Mitigation

It’s important to view the regulatory and organizational aspects together. Besides the already available mitigation activities related to tax matters, corporations need to take a closer look at the following four topics:

<table>
<thead>
<tr>
<th>It’s about facilitation</th>
<th>Managing third parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unlike existing AML controls, the CCO is focused on facilitation risks, and therefore on the actions of dishonest employees or associated third parties. Corporations will need to consider how resistant controls are to circumvention and whether associated persons may be able to facilitate evasion despite new measures.</td>
<td>As for the Bribery Act, organizations will need to consider how the rules apply to third parties over whom they may have little control. Identifying risk related to associated persons is likely to be a key component of any risk assessment, and ensuring that controls cover all associated persons will be a substantial challenge.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Ownership</th>
<th>Leveraging existing controls</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complying with the CCO requires a blend of tax and financial crime expertise, along with resources to conduct risk assessments and oversee the implementation of changes. Establishing ownership and accountability is critical and challenging as there is not a single core specialization.</td>
<td>Effective compliance will leverage existing controls to address risks, and focus effort on the areas of highest risk to deliver effectively. At the same time, the risk assessment and implementation planning must be robust and honest, to ensure that risks are adequately addressed.</td>
</tr>
</tbody>
</table>

**Recommended immediate actions**

- Perform a risk assessment (Principle 1) and establish an implementation plan
  
  Corporations are advised to perform a risk assessment in order to understand risk exposure and how these risks are controlled. This risk assessment forms the basis of the implementation plan to ensure that proportionate procedures are in place to prevent the facilitation of tax evasion.

- Build reasonable procedures (Principles 2-6)
  
  Following the risk assessment, the business can build a proportionate response to the legislation to seek to ensure that it meets the “reasonable procedures” test. With time, what constitutes "reasonable" is likely to change, as businesses are expected to adapt their systems and controls on an ongoing basis in line with the new legislation. And with the 30 September 2017 deadline for completion looming, now is the time for businesses to act.

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ED None.

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The new UK Corporate Criminal Offence:

**Need for action by Swiss corporates**

**EY Point of View**

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Introduction

As an officer of a Swiss corporation - maybe a Swiss financial institution - you may be surprised to learn that the new UK Corporate Criminal Offence should be on your radar. Effective from 30 September 2017, the legislation provides for a new Corporate Criminal Offence (CCO) that is committed when a person associated with a business (such as an employee, agent, contractor or subsidiary) facilitates tax evasion. Unless corporates with a UK nexus can prove that reasonable prevention procedures are in place, they risk criminal conviction.

Relevance

A foreign corporation which carries on any "part of a business" in the UK could be prosecuted under the new UK Corporate Criminal Offence for failing to prevent facilitation of tax evasion by any of its employees, agents or other third parties ("associated persons"), even if the offence takes place outside the UK and involves non-UK persons. The CCO legislation provides for two types of offence:

1. (a) a taxpayer has criminally evaded UK tax
2. (b) a taxpayer has criminally evaded non-UK tax and there is a UK nexus

Scopes

The CCO has a wide scope. It applies not only to all entities worldwide where the underlying tax is owed to HM Revenue and Customs (HMRC), but also to non-UK taxes where an entity is incorporated in the UK, has a place of business in the UK, or where any aspect of the offence occurs in the UK.

A. UK branches of overseas groups
Both the UK and non-UK tax offences apply to all offices of the legal entities, wherever constituted. That means that a corporation could be liable if a Swiss employee helped a customer to evade Swiss tax, solely because there is also a UK branch of that entity.

B. Employees traveling through the UK
Employees of non-UK entities may bring the entity into scope of the offence if they facilitate tax evasion whilst in the UK. This could occur by sending emails, making phone calls or partaking in other activities whilst the employee is physically in the UK.

C. Third-party relationships
Where a third party provides services to a customer on behalf of an entity in scope, that third party will be an associated person and its actions could cause the entity to be liable.

Increased corporate accountability

This CCO focuses on incentivizing strong governance and does not so much alter the nature of criminality, but focuses on accountability for criminal acts. So, the offence does not hold a corporation accountable for the crimes of their clients. Instead, the offence relates to failure to prevent facilitation of crimes by those who act for, or on behalf of, a corporation such as its employees, agents or others that provide services on a corporation’s behalf.

Tax compliance accountability

1. Failure by organization to prevent the criminal facilitation of tax evasion by external associated persons (e.g., agents, service providers)

2. Failure by organization to prevent the criminal facilitation of tax evasion by external associated persons (e.g., agents, service providers)

Tax compliance accountability

- A
- B
- C
- D

Regulatory focus as at 30 September 2017

Implications: Inside-out view

Organizational perspective

Organizations will need to carry out a risk assessment to understand the nature and extent of their exposure to the risk of this offence. This assessment will need to consider the inherent risk of tax evasion being facilitated by an associated person and the effectiveness of the current controls to mitigate that risk. Based on the findings of this risk assessment, organizations will then need to develop a plan to implement proportionate procedures. These procedures will need to address the principles set out in the HMRC guidance as well as other relevant guidance.

- Client Due Diligence (AML, KYC, etc.) process enhancements
- Client tax transparency efforts on the basis of FATCA and Automatic Exchange of Information requirements
- Risk and control frameworks assessing "tax risks" on an ongoing basis

What we see already addressed in the industry

- Minimum requirements set by HMRC for 30 September 2017 include the completion of a risk assessment, communication of the importance of the legislation’s aims by senior management and a complete action plan. The following steps need to be taken:

Increased corporate accountability

- Assess the inherent risks that the organization might facilitate tax evasion through its employees and other associated persons.
- Evaluate the extent to which current internal controls eliminate or mitigate the inherent risk.
- Adopt reasonable prevention procedures based on the nature, scale and complexity of the business and the risk rating determined by the yearly risk and control assessments.
- Establish the "tone from the top" by sending a clear message about zero tolerance of facilitation of tax evasion to the business; clearly define ownership and accountability within senior management, etc.
- Enhance the due diligence procedures and processes regarding third parties in order to capture facilitation risk; review and enhance third party risk management processes and procedures (e.g., assess contractual arrangements).
- Define and roll out additional top level commitment communications; define training needs for all associated persons (e.g., RML, service providers) and either incorporate into existing tax trainings or establish new trainings related to criminal facilitation of tax evasion.
- Enhance monitoring and review processes and controls effectiveness as part of the controls landscape, enhancement to capture facilitation risk of associated persons.

Implications: Outside-in view

Regulatory perspective

The offence is wide ranging, applying to relevant bodies (typically companies and partnerships) not only in the UK but also to those based or operating overseas. It is closely modelled on the Bribery Act 2010 and holds the relevant body responsible for preventing those who act for, or on its behalf ("associated persons"), from criminally facilitating tax evasion.

Liabilities and consequences

- Generally, any entity which is in scope will be liable for any criminal facilitation of tax evasion by an associated person of a relevant body.
- Consequences of non-compliance include a potentially unlimited fine for the corporation, and could include regulatory sanctions (such as the loss of a license) plus significant reputational damage.

Regulatory requirements

- The entity in scope can defend itself only by implementing "reasonable prevention procedures". HMRC has set out 6 "guiding principles" to help determine what procedures are reasonable:

- The relevant body assesses the nature and extent of its exposure to the risk of those who act for or on its behalf, engaging in activity during the course of business to criminally facilitate tax evasion.

- Reasonable procedures will be proportionate to the risk a relevant body faces of persons associated with it committing tax evasion facilitation offences. This will depend on the nature, scale and complexity of the relevant body’s activities.

- The top-level management of a relevant body should be committed to preventing persons associated with it from engaging in criminal facilitation of tax evasion. They should foster a culture within the relevant body in which activity intended to facilitate tax evasion is never acceptable.

- The organization applies due diligence procedures, taking an appropriate and risk based approach, in respect of persons who perform or will perform services on behalf of the organization, in order to mitigate identified risks.

- The organization seeks to ensure that its prevention policies and procedures are communicated, embedded and understood throughout the organization, through internal and external communication, including training. This is proportionate to the risk to which the organization assesses that it is exposed.

- The organization monitors and reviews its prevention procedures and makes improvements where necessary.