



GLOBAL INVESTIGATIONS AND COMPLIANCE

RAISING THE STAKES ON CORPORATE LIABILITY FOR TAX EVASION

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INTRODUCTION

Shortly before Parliament was dissolved for the June 2017 General Election campaign, Parliament passed the Criminal Finances Bill, with the result that the Criminal Finances Act 2017 (CFA) is on the UK statute book.

In March 2017, Navigant released a White Paper summarising and comparing the Bill to existing U.S. law.¹ In this paper, Navigant's London team examine the CFA's new corporate criminal offences of failure to prevent the facilitation of UK and foreign tax evasion, and reflect on the impact the offences will have on financial institutions in the UK.

The offences come into force on 30 September 2017. Given the amount of work required, it is imperative that firms act now to avoid being caught out.

BACKGROUND TO THE OFFENCE

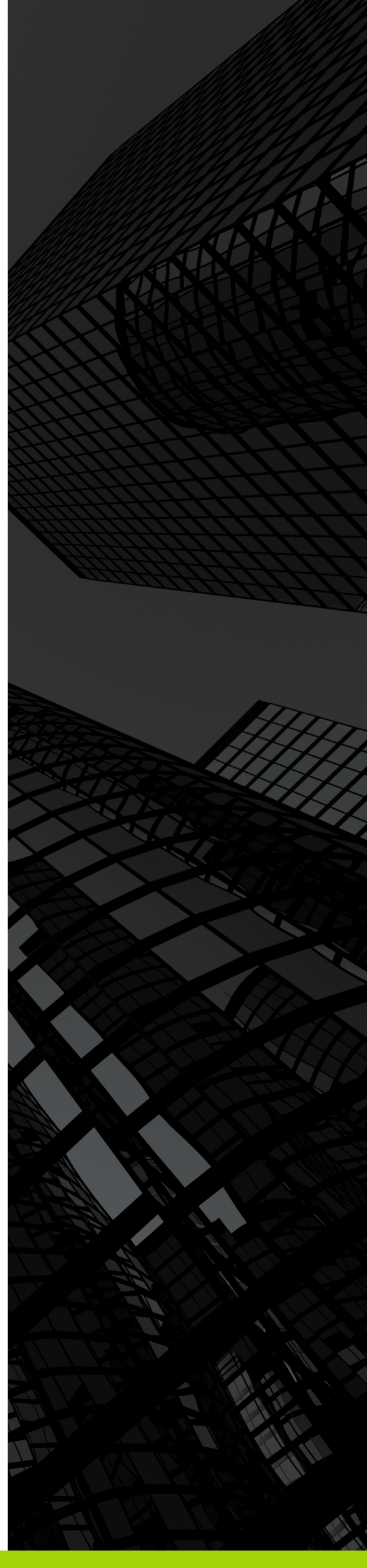
The introduction to the draft Government Guidance (the Guidance) on the CFA sets out the aim of the legislation: under the old law it was difficult to attribute criminal liability to corporations in respect of criminal acts performed by individuals on the company's behalf. Prosecutors were required to show that the senior members of the "relevant body"² were involved in and aware of the illegal activity, typically those at the Board of Director level.

Therefore, under the old law, it was particularly difficult to prosecute large multinational corporations with diverse layers of management where decisions are often taken at lower levels than the Board of Directors. This was felt to be unfair on smaller organisations where the Board of Directors are more actively involved in running the business.³ Further, this environment acted as an incentive for senior management to turn a blind eye to the criminal acts of its representatives to shield the relevant body from criminal liability.

1. *The UK's Criminal Finances Bill: A Comparison to the US Approach* (March 2017), Navigant White Paper, <https://www.navigant.com/insights/global-investigations-and-compliance/2017/uk-criminal-finance-bill>

2. "Relevant body" means a body corporate or partnership (wherever incorporated or formed), UK Criminal Finances Bill, 2017, 36(2). Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560122/Criminal_Finances_Bill.pdf

3. HMRC Draft Government Guidance (October 2016), page 3, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560120/Tackling_tax_evasion_-_Draft_government_guidance_for_the_corporate_offence_of_failure_to_prevent_the_criminal_facilitation_of_tax_evasion.pdf



The CFA aims to overcome these difficulties by introducing a specific offence of failure to prevent the facilitation of tax evasion. Importantly, the Guidance notes that the new offence does not alter what is criminal, it simply focuses on who is held to account for the criminal acts.⁴ It does this by focusing on the failure of the corporation to prevent crimes of those acting on or behalf of the corporation, rather than trying to attribute criminal acts to that corporation.

THE OFFENCES OF FAILURE TO PREVENT FACILITATION OF UK AND FOREIGN TAX EVASION

The new offences are prescribed to overcome difficulties in prosecuting large companies where tax evasion was facilitated by employees. To achieve this, the new offences do not require proof of involvement of senior management (or a “directing mind”). In contrast to the Bribery Act, it does not matter if any benefit has been obtained from facilitating tax evasion.

The CFA splits the offences into two categories: failing to prevent facilitation of UK tax evasion, and a failure to do so in respect of foreign tax evasion.

The UK offence

The table below summarises the main tests of the UK offence, all of which must be met for the offence to be committed:

REQUIRED ELEMENT	COMMENTARY
Criminal facilitation of tax evasion by an “associated person”⁵ of a company or partnership formed anywhere in the world	<p>This occurs where the associated person is:</p> <ul style="list-style-type: none"> • knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax by another person; or • aids, abets, counsels or procures the commission of an offence of UK tax evasion⁶. <p>See below for an explanation of how the CFA deals with criminal offences of UK tax evasion.</p>
Criminal evasion of UK tax	<p>The offences are:</p> <ul style="list-style-type: none"> • an offence of cheating the public revenue; • being concerned in, or taking steps with a view to, the fraudulent evasion of a tax. <p>The CFA defines “tax” widely to include national insurance contributions.</p>
Failure to prevent an associated person from committing the criminal facilitation.	<p>If the firm failed to prevent the facilitation of tax evasion, it may be prosecuted and liable to a fine, unless it can show that it had reasonable procedures in place to prevent the facilitation occurring.</p>

4. HMRC Draft Government Guidance (October 2016), page 4, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560120/Tackling_tax_evasion_-_Draft_government_guidance_for_the_corporate_offence_of_failure_to_prevent_the_criminal_facilitation_of_tax_evasion.pdf

5. An “associated person” can be an employee or agent (acting in that capacity) or any other person who performs services for or on behalf of the company or partnership.

6. The definition also includes the Scots law concept of being involved “art and part” in the commission of an offence consisting of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax.

The foreign offence

The table below summarises the main tests of the foreign offence, all of which must be met for the offence to be committed:

REQUIRED ELEMENT	COMMENTARY
Criminal facilitation of tax evasion by an “associated person” of a company or partnership formed anywhere in the world	<p>The conduct:</p> <ul style="list-style-type: none"> • is an offence under the law of a foreign country; • relates to another person committing criminal evasion of foreign tax (see below); and • would be criminal facilitation of UK tax evasion (see above) if the foreign offence was an offence in the UK.
Criminal evasion of foreign tax	<p>The conduct:</p> <ul style="list-style-type: none"> • amounts to an offence under the law of a foreign country; • relates to a breach of any duty relating to tax in that country; and • would be regarded by the UK Courts as amounting to being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of that tax.
A UK nexus to the criminal conduct	<p>There must be some nexus between the criminal conduct and the UK, namely:</p> <ul style="list-style-type: none"> • the body or partnership is incorporated or formed under UK law; • the body or partnership carries on business or part of its business in the UK; or • the conduct forming part of the foreign facilitation offence takes place in the UK. <p>The third limb of the UK nexus means that, even if the firm has no place of business in the UK, it can still commit the failure to prevent offence if an employee visits a client in the UK and commits any element of the foreign facilitation offence while there.</p>
Failure to prevent an associated person from committing the criminal facilitation.	<p>If the firm failed to prevent the facilitation of tax evasion, it may be prosecuted and liable to a fine, unless it can show that it had reasonable procedures in place to prevent the facilitation occurring.</p>

For the offence of facilitation of foreign tax evasion, the conduct of the taxpayer and the associated person must be recognised as criminal both in the UK and in the jurisdiction to which the foreign tax evasion relates. This is known as “dual criminality.”

A DEFENCE: REASONABLE PROCEDURES

Similar to the Bribery Act 2010, the CFA establishes a defence of having reasonable procedures in place to prevent the commission of the offence. As such, it is vital that firms act now to ensure that they have appropriate procedures in place when the CFA comes into force, expected to be later in the year.

The Guidance on reasonable procedures is designed and formulated around six key principles that are relevant to all businesses. These are:

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

The following table outlines steps firms can take to ensure they are aligned with these six principles:

PRINCIPLE	ACTION
Risk assessment	<ul style="list-style-type: none"> Engage financial crime, compliance and risk teams early Identify the risk that various aspects of the business (structure, operations, business lines, counterparties, clients and suppliers) pose for the new offence Document the risks identified in a risk assessment Clearly articulate your company's policy against the facilitation of tax evasion Review policies and procedures and identify where existing processes can help minimise risk
Proportionality	<ul style="list-style-type: none"> Implement preventative procedures that are proportionate to the risk faced, potentially modifying existing procedures where appropriate. The Guidance is clear that the procedures need not be burdensome and address every conceivable risk. Firms should therefore take full account of the risks identified during the risk assessment process in designing procedures.
Top level commitment	<ul style="list-style-type: none"> Ensure there is a suitable "tone from the top": <ul style="list-style-type: none"> Clearly communicate senior management's stance; and Ensure that the communications are followed up by appropriate action to reinforce senior management's position. Demonstrate senior management's commitment to whistleblowing processes and rejecting profit by way of facilitating tax evasion
Due diligence	<ul style="list-style-type: none"> Identify risk of criminal facilitation of tax evasion by associated persons Consider whether to make any changes to contractual documentation for existing and future relationships Clearly articulate due diligence processes that are designed specifically to prevent the new offence
Communication & training	<ul style="list-style-type: none"> Ensure awareness and understanding of the company's policies among employees, agents and representatives, for example by: <ul style="list-style-type: none"> making clear in internal communications that the firm does not tolerate the facilitation of tax evasion by its employees, agents or representatives; providing training on the new offence, either by incorporating it into existing financial crime prevention training, or implementing bespoke training to address specific tax evasion facilitation risk; and considering whether tailored training is required for those in the highest risk posts Consider how the firm will monitor training and follow up on any person who has not undertaken appropriate training
Monitoring & review	<ul style="list-style-type: none"> Seek feedback from staff Begin formalised periodic reviews Work with other organisations facing similar risks Prepare to review policies and procedures in response to changing and evolving risks. This might example, for example when significant changes occur to the business – such as changes in customer base or a change in the economic or regulatory regime (e.g. due to Brexit).

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HOW CAN NAVIGANT HELP?

Navigant's Global Investigations and Compliance practice has the expertise and experience to assist UK financial institutions respond to the new offences set out in the CFA. Core to a response is conducting an independent, thorough review to evaluate how compliance was handled in the past, and developing or enhancing a compliance program to ensure it complies with the new legislation. Navigant's global team of experts includes former senior regulators and law enforcement officers (including tax investigators), compliance officers, consultants and technologists, deploying seasoned professionals with deep expertise to provide pragmatic, integrated solutions to clients.

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