

New offences under the Criminal Finances Act 2017: are corporate pension trustees at risk?

January 2018

Pension briefing

HIGHLIGHTS

- The Criminal Finances Act 2017 creates two new offences concerning tax evasion, potentially relevant to pension scheme corporate trustees (but not individual trustees).
- For most corporate pension trustees, the risk of committing an offence will be remote. However, these offences have "strict liability" – meaning that, if certain conditions apply, the corporate trustee will automatically be considered guilty. It would then be for the corporate trustee to show that it has a valid defence and so should not be criminally liable.
- Corporate pension trustees should consider whether they wish to take some action, or if they are comfortable that established procedures (combined with the low risk of an offence occurring) are sufficient.



WHAT ARE THE NEW OFFENCES?

The Criminal Finances Act 2017 (the "Act") creates two new offences which may be relevant to pension scheme trustees:

- "failure to prevent facilitation of UK tax evasion"; and
- "failure to prevent facilitation of foreign tax evasion".

The new offences have effect from 30 September 2017. Penalties for the offences include unlimited fines and ancillary orders such as confiscation orders.

Only corporate trustees can be affected

The new offences can only be committed by a "relevant body". A corporate trustee will be a relevant body and so could commit one of the new offences. Individual trustees are not within the scope of the Act.

WHEN IS AN OFFENCE COMMITTED?

HMRC guidance explains that one of the new offences will be committed only if a three stage test is met:

Stage one: criminal tax evasion by a taxpayer under existing law

There must be a *criminal offence* by a taxpayer (an individual or a legal entity) – non-compliance by a taxpayer which falls short of fraud will not be enough. Note though, that it is not necessary for the taxpayer to have been successfully prosecuted.

Stage two: criminal facilitation of the tax evasion by an "associated person" of the relevant body

An "associated person" of the corporate pension trustee (please see box) must *deliberately and dishonestly* take

action to facilitate the taxpayer's criminal tax evasion. Facilitating the tax evasion accidentally, through ignorance or even negligently will not be sufficient.

Stage three: failure by the relevant body to prevent its associated person from committing the criminal facilitation act

If stages one and two are met then the relevant body will automatically have committed an offence, unless it can demonstrate that it has a defence (please see below).

Who is an "associated person"?

A person will be an "associated person" of a corporate pension trustee if that person is:

- the corporate trustee's employee;
- the corporate trustee's agent; or
- any other person who performs services for or on behalf of the corporate trustee.

Failure to prevent facilitation of foreign tax evasion

The offence of failing to prevent facilitation of foreign tax evasion operates in a broadly similar way to the UK offence save that:

- the issue concerns criminal tax evasion in an overseas country; and
- there has to be a connection with the UK (for example the corporate trustee or associated person is in the UK).

DEFENCES

A corporate trustee will have a defence against liability for one of the new offences if:

- it had such prevention procedures in place as was reasonable in all the circumstances; or
- it was not reasonable in all the circumstances to expect it to have any prevention procedures in place.

HMRC guidance issued in September 2017 provides examples of prevention procedures. The government expects prevention procedures to be informed by the following principles:

- risk assessment;
- proportionality of risk-based prevention procedures;
- top level commitment;
- due diligence;
- communication (including training); and
- monitoring and review.

The guidance expects the procedures which are "reasonable" to change over time: a higher standard may be expected when the offences have been in effect for a number of years. HMRC will take into account any measures which were in place or planned at the time the facilitation offence took place.

The guidance also comments that timely self-reporting will be seen as an indicator that a relevant body (such as a corporate trustee) has reasonable prevention procedures in place.

RISK FOR CORPORATE PENSION TRUSTEES?

For most corporate pension trustees, the risk of falling foul of the new legislation will be very low. There would have to be both criminal tax evasion by a taxpayer (for example, a member) plus criminal facilitation of the tax evasion by the

trustee's associated person (while acting as the trustee's employee, agent or service provider).

In theory, it is possible to imagine scenarios in which an unauthorised payment is dishonestly made from a scheme but not declared to HMRC, with the connivance of a rogue individual involved in the scheme administration. If the individual qualifies as an associated person of the pension trustee, the corporate trustee could be liable (unless it demonstrates that it has a defence).

In practice, however, well-run schemes will already have robust systems of checks and balances to monitor and control payments in and out of the scheme and to ensure timely reporting to HMRC as required. These systems should already be documented and subject to periodic review as part of trustees' existing internal controls.

ACTION FOR TRUSTEES

We recommend that corporate pension trustees:

- consider whether any specific action is required (weighing-up the likelihood of the risk of the event occurring against the criminal sanction); and
- consider asking their scheme administrator (and any other service provider which handles scheme money or other assets) for details of the procedures it has in place to avoid criminal facilitation of tax evasion and review those responses.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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