

CLIENT ALERT

# Criminal Offence of Failure to Prevent the Facilitation of Tax Evasion

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## AUTHORS

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The new UK corporate criminal offence of failure to prevent the facilitation of tax evasion comes into force on 30 September 2017. Affected businesses need to act fast if they have not yet begun to put in place prevention procedures.

In summary, the offence is committed by a 'relevant body' if an 'associated person' of that relevant body, while performing services for or on its behalf, criminally facilitates fraudulent evasion of UK or foreign tax by a third party. It is a defence for the relevant body to have 'reasonable prevention procedures' in place.

H.M. Revenue and Customs (**HMRC**) have said that the UK government accepts that some procedures will take time to roll out, but nevertheless expects there to be rapid implementation, focusing on the major risks and priorities, with a clear time frame and implementation plan on 30 September.

There are three main elements to the offence, all of which must be present:

- 1. A person (whether an individual or any legal entity) has committed a criminal offence of fraudulent tax evasion**

It does not matter whether the evasion was of UK or non-UK tax. In the case of non-UK tax, 'dual criminality' is required, meaning that the behaviour must constitute a crime under the relevant foreign law and also be of such a nature as would have constituted a crime under UK law if it had been committed in respect of UK tax.

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### **2. There was criminal facilitation of the tax evasion by an ‘associated person’ of the ‘relevant body’**

Only ‘relevant bodies’, being incorporated bodies (typically companies) or partnerships, can commit this new criminal offence.

‘Associated persons’ can be individuals or companies and includes employees, agents, contractors, sub-contractors or other persons who perform services for or on behalf of the relevant body. Whether or not the associated person is performing services for or on behalf of the relevant body will depend on the facts and not on the label given to the relationship.

Where the underlying offence is the fraudulent evasion of non-UK tax, there must be a UK nexus of one of the following three kinds: the relevant body is incorporated or formed in the UK, or the relevant body carries on (part of its) business in the UK (although the facilitating behaviour in question need have no connection with the UK branch), or any conduct that is part of the facilitation offence took place in the UK.

The associated person must have criminally facilitated the tax evasion and have done so in the course of acting in the capacity of an associated person. Again, ‘dual criminality’ is required in the case of non-UK tax evasion, meaning that the facilitation behaviour must constitute a crime under the relevant foreign law and also be of such a nature as would have constituted a crime under UK law if it had been committed in relation to UK tax.

Essentially, criminal facilitation consists of:

- a. Being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax by another person;
- b. Aiding, abetting, counselling or procuring the commission of fraudulent tax evasion; or
- c. Being involved in, or being a part of, the commission of fraudulent tax evasion.

The associated person will not have criminally facilitated fraudulent tax evasion by another person if the facilitation was done accidentally, ignorantly or negligently. The facilitation must be deliberately dishonest.

### **3. The relevant body failed to prevent the associated person from committing the criminal facilitation**

The first two elements of the offence do require deliberate dishonesty, as described above, on the part of both the underlying taxpayer and the associated person facilitator (although there need not have been any criminal conviction in respect of either of those offences).

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However, the new offence of failure to prevent the facilitation is itself one of 'strict liability' meaning that the relevant body can be prosecuted for this offence without a court needing to find evidence of the relevant body's dishonesty. In addition to the reputational and potential regulatory impact of criminal prosecution, the offending company or partnership is at risk of incurring an unlimited fine.

The sole available defence is that the organisation can show that it had in place reasonable prevention procedures, or that it was not reasonable in the circumstances to have any such procedures.

HMRC has published guidance (**Guidance**). The Guidance is not mandatory, nor is it a safe harbour. Rather, it is illustrative of the factors relevant bodies should take into account when designing and implementing their procedures.

The Guidance can be found [here](#).

Sector-specific guidance may also be relevant.

The Guidance suggests six principles:

### **i. Risk assessment**

A relevant body should assess the nature and extent of its exposure to the risk that its associated persons may facilitate tax evasion by another person. This would involve assessing whether its employees, agents, etc., could have the motive, opportunity and means to criminally facilitate tax evasion. The types of products or services, the nature of the clients and supply chain and the locations of the organisation's operations will all be relevant.

### **ii. Proportionality of risk-based prevention procedures**

Whether prevention procedures are proportionate to the risks identified will depend on the nature, scale and complexity of the relevant body's activities. It will also depend on the level of control and supervision the organisation can exercise over those who perform services for or on its behalf.

Prevention procedures include both formal policies and the practical steps taken to implement those policies and monitor compliance.

Even though it may be unreasonable to expect certain organisations to have prevention procedures in place, HMRC's view is that it will rarely be reasonable to have not even conducted a risk assessment. So, as a starting point and bare minimum, all affected organisations should carry out a risk assessment and record the findings.

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### **iii. Top level commitment**

Depending on the nature and size of the organisation, the highest levels of management should be involved to some degree (even in an oversight capacity) in the design and implementation of preventative measures. They should communicate in some way their positive endorsement of the policies and foster a culture of zero tolerance.

### **iv. Due diligence**

Organisations in high-risk sectors, such as financial service providers and professional advisors, may already undertake a variety of due diligence procedures. Due diligence should be proportionate to the risks identified.

### **v. Communication and training**

This will need to be proportionate to the risks identified. This principle also encompasses implementing procedures for the confidential reporting of concerns about potential facilitation offences.

### **vi. Monitoring and review**

An organisation should conduct periodic reviews of its prevention procedures, in light of its experience and in response to changing risks or circumstances.

The Guidance contains illustrative examples. These include cases where a bank's employees help its customer to set up a bank account to hide taxable income from the tax authority and an oil company allows its payroll provider to help staff to conceal their earnings from the tax authority.

Willkie has experience in assisting clients to carry out a risk assessment and then develop procedures that are tailored to the business.

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If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

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