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CLIENT MEMORANDUM

New Requirement for Large Businesses to Publish UK Tax Strategy

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Large businesses with UK operations must publish a tax strategy online in respect of their accounting periods beginning on or after September 15, 2016.

The UK Finance Act 2016 introduced a package of measures aimed at restraining aggressive tax avoidance in the business sector. The UK government's hope is that the reputational implications of having to state publicly the business' approach to tax, combined with the discipline of the strategy receiving board-level attention, will lead to changes in corporate tax planning behaviour.

Who is required to publish

The new regime applies to a group or sub-group headed by a UK incorporated company if, in the previous financial year, the UK companies and permanent establishments within the group or sub-group had a consolidated turnover of more than £2 million or a consolidated balance sheet total of more than £2 billion.

In addition, where the group parent company is not incorporated in the UK and the UK sub-group does not meet the above thresholds, the tax strategy obligation still applies to the UK business if the multinational enterprise (**MNE**) group has a consolidated global turnover of more than €750 million. This parallels the scope of the UK country-by-country reporting regime (**CbCR**) and captures a UK sub-group that is caught by CbCR (or would be if the parent were UK tax resident). There is no *de minimis* threshold, so even minor UK subsidiary or branch operations will pull a large MNE within the regime.

Similar rules apply to partnerships formed under UK law (general and limited partnerships and LLPs) and UK-incorporated stand-alone companies or subsidiaries of foreign groups. The inclusion of partnerships means that certain investment funds will be covered although there are exclusions for two kinds of retail funds – UK open-ended investment companies and investment trusts. However, in a structure where the sole or main UK presence is a (tax-transparent) UK investment limited partnership, which holds an international investment portfolio, there may be little UK tax nexus on which a strategy can "bite".

Where the group parent company is incorporated in the UK, it is that company which is obliged to publish the strategy. Where the group is parented by a non-UK incorporated company, each separate UK-headed sub-group or stand-alone company within the group is, in principle, obliged to publish its own strategy.

However, although the legal obligation only extends to the UK parts of the business and only applies to the strategy in relation to UK tax, it is open to the business to publish a strategy with a wider scope that covers, for example, the group as a whole and/or tax in all jurisdictions.

What must be published

According to the legislation, the strategy must cover four areas. These are stated without elaboration as to the detailed content. Nor does the legislation indicate any overall objective of the regime, as a guide to a purposive interpretation.

H.M. Revenue & Customs (**HMRC**) are obviously keen that strategies are substantive and tailored to the particular business. To that end, their published guidance indicates their view as to what should be covered under the four headings:

1. *The approach of the business to risk management and governance arrangements in relation to UK tax.* According to HMRC guidance, this should include details on how the business manages its tax risk, a high-level description of key roles and their responsibilities, information on the systems and controls in place to manage tax risk, and details of the levels of oversight by the board and its involvement. HMRC also say that the business should work out and include what risks are linked to the business' size, complexity and any changes to the business. The creation and regular review of a tax-risk register could well be an important tool for managing tax risk internally – the fact that such a register is part of the established processes is almost certainly relevant but its substantive content seems to be beyond the scope of the strategy. Listed groups and other businesses seeking investment will obviously disclose tax risk factors in information made available to (potential) investors, but it does not appear that the strategy demands any additional disclosure on specific risks.

2. *The attitude of the business towards tax planning, so far as affecting UK tax.* HMRC guidance indicates that this should include an explanation as to why the business might seek external tax advice, an outline of its tax planning

motives and the importance of each of them to its tax strategy. HMRC go on to say that where the business forms part of either a group or sub-group, the group's overall approach to structuring tax planning should be included.

3. *The level of risk in relation to UK tax that the business is prepared to accept.* According to the HMRC guidance, where relevant, this should include any internally set level of acceptable risk and how this is influenced by stakeholders.

4. *The approach of the business towards dealings with HMRC.* HMRC say that this should include how the business meets its requirement to work with HMRC on current, future and past tax risks, tax events and interpreting the law.

The main focus of the measure is to put the development and oversight of group tax affairs onto the main board agenda and to embed the tax strategy within the operational procedures and reporting lines, so that it is not just an aspirational statement by the board, but is actually lived alongside the business plan.

The HMRC guidance makes clear that the amount of tax paid, or commercially sensitive information, does not have to be included. So, for example, the tax strategy regime does not require publication of the group's effective tax rate. Having said that, some groups have already chosen to publish their contribution to society in the form of the amount of tax, of all kinds, borne by the business or generated by the business (in particular, by way of tax payable by employees on their remuneration).

The legislation confers power on H.M. Treasury to issue regulations requiring the tax strategy to include the business' CbCR report (in addition to its being submitted to the relevant tax authority). However, this power has not been exercised yet and there is no indication that it is likely to happen in the near future.

How it must be published

The tax strategy must be made available free of charge on the internet, either as a separate document or as a self-contained part of a wider document, in either case with a clear indication that it is intended to be the means by which the business complies with its statutory obligation. The first strategy must be published before the end of the first financial year commencing after September 15, 2016 (i.e., by December 31, 2017 for companies which report on a calendar-year basis). It must remain available for public viewing for twelve months after first publication or until the next update. An updated strategy must be published between nine and fifteen months after publication of the previous one.

There are financial penalties for failure to publish and for publication of incomplete material.

Implementation of the tax strategy

The strategy should obviously aim to be consistent with the business' activities. It should also be aligned with any corporate social responsibility statement and other IR or communications policies.

There are no penalties, as such, for failure to comply with the strategy.

However, inconsistent behaviour would undermine the business' working relationship with HMRC and would presumably lead to the business being rated non-low risk (if not already) and therefore more likely to experience HMRC-initiated interventions. No doubt the same would be the case if the published strategy were sketchy and only complied at a perfunctory level with the legal requirements, or if it otherwise demonstrated a lax attitude towards tax risk.

In addition, there may be adverse reputational implications of a dismissive attitude towards identifying and/or implementing a strategy, now that stakeholders (including shareholders, employees, customers, the media and campaigning bodies) are scrutinizing the stance that businesses take towards tax matters more closely.

Impact on businesses

Many large businesses will already have a tax strategy (although not necessarily one that has been published) that can be used as the starting point.

However, in all cases, careful thought is likely to be involved in the drafting of the first version. The main audience is not solely, nor even necessarily primarily, the tax authorities. Other stakeholders and the media are potentially as important.

Once the strategy has been published for the first time under the new regime, the subsequent annual updating should be more straightforward.

If you have any questions regarding this memorandum, please contact Judith Harger in London (+44 20 3580 4705, jharger@willkie.com) or the Willkie attorney with whom you regularly work.

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