Establishing HMRC's View on a Bank's Compliance with the Code of Practice on Taxation for Banks

Introduction

1. The Code of Practice on Taxation for Banks ("the Code") was introduced in 2009 and applies to a banking or Building Society group, banks in non banking groups and single banking or Building Society entities. The Code uses "bank" as a collective term for these groups or entities.
2. HMRC published its Governance Protocol on a Bank's Compliance with the Code of Practice on Taxation for Banks ("the Protocol") on 26 March 2012.
3. The Protocol sets out HMRC's communication and escalation procedures in any case where HMRC has concerns about a bank's compliance with its commitments under the Code.
4. **The version of the Protocol, published on 5 December 2013 replaces the 26 March 2012 version and is to be read as the current HMRC Protocol by banks and their advisers.**
5. The Protocol covers "participating groups and entities". These terms are defined in Section 2 of the draft legislation included in the formal Consultation Response Document *"Strengthening the Code of Practice on Taxation for Banks"*.

   https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204321/130530_Code_consultation_Docprint_version.pdf
6. Participating groups and entities are banks which have notified the Commissioners, in writing, that they have unconditionally committed to complying with the Code on or after 31 May 2013. An updated draft of the legislation will be published on 5 December 2013.
7. In accordance with Clause 4 ("Code of Practice on Taxation for Banks: HMRC to publish reports") of the draft legislation to be included in Finance Bill 2014, any future changes to the Protocol will be subject to consultation before being introduced.
8. Not all banks are required to fully adopt the Code. Some smaller banks are only required to adopt Section 1 of the Code. This provides these institutions with a more flexible and appropriate approach to documenting and governing their strategy towards tax and is proportionate to, and consistent with, HMRC's risk strategy. However, the principles underpinning that strategy should be the same as those for larger banks that adopt the Code in its entirety, and it should be noted that the considerations and processes set out in the Protocol will apply equally to both smaller and larger banks.

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9. HMRC issued a consultation *“Strengthening the Code of Practice on Taxation for Banks”* on 31 May 2013. The consultation focussed on:
    - The HMRC governance procedure by which it determines a bank’s non-compliance;
    - The processes and criteria by which a decision to name a bank as non-compliant will be made; and
    - The nature of the Annual Report to be published by HMRC.

10. HMRC has updated the original Protocol to ensure that it reflects the proposals set out in the consultation document for a new strengthened Code.
11. The updated Protocol sets out in detail how the HMRC governance process will operate taking into account the roles of the HMRC Tax Disputes Resolution Board (“TDRB”), an appointed “independent reviewer” and the HMRC Commissioners. In addition it provides indicative timescales for banks to make representations and is updated to reflect further points and requests for clarification raised during the consultation.
12. Full details of the behaviours or circumstances that might lead HMRC to have concerns over a banks compliance with the Code were set out in the consultation document dated 31 May 2013. HMRC plans to consolidate existing and revised guidance in early 2014 – in particular further guidance will be provided on HMRC’s views on the “intentions of Parliament”. These future changes to the HMRC guidance will be subject to consultation before being introduced.

HMRC Operation of the Code

13. In most cases HMRC will not have cause for concern about a bank’s compliance with the Code.
14. However, where HMRC does have concerns over whether a bank has met its undertakings under the Code, they will be in relation to;
    - the bank’s <u>governance process</u> (under paragraphs 2 to 2.2 of the Code)
    - <u>the bank’s tax planning</u> (under paragraphs 3 to 3.3 of the Code), or,

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- the relationship between the bank and HMRC (under paragraphs 4 to 4.2 of the Code).

Governance

These situations would arise where HMRC had concerns 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 attitude towards the openness, transparency and professionalism of its relationship with HMRC.

Tax Planning

These concerns would arise where the bank has failed to:

- adhere to the tax planning strategy envisaged by the Code in its formal operations and policy, where it has one;
- adopt the tax planning strategy approach envisaged by the Code in practice; including failure to provide adequate guidance to the bank's operational staff on how the strategy operates;
- review, prior to implementation, all potentially contentious transactions for compliance with the tax planning strategy, involving an appropriate level of tax expertise and challenge, and documenting the review appropriately;
- prevent implementation of or the facilitation or promotion of transactions where the tax management function was not 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", or
- take reasonable views in coming to decisions under points (1) to (3) in the above bullet point, where the failure to do so amounts to failing systematically or wilfully to implement its undertakings about tax planning.

Relationship between the Bank and HMRC

These concerns would arise where HMRC felt that:

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  - the bank was failing to deliver on these undertakings over the period concerned; or
  - the bank was not fully committed to the undertakings, or to a shared plan to resolve the delivery concerns.

17. The Protocol published on 05 December 2013 sets out:

- the way in which HMRC will interact with a bank where either, it has concluded that a bank has met its commitments under the Code or, where it has identified that a bank may not have met its Code commitments, and
- the escalation route where HMRC suspects that a bank may not have met its commitments under the Code, and
- the role that the TDRB, the Commissioners and the independent reviewer will play in reaching a decision that a bank should be named in an annual report as not complying with the Code, and
- how the escalation route interacts with the GAAR advisory panel.

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