

Draft Finance Bill 2016—criminal offences and civil sanctions

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Corporate Crime analysis: What proposed criminal offences and civil sanctions are included in the draft Finance Bill 2016? Catherine Richardson, associate at Cadwalader, Wickersham & Taft LLP, and Adam Blakemore, partner at the firm, consider the proposed new criminal offences and civil sanctions contained in the draft Finance Bill 2016.

Original news

Government publishes draft Finance Bill 2016 legislation, LNB News 09/12/2015 84

The government published draft tax legislation on 9 December 2015 for inclusion in Finance Bill 2016. Consultation on the draft legislation will run until 3 February 2016.

What is the substance of the proposed new offences and civil sanctions for tax evasion and anti-avoidance measures contained in the draft Finance Bill 2016?

Draft legislation to be included in Finance Bill 2016 (FB 2016) was published on 9 December 2015 following the Chancellor's 2015 Spending Review, and the Autumn Statement on 25 November 2015. Among other measures, the draft FB 2016 legislation proposes the introduction of new civil sanctions and criminal offences, as well as the strengthening of certain existing civil sanctions. These measures had been foreshadowed in the Chancellor's 2015 Budget and were subject to public consultation during 2015. As such, these measures affirm the government's commitment to tackling tax avoidance and evasion rather than constituting new announcements.

It is proposed that FB 2016 will include four specific measures aimed at tax avoidance and evasion. The focus of these measures is on preventing offshore tax evasion, and specifically:

- o increased civil sanctions for offshore tax evaders
- o new civil sanctions for 'enablers' of offshore tax evasion
- o new criminal offences for offshore tax evaders, and
- o a new corporate criminal offence for failure to prevent the criminal facilitation of tax evasion

In the broader context of general tax avoidance and evasion, FB 2016 is also intended to include additional measures to protect the UK Exchequer. These include:

- o a penalty of 60% of tax due where the general anti-abuse rule (GAAR) is found to apply
- o the broadening of the circumstances in which a 'conduct notice' can be issued to a promoter of tax avoidance schemes, and
- o the introduction of a new regime for serial tax avoiders

The government has also undertaken to consult during 2016 on a new legal requirement to correct historic tax non-compliance involving offshore arrangements.

What is the scope of the proposals?

Increased and new civil sanctions

The changes to existing civil sanctions propose to increase the minimum penalty for deliberate offshore tax evasion, as well as requiring taxpayers to provide additional details on how the evasion took place—in order to secure maximum penalty reductions. A new penalty based on the value of the underlying asset is involved in the offshore evasion (for example, the offshore bank account where the interest was not declared, or an offshore property with undeclared rental income) is also proposed, with the relevant draft legislation to be published in early 2016. These measures will be included in FB 2016, but will be subject to a commencement order that will take into account a final disclosure facility, which is expected to operate from April 2016 to September 2018.

New civil sanctions, including penalties of up to 100% of the tax evaded and ‘naming’ provisions for ‘enablers’ of offshore tax evasion, are also proposed to be introduced. These measures will require the enablers’ behaviour to be deliberate and for the evader to have received a penalty relating to offshore non-compliance. An ‘enabler’ is defined as a person who encourages, assists or otherwise facilitates offshore tax evasion by the taxpayer and, accordingly goes beyond just ‘advisors’. These measures will be included in FB 2016, but will be subject to a commencement order.

Both the increased and new civil measures will be limited to ‘offshore tax evasion’. HMRC identifies moving UK gains, income or assets offshore to conceal them from HMRC, not declaring income or gains arising overseas and using complex offshore structures to conceal the beneficial ownership of assets, income or gains as activities constituting ‘offshore tax evasion’. For the purposes of the legislation proposed to be included in FB 2016, the existing definitions of ‘offshore matter’ and ‘offshore transfer’ contained in paragraphs 4A and 4AA of Schedule 24 of the Finance Act 2007 are used. The new civil sanctions also introduces an alternative activity of ‘a relevant offshore asset move’.

New criminal offence

FB 2016 will include draft legislation in relation to a new strict liability criminal offence for taxpayers who fail to notify HMRC of their liability to pay tax, fail to submit a return or submit an inaccurate return in each event where such tax relates to offshore income, assets or activities. This will be subject to a threshold, which will be not less than £25,000 of tax underpaid or understated per tax year. A ‘reasonable excuse’ defence will apply and while the offence will be a summary only offence, a taxpayer may be liable to a fine and/or custodial sentence of up to six months. This measure is subject to a commencement order and will come into force at a time that is co-ordinated with the introduction of other changes in relation to offshore tax evasion.

New corporate criminal offence

HMRC published draft legislation on 9 December 2015 concerning the introduction of a new corporate criminal offence of failure to prevent the facilitation of tax evasion. Broadly, this offence would impose criminal liability on corporations who fail to prevent their ‘representatives’ from facilitating or committing a UK tax evasion offence or an equivalent offence committed overseas. The emphasis is on the ‘failure to prevent’ and accordingly, the draft legislation requires HMRC to publish guidance about the type of procedures corporations should implement to avoid such failure. The government’s stated intention is not to impose additional monitoring obligations on corporations in respect of their clients, but rather to ensure that corporations appropriately monitor anyone representing the corporation. The draft legislation for the new offence will be subject to a public consultation in 2016, with the final legislation being introduced prior to the commencement of the exchange of information provisions to be introduced under the common reporting standard (CRS).

It is evident from the decision to introduce new provisions, as well as strengthening existing measures, that the proposals are broad in their intended scope. This breadth is tempered by the fact that the number of tax evaders to whom the measures should apply is expected to be relatively small (albeit that the cost of such evasion may be significant).

What is the reasoning behind the introduction of these measures?

By its very nature, tax avoidance and tax evasion deprives the UK government of revenues that support the provision of public services. It should therefore not come as a surprise that the government is seeking to protect its revenue base.

These measures are also aligned with the current political climate in which taxpayers are expected to pay their 'fair share of tax' and in which unprecedented international efforts to tackle tax avoidance and evasion are being undertaken.

In particular, HMRC's 'No Safe Havens' offshore evasion strategy for 2013 and beyond, the existing domestic offshore penalty regime, and international measures such as the OECD's standard in automatic exchange of information (including the CRS), form the backdrop against which these measures have been introduced.

Through the introduction of these provisions, the UK government is seeking to:

- o reduce the opportunities available for engaging in tax avoidance and evasion
- o ensure voluntary compliance on the part of taxpayers, and
- o impose harsh penalties on those who participate in, or facilitate offshore tax avoidance and evasion

What is your assessment of the effect and practical implications of the measures?

The effect on taxpayers of the proposed measures is intended to be two-fold:

- o to act as a deterrent to those considering engaging in tax evasion, and
- o to impose new and/or more robust sanctions on those who do engage in tax evasion

HMRC's current efforts to tackle tax avoidance and evasion have led to increased voluntary disclosures, additional tax revenues being raised and penalties being imposed. It should be anticipated that, with the increase in information to be made available to HMRC because of civil sanctions and the developing network of measures under which tax information is shared between national tax authorities, the measures proposed in FB 2016 will only further enhance HMRC's ability to prevent, detect and penalise tax avoiders and evaders.

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The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor



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