



HM Revenue
& Customs

**The Code of Practice on Taxation for Banks: HMRC to publish
annual reports on the operation of the Code**

Technical Note
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Introduction

This Technical Note sets out the detail of a legislative change which will require HMRC to publish reports on the operation of the Code of Practice on Taxation for Banks.

Responses

Comments on the proposed approach and the draft clause, set out in Chapter Two, would be welcomed and should be addressed electronically to either:

Aidan Reilly at: aidan.reilly@hmrc.gsi.gov.uk, or,

Fiona Hay at: fiona.hay@hmrc.gsi.gov.uk

Copying in the consultation mailbox bankcode.consultation@hmrc.gsi.gov.uk

Or in writing to

Alan Taylor at: HM Revenue & Customs, Large Business Service, 7th Floor, South West Wing, Bush House, Strand, London WC2B 4RD

Chapter 1

Background

1. At Budget 2013 the Government announced that, following consultation, legislation would be introduced in Finance Bill 2014 requiring HMRC to publish an annual report, beginning in 2015, on the operation of the Code of Practice on Taxation of Banks (“the Code”).
2. On 31 May 2013 HMRC published a consultation document “*Strengthening the Code of Practice on Taxation for Banks*”, which included draft legislation requiring HMRC to publish an annual report on the operation of the Code.
3. A revised draft of the legislation is set out in Chapter Two of this Note. This makes a number of changes to address issues raised during the consultation.

Proposed Approach

4. From 2015 the HMRC Commissioners will publish an annual report on the operation of the Code. The report will apply to “participating” groups or entities. That is, groups or entities which are within the charge to the bank levy or which meet the definition of a bank in s991(2)(b) or (c) of the Income Tax Act 2007, and which (in either case) have unconditionally adopted the Code. Where a participating group or entity no longer intends unconditionally to commit to the Code it must inform HMRC in writing.
5. The annual report may name participating entities or groups which the Commissioners consider have not complied with their obligations under the Code during the period of the report or an earlier period. The Commissioners will not take into account any conduct that occurred before the date of Autumn Statement 2013 or, if a group or entity becomes a participating group or entity from a later date, before that date. The first report will cover the period from Autumn Statement 2013 to 31 March 2015, and subsequent reports will cover annual periods to 31 March.
6. The first report will set out participating groups or entities at the date of Autumn Statement 2013, including smaller banks and building societies which adopt Part 1 of the Code. The smaller banks and building societies that adopt only Part 1 of the Code are defined in a document published by HMRC

today. Where a participating entity or group is named in an annual report as having breached the Code, it will be included on the list of groups and entities that have not adopted the Code in the annual report for that period. It can then only become a participating group or entity, and be listed as such, in a later period, if it gives notice to the Commissioners that it is unconditionally committed to complying with the Code, and the Commissioners are satisfied that it intends to comply.

7. The Commissioners will publish a Governance Protocol setting out HMRC's communication and escalation procedures in any case where HMRC has concern about a participating group's or entity's compliance with the Code. The Governance Protocol will require that before the Commissioners determine that a participating group or entity has breached the Code they must first commission a report from an independent reviewer. The report will set out the independent reviewer's opinion on whether the group or entity has breached the Code and, if it has, whether it should be named. There is an exception to this where the group or entity has undertaken or promoted a transaction or arrangement for which a notice of counteraction under the General Anti-Abuse Rule (GAAR) has been issued, and it was the unanimous or majority view of the GAAR advisory panel that entering into or carrying out the arrangements was not a reasonable course of action. In this instance the independent reviewer, and subsequently the Commissioners, will only consider whether the group or entity should be named. In either circumstance the report will be shared with the group or entity.

8. Before reaching a decision on whether a group or entity should be named, both the independent reviewer and the Commissioners must take into account any remedial or mitigating action that the group or entity has taken in relation to the breach and any exceptional circumstances that might justify not naming the group or entity.

9. The independent reviewer will take into account any representations from the group or entity and HMRC, the provisions of the Governance Protocol and any other information or data that they consider to be relevant. However, the Commissioners and the independent reviewer cannot take into account the conduct of the group or entity before Autumn Statement 2013 or at any time when the group or entity is not a participating group or entity if this is after Autumn Statement 2013. The Commissioners may disclose information to the independent reviewer to enable them to produce the report. The independent reviewer must provide a copy of their report to the group or entity.

10. In determining whether a group or entity has breached the Code the Commissioners must take into account the independent reviewer's report and give the group or entity an opportunity to make representations on it. The Commissioners must notify the group or entity of their decision to name it in an annual report at least 30 days before its publication.

11. Where the Commissioners propose to name a group or entity despite a contrary opinion by the independent reviewer, they must, when notifying the group or entity, set out their reasons for reaching a different conclusion and must ensure that the annual report refers to this difference of opinion. In the event of a legal challenge to the reasonableness of the Commissioners' reaching a different view from the independent reviewer, the onus will be on the Commissioners to demonstrate that their decision was reasonable.

12. After Autumn Statement 2013 HMRC must consult before making any modification or revocation of the Governance Protocol or the document containing the definition of banks required to comply with only Part 1 of the Code.

Chapter 2

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

(1) No later than the end of the calendar year in which a reporting period ends, 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) If the Commissioners determine that a group or entity which was a participating group or entity during some or all of a reporting period breached the Code at a time during the period, the Commissioners may name the group or entity in a report under this section.

(3) If -

(a) the Commissioners determine that there has been a breach of the Code,

but

(b) it was not reasonably practicable for information relating to the breach to be included in the report for the reporting period in which the breach occurred, the information may be included in the first subsequent report in which it is reasonably practicable for the information to be included.

(4) 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 reporting period,

(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 is charged in a case where the chargeable period ends in the reporting period (or would be charged in such a case if it is assumed that any period of account beginning before or in, but ending after, the reporting period ends at the end of the reporting period instead), and

(c) the entities appearing to the Commissioners -

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

(ii) to be entities which fell within subsection (2)(b) or (c) of section 991 of ITA 2007 (subject to subsection (3) of that section) during some or all of the reporting period.

(5) For the purposes of subsection (4)(b)(ii) it does not matter if the amount of the bank levy is (or would be) nil in the case of a group or entity.

(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 the groups or entities which were participating groups or entities on [] 2013.

(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) If, on or after 31 May 2013, the Commissioners publish a document which states that only Part 1 of the Code is to apply in the case of a group or entity of a specified description, in the case of such a group or entity references to the Code are to be read as references to Part 1 of the Code.

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

(12) Section 3 makes provision about the operation and breaches of the Code.

(13) Section 4 makes provision about documents relating to the Code published by the Commissioners.

2 The 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 report under section 1 under subsection (2) of that section.

(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.

3 The Code of Practice on Taxation for Banks: operation and breaches of the Code

(1) The Commissioners must -

(a) publish a protocol, to be called "the Governance Protocol", setting out how the Commissioners are going to operate the Code and section 1(2),
and

(b) follow the Governance Protocol when operating the Code and section 1(2).

(2) The Governance Protocol must require the Commissioners, before determining for the purposes of section 1(2) whether a group or entity has breached the Code at a time during a reporting period, to commission a person (an "independent reviewer") who is independent of the Commissioners and the group or entity to report on -

(a) whether the group or entity has breached the Code, and

(b) whether the group or entity should be named in a report under section 1 were the Commissioners to determine that the group or entity has breached the Code.

(3) The independent reviewer -

(a) may have regard to any matter which the reviewer considers to be relevant (subject to subsection (8)),

(b) must give the group or entity a reasonable opportunity to make representations about the matters being considered by the reviewer,

(c) must give the group or entity a copy of the reviewer's report, and

(d) must otherwise follow the Governance Protocol so far as it is relevant to the reviewer's functions.

(4) The Governance Protocol may provide that, in the case of any conduct of a group or entity to which subsection (5) applies, the independent reviewer is to assume that the conduct constitutes a breach of the Code and, accordingly, is to report only on the matter mentioned in subsection (2)(b).

(5) This subsection applies to any conduct -

(a) in relation to which there has been given -

(i) an opinion notice under paragraph 11(3)(b) of Schedule 43 to FA 2013 (GAAR advisory panel: opinion that conduct unreasonable) stating the joint opinion of all the members of a sub-panel arranged under paragraph 10 of that Schedule, or

(ii) one or more such notices stating the opinions of at least two members of such a sub-panel, and

(b) in relation to which there has been given a notice under paragraph 12 of that Schedule (HMRC final decision on tax advantage) stating that a tax advantage is to be counteracted.

(6) The Governance Protocol must make provision -

(a) for the Commissioners, in determining whether a group or entity has breached the Code or should be named in a report under section 1 -

(i) to have regard to the independent reviewer's report, and

(ii) to give the group or entity a reasonable opportunity to make representations about the matters being considered by the Commissioners,

(b) for the Commissioners to notify the group or entity of their determination,

(c) if the Commissioners' determination is different from the independent reviewer's determination, for the Commissioners to include in the notification of their determination to the group or entity their reasons for making a different determination, and

(d) if the Commissioners determine that the group or entity should be named in a report under section 1, for the Commissioners to hold off including in a report under that section any information relating to the breach of the Code -

(i) until the notification of the determination is given to the group or entity, and

(ii) for at least 30 days after the day on which that notification is given.

(7) The Governance Protocol must make provision for the independent reviewer and the Commissioners, in determining whether a group or entity should be named in a report under section 1, to have regard to -

(a) any action taken by the group or entity to remedy the breach of the Code or otherwise to mitigate its effect, and

(b) any exceptional circumstances which might justify not naming the group or entity.

(8) In determining whether a group or entity has breached the Code or should be named in a report under section 1, the independent reviewer and the Commissioners may have regard to any conduct of the group or entity occurring on or after [] 2013 but not any conduct of the group or entity occurring before that date or at a time when the group or entity was not a participating group or entity.

(9) Subsection (10) applies if -

(a) the Commissioners determine -

(i) that a group or entity has breached the Code, and

(ii) that the group or entity should be named in a report under section 1, and

(b) one or both of the Commissioners' determinations is different from the

independent reviewer's determination.

(10) In any legal proceedings in which an issue arises as to whether it was reasonable for the Commissioners to make a determination which was different from the independent reviewer's determination, it is for the Commissioners to show that it was reasonable for them to make the different determination.

(11) If a determination of the Commissioners is different from the independent reviewer's determination, they must mention that fact, giving such details of the case as they consider appropriate -

(a) in the report under section 1 for the reporting period in question, or

(b) if it was not reasonably practicable for that fact to be mentioned in that report, in the first subsequent report under section 1 in which it is reasonably practicable for that fact to be mentioned.

(12) In determining for the purposes of section 1(3) or subsection (11)(b) of this section when it is reasonably practicable for any information to be included in a report under section 1, regard must be had (in particular) to the requirements of subsections (1) to (7) of this section.

(13) The Commissioners may disclose to an independent reviewer such information as they consider appropriate to enable the reviewer to carry out the reviewer's functions.

(14) If the Commissioners disclose information to an independent reviewer under subsection (13), section 18 of CRCA 2005 (confidentiality) applies in relation to the reviewer's holding and use of the information as if the reviewer were an officer of Revenue and Customs and the reviewer's functions were functions of the reviewer as such an officer.

4 The Code of Practice on Taxation for Banks: documents relating to the Code

(1) The Commissioners may publish a relevant document, or revoke or modify a relevant document previously published by them, only after -

(a) consultation with such persons as they consider appropriate, and

(b) consideration of any representations made to them in the course of the consultation.

(2) When publishing a relevant document or a modified relevant document or when revoking a relevant document, the Commissioners must also publish -

(a) an account of the representations mentioned in subsection (1)(b), and

(b) their responses to those representations.

(3) In this section "relevant document" means -

(a) the Governance Protocol, or

(b) any document of the kind mentioned in section 1(10).

(4) This section does not apply in relation to the first publication of the Governance Protocol.

(5) This section does not affect any document of the kind mentioned in section 1(10) published before the passing of this Act except where it is to be revoked or modified after the passing of this Act.