



## Code of Practice on Taxation for Banks

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### Who is likely to be affected?

Banks, building societies and investment firms.

### General description of the measure

This measure ensures that HM Revenue & Customs (HMRC) will publish an annual report on the voluntary operation of the Code of Practice on Taxation for Banks (the Code).

### Policy objective

This measure makes the tax system fairer by ensuring that there is greater transparency around the operation of the Code.

### Background to the measure

The Code, first introduced in 2009, requires banks to abide by both the letter and the spirit of tax law. This measure was announced in Budget 2013. The draft legislation was consulted on between 31 May 2013 and 16 August 2013.

## Detailed proposal

### Operative date

The first annual report on the operation of the Code will be for the period 5 December 2013 to 31 March 2015.

### Current law

This is a new piece of legislation.

### Proposed revisions

Legislation will be introduced in Finance Bill 2014 to ensure that HMRC publishes an annual report on the operation of the Code. The report will list groups or entities which have unconditionally adopted the Code at the date of the report as well as those groups or entities which have not adopted the Code. In addition the report will name any groups or entities that HMRC considers has not complied with Code.

The legislation provides that where HMRC considers a group or entity has not complied with the Code before naming a group or entity in an annual report HMRC must first commission a report from an independent reviewer on whether the Code has been breached and whether the group or entity should be named in an annual report.

## Summary of impacts

Exchequer impact (£m)	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
	nil	nil	nil	nil	nil	nil
	This measure is not expected to have an Exchequer impact.					
<b>Economic impact</b>	This measure is not expected to have any significant economic impacts.					
<b>Impact on individuals and households</b>	This measure applies to banks, building societies and investments firms. It will have no impact on individuals and households.					
<b>Equalities impacts</b>	There are no impacts on any group which shares a protected characteristic.					
<b>Impact on business including civil society organisations</b>	This measure will have a negligible impact on business including civil society organisations: the measure only impacts on banks, building societies and investment firms.					
<b>Operational impact (£m) (HMRC or other)</b>	The costs to HMRC will be negligible.					
<b>Other impacts</b>	Other impacts have been considered and none have been identified.					

## Monitoring and evaluation

The measure will be monitored through communication with affected taxpayer groups to ensure that the Code is operating as intended.

## Further advice

If you have any questions about this change, please contact Fiona Hay on 03000 585882 (email: [fiona.hay@hmrc.gsi.gov.uk](mailto:fiona.hay@hmrc.gsi.gov.uk)).

## Declaration

David Gauke MP, the Exchequer Secretary to the Treasury, has read this Tax Information and Impact Note and is satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impacts of the measure.

## 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 (see section 2) 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.  
This subsection is subject to section 3.
- (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) In a case where the bank levy is (or would be) charged in relation to a relevant non-banking group (as defined in paragraph 11 of Schedule 19 to FA 2011), any list prepared under subsection (4)(b) is to refer to the group only so far as it consists (or would consist) of—
  - (a) relevant UK banking sub-groups (as defined in paragraph 19(5) of that Schedule), and
  - (b) so far as not covered by paragraph (a) —

- (i) UK resident banks (as defined in paragraph 80 of that Schedule), and
  - (ii) relevant foreign banks (as defined in paragraph 78 of that Schedule).
- (6) 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.
- (7) The first “reporting period” is the period beginning with 5 December 2013 and ending with 31 March 2015.
- (8) After that, each year beginning with 1 April is a “reporting period”.
- (9) The report for the first reporting period must list the groups or entities which were participating groups or entities on 5 December 2013.
- (10) Subsection (9) 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.
- (11) 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.

## **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 written 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 written 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) must give the group or entity a reasonable opportunity to make representations about the matters being considered by the independent reviewer,
  - (b) subject to subsection (8), must have regard to the group or entity’s representations and may have regard to any other matter which the independent reviewer considers to be relevant,
  - (c) must give the group or entity a copy of the independent reviewer’s report, and
  - (d) must otherwise follow the Governance Protocol but only so far as it is relevant to the independent 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

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- (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 in writing 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 90 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 –
    - (a) may have regard to any conduct of the group or entity occurring on or after 5 December 2013, but
    - (b) must not have regard to any conduct of the group or entity occurring before that date or at a time when the group or entity is not a participating group or entity.
  - (9) Subsection (10) applies if the independent reviewer determines –
    - (a) that a group or entity has not breached the Code, or
    - (b) that a group or entity should not be named in a report under section 1.
  - (10) The Commissioners may make a determination which is different from the independent reviewer's determination only if –
    - (a) the independent reviewer's determination is flawed when considered in the light of the principles applicable in legal proceedings for judicial review, or
    - (b) there are other compelling reasons for making a different determination.
  - (11) If the Commissioners make a different determination in a case where subsection (10) applies –
    - (a) their reasons notified under subsection (6)(c) must set out (in particular) why the independent reviewer's determination is flawed or (as the case may be) the other compelling reasons,
    - (b) in any legal proceedings in which an issue arises as to whether it was lawful for them to make the different determination it is for them to

- show that it was lawful for them to make the different determination, and
- (c) subsection (12) applies in relation to any claim for judicial review of the different determination made by a member of the group or by the entity.
- (12) If the claim is made no later than the end of the 90 day period mentioned in subsection (6)(d)(ii) –
- (a) it is to be treated as having been made within any applicable time limit (if that would not otherwise be the case),
  - (b) the court must give permission for the claim to proceed (if the court’s permission is required), unless that would lead to multiple claims dealing with the same issues, and
  - (c) any hearing (including any hearing on appeal) must be held in private, unless (having regard to the risk that holding the hearing in public might undermine to any extent the purpose of the making of the claim) the court is satisfied that there are exceptional circumstances requiring the hearing to be held in public.
- (13) If a determination of the Commissioners is different from the independent reviewer’s determination, they must mention that fact –
- (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.
- (14) In determining for the purposes of section 1(3) or subsection (13)(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 (12) of this section.
- (15) The Commissioners must disclose to an independent reviewer such information held by them as they consider appropriate to enable the independent reviewer to carry out the independent reviewer’s functions.
- (16) If the Commissioners disclose information to an independent reviewer under subsection (15), section 18 of CRCA 2005 (confidentiality) applies in relation to the independent reviewer’s holding and use of the information as if the independent reviewer were an officer of Revenue and Customs and the independent reviewer’s functions were functions of the independent 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(11).
- (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(11) published before the passing of this Act except where it is to be revoked or modified after the passing of this Act.



## EXPLANATORY NOTE

### THE CODE OF PRACTICE ON TAXATION FOR BANKS

#### SUMMARY

1. This measure requires HMRC from 2015 to publish an annual report on the operation of the Code of Practice on Taxation of Banks (the Code).

#### DETAILS OF THE CLAUSES

2. Clause 1 subsections (1), (2) and (3) provides that HMRC must publish a report on the operation of the Code and if the Commissioners conclude that a group or entity has breached the Code during a reporting period they may name the group or entity. Subsection (3) deals with the circumstance where the Commissioners determine that there has been a breach of the Code and it is impractical to name the group or entity in the report for the period.

3. Clause 1 subsections (4), (5) and (6) sets out those groups and entities that will be listed in the annual report. These are those groups and entities that are chargeable to bank levy, would be chargeable if it were not for the £200 million de minimis exemption, or those groups and entities which meet the definition of a bank in section 991 of Income Taxes Act 2007 other than where the entity is a building or friendly society. In the case of a group or entity in which either there is a UK or foreign bank(s) but where the wider group is a non-banking group, subsection (5) ensures that the annual report will only list the UK or foreign banks or UK banking sub-groups and not the wider group.

4. Clause 2 subsections (1) and (2) define ‘participating groups or entities’ for the purposes of clause 1.

5. Clause 2 subsections (3) and (4) set out what participating groups or entities must do if they no longer want to be participating groups or entities, or if they wish to be so again.

6. Clause 2 subsections (5), (6) and (7) set what happens where a participating group or entity is named in an annual report and what it must do subsequently to become a participating group or entity in a later report.

7. Clause 3 subsections (1), (2), and (3) provide that the Commissioners will publish and follow a governance protocol in relation to the Code, and that before they reach a decision to name a bank they must appoint an independent reviewer. The independent reviewer must take into account any representations by the group or entity and provide a copy of the report to the group or entity concerned. The identity of the independent reviewer has yet to be decided but will be a person of suitable stature who is independent of both HMRC and the group or entity such as for example a retired high court judge.

8. Clause 3 subsections (4) and (5) provide that where the group or entity has received a GAAR advisory panel opinion notice(s) the independent reviewer will only be required to report upon whether the group or entity should be named in a report.

9. Clause 3 subsections (6), (7) and (8) set out the procedure for and matters that the Commissioners must take into account when deciding to name a group or entity in an annual report.

10. Clause 3 subsections (9), (10) and (11) set out the grounds on which the Commissioners may reach a different determination than that of the independent reviewer and, where the group or entity decides to judicially review the Commissioners determination, the onus will be the Commissioners to show that they acted reasonably in reaching their determination.

11. Clause 3 subsection (12) sets out the time limit for making a claim to judicial review and provides that unless the Court is satisfied that there are exceptional circumstances which would warrant a public hearing, the judicial review in subsection (11) will be held in private.

12. Clause 3 subsection (13), (14), (15) and (16) set out what the Commissioners must include in an annual report where they have reached a different determination than the independent reviewer and the timing of that report. Subsections (15) and (16) set out the information that the Commissioners must disclose to the independent reviewer and the basis on which the independent reviewer can use that information.

13. Clause 4 sets out that changes to any document published by HMRC in relation to the Code must be consulted upon and HMRC must take account of any consultation responses. This does not apply to the first publication of the governance protocol on 5 December 2014 or any documents published before Royal Assent to Finance Bill 2014.

## **BACKGROUND NOTE**

14. The Code was introduced in 2009. The names of the top 15 banks that had adopted the Code were published in November 2010. 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.

15. The Code 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 to adopt best practice in relation to their tax affairs.

16. If you have any questions about this change, or comments on the legislation, please contact Fiona Hay on 03000 585 882 (email: [fiona.hay@hmrc.gsi.gov.uk](mailto:fiona.hay@hmrc.gsi.gov.uk)).

## Technical Note

### 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 for 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.

### Proposed Approach

3. 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 entities 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 bank levy would be charged to a non-banking group then the Code will only apply to UK banking sub- groups or bank entities within the group. In all cases the Code will only apply to those entities which are within the charge to corporation tax or income tax. Where a participating group or entity no longer intends unconditionally to commit to the Code it must inform HMRC in writing.
4. 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 cannot take into account any conduct that occurred before 5 December 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 5 December 2013 to 31 March 2015, and subsequent reports will cover annual periods to 31 March.
5. The first report will refer to the list of participating groups or entities published on 5 December 2013 as well as listing those participating groups and entities during the period ended 31 March 2015, 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 those banks or building societies which have not been assigned a Customer Relationship Manager. It will also set out all those groups and entities within the scope of the Code that have chosen not to adopt.
6. Where a participating entity or group is named in an annual report as having breached the Code, it will also 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 have today published 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 requires (in line with the draft legislation) 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. At the time of publication of this note the identity of the independent reviewer has yet to be decided. However, the reviewer is likely to be a person of suitable stature such as a retired High Court judge who is independent of both the bank and HMRC.

8. 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.

9. 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.

10. The independent reviewer will take into account any representations from the group or entity and HMRC, the provisions of the Governance Protocol which relate to the role of the independent reviewer 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 5 December 2013 or at any time when the group or entity is not a participating group or entity if this is after 5 December 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.

11. 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 90 days before publication.

12. Where the independent reviewer determines that either, there is no breach of the Code or where they determine that there has been a breach but the bank should not be named the Commissioners will only reach a different determination, in two limited circumstances. That is where they decide that the independent reviewer's determination was unreasonable or where exceptionally there are compelling reasons for reaching a different determination.

13. Where the Commissioners propose to name a group or entity despite a contrary opinion to the independent reviewer, they must, when notifying the group or entity, set out their reasons for not following the independent reviewer's recommendations and must ensure that the annual report refers to the disagreement. In the event of a legal challenge to the lawfulness of the Commissioners' reaching a different view from the independent reviewer, the onus will be on the Commissioners to demonstrate that their decision was lawful.

14. After 5 December 2013 HMRC must consult with relevant stakeholders before making any modification or revocation of the Governance Protocol or the definition of banks required to comply with only Part 1 of the Code.