



Strengthening the Code of Practice on Taxation for Banks

Consultation document

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Closing date for comments: 16 August 2013

Subject of this consultation:	The Code of Practice for Taxation of Banks (“the Code”)
Scope of this consultation:	Comments are sought on the HMRC governance process around determining non-compliance with the Code and the nature of the report to be published by HMRC.
Who should read this:	The UK banking and building society sectors, their advisers and representative bodies.
Duration:	From publication on the 31 May 2013 to 16 August 2013.
Lead official:	Malcolm White, HMRC Policy and Technical Adviser (Financial Products and Services Team) CTIAA
How to respond or enquire about this consultation:	Electronic responses should be sent to bankcode.consultation@hmrc.gsi.gov.uk Written responses should be addressed to Alan Taylor at: HMRC, Large Business Service, 7th Floor, South West Wing, Bush House, Strand, London WC2B 4RD.
Additional ways to be involved:	HMRC will engage directly with representative bodies and affected businesses through existing customer relationships but welcomes written views from all interested parties. Also a “Town Hall” meeting will be held in London on 24 June, details of the venue are: HMRC, Bush House, South West Wing, London, WC2B 4RD. Expressions of interest to attend should be sent to bankcode.consultation@hmrc.gsi.gov.uk Please note places for this event are limited and not all those who express an interest in attending may be able to attend.
After the consultation:	The proposals will be reviewed in light of the responses. A summary of responses will be published after the close of the consultation.
Getting to this stage:	The Code was introduced in 2009 and strengthened by the Government in 2010. The Government feels it is now time to further strengthen the Code to ensure that the Code remains as effective as possible for the future.
Previous engagement:	Since Budget 2013 HMRC have held informal stakeholder engagement with representative bodies of the banking and building society sector, and interested parties to help identify the key issues and concerns that need to be addressed.

Contents

1	Introduction	4
2	Adoption and re-adoption	9
3	HMRC Governance Protocol and Compliance	11
4	HMRC's Annual Report	20
5	The Legislation	21
6	Assessment of Impacts	24
7	Summary of Consultation Questions	26
8	The Consultation Process: How to Respond.	27
Annex A	The Code of Practice on Taxation for Banks	29
Annex B	HMRC Governance Protocol on the Code	31
Annex C	Draft legislation	35

On request this document can be produced in Welsh and alternate formats including large print, audio and Braille form.

1. Introduction

- 1.1 The Government expects all businesses and individuals to manage their tax affairs in a responsible way.
- 1.2 The Code of Practice for Taxation of Banks (the “Code”) was introduced by the previous government in 2009. The current Government published the names of the top 15 banks that had adopted the Code in November 2010.
- 1.3 The Code is one element of the Government’s anti avoidance strategy and is designed to change the attitudes and behaviour of banks towards avoidance given their unique position as potential users, promoters and funders of tax avoidance.
- 1.4 The Code (reproduced in Annex A) describes the approach expected of banks with regard to governance, tax planning and engagement with HMRC. It aims to encourage banks, building societies and organisations providing banking services operating in the UK (hereafter collectively referred to as “banks”) to adopt best practice in relation to their tax affairs. The Code sets out that:
 - Banks should have strong governance around tax, which is integrated into their business decision making.
 - Banks should follow the spirit of the law in addition to the letter - this means banks can undertake tax planning to support their business operations, but this should not be used to achieve tax results that are contrary to the intentions of Parliament.
 - HMRC and the banks should work together to encourage mutually open and transparent relationships.
- 1.5 Since the introduction of the Code HMRC has seen a positive response by banks in relation to their tax planning and transparency. We believe that this is in large part down to changing attitudes by banks toward avoidance, and that the Code has been a significant factor in that change. However the work the Government has undertaken in recent years to close avoidance loopholes together with the current economic environment and regulatory changes have also lessened the opportunities for tax avoidance.
- 1.6 Although the Code is generally operating well, it lacks public transparency. There are also no obvious downsides for banks from not adopting the Code and no codified consequences for non-compliance with a bank’s Code commitments.

- 1.7 HMRC is also aware of concerns from some stakeholders that a small number of banks may be interpreting the Code differently from others.
- 1.8 These concerns do not reflect the reality of the situation as HMRC applies the operation of the Code consistently across the banking sector (subject to the present approach for “smaller banks” – see 2.5-2.7 below). Nonetheless such perceptions potentially undermine the operation of the Code.
- 1.9 The Government therefore believes that now is the right time to strengthen the Code, to cement the behavioural improvements and to ensure the long-term effectiveness of the Code, by providing a legal basis for the naming of non-compliant banks and by providing full transparency around which banks have adopted the Code and certainty that all banks are complying with the same commitments.
- 1.10 Budget 2013 therefore announced that, following consultation, the Government will introduce legislation in Finance Bill 2014 requiring HMRC to publish an annual report, beginning in 2015, on the operation of the Code.
- 1.11 The legislation will also provide that such a report may include the naming of any bank that HMRC considers has not complied with their Code commitments as well as a full list of all banks that have, or have not, adopted the Code.
- 1.12 This consultation focuses on;
- the governance process around determining non-compliance,
 - the processes and criteria by which a decision to name a bank as being non-compliant will be made, and
 - the nature of the report to be published by HMRC.

It also considers the timescale for banks to adopt or reaffirm their adoption of their Code commitments in light of these strengthened features and seeks comments on the draft legislation giving effect to those features.

- 1.13 The Government believes that the commitments enshrined in the Code remain appropriate and that the wording used and the concepts and actions involved are now well understood by banks and practitioners. **Therefore this consultation does not include any proposals on the content of the Code itself.**
- 1.14 The Government feels that its actions to strengthen the Code will ensure that the Code remains as effective as possible for the future. It will enable

compliant banks to be reassured that there is a level playing field in terms of commitments entered into under the Code by those banks that have adopted the Code; ensure that there is full transparency where a bank that has adopted the Code does not comply with it; and provide full transparency around the banks which have chosen not to adopt.

Background

- 1.15 The Code, which is voluntary, was introduced in 2009 to encourage banks to follow the spirit as well as the letter of the law in their tax planning, both in relation to their own tax affairs and those of their customers and employees.
- 1.16 On 30 November 2010 the Government announced that the top fifteen banks operating in the UK had adopted the Code. The list of these banks can be found on HMT's website at <https://www.gov.uk/government/news/top-15-banks-sign-code-of-practice>
- 1.17 Currently 262 banks, (dealt with by HMRC's Large Business Service (LBS) and the Large & Complex section within HMRC Local Compliance), have adopted the Code.
- 1.18 The Code was introduced for banks only, as banks have historically undertaken and promoted tax avoidance and their behaviour in this activity was typically more aggressive than that of companies in other sectors. Banks are uniquely placed in that they:
- can seek to avoid their own tax liabilities, and their employees' income tax and national insurance contributions;
 - provide financial services to customers, many of which services are sensitive to tax and some of which can be used for tax avoidance; and
 - have access to large amounts of capital which they can use to facilitate avoidance schemes designed and implemented by others from which the banks can benefit through sharing in the tax benefits directly or by more remunerative lending terms.
- 1.19 The Code sets out a constructive framework with several components:
- It describes what the Government believes to be good practice for governance and decision-making in banks, including tax planning. The Code asks banks to have proper governance around tax, integrated into business decision-making.

- Following the spirit of the law means banks may undertake tax planning to support their business operations, but this should not be used to achieve tax results that are contrary to the intentions of Parliament.
- The Code encourages banks to work with HMRC to build mutually open and transparent relationships.

1.20 To comply with the Code, banks need to consider whether the tax results of a transaction are contrary to the intentions of Parliament.

1.21 In arriving at a view as to whether the transaction is contrary to the intentions of Parliament, the bank should not only consider a purposive construction of the legislation but should also consider whether Parliament can realistically have intended to give the proposed result in circumstances that are very different from those that prevailed at the time (e.g. are loopholes being used to arrive at an unexpected result).

1.22 In March 2012 HM Revenue & Customs (HMRC) published its governance process around communication and escalation in any case where HMRC had concerns about a bank's compliance with its commitments under the Code (hereafter referred to as "Governance Protocol").

1.23 HMRC has also published further guidance on the terms 'promote' and 'facilitate' and how these should be read in regard to the Code of Practice on Taxation for Banks¹.

What is proposed?

1.24 Chapters 2 to 5 set out in greater detail the background to HMRC's proposals, and seek views of respondents on these proposals, which will be considered by HMRC in finalising the proposals.

1.25 The proposals are:

- a requirement for any bank that wishes to continue to be subject to the strengthened Code, to unconditionally confirm or re-confirm their commitment to the obligations set out in the Code;
- publication by HMRC at Autumn Statement 2013 of a list of all banks that have newly adopted or re-adopted the Code;

¹ The Code of Practice on Taxation for Banks does not currently have legislative underpinning. However all published guidance can be found here;

<http://www.hmrc.gov.uk/thelibrary/bank-code-practice.htm>

- from 2015 onwards, the publication of an annual report on the operation of the code, which may include the naming of any bank that in HMRC's opinion is not complying with the Code. Each annual report will include an updated list of those banks that have adopted and those that have not; and
- legislation enacting the above proposals will be included in Finance Bill 2014.

1.26 The proposed governance process around determining non-compliance and the decision to name a bank in an annual report builds on the original Governance Protocol and is discussed in detail below.

2. Adoption and Re-adoption

- 2.1 In the light of the features to strengthen the Code, the Government believes that it is important that all banks which have already adopted the Code should re-confirm their commitment to their obligations under the Code.
- 2.2 These re-confirmations (or in the case of new adopters, confirmations) to Code commitments need to be unconditional to provide the necessary external assurances and transparency (given the public listing of all Code adopters) to all banks that the Code is being adopted and applied fairly and consistently.
- 2.3 **The Code will remain a voluntary commitment.** Banks can choose whether or not to adopt or re-adopt this strengthened Code. However, as noted above, the Government proposes to provide full transparency about banks' decisions by publishing a full list of those which have adopted at Autumn Statement and an annual list from 2015 of those that have adopted and those that have chosen not to.

Smaller banks

- 2.4 The terms under which the Code was originally issued required smaller banks to adopt only Section 1 of the Code. This section of the Code covers governance and transparency and it was considered adequate to control the nature or character of transactions such banks enter into.
- 2.5 Following consultation between HMRC and banks when the Code was introduced, it was felt that adoption of all sections of the Code by smaller banks would put a disproportionate level of governance, and hence costs, on such banks; which did not reflect the risks relating to their tax affairs.
- 2.6 HMRC notes that there are benefits in terms of full transparency and consistency of asking all banks to adopt all sections of the Code. However any decision on this matter needs to consider all the impacts and risks of smaller banks adopting or not adopting the Code in full.
- 2.7 HMRC does not want to introduce costs without any compliance benefit and it may be disproportionate to ask a small bank to sign up to all sections of the Code and introduce full blown written tax strategies where, for example, it has only small scale or simple UK operations: some smaller banks may not have a tax department.

Q.1 We welcome respondents' views on whether requiring smaller banks to only adopt Section 1 of the Code remains a tenable approach under the strengthened Code?

Timetable for adoption/re-adoption

- 2.8 The Government proposes that HMRC will publish a full list of all banks who have confirmed adoption or re-adoption to HMRC at Autumn Statement 2013.
- 2.9 HMRC understands that banks will need time to understand the governance processes, procedures and criteria that will lead to a conclusion of non-compliance and a bank being named.
- 2.10 As set out above there are no plans to change the scope of the Code.
- 2.11 HMRC therefore believe that a period of approximately three months after the end of the consultation period will be sufficient to allow banks to be fully apprised of, and satisfied with, the new procedures and safeguards proposed to support the new legislative processes to allow them to decide whether to adopt or re-adopt in time for Autumn Statement.
- 2.12 Additionally banks are encouraged to engage during the consultation process with their Customer Relationship Manager ("CRM") or Local Compliance Contact to clarify any areas of difficulty or concern.

Q2. Views are welcomed from respondents on the proposed timetable for adoption/re-adoption.

3. HMRC Governance Arrangements

Governance

- 3.1 HMRC's internal governance arrangements are not normally a matter for public consultation. However, HMRC recognises that banks should be able to make their decision regarding adopting or reaffirming adoption of the Code with a good understanding of the potential ramifications and impacts of the decision.
- 3.2 In particular banks will want to have a clear understanding of the governance arrangements and safeguards around how HMRC forms the view that a bank is not complying with the Code and that a bank should be publicly named. Therefore we set out below proposals for how we intend the governance arrangements in respect of the Code to operate.
- 3.3 Following informal consultation, HMRC published its Governance Protocol on compliance with the Code of Practice on Taxation for Banks on 26 March 2012. This sets out the communication and escalation procedures in any case where HMRC has concerns about a bank's compliance with its commitments under the Code.
- 3.4 HMRC proposes that the procedures set out in the Governance Protocol should continue to be the basis for HMRC's handling of concerns about a bank's compliance with the Code. However we propose to set out much more explicitly the escalation routes and governance arrangements around conclusions of non-compliance.
- 3.5 We also intend to build in the requirement for the Tax Assurance Commissioner (see below) to take the final decision on whether to name a bank as non-compliant in a report.
- 3.6 The Protocol envisages that a conclusion that a bank is non-compliant will not automatically lead to the bank being named as non-compliant. This is reflected in the draft legislation (discussed further below) that **enables**, but does not **require** HMRC to name such a bank.
- 3.7 We envisage that in most cases a conclusion of non-compliance will lead to a bank being named. But the public naming of a bank is not an end in itself, but rather a means of ensuring that the Code remains effective in preventing tax avoidance activity by banks.
- 3.8 Therefore, there may be cases where, following HMRC's communication to a bank's board of its opinion that the bank is not complying with the Code, the bank takes actions that convince HMRC that the bank is

committed to a cessation of tax avoidance behaviour going forward and where therefore no further purpose would be served by publicly naming that bank.

3.9 Banks will have the normal rights of legal recourse in relation to any decision by HMRC to publish the bank's name, for instance through Judicial Review. But as the Code will remain voluntary there will be no statutory right of appeal against HMRC's view of a bank's compliance with the Code and decision to name such a bank.

3.10 The proposed revisions to the Governance Protocol are set out below.

Tax Assurance Commissioner

3.11 On 1 November 2012 HMRC published its Code of governance for resolving tax disputes <http://www.hmrc.gov.uk/adr/resolve-dispute.pdf> which explains the role of the Tax Assurance Commissioner.

3.12 HMRC's Tax Assurance Commissioner is responsible for:

- seeing that tax disputes are resolved efficiently and on a basis that determines the correct tax in accordance with the Litigation & Settlement Strategy and achieves outcomes that are even-handed across different customer groups;
- ensuring that we have appropriate governance arrangements in place to meet those objectives;
- ensuring that those arrangements are observed in practice in individual cases; and
- monitoring and evaluating the effectiveness of our processes for resolving tax disputes and our governance arrangements, and implementing improvements.

3.13 The Tax Assurance Commissioner has no role in managing the tax affairs of specific taxpayers and no line management responsibility for caseworkers, maintaining clear separation of responsibilities.

3.14 Three Commissioners will make the final decision on whether a bank is considered not to be complying with its Code commitments. This could include the Tax Assurance Commissioner. The Tax Assurance Commissioner however will have the ultimate decision on whether or not to publish the name of a bank as non-compliant in the annual report.

- 3.15 Whether actions will be considered non-compliant with the Code will depend on the nature or severity of the actions undertaken and be assessed on a case by case basis.
- 3.16 The types of actions undertaken that would be considered by HMRC as not complying with the Code are varied. For example a single transaction within the scope of the General Anti Abuse Rule (“GAAR”)² will, on its own, without remedial action by the bank, be sufficient, but also a pattern of behaviour may lead to such a conclusion. These matters are explored in detail in the following sections.

Revised Governance Protocol

- 3.17 The changes proposed to the Governance Protocol all relate to Chapter 1 of the Protocol. See box 3.1 below. The concept of a ‘potentially abusive transaction’ is explained in the “Interaction with the GAAR” section further on in this document. The full original Governance Protocol is set out at Annex B.

² The General Anti Abuse Rule provisions are set out in Part 5 of Finance Bill 2013. It will apply to relevant tax arrangements entered into on or after the day the Finance Bill receives Royal Assent.

Box 3.1

Chapter 1 of Revised Governance Protocol

Introduction

HMRC may at any time take one of three views about a bank's compliance with the Code of Practice:

- i. it has not expressed concerns over a bank's compliance with the Code
- ii. it has expressed concerns over compliance which are being discussed
- iii. its concerns over compliance have not been adequately addressed or are so serious that short term remedial action is not possible and it considers that the bank has not complied with the Code.

If HMRC has concerns about compliance with the Code then the CRM or equivalent will raise them with the bank at the earliest opportunity, once this action has been approved at Deputy Director level or above.

If discussions between the CRM and the bank do not resolve the concerns, or if the transaction giving rise to the concern is a potentially abusive transaction, HMRC (at or above Deputy Director level) will escalate those concerns to the bank's board for further discussion at this level.

Following discussions with the bank's board, HMRC will only take the view that the bank has not complied with the code if;

- the transaction giving rise to the concerns is a potentially abusive transaction that the bank has promoted or implemented in respect of the bank's employees, or otherwise
- its concerns still remain unresolved.

In the case of a potentially abusive transaction that the bank has undertaken on its own account HMRC's concerns can only be resolved if the bank self assesses or amends its self assessment to negate the tax advantage from the transaction.

HMRC's formal view on Code compliance will be determined by the Commissioners following a reference to them by the Director with operational accountability for the case (or a substitute of the same grade or above).

Once HMRC's view has been determined by the Commissioners, HMRC shall:

- i tell the bank that it considers that the bank is not complying with its undertakings under the Code; and
- ii. where the reasons for that consideration do not concern a potentially abusive transaction, explain what it considers the bank should do in order to begin to comply.

Where the reason for HMRC's views of a bank's non-compliance concerns a potentially abusive transaction, a report shall immediately be prepared for the Tax Assurance Commissioner to decide whether the bank in question should be named in the next annual report to be published by the Commissioners as not complying with its Code commitments (in accordance with clause 1(3) of the draft legislation set out in Annex C).

In other cases and following consideration of the bank's response to point ii above, such a report will be prepared for the Tax Assurance Commissioner within three months of the above actions (or exceptionally as soon as practicable thereafter).

If the Tax Assurance Commissioner decides that the bank will be named, HMRC will inform the bank at board level of this decision.

Q.3. HMRC welcomes comments and views on the proposed approach set out to revise the Governance Protocol on Code compliance and whether the proposals provide the necessary assurance safeguards around the naming of non-compliant banks.

Q.4. Do these proposals offer sufficient transparency for the public around how the rules will operate?

Q.5. We also welcome views on whether any other enhancements should be considered at this time to the Governance Protocol.

Code Compliance

- 3.18 As set out above, HMRC has seen a positive response by banks in relation to their tax planning since the introduction of the Code.
- 3.19 However where HMRC has concerns over a bank's compliance with the Code then it will undertake the actions set out in the Governance Protocol. Given the strengthening of the Code HMRC feels that it is appropriate to set out examples as part of this consultation on how this might apply in certain scenarios. These are set out in the boxes below.
- 3.20 HMRC will consider non-compliance in relation to actions undertaken following adoption/re-adoption of the strengthened code or Autumn Statement 2013 if that is earlier.

Q.6. We would welcome views from respondents on whether the examples set out below provide a sufficient degree of guidance of the types of transactions, or patterns of transactions or other behaviours that would lead to HMRC concluding that a bank is not complying with its Code commitments?

Interaction with the GAAR

- 3.21 The Government has been clear that the requirements relating to tax planning placed on banks under the Code will remain in place following introduction of the GAAR.
- 3.22 The GAAR will target abusive transactions, whereas the Code has a wider scope and is aimed at a wider range of avoidance transactions.
- 3.23 This document refers to any transaction that is potentially within the ambit of the GAAR as a 'potentially abusive transaction'. We propose that such a transaction is one where, in accordance with the GAAR provisions, a

designated officer of HMRC has issued a notice of proposed counteraction of the tax advantage that has arisen from the transaction under the GAAR and having considered the representations from the bank (or no representations having been received) that the designated officer has referred the matter to the GAAR Advisory Panel.

- 3.24 The Governance Protocol envisages that such transactions will in most cases be sufficient on their own to lead to a conclusion of Code non-compliance. The only situation where this might not be the case is if the bank has undertaken the transaction on its own account and self assesses on the basis that it does not achieve the tax advantage sought under the transaction (i.e. counteracts the tax advantage itself) before reference to the GAAR Advisory Panel.

Q.7. Do respondents consider this to be an appropriate descriptor for transactions within the ambit of the GAAR?

Case Studies

- 3.25 The following examples set out possible scenarios in which HMRC would consider whether a bank was in compliance with its Code commitments.

Example 1 - a one-off transaction

A bank implements a transaction to achieve a tax advantage on own account, and also markets the product to a number of clients. The bank does not approach HMRC under the Code pre-transaction but does submit a DOTAS disclosure in respect of the transaction(s). Having reviewed the arrangements HMRC comes to the view that these fall within the ambit of the GAAR and a designated officer sends a notice of proposed counteraction of the tax advantage to the bank.

Following receipt of the notice of proposed counteraction, the bank self assesses on the basis that it doesn't achieve the tax advantage. However, HMRC is aware that the purchasers of the product have achieved tax savings because of the arrangements (which are also subject to notices of counteraction).

HMRC will raise concerns about Code compliance with the bank as soon as they have become aware of the nature of the transaction. As the transaction is identified as one that may fall within the ambit of the GAAR (a potentially abusive transaction) the issue is escalated to the bank's board in line with the Governance Protocol.

Once HMRC has decided, on the facts given, that the arrangement is a potentially abusive one to which HMRC would seek to apply the GAAR, and following the notice of proposed counteraction is sent and a reference is made to the GAAR Advisory Panel, a report will be sent to the Commissioners asking their view on whether the bank is Code compliant. In this case the Commissioners agree that the bank is not complying with its Code commitments and the bank is informed at board-level that HMRC considers them to be non-compliant.

HMRC will discuss with the bank the actions they consider necessary for the bank to become compliant once again – but will flag up that, because the bank has promoted a potentially

abusive transaction, there are no actions the bank can take in the immediate future that could change HMRC's view. Although it is positive that the bank has self assessed on the basis that its own tax advantage has been counteracted.

As the reasons for the conclusion of non-compliance concern a potentially abusive transaction, a report will immediately be prepared for the Tax Assurance Commissioner to decide whether to name the bank as being non-compliant on the next annual report on the operation of the Code to be published by the Commissioners.

Examples of when GAAR might or might not apply can be found via the following link <http://www.hmrc.gov.uk/avoidance/gaar-partd-examples.pdf>

This guidance is approved by the GAAR Advisory Panel and was published on 15 April 2013.

Example 2 - a pattern of behaviour

A bank has undertaken three transactions since Autumn Statement 2013. With the first of those transactions, although the bank did not appear to have structured itself into obtaining a tax advantage (and claimed not to have done), the tax outcome of the transaction exposed a loophole that required immediate Government legislative action to close. With the latter two transactions HMRC has concluded and communicated to the bank in question that these transactions do not in its opinion:

1. support genuine commercial activity;
2. produce tax results for the bank that are consistent with the underlying economics of the arrangements; and if so,
3. produce tax results that are in accordance with the intentions of Parliament, taking into account both a purposive construction of legislation and whether Parliament could realistically have intended the result, given a track record of acting to close loopholes to prevent transactions that are "too good to be true".

Of the latter two transactions one was on own account and one has been developed and marketed in conjunction with a 3rd party promoter. Neither of the transactions is in the ambit of the GAAR.

Given this pattern of behaviour, HMRC has warned the bank at board level of the potential consequences arising from further such transactions. The bank has assured HMRC that it will not undertake such transactions again. However, within 2 years of that discussion, the bank approaches HMRC to discuss arrangements it is looking to put in place which this time seek to reduce the PAYE taxes payable by its employees. HMRC's opinion is that the arrangements are Code 'red'; achieving an effect which is contrary to the intentions of Parliament and tells the bank this. The bank does not agree with HMRC's view and decides to implement the arrangements.

HMRC had expressed concerns over the bank's Code compliance because of the three transactions that have already been implemented. The decision by the bank to put the arrangements in place for its employees despite HMRC's opinion that these do not comply with the Code would lead HMRC to take the view that the bank is not addressing the concerns about Code compliance.

HMRC would escalate discussions to board level, where this has not already been done, and explain that because of the pattern of transactions HMRC would be asking the Commissioners to decide that the bank is no longer Code-compliant. The bank's board would have the opportunity to address and resolve HMRC's concerns about how they are applying the Code which might, in this instance, require them to unwind the arrangements that they have put in

place for their employees. Such actions would be likely to influence the Commissioners' decision on whether to conclude that the bank was not Code compliant.

If the Commissioners determine that the bank is not Code compliant, (perhaps because the bank is unwilling to unwind the arrangements or otherwise resolve HMRC's concerns) then within 3 months a report will be put before the Tax Assurance Commissioner to inform his decision about whether the bank should be named in the next following annual report. The bank will be able, during that 3 month period, to provide HMRC with further information about proposed remedial action to help resolve concerns about the bank's Code compliance.

Example 3 – Poor Internal Governance

A serious lack of internal governance that in HMRC's opinion is not consistent with a bank's Code commitments

Scenario 1

Transactions are undertaken before Code compliance is considered and HMRC only become aware of issues post transaction. This would suggest that;

- the bank's strategy for and governance of risk management for tax matters does not include all key personnel;
- in large organizations the key tax department/advisers are not sighted on all aspects of the business (such as wealth units or private banks).

Scenario 2

As detailed in Example 2, in relation to the PAYE scheme, a repeated difference of opinion could be an indication that, despite rigorous internal governance processes, these do not adequately reflect the principles of the Code and are not therefore capturing transactions that achieve outcomes which are contrary to the intentions of Parliament. This would suggest that;

- the bank's strategy for and governance of risk management for taxation matters is not fully understood and operated within the bank;

In both scenarios HMRC would have a concern over failings in considering the Code in the bank's internal governance. In these circumstances the CRM or equivalent will raise them with the bank at the earliest opportunity, once this action has been approved at deputy director level or above in HMRC.

If discussion between the CRM and the bank does not resolve the concerns, HMRC (normally at or above Deputy Director level) will escalate them to the bank's Board for further discussion at this level.

If there is no indication that a bank is attempting to implement strategic or governance change, the director with operational responsibility for the case (or appropriate substitute) would prepare a report for the Commissioners to consider whether the bank is compliant with its Code commitments. If the Commissioners consider that the bank is not compliant this formal view will be communicated to the bank at Board-level. If the bank does not take adequate action in response to this discussion, a report would be sent to the Tax Assurance Commissioner to consider the bank for naming as non compliant in the next annual report.

Example 4 – Relationship between bank and HMRC

A bank may have adopted the Code but not have an open and transparent relationship with HMRC

HMRC might indicate concern to the bank about delivery of or commitment to its Code undertakings for the following reasons:

- Failure to disclose significant potentially contentious transactions at the earliest reasonable date
- Failure to provide adequate information for HMRC to understand potentially contentious transactions
- Failure to work with HMRC to agree reasonable timelines for enquiries or potential disputes to be brought to decision point
- Failure to discuss in advance transactions when the bank is unsure whether they are contrary to the intentions of parliament, if it is reasonable to assume a primary reason for that is to leave Parliament uninformed about the impact of the transaction until completed.

In these circumstances the CRM or equivalent will raise them with the bank at the earliest opportunity, once this action has been approved at HMRC deputy director level.

If discussion between the CRM and the bank does not resolve the concerns, HMRC (normally at or above Deputy Director level) will escalate them to the bank's board for further discussion at this level.

If there is no indication that a bank is attempting to implement strategic or governance change, the director with operational responsibility for the case (or appropriate substitute) would prepare a report for the Commissioners to consider whether the bank is compliant with its Code commitments. If the Commissioners consider that the bank is not compliant this formal view will be communicated to the bank at board-level. If the bank does not take adequate action in response to this discussion, a report would be sent to the Tax Assurance Commissioner to consider the bank for naming as non-compliant in the next annual report .

- 3.26 A conclusion on whether a bank is non-compliant in a general sense may be reached on the basis of consideration of transactions undertaken by a bank before Autumn Statement (where that bank had previously adopted the Code) as well as after. But for the purposes of deciding on whether to name a bank that in HMRC's opinion is not complying with the Code under the provisions of the legislation, this decision will be made only on the basis of actions undertaken after re-adoption or adoption at or after Autumn Statement 2013 and not in respect of anything prior to this.

4. HMRC's Annual Report on the Code

- 4.1 The draft legislation proposed for Finance Bill 2014 (as set out below) requires HMRC to produce an annual report from 2015 on the operation of the Code and enables HMRC to name any bank that has not complied with its Code commitments.
- 4.2 The first report will cover the period from Autumn Statement 2013 to 31 March 2015 and the report will be thereafter on an annual basis covering the period 1 April to 31 March in the following calendar year.
- 4.3 The draft legislation set out below provides that the report will be produced "as soon as practicable" after the end of the reporting period.
- 4.4 The report will cover the operation of the Code during the report period, but in relation to the naming of any bank as not complying with the Code, and in considering the actions that may lead to such a conclusion, HMRC may consider actions which have happened, or started to happen, in a period earlier than the relevant report period. However no action by a bank before Autumn Statement 2013 will be taken into account in arriving at a decision over whether a bank is complying with its Code commitments.
- 4.5 The elements of the report will be:
- A list of all banks that have adopted the Code before or during the period and are still subject to those commitments, plus a list of all banks that have not adopted the Code.
 - A report on the operation of the Code during the period,
 - If appropriate the name of any bank that in HMRC's opinion has not complied with the Code.
- 4.6 The elements covered on operation of the Code during the reporting period will include matters (on an anonymised basis) such as the number of approaches by banks to HMRC during the period on Code matters, the number of such transactions that HMRC consider to be acceptable transactions under the Code ("Code Green" transactions) and the number that HMRC considered to be unacceptable ("Code Red" transactions) and the number of the latter that banks have proceeded with.

5. The Legislation

- 5.1 The draft legislation to give effect to the strengthened features set out in this Consultation Document is set out in Annex C. The Government welcomes comments on this draft legislation. Although referred to in this section for convenience as clauses 1 and 2 this is not meant to suggest actual Finance Bill numbering but is rather to aid understanding.
- 5.2 Clause 1(1) sets out the requirement for HMRC to publish an annual report on the operation of the Code. The Code is re-published with this Consultation Document (Annex A) and legislation refers to the Code as published today.
- 5.3 Clauses 1(2) and (3) enable HMRC to name a bank that has adopted the Code (the legislation introduces the concept of “participating” group or entity which is defined in clause 2) in an annual report which in the opinion of the Commissioners of HMRC did not comply with the Code during that period. The legislation provides that HMRC can give details of the non-compliance. This will be the minimum required to describe the reasons for the designation of non-compliance.
- 5.4 Clause 1(4) makes clear that HMRC must take account of any published guidance on the operation of the Code (such as the guidance on promote/facilitate published last year) and must also comply with the Governance Protocol in forming an opinion on Code compliance and in deciding whether to name a bank as non-compliant. Furthermore, in determining non-compliance for the purposes of this legislation, and in deciding whether to name a bank as non-compliant HMRC can only take account of actions undertaken by a bank after Autumn Statement.
- 5.5 Clause 1(5) sets out the requirement that HMRC list all the banks that have adopted the Code and are subject to it during the period covered by the report. The report will also include a list of all banks within the ambit of the Code that have not adopted.
- 5.6 In defining banks that are within the ambit of the Code for these purposes the legislation refers to entities and groups charged to the Bank Levy during the period. The legislation makes clear that this includes any groups or entities that do not pay any Bank Levy due to their chargeable equity and liabilities being less than £20 billion.

Q.8. Do respondents agree that this definition will result in appropriate coverage by the Code?

- 5.7 Clause 1(6) sets out that the first reporting period for the Code of Practice is the period from Autumn Statement to 31 March 2015. Clause 1(7)

makes clear that reporting periods thereafter will be each subsequent financial year.

- 5.8 Clause 1(8) makes clear the first report must include the list of all banks that have adopted the Code by Autumn Statement 2013 and all those that have not.
- 5.9 Clause 1(9) provided that those requirements may be met by any previous publication of those lists by HMRC (for instance at Autumn Statement 2013). If those lists are not being published in the report, reference must be made to any previous publication.
- 5.10 Clause 2 sets out the requirements for adoption and re-adoption of the Code and defines certain other concepts used in the legislation.
- 5.11 Clause 2(2) provides that a group or entity becomes a “participating” group or entity (i.e. subject to the Code obligations) if it notifies HMRC in writing, on or after 31 May 2013 that it is unconditionally committed to complying with the Code. So to be a participating group or entity a bank must notify HMRC as set out above on or after today’s date of its Code commitments going forward. In the case of smaller banks, if following consultation we consider that they need only comply with Section 1 of the Code, we will consider whether any further drafting is required here to reflect this fact.
- 5.12 Clause 2(3) makes clear that a bank will cease to be a participating group or entity (i.e. subject to Code obligations) if it notifies HMRC in writing that it is no longer unconditionally committed to complying with the Code.
- 5.13 Clause 2(4) sets out that a bank that ceases to be a participating group or entity by virtue of a notice under Clause 2(3) can become a participating group or entity again by virtue of a subsequent notice in writing of unconditional commitment to compliance with the Code.
- 5.14 Clause s 2(5) to (7) set out that a bank that has been named as being non-compliant by HMRC in a report will no longer be a participating group or entity in respect of the Code and will only become so again if it commits unconditionally in writing to comply with the Code and if HMRC is satisfied that the bank is unconditionally so committed. So in other words a notice by the bank is insufficient in this case. HMRC must be satisfied that the bank is genuine in its commitment.

Q.9. Do respondents agree that the legislation as drafted covers the issues set out in this Consultation Document appropriately?

Q.10. Are there any other matters that respondents would like to see covered in the legislation?

Q.11. HMRC would also be grateful for any detailed drafting points that respondents might have on the draft clauses.

6. Assessment of Impacts

Summary of Impacts

Exchequer impact (£m)	2012-13	2013-14	2014-1	2015-16	2016-17
	+/- N/A	+/- N/A	+/- TBC	+/- TBC	+/- TBC
Economic impact	At present we cannot predict the impact this Code will specifically have on tax receipts as many other factors will also influence tax receipts from the banking sector. The measure should have a positive impact on the UK economy as the strengthened Code should further encourage banks to have transparent relationships with HMRC and lead to a behavioural change in those banks that have been engaging in tax avoidance.				
Impact on individuals and households	No impacts are expected on individuals or households.				
Equalities impacts	<p>There are no impacts on any group which shares a protected characteristic.</p> <p>The terms under which the Code was originally issued required smaller banks to only adopt Section 1 of the Code. This section of the Code is worded to reflect the adequacy of governance and transparency it was considered appropriate to control the nature or character of transactions such banks enter into. It was felt that adoption of all sections of the Code by smaller banks would put a disproportionate degree of governance, and hence costs, on such banks; which did not reflect the risks relating to their tax affairs.</p> <p>HMRC notes that there are benefits in terms of full transparency and consistency of asking all banks to adopt all sections of the Code. However any decision on this matter needs to consider all the impacts and risks of smaller banks adopting or not adopting the Code in full.</p>				
Impact on businesses and Civil Society Organisations	Some banks may incur costs if as a result of this measure they need to set up additional governance and/or reporting procedures in order to comply with the strengthened Code. However as majority of banks have operated within the Code for up to 3 years HMRC is of the opinion that any additional administrative cost to comply with the strengthened Code should be minimal. If banks feel that this assumption is wrong we would welcome information that explains why.				
Impact on HMRC or other public sector delivery organisations	As the Code and internal HMRC governance procedures are already established, there should be limited impact on of the proposed enhancements.				

Other impacts

The Government believes that now is the right time to strengthen the Code, to cement the behavioural improvements and to ensure the long-term effectiveness of the Code. Providing a legal basis for the naming of non-compliant banks and by providing full transparency around which banks have adopted the Code will provide certainty that all banks are complying with the same commitments.

7. Summary of Consultation Questions

Q.1 We welcome respondents' views on whether requiring smaller banks to only adopt Section 1 of the Code remains a tenable approach under the strengthened Code?

Q2. Views are welcomed from respondents on the proposed timetable for adoption/re-adoption.

Q.3. HMRC welcomes comments and views on the proposed approach set out to revise the Governance Protocol on Code compliance and whether the proposals provide the necessary assurance safeguards around the naming of non-compliant banks.

Q.4. Do these proposals offer sufficient transparency for the public around how the rules will operate?

Q.5. We also welcome views on whether any other enhancements should be considered at this time to the Governance Protocol.

Q.6. We would welcome views from respondents on whether the examples set out below provide a sufficient degree of guidance of the types of transactions, or patterns of transactions or other behaviours that would lead to HMRC concluding that a bank is not complying with its Code commitments?

Q.7. Do respondents consider this to be an appropriate descriptor for transactions within the ambit of the GAAR?

Q.8. Do respondents agree that this definition will result in appropriate coverage by the Code?

Q.9. Do respondents agree that the legislation as drafted covers the issues set out in this Consultation Document appropriately?

Q.10. Are there any other matters that respondents would like to see covered in the legislation?

Q.11. HMRC would also be grateful for any detailed drafting points that respondents might have on the draft clauses .

8. The Consultation Process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

- Stage 1 Setting out objectives and identifying options.
- Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
- Stage 3 Drafting legislation to effect the proposed change.
- Stage 4 Implementing and monitoring the change.
- Stage 5 Reviewing and evaluating the change.

This consultation forms stages 2 and 3 of the process. The purpose of the consultation is to

- seek views on the detailed policy design and a framework for implementation of a specific proposal, rather than to seek views on alternative proposals, and
- seek views on draft legislation in order to confirm, as far as possible, that it will achieve the intended policy effect with no unintended effects.

How to respond

A summary of the questions in this consultation is included at chapter 7.

Responses should be sent by 16 August 2013, by e-mail to bankcode.consultation@hmrc.gsi.gov.uk or by post to: Alan Taylor, Large Business Service, 7th Floor, South West Wing, Bush House, Strand, London WC2B 4RD

Or by fax to 020 7438 6494

Telephone enquiries 020 7438 7696 (from a text phone prefix this number with 18001)

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from [HMRC Inside Government](#). All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs (HMRC).

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Principles

This consultation is being run in accordance with the Government's Consultation Principles.

The Consultation Principles are available on the Cabinet Office website: <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

If you have any comments or complaints about the consultation process please contact:

Amy Burgess, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

Please do not send responses to the consultation to this address.

Annex A

Code of Practice on Taxation for Banks

OVERVIEW

1. The Government expects that banking groups, their subsidiaries, and their branches operating in the UK, will comply with the spirit, as well as the letter, of tax law, discerning and following the intentions of Parliament.

1.1 This means that banks should:

- adopt adequate governance to control the types of transactions they enter into
- not undertake tax planning that aims to achieve a tax result that is contrary to the intentions of Parliament
- comply fully with all their tax obligations
- maintain a transparent relationship with HM Revenue & Customs (HMRC).

GOVERNANCE

2. The bank should have a documented strategy and governance process for taxation matters encompassed within a formal policy. Accountability for this policy should rest with the UK board of directors or, for foreign banks, a senior accountable person in the UK.

2.1. This policy should include a commitment to comply with tax obligations and to maintain an open, professional, and transparent relationship with HMRC.

2.2. Appropriate processes should be maintained, by use of product approval committees or other means, to ensure the tax policy is taken into account in business decision-making. The bank's tax department should play a critical role and its opinion should not be ignored by business units. There may be a documented appeals process to senior management for occasions when the tax department and business unit disagree.

TAX PLANNING

3. The bank should not engage in tax planning other than that which supports genuine commercial activity.

3.1. Transactions should not be structured in a way that will have tax results for the bank that are inconsistent with the underlying economic consequences unless there exists specific legislation designed to give that result. In that case, the bank should reasonably believe that the transaction is structured in a way that gives a tax result for the bank which is not contrary to the intentions of Parliament

3.2 There should be no promotion of arrangements to other parties unless the bank reasonably believes that the tax result of those arrangements for the other parties is not contrary to the intentions of Parliament.

3.3 Remuneration packages for bank employees, including senior executives, should be structured so that the bank reasonably believes that the proper amounts of tax and national insurance contributions are paid on the rewards of employment.

RELATIONSHIP BETWEEN THE BANK AND HMRC

4. Relationships with HMRC should be transparent and constructive, based on mutual trust wherever possible.

4.1. The features of this relationship should include:

- disclosing fully the significant uncertainties in relation to tax matters
- focusing on significant issues
- seeking to resolve issues before returns are filed whenever practicable
- engaging in a co-operative, supportive and professional manner in all interactions
- working collaboratively to achieve early resolution and hence certainty.

4.2. Where the bank is in doubt whether the tax result of a proposed transaction is contrary to the intentions of Parliament, to help the bank form its reasonable belief under section 3, it may discuss its plans in advance with HMRC.

Annex B

HMRC Governance Protocol on compliance with the Code of Practice on Taxation for Banks as published on 26 March 2012.

Chapter 1

Introduction

1. HMRC may at any time take one of three views about a bank's compliance with the Code of Practice:
 - i. it has not expressed concerns over a bank's compliance with the Code
 - ii. it has expressed concerns over compliance which are being discussed
 - iii. its concerns over compliance have not been adequately addressed and it considers that the bank has not complied with the Code.
2. If HMRC has concerns about compliance with the Code then the CRM or equivalent will raise them with the bank at the earliest opportunity, once this action has been approved at deputy director level.
3. If discussion between the CRM and the bank does not resolve the concerns, HMRC (normally at or above deputy director level) will escalate them to the bank's Board for further discussion at this level.
4. HMRC will only take the view that the bank has not complied with the Code if its concerns still remain unresolved. If this is the case, it will
 - i. tell the bank that it considers that the bank is not complying with its undertakings under the Code; and
 - ii. explain what it considers the bank should do in order to comply.
5. Where HMRC has told a bank that it considers it to not have complied with its Code undertakings HMRC would expect the bank to acknowledge this in any public pronouncements it makes on its operation of the Code.
6. Some smaller banks have been asked to adopt section 1 of the Code only. This allows them a more flexible approach to documenting and governing their strategy towards tax. However the principles underpinning that strategy should be the same as for larger banks that adopt the Code in its entirety. The considerations set out below therefore will be applied to all banks.

Chapter 2

Governance

7. HMRC may express concerns over whether a bank has met its undertakings under Code paragraphs 2 to 2.2: where the concerns are over

- the bank's strategy for and governance of risk management for taxation matters;
- whether the strategy is understood and operated within the bank; or
- the bank's strategy towards the openness, transparency and professionalism of its relationship with HMRC.

8. Reasons HMRC may be concerned over the bank's strategy or governance could include:

i. a lack of policy for proper tax risk management containing a documented strategy and governance process for taxation matters except where the bank's approach to avoiding tax risk is sufficiently clear for it to be unnecessary for the bank to have such a formal written policy

ii. failure to let the CRM or equivalent officer see any such policy on request

iii. evidence that the strategy, and compliance with it, is not considered at an adequately senior level consistent with the scale of risks being managed

iv. failure to give the CRM on request an understanding of the processes adopted over the period concerned to ensure that the policy is taken account of in business decisions

v. failure by the bank to review its actions over time to ensure it believes it is properly implementing its governance obligations under the code

vi. evidence of systemic failures in implementation revealed by the bank's review or for other reasons

vii. failure to provide any required certificate under schedule 46 FA 2009,

viii. evidence that the tax department is not involved in, does not fully understand, or has little power to influence transactions undertaken which may present tax risk

ix. a recent pattern of mistakes in completing tax returns

- x. significant arrears in filing returns or paying tax
- xi. failure to disclose transactions which may present a significant tax risk.

Chapter 3

Tax Planning

9. HMRC may express concerns whether a bank has met its undertakings under paragraphs 3 to 3.3 of the Code where the concerns are that the bank has failed to:

i. embody the tax planning strategy envisaged by the Code in its formal policy, where it has one ; or

ii. adopt this tax planning approach in practice; and give guidance to the bank's operating staff accordingly

iii. review, prior to contracting, all potentially contentious transactions for compliance with this tax planning strategy, involving an appropriate level of tax expertise and challenge, and documenting the review appropriately

iv. enter into or promote reviewed transactions only if its management was satisfied that:

(1) they supported genuine commercial activity

(2) they produced tax results for the bank that are consistent with the underlying economics of the arrangements; or if not,

(3) the tax results they produced were not contrary to the intentions of Parliament, taking into account both a purposive construction of legislation and whether Parliament could realistically have intended the result, given a track record of acting to close loopholes to prevent transactions that are "too good to be true".

v. take reasonable views in coming to decisions under (iv), where the failure to do so amounts to failing systematically or wilfully to implement its undertakings about tax planning

10. Evidence of possible systematic or wilful failure may include one or more of the following:

i. a pattern of executed transactions which are followed by corrective or clarificatory changes to tax law that prevent the intended tax results.

ii. a deliberate or continuing failure by the bank's management to undertake a proper review of proposed transactions; to ensure that it is sufficiently well informed about the transactions and the legislative context for it to take reasonable decisions; or to challenge proposals that are inconsistent with the Code.

iii. an approach to the Code which ignores its overall intent of constraining destabilising tax avoidance transactions that are likely to trigger a need for Parliament to consider legislative change.

Annex C

Draft clauses:

1 The Code of Practice on Taxation for Banks: HMRC to publish reports

(1) As soon as practicable after the end of a reporting period, the Commissioners for Her Majesty's Revenue and Customs must publish a report on the operation during the period of the Code of Practice on Taxation for Banks as published by the Commissioners on 31 May 2013 ("the Code").

(2) Subsection (3) applies if, in the opinion of the Commissioners, a group or entity which was a participating group or entity during some or all of a reporting period did not comply with the Code at a time during the period.

(3) The report for the reporting period may state the Commissioners' opinion, naming the group or entity and giving details of the non-compliance.

(4) In forming an opinion for the purposes of subsection (2) in relation to a group or entity or in deciding whether to name a group or entity in a statement under subsection (3), the Commissioners -

(a) must have regard to any relevant guidance or protocol relating to the Code published by them from time to time which has effect during the reporting period, and

(b) may have regard to any conduct of the group or entity on or after [] 2013.

(5) The report for a reporting period must list -

(a) the groups or entities which were participating groups or entities during some or all of the period, and

(b) the groups or entities appearing to the Commissioners -

(i) not to be covered by paragraph (a), and

(ii) to be groups or entities in relation to which the bank levy was charged during the period (including where the amount of the bank levy was nil).

(6) The first "reporting period" is the period beginning with [] 2013 and ending with 31 March 2015.

(7) After that, each year beginning with 1 April is a "reporting period".

(8) The report for the first reporting period must list -

(a) the groups or entities which were participating groups or entities on [] 2013, and

(b) the groups or entities appearing to the Commissioners -

(i) not to be covered by paragraph (a), and

(ii) to be groups or entities in relation to which the bank levy was charged during the year ending with [] 2013 (including where the amount of the bank levy was nil).

(9) Subsection (8) does not require the inclusion in the report of any information which has previously been published by the Commissioners, so long as the report makes reference to the previous publication.

(10) Section 2 explains what is meant by a "participating" group or entity.

2 Code of Practice on Taxation for Banks: .participating. groups or entities

(1) This section applies for the purposes of section 1.

(2) A group or entity becomes a "participating" group or entity if, on or after 31 May 2013, it notifies the Commissioners in writing that it is unconditionally committed to complying with the Code.

(3) A group or entity ceases to be a "participating" group or entity if it notifies the Commissioners in writing that it is no longer unconditionally committed to complying with the Code.

(4) A group or entity which ceases to be a "participating" group or entity in accordance with subsection (3) becomes a "participating" group or entity again if it gives a further notice of the kind mentioned in subsection (2) (subject to what follows).

(5) Subsections (6) and (7) apply if a group or entity is named in a statement under section 1(3).

(6) If the group or entity is a "participating" group or entity immediately before the publication of the report, it ceases to be so on the publication of the report.

(7) In any case, the group or entity cannot be a "participating" group or entity after the publication of the report unless and until -

(a) it gives the Commissioners a further notice of the kind mentioned in subsection (2), and

(b) the Commissioners are satisfied that it is unconditionally committed to complying with the Code.