



Failure to Prevent the Facilitation of Tax Evasion

RISK ASSESSMENT TEMPLATE



1. Introduction

This template provides an outline and template designed to assist in carrying out a risk assessment of an asset management business pursuant to the corporate criminal offence of failure to prevent the facilitation of tax evasion.

If a company or a partnership is accused of having committed the offence, it is a complete defence to demonstrate that it had in place reasonable prevention procedures to prevent the facilitation of tax evasion (or that in all the circumstances it was reasonable to have no such procedures in place). In order to develop procedures which are “reasonable”, it is essential that a risk assessment of the relevant business be carried out. Only when areas and levels of risk have been identified can policies and procedures be designed which are reasonable in the context of such risk. HMRC have identified the risk assessment as key in considering whether or not they consider the “reasonableness” requirements of the defence to have been met. It is not sufficient to simply implement “standard” policies and procedures – these must be bespoke. See our [technical note](#) for further discussion on this.

This template is designed as a tool to identify certain issues that should be considered as part of any internal risk assessment of a typical fund management business. However, whether a particular business has in place reasonable procedures to address the risk of the offence being committed will always be a question of fact. Accordingly, there are likely to be issues not addressed in this template which are pertinent to a particular business. The risk assessment and resultant policies and procedures once completed, need to be reviewed regularly at a senior level to ensure that they are effective in addressing risk and that where breaches are reported, these are dealt with effectively.

This template is not a “model” and has not been approved or endorsed by HMRC. Equally, it is not intended to provide advice and is not a substitute for professional advice. It is simply a tool to assist BVCA members and must be viewed in conjunction with other BVCA materials available on the [website](#) and each member’s circumstances.



2. Identifying Relevant Bodies

Relevant bodies are the entities that can be criminally liable under the new offence and which therefore need to implement reasonable measures to manage the risk. Accordingly, all relevant bodies within a structure must be identified. The checklist below is designed to assist in identifying such relevant bodies:

Relevant Bodies		
Checklist Item	Explanation	Notes
List all 100% or majority owned companies within the group	All group companies will be relevant entities for the purpose of the new offence.	
List all partnerships which form part of the business. This will include, for example, any LLP asset manager/advisory entities, but also any partnerships which are fund vehicles	Partnerships, including fund vehicles, will also be relevant entities for the purpose of the new offence.	
List any joint venture companies or partnerships which are owned as to more than 50% or controlled by a group company	It is prudent to treat these joint ventures as relevant entities for the purposes of the risk assessment. The JV entity itself must comply, but you may want to discuss with your JV partners, who will be commercially responsible for driving this forward. Minority JVs may not be relevant entities, but may be associated persons).	

3. Addressing Non UK Relevant Bodies (optional policy decision)

The offence has a potentially wide remit in relation to non-UK entities. However, if the identification process reveals non-UK relevant bodies within the structure, which are considered to be “low risk”, internal policy may be to either exclude them completely from the risk assessment and the subsequent policies and procedures, or subject them to a lower level of risk assessment. This would be on the basis that such entities are outside the intended scope of the legislation or of such low risk that no further action is reasonable.

It should be noted that the most prudent approach (and that recommended) will always be to include all relevant entities (whether UK or non-UK) in the risk assessment and in the group's policies and procedures since all entities can be liable for the facilitation offence. Even if a non-UK entity has no apparent UK nexus, then, although the risk of the offence being committed may be low, should the risk materialise, that entity will need to demonstrate that it had reasonable policies and procedures in order to have a defence.

If the decision is taken to consider excluding certain non-UK relevant bodies from the scope of the risk assessment or limiting the assessment in relation to them, the following factors (among others) should be taken into account:

- The risk of reputational damage;
- The extent of the overall business links to the UK generally, and the risk that non-UK entities may have UK-based associates who might facilitate the evasion of tax in the UK;
- The anticipated changes to the structure and operations of the overall business increasing the links to the UK; and
- The cost and business impact of implementing the policy and procedures (perhaps in a more limited form) in contrast to the level of risk faced by the business.

4. Associated persons

The corporate offence is committed where an "associated person" of a relevant body criminally facilitates the evasion of tax. Accordingly, once **relevant bodies** to be included in the risk assessment have been identified, the next step is to identify the potential **associates** of such relevant bodies. The potential risk of such associates being in a position to facilitate tax evasion will then need to be considered. The definition of associated persons is extremely broad and includes any person carrying out services for or on behalf of the relevant bodies identified. For guidance in this area please refer to the [BVCA technical note](#).

The checklist below is designed to assist in identifying key categories of associated person. This will need to be completed for **each relevant body identified**.

Associated Persons		
Checklist Item	Explanation	
Identify the key groups of employee within the relevant body (by reference to business area, role or seniority)	The aim here is to group employees in a way that facilitates a risk assessment. You may therefore want to identify groups of employees who are within higher risk areas of the business (such as accounts/finance, legal or investor on-boarding) or in positions of seniority where they will be expected to enforce policy or have oversight of others (such as senior managers or directors) and differentiate these from groups who are in lower risk roles or more junior. You may also want to consider the position of the key deal executives, fund managers who may be under performance-related pressures. Later, you will want to consider whether those individuals have the potential to facilitate tax evasion where such steps might be motivated by achieving those performance targets.	
Identify any group company or partnership which you have not identified as a "relevant body", but which carries out services for or on behalf of group companies/entities which are "relevant bodies"	This may, for example, include non-UK companies which you do not consider to be "relevant bodies", or joint venture companies which are not controlled by a company within your group, but which carry out services for or on behalf of the group.	



Associated Persons		
Checklist Item	Explanation	Notes
3.3 Identify any other potential associates who perform services for or on behalf of the business, such as: a. Self-employed contractors b. Agents c. Consultants d. Fund administrators e. JV partners f. Suppliers g. Distributors h. Sub-contractors i. Professional advisers	<p>In the context of an asset management business, this list might include:</p> <ul style="list-style-type: none">- Offshore administrators e.g. if a fund is in the Cayman Islands/ Jersey/Luxembourg and a service provider assists with e.g. on-boarding investors, payments to investors, provision of directors. This may be a key associate to consider in the risk assessment.- Consultants: you may engage consultants to help your in-house team, for example, source deal-flow, with market knowledge, with specialist due diligence. These consultants may also be key associates to consider.- Non-executive directors on fund vehicle boards.	

5. Risk assessment of associated persons

Having now identified all **relevant bodies** and their **associated persons**, consideration needs to be given to the extent to which they have the **means, motive and opportunity** to facilitate tax evasion.

This risk assessment will be unique to each business and it is impossible to set out a definitive list of factors which should be considered. The checklist below is designed to identify some of the main areas that you should consider, based on the guidance in relation to the new offence produced by HMRC (for more information see the [BVCA technical note](#)). **These factors need to be analysed in relation to each of the associated persons identified.**

Risk Assessment		
Checklist Item	Explanation	Notes
<p>Country Risk</p> <p>a. Is the associated person incorporated or based in a jurisdiction with a low tax transparency rating?</p> <p>b. Is the associated person doing business on your behalf in a jurisdiction with a low tax transparency rating?</p> <p>c. Does the associated person transact with your business through any structure or arrangements involving a jurisdiction with a low tax transparency rating?</p> <p>d. Based on your knowledge of tax reporting and transparency and levels of corruption more generally, are there any other associated persons that you consider to be operating in a jurisdiction where there is a high risk of tax evasion?</p>	<p>A list of countries regarded by the OECD as partially compliant, non-compliant or unrated in relation to its standards on transparency and exchange of information are set out in Appendix I.</p> <p>In the context of fund management, FATCA and CRS are critical to risk assessment. As part of country risk you may want to consider whether you/your associated persons are operating in FATCA/CRS compliant jurisdictions.</p>	



Risk Assessment		
Checklist Item	Explanation	Notes
<p>Sector/Product Risk Are any of the "relevant bodies" or any associated persons operating in any of the following high-risk sectors:</p> <ul style="list-style-type: none">- Financial services, including private banking or private wealth management- Tax structuring or tax advice- Legal services- Trusts and fiduciary services- Company service providers- Corporate infrastructure providers- Services commonly provided for cash?	<p>You should consider both the entities within your group and associated persons which are carrying out services for or on behalf of your business to determine whether they are operating in high risk sectors. You will only be liable for the actions of associated persons to the extent that they are facilitating tax evasion in their capacity as an associate of your business, so your risk assessment should focus on the services that your associates provide for or on behalf of your business rather than their wider client base.</p> <p>HMRC has identified financial services as high risk in itself. You may want to consider your most relied-on associates and engage with them to understand whether the actions they take on your behalf are sufficiently robust to make the risk of their facilitating tax evasion low. For example, if you engage a service provider to on-board your investors – are they thorough and diligent in operating AML procedures. What is their in-house procedure if a concern is raised in the on-boarding process? Do they also collect all information required for FATCA and CRS and would they push back with an investor if they were not forthcoming with all required information?</p>	

Risk Assessment		
Checklist Item	Explanation	Notes
<p>Transaction Risk Are any of the "relevant bodies" involved in transactions which:</p> <ul style="list-style-type: none"> - Are multijurisdictional - Are high-value - Are structured in a complex way (either expressly for tax planning purposes or where the commercial purpose of the structuring is not clear to you) - Involve cash - Involve politically exposed persons or personal asset holding vehicles - involve high levels of secrecy (i.e. beyond typical commercial confidentiality arrangements) - involve transactions of particularly high value where there is a lot at stake - do not have a clear and obvious commercial objective - involve legal persons or arrangements that are personal asset holding vehicles - non face-to-face business relationships 	<p>Fund managers are likely to have at least two types of transactions to be considered for these purposes. One is their interaction with their investors as they establish a fund and bring in investors. The second type is the investments made by that fund. Some fund managers may also establish joint advisory ventures (or similar) with e.g. asset-type specialists.</p> <p>You will need to think about the structure and machinery of your transactions to identify transaction related risks.</p> <p>For example, in relation to investor on-boarding – what information do you already require under AML in relation to source of funds or under CRS / FATCA about the identity of your investor and their controlling persons? Is this process enough? CRS / FATCA require you to report details about investors to the relevant tax authorities. Would you admit an investor if they wanted to invest via a vehicle which was in a non-CRS compliant jurisdiction or a jurisdiction which is identified by the OECD as partially or non-compliant in relation to transparency? If yes, what additional checks would you run in relation to that investor?</p>	

Risk Assessment		
Checklist Item	Explanation	Notes
<p>Within your business, are there employees who are likely to be involved in the negotiation or structuring of arrangements that have these characteristics (e.g. those negotiating contracts, agreements with suppliers or agents, service agreements or arrangements with employees)?</p>	<p>For example, in relation to investments made by your fund, could the pressure to 'get the deal done' result in your employees / consultants participating in or turning a blind eye to potential tax evasion / facilitation of tax evasion?</p> <p>For example, if you are buying a stake in the business, what procedures are followed if something which potentially amounts to evasion or facilitation emerges in the course of due diligence?</p>	
<p>Have any associates of the business been subject to adverse publicity or market speculation about tax evasion?</p>		
<p>Are any of the associates of your business (including your employees) in a position where they might have the opportunity to be involved in:</p> <ul style="list-style-type: none"> - Structuring transactions so that one of the parties might be able to hide money offshore from the tax authorities (in an offshore bank account, trust, company or other entity) - Agreeing when, how, to whom and for what amounts invoices should be issued so that tax could be evaded - Referring customers or those within the business to third parties who could assist them in evading tax - Entering into cash transactions that might enable one of the parties to evade tax by under-declaring income or profit 	<p>As part of this process, if your senior management invest in the business, the funds under management or are incentivised through such interests e.g. carried interest, you may want to consider whether the business should apply standards to the way in which such investments are structured. Ideas here might include, for example, considering whether your firm's policies and procedures make it clear that you expect them to take reputable tax advice, that you would not admit a family investment entity into the fund if it was situated in a non-FATCA / CRS jurisdiction, that being convicted of tax evasion is a sackable offence (this is likely to be the case if you are an FCA regulated business in any event).</p>	



Risk Assessment		
Checklist Item	Explanation	Notes
<ul style="list-style-type: none">- Preparing and signing off of tax returns in which tax could be deliberately under-reported- Negotiating or implementing employment or share incentive arrangements for employees or directors which might result in the relevant individuals being able to evade tax (by hiding payments offshore or holding assets in a way that is not transparent to local tax authorities)		
Is there any risk that your current remuneration or bonus policies could be viewed as incentivising undue risk-taking or involvement in the facilitation of tax evasion activity by your employees or other associates of the business?		
Does the business require its staff to carry out and record due diligence on its associates at pre-contract stage? Is there evidence that the business has followed up on due diligence where the results give rise to concern?		

6. Assessing current procedures

Internal processes and procedures may be reasonable (or could be adapted to be reasonable) to address the risks identified. HMRC acknowledge this may be the case. The following checklist highlights the main areas that should be considered to ascertain this.

Processes and Procedures		
Checklist Item	Explanation	Notes
<p>Does your business have procedures in place enabling it to carry out due diligence to determine:</p> <ul style="list-style-type: none"> - The jurisdiction in which an associate operates - Whether there are politically exposed persons involved with the associate - The structure through which an associate operates? 		
<p>Where transactions involve the high risk areas outlined above, does your business already have in place procedures which involve:</p> <ul style="list-style-type: none"> - Enhanced due diligence in relation to fund investors, clients, associates and transactions - Supervision and oversight of employees involved with such transactions at a senior level - Oversight of associates providing services in relation to these areas - Policies and procedures for reporting and addressing any concerns about particular transactions 	<p>There has to be an intention to commit tax evasion. Recklessness is not enough. But the courts have made it clear that recklessness about wilfully weak policies and procedures which then result in tax evasion may be evidence of intent. You may want to consider how robust policies and procedures are in areas of risk. For example, how much thought is given to whether an invoice on a transaction can be properly addressed to a non-EU fund (no VAT) or to whether a consultant is really an employee or whether board decisions made by non-UK companies are properly made in the jurisdiction of residence?</p>	

Processes and Procedures		
Checklist Item	Explanation	Notes
<p>In relation to high risk transactions outlined above, would such transactions generally:</p> <ul style="list-style-type: none"> - Be subject to appropriate legal and tax advice - Be worked on by a team, supervised by a senior employee or director - Require those working on the transaction to share information with and report to a line manager/project manager - Be scrutinised at a senior level in detail before being signed off by the Board? - Involve due diligence of other transaction parties to determine that they have not been subject to criminal or regulatory investigation, adverse publicity, etc 		
<p>Are the employees identified in above:</p> <ul style="list-style-type: none"> - Already subject to enhanced training in relation to the risk of criminal conduct (e.g. money laundering) - Required to obtain sign-off from a senior employee or director in relation to the transactions that they negotiate - Subject to day to day supervision of their activities? 		
<p>Has your business previously put in place group-wide policies and procedures to address other criminal offences (such as those under the Bribery Act)?</p>		
<p>Are the group's existing policies and procedures for dealing with criminal offences such as bribery subject to board level supervision and review?</p>		
<p>Does the group have a confidential "whistle blowing hotline" to be used by those reporting any concerns about criminal conduct in other contexts?</p>		



Processes and Procedures		
Checklist Item	Explanation	Notes
Does the group have previous experience of implementing training and providing learning materials for staff in relation to criminal offences (e.g. bribery, money laundering)?		
Does the group include terms in its standard form contracts with associates and employees in relation to other criminal offences?		

7. Developing policies and procedures to address risk

Once the key risk areas have been identified, policies and procedures should be implemented in order to address these risks. The law does not require businesses to take any specific measures, but it is important to be able to demonstrate that the policies and procedures adopted are reasonable to address the risks that you have identified.

As a minimum, it is anticipated that HMRC would require that a business produces:

Overall Policy Document

This would be shared with employees and certain other associates and would set out a “zero tolerance” approach to tax evasion generally, provide procedures to be followed by employees to address identified risks and advise of how employees can obtain further information and report any concerns internally. This document should also identify which senior personnel are responsible for overseeing compliance in this area.

It would be expected that a general communication to employees would summarise the content of the overall policy document, while not seeking to replace it.

Training procedures

An appropriate training programme, with priority given to those in high risk areas or involved in potentially high risk transactions should be implemented.

Arrangements with certain associates which refer to the facilitation offence

Contracts with associates should include language which requires them to have their own reasonable prevention procedures in place and which requires them to report any facilitation identified within their organisation. Please note that wholesale amendment of all existing contracts is not necessarily required (depending upon level of risk) but new contracts and renewals must include suitable language.

Review and monitoring procedures

It is important that the risk assessment and resultant policies and procedures are reviewed regularly at a senior level to ensure that they are effective in addressing risk and that where breaches are reported, these are dealt with effectively. Accordingly, there should be a separate procedure to ensure this and review should be a regular board agenda item.

In addition to the above, other documents may also be necessary such as enhanced training or processes for employees in higher risk areas or due diligence in relation to certain associates potentially regarded as “high risk” e.g. by reason of jurisdiction, connection or relevant publicity.

As stated above, depending upon the nature of the risk, it may be possible to develop existing policies, procedures and documents (e.g. whistle blowing hotlines already in existence for other purposes; policy documents in relation to bribery). It is, however, important that it is clear that this is an appropriate way to deal with the risk of facilitating tax evasion, rather than simply a mechanical process of adding facilitation to existing policies.

Appendix I: Jurisdictions considered partially compliant by the OECD

- Andorra
- Anguilla
- Antigua and Barbuda
- Costa Rica
- Curaçao
- Dominica
- Dominican Republic
- Federated States of Micronesia
- Guatemala
- Indonesia
- Kazakhstan
- Marshall Islands
- Panama
- Samoa
- Sint Maarten
- Trinidad and Tobago
- Turkey
- UAE