

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:

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:

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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