution
- An unlimited penalty
- Director disqualification
- Exclusion from bidding for public contracts
- Loss of license in a regulated sector
- Reputational damage.

Defence

The company may have a defence if they have put in place reasonable prevention measures. A reasonable prevention procedure is one that ‘identifies and mitigates its tax evasion facilitation risks’. A prevention procedure will make prosecution more unlikely. The onus will remain on the company to prove that it had the requisite prevention measures in place. Alternatively, it may be deemed that it was unreasonable to expect the company to have such measures in place and this decision will ultimately be made by the court on a case by case basis.

What should my company do?

HMRC’s guidance dated 1 September 2017\(^2\) provides six guiding principles that companies should consider when interpreting the new legislation. It also provides examples of processes and prevention procedures that can be administered in order to prevent associated persons from being criminally charged with the facilitation of tax evasion.

The six guiding principles contained within the guidance are:

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1. Risk assessment
Companies should assess their own risk exposure level in relation to their employees engaging in the facilitation of tax evasion in the course of business. Risks should consider all aspects of risk including:
- Geographical risk – are credible tax sanctions in place?
- Customer risk – review unusual or complex circumstances
- Sector risk – financial services and legal sectors are higher risk than others
- Product risk – some products have a higher risk of misuse
- Internal structures – are there deficiencies in training or clarity on policy?

2. Proportionality of risk-based prevention procedures
It is anticipated that relying upon existing in house anti-money laundering procedures will not be sufficient to satisfy the defence of having prevention procedures in place. Prevention procedures should be proportionate to risks faced but not unreasonably demanding, extensive or expensive. The guidance explores some of the varying common elements that would be considered to be reasonable prevention procedures.

3. Top-level commitment
The top-level management of each company should be committed to raising awareness and establishing safeguards intended to prevent the facilitation of tax evasion among its employees. Procedures include communication and endorsement of the new legislation within the company, as well as development and review of prevention procedures. A zero-tolerance policy towards criminal facilitation should be conveyed to the breadth of employees, as well as endorsement of the procedures.

4. Due diligence procedures
The company should mitigate any risks that it identifies by way of applying advanced due diligence procedures. The guidance indicates that bespoke financial or tax related service companies will face the greatest risk, and that merely applying existing procedures will not be an adequate response to mitigating their exposure. The new procedures will differ from organisation to organisation however they are expected to be applied clearly in conjunction with the new legislation.

5. Communication and training
The company must ensure that its new prevention procedures are widely communicated and understood through internal and external communication with all employees. This communication may vary depending upon the size of the company, however training must be provided, and a zero tolerance policy for facilitation of tax evasion and its consequences must be properly communicated. The company must ensure that the stance of their organisation is externally clear to act as a deterrent to anyone who would want to use their services for illegal activity. This can be as simple as a short statement on your website stating that your company will not provide any services which facilitate illegal activity.

6. Monitoring and review
The company must put in place ongoing monitoring mechanisms and reviews to ensure that the system is effective, and it must make improvements where necessary. Prevention procedures should evolve as new facts are discovered. The company may choose to have reviews conducted by internal or external third parties.
HMRC proposed prevention procedures

HMRC suggests some proposed prevention measures that small and medium sized companies might want to put in place to confirm their stance against all forms of tax evasion:

- Having terms in contracts (with employees and contractors) requiring them not to engage in facilitating tax evasion and to report and concerns immediately
- Providing regular training for staff on preventing the facilitation of tax evasion, which may form part of wider financial crime detection and prevention training.
- Having clear reporting procedures for whistle-blowing of suspected facilitation of tax evasion offences
- Ensure their pay and bonus policy/structure encourages reporting and discourages pursuing profit to the point of condoning tax evasion
- Having regular reviews of the effectiveness of prevention procedures and refining them where necessary
- Monitoring and enforcing compliance with prevention procedures
- An overview of its strategy and timeframe to implement its preventative policies.

Can I still make referrals?

If a company makes a referral in good faith and believes that the external service provider is unlikely to be involved in the facilitation of tax evasion and steps away from the transaction entirely, then the company who made the referral is unlikely to fall within the scope of the offence. In these circumstances the new service provider is not providing services for or on behalf of the referrer and is not sub contracted by the referrer. However, if it can be proved that the referrer was aware that the motive of the client or the new service provider might be to facilitate tax evasion, then the referrer may also be convicted for the dishonest referral.

HMRC provides two examples within its guidance of an outward and an inward referral, which may be helpful:

1. **Straight-forward Referral Out**
   A UK Bank ‘B’ gets occasional client requests for services in South Africa, where it has neither a branch, nor a subsidiary. It has a relationship with a firm ‘F’ in that country to which it refers business. This arrangement is a ‘pure’ or ‘vanilla’ referral. Once the referral has been made, the client becomes a client of F, and bank B takes no further part in any provision of services in the country in question (although its own separate relationship with the client continues to exist independently). Firm F criminally facilitates the client’s tax evasion. It is not a relationship in which services are provided by F for or on behalf of bank B.

   **Question:** Would firm F criminally facilitate the tax evasion whilst acting in the capacity of a person associated with bank B?

   **Answer:** No. Firm F does not, as it was not providing services on behalf of bank B; once the client was introduced, firm F and the customer had their own relationship in which bank B had no role.

2. **Inward Referral**
   A UK bank uses a consultancy firm in India that introduces clients to the bank. The consultancy firm was previously exclusive to the UK bank but now also introduces Indian clients to the UK bank’s sister bank in India. The consultancy firm is not used by the UK bank to provide any tax advice to clients of either bank. The consultancy firm later offers additional services (beyond the contracted services with the banks) and criminally facilitates tax evasion for clients of both the UK and Indian-
based banks, including by falsifying documentation. Neither bank was aware of the additional services and illegal activity.

**Question:** Would the activity of the consultancy firm attract liability for the bank?

**Answer:** No. The Indian consultancy firm was offering tax services outside of its relationship with the bank. Although the consultancy firm was providing some services on behalf of the bank (introducing clients) the criminal facilitation of tax evasion was outside the contracted service provision and was therefore not provided when acting in the capacity of a person associated with the bank.

**How to self-report**

Corporate self-reporting has been live on [www.gov.uk](http://www.gov.uk) since 30 September 2017 and is a dedicated route for companies to self-report wrong doing under these new offences. Not only is it dedicated to self-reporting, but you can also report a company that you believe might be helping people to evade tax.

The advantage to a corporate self-reporting is that it will enhance their reasonable procedures defence and it may result in an alternative prosecution route and a reduced fine. It will not, however, provide immunity from prosecution. Deferred Prosecution Agreements are also available for Corporate Criminal Offences.