

HMRC Governance Protocol on a Bank's Compliance with the Code of Practice on Taxation for Banks ("the Code")

General

- The Protocol is the Governance Protocol published on 5 December 2013 and which is referred to in clause 3 of the draft Finance Bill 2014 legislation. The Protocol applies to banking or Building Society groups, banks in non banking groups and single banking or Building Society entities. In all cases the protocol will only apply to those entities which are within the charge to corporation tax. Where one of these groups or entities has notified the Commissioners in writing that it is unconditionally committed to complying with the Code on or after 31 May 2013 the draft Finance Bill 2014 legislation at Clause 2 provides that these institutions are termed "participating groups or entities". Participating groups or entities will for the purposes of this Protocol be referred to collectively as "banks". Where a participating entity or group bank is part of a larger worldwide group the Code will only apply to those entities within the charge to corporation tax.
- HMRC will engage with banks in a co-operative, supportive and professional manner and in return expects those banks to comply with their commitments under the Code.
- HMRC may at any time have one of the following views about a banks' compliance with the Code:
 - I. it considers the bank to be compliant with its Code commitments;
 - II. it has initial concerns over the bank's compliance with the Code;
 - III. it has an interim view that the bank has breached the Code; or
 - IV. it has reached a final opinion that the bank has breached the Code.
- In each case HMRC will notify the bank of its view and where HMRC has concerns over compliance with the Code will as appropriate enter into a dialogue with the bank.
- Equally where HMRC is satisfied that a bank is fully complying with its Code commitments, the Customer Relationship Manager ("CRM") or equivalent HMRC Officer¹ (hereafter referred to collectively as CRM) will notify the bank of this view as part of the annual risk review process or on another appropriate occasion.
- Under the Protocol the final decision on whether a bank has breached the Code will be made by the HMRC Commissioners.
- The following sections set out the process which HMRC will follow to determine whether a bank has breached the Code and also, from 2015, whether a bank should be named in the HMRC Annual Report.
- Appendix 2 provides a diagrammatic representation of the Protocol stages.

¹ <http://www.hmrc.gov.uk/large-businesses/crm.htm>

HMRC has concerns about a bank's compliance with the Code

- If the team with operational responsibility for the bank has a concern about an element of the bank's behaviour by reference to its commitments under the Code then initially the CRM will raise this with the bank at the earliest opportunity; setting out the reasons for the concern. As part of this process the bank will be asked to make its representations on the issue. *There is no fixed or indicative timeframe by which HMRC would expect these conversations to be concluded however HMRC would expect an open collaborative conversation to take place: in line with Section 4 of the Code.*
- Where the concern relates to whether a transaction or transactions that the bank has undertaken, or promoted, include tax planning that may give rise to a tax result that is contrary to the intentions of Parliament, the CRM must discuss their concerns with the technical and policy specialist(s) with responsibility for the relevant legislative area(s) once the bank has set out its position.
- If following the HMRC technical and policy specialists' review there is still a concern, then the CRM must obtain the agreement of an HMRC Officer at or above Deputy-Director grade in both the Large Business Service and Corporation Tax, International, Stamps and Avoidance ("CTISA") before sharing their concerns with the bank. Equally where the concerns relate to other elements of a bank's behaviour no firm view of those concerns will be relayed to the bank until approval has been jointly given by the relevant HMRC Officers.
- If, after subsequent conversations between the CRM and the bank, concerns remain then, HMRC (typically at or above, Director level and hereafter referred to as the "HMRC Director") will seek to discuss the issue with the bank's board (typically the Chief Financial Officer). In the case of a single transaction undertaken or promoted by a bank where HMRC is concerned that it includes tax planning which gives a tax result that is contrary to the intentions of Parliament, unless the transaction is part of an emerging pattern of behaviour by the bank or it is a potential GAAR transaction, then normally a reference to the HMRC Director will not be required. The bank will be provided with 28 days in which to make any further representations following the discussion between the HMRC Director and its board.
- If following this period and any subsequent related discussions with the bank's board HMRC's concerns still remain unresolved, then the case will be referred by the HMRC Director to the HMRC Tax Disputes Resolution Board ("TDRB") for the TDRB to consider whether in their view those unresolved concerns constitute a breach of the Code.
- The HMRC Director will inform the bank of the reference to TDRB as soon as possible.

Role of the TDRB

- The TDRB reviews all significant tax disputes before they are referred to the Commissioners with a recommendation. This process, and the detail of the

cases that should be referred to TDRB, is laid out in the Code of Governance for settling tax disputes

<http://www.hmrc.gov.uk/adr/resolve-dispute.pdf>

- In coming to its view as to whether a bank has breached its commitments under the Code the TDRB will be required to take into account any representations made by the bank.
- In reaching its conclusions as to whether there has been a breach of the Code the TDRB may not take into consideration actions undertaken by the bank prior to 5 December 2013. However the TDRB may take into account any actions undertaken after 5 December 2013 or, if later, the date from which the bank becomes a participating group or entity.
- The bank will be invited to make written representations for consideration by TDRB. The bank will be provided with 28 days to make these representations from the date the HMRC Director notifies it of the referral.
- The HMRC Director will notify the bank's board of the TDRB's decision within 14 days.
- Where the conclusion is that the bank has breached the code the HMRC Director will, when notifying the bank, ask the bank to set out any remedial or mitigating action or any exceptional circumstances that should be taken into account in determining whether the bank should be named. The bank will have 28 days to respond to this request.
- If the bank does respond within the time limit then any evidence or arguments that the bank provides will be referred to TDRB for consideration of whether, if the Commissioners conclude that the bank has breached its commitments under the Code, any mitigating or remedial action undertaken by the bank, or exceptional circumstances are such that the bank should not be named in the annual report. The bank will be informed of TDRB's conclusion on this point with its reasons.
- The matter will be referred to the independent reviewer once the bank is notified of TDRB's conclusion or, if the bank has not responded in the 28 day period mentioned above, at the end of that period.

Role of the "independent reviewer"

- Clause 3 of the draft Code of Practice legislation to be included in Finance Bill 2014 sets out the role of an independent reviewer.
- The independent reviewer will be appointed by the HMRC Commissioners but must be a person independent of both the Commissioners and the bank in question.
- The final decision on whether a bank has breached the Code will be made by the HMRC Commissioners. But before they consider whether a bank has breached the Code and, if so, whether to name the bank they must commission the independent reviewer to compile a report on
 - whether in the independent reviewer's opinion there has been a breach of the Code, and if so,

- whether or not, in the independent reviewer's opinion, having regard to any remedial or mitigating actions undertaken by the bank or any exceptional circumstances, HMRC Commissioners should publish the name of a bank as having breached the Code in the HMRC Annual Report.
- The independent reviewer must give the bank at least 28 days from the receipt of TDRB's report to make representations. It is for the independent reviewer to decide whether the representations are to be oral or written (or both).
- In compiling their report the independent reviewer must have regard to;
 - the TDRB's report setting out the rationale for its conclusion that the bank has breached the Code and its view on whether the bank should be named in an annual report on the operation of the Code;
 - any representations made by the bank;
 - any action taken by the bank to remedy or otherwise mitigate the alleged breach of the Code, or any exceptional circumstances that might justify not naming the bank;
 - this Governance Protocol insofar as it is relevant to their functions,

and may take account of:

- any other matters they consider relevant to the consideration of whether the bank has breached the Code, and
- any actions by the bank after 5 December 2013, but may not take into account any actions before that date or before the bank became a participating group or entity.
- HMRC must provide the independent reviewer with access to the information held by HMRC in relation to the issue, or issues, under consideration.
- The independent reviewer's report must be completed within 90 days of receipt of HMRC's report.
- Once completed the independent reviewer's report must be provided to both the bank and the HMRC Commissioners.

HMRC Commissioners' role

- Once the independent reviewer has delivered their report to HMRC Commissioners, the bank has 28 days in which to make written representations on the report to the Commissioners.
- It is expected that Commissioners will consider the case 28 days after the end of that period (i.e. 56 days after the report of the independent reviewer is given to Commissioners).

- Any document containing observations by HMRC on the independent reviewer's report that is given to the Commissioners for the purpose of their consideration will be given to the bank at the same time.
- In reaching their final decision on whether a bank has breached the Code the HMRC Commissioners must have regard to:
 - the report made by the independent reviewer; and
 - any representations made by the bank, .
 and may take into consideration
 - any actions by the bank after 5 December 2013, but may not take account of any actions before that date or before the bank became a participating bank.
- In reaching their final decision on whether a bank should be named, the HMRC Commissioners must have regard to any remedial or mitigating action undertaken by the bank or exceptional circumstances which might justify not naming the bank in the annual report.
- The Commissioners will only make a determination that is different to that of the independent reviewer where they consider the independent reviewer's determination was unreasonable or where exceptionally there are other compelling reasons for making a different determination.
- If exceptionally the Commissioners think that they may form a different opinion from that of the independent reviewer, then before reaching their final decision they will explain to the independent reviewer the reasons why they might reach a different decision. The independent reviewer will be asked for any comments on that explanation within 14 days. HMRC's reasons will be copied to the bank at the same time and the bank will be able to make further written comments within the same 14 day period as the independent reviewer. The Commissioners must have regard to any comments of the independent reviewer and the bank before reaching their final decision.
- Once the Commissioners have reached their final decision the Commissioners will inform the bank's board of their decisions no later than the end of the following working day.
- If the Commissioners form a different opinion from that of the independent reviewer HMRC must, when informing the bank of their decision in writing, set out, and explain why they have concluded the independent reviewer's determination was unreasonable or what compelling reasons they took into account in reaching their determination.
- Where the Commissioners have decided that a bank has breached the Code and that the bank should be named in an annual report then there must be a delay of at least 90 days before the annual report is published.

The HMRC Annual Report

- The Code is one element of the Government's anti avoidance strategy and is designed to change the attitudes and behaviours of banks towards tax avoidance. The Government provides transparency around the operation of the Code in two ways by:
 - providing full transparency where a bank has adopted the Code but does not comply with it, and
 - providing full transparency around the banks which have chosen to, and those that have chosen not to, adopt the Code.
- Where a bank has unconditionally committed to the obligations under the Code but, after having followed this Governance Protocol, HMRC Commissioners have concluded a bank has breached the Code the Commissioners may publish the name of a bank as non-compliant in the HMRC annual report on the operation of the Code.
- Normally the relevant annual report will be the one for the year or period in which the breach of the Code was determined to have occurred. However Clause 1(3) of the draft legislation provides that where, it is not practicable for the bank to be named in the report for the period in which the breach arises, the bank will be named in the next annual report where it is possible to do so.
- If the Commissioners form a different opinion from that of an independent reviewer on whether a bank has breached the Code or over the naming of a bank, then the HMRC annual report for the relevant reporting period must set out that there was a difference of opinion between the Commissioners and the independent reviewer.

Interaction with the GAAR

Where there is a unanimous or majority agreement amongst the GAAR Advisory Panel that arrangements entered into, or promoted by, a bank are not a reasonable course of action and concluded that it would be appropriate to seek to apply the GAAR to the arrangement concerned and a notice has been given under paragraph 12 of Schedule 43 to FA 2013 stating that a tax advantage is to be counteracted then—

- The action by the bank in entering into or promoting these arrangements will constitute a breach of the Code and accordingly:
- the role of the independent reviewer and thereafter the Commissioners is limited to considering whether the bank should be named in the HMRC annual report.

In all other cases where arrangements entered into or promoted by a bank have been referred to the GAAR Advisory Panel in accordance with Schedule 43 to Finance Act 2013 whether or not the bank has breached the Code will depend on all the facts and surrounding circumstances which could include for

example whether the arrangements form part of a pattern of behaviour. If following discussions between the bank and HMRC, HMRC concludes that the bank has breached the Code and should be named in an annual report it would be required to commission a report from the Independent Reviewer.

Archive material

Outline of Code Governance Protocol

