The Code of Practice on Taxation for Banks – consolidated guidance

The previous version of this consolidated guidance replaced all existing published guidance including:

- Initial consultation – May 2009
- Supplementary guidance - December 2009
- Guidance on promotion and facilitation - June 2012
- Strengthening Code consultation - May 2013
- Establishing HMRC's view on a bank's compliance with the Code - Dec 2013

It also included new material on the "intentions of Parliament", the Annual Report, identifying the Code population, the application of the Code to overseas entities, how HM Revenue and Customs (HMRC) will monitor Code compliance and how the Large Business Compliance Strategy applies to banks which have adopted the Code.

This version provides clarification on a number of terms, such as "meeting all tax obligations", "genuine commercial activity", "reasonable belief", and provides new material on purpose tests. It also provides more information on how HMRC operates the Governance Protocol, and there is information on how the Code interacts with the senior accounting officer regime, the penalties for enablers of defeated tax avoidance legislation, and the corporate offences for failing to prevent criminal facilitation of tax evasion.

Contents

Chapter 1 - Introduction

1.1. The Code of Practice on Taxation for Banks ("the Code") is a voluntary undertaking that requires participants to maintain good standards of governance and behaviour in their approach to taxation.

1.2. 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 (see Chapter 2).

1.3. At the time the Code was introduced, some businesses were involved in tax avoidance that went well beyond reasonable tax planning. Many schemes worked by targeting loopholes in the legislation or forcing different parts of the tax code together in a way that was not intended by Parliament. Others relied on complex financing arrangements that sought to create a loss for tax purposes that was far greater than the true commercial or economic cost to the borrower.

1.4. Previously, governments had attempted to counteract avoidance by changing the law to stop individual schemes. Sometimes this worked, but often the avoidance industry simply altered the scheme to work around the new law.

1.5. The Code is one element of the government's anti-avoidance strategy and when introduced was designed to change the attitudes and behaviours of banks towards avoidance given their unique position as potential users, promoters and facilitators of tax avoidance.

1.6. The Code (reproduced in Appendix A) describes the approach expected of banks with regard to governance, tax planning and engagement with HM Revenue & Customs (HMRC). It encourages banks operating in the UK to adopt best practice in relation to their own UK tax affairs, and not to promote UK tax avoidance by others.

1.7. By early 2013, most banks had adopted the Code and HMRC had seen a positive response by banks in relation to their tax planning and transparency.

1.8. Although HMRC believed the Code was generally operating well, it lacked public transparency. There were also no obvious downsides for banks from not adopting the Code and no codified consequences for non-compliance with a bank's Code commitments.

1.9. As announced at Budget 2013, legislation was introduced in Sections 285-289 Finance Act 2014 (FA 2014) requiring HMRC to publish an annual report, beginning in 2015, on the operation of the Code. This strengthened the Code, and ensures its long-term effectiveness, by providing a mechanism for the naming of non-compliant banks and by providing full transparency around which banks have adopted the Code.

1.10. Where HMRC has concerns over whether a bank has met its obligations under the Code, it will take action to address these concerns in line with the escalation process

detailed in the published Governance Protocol[1] ("the Protocol"). HMRC can only name a bank as having breached the Code when it has completed all the steps set out in the Protocol.

1.11. Following consultation, HMRC invited all banks to unconditionally confirm or reconfirm their commitment to the obligations set out in the Code before Autumn Statement 2013. The names of the 264 banks which did so were published at that time[2].

Code Requirements

1.12. Banks that adopt the Code are expected to comply with the spirit of the law as well as its letter. Part 1 of the Code contains commitments to:

(1) adopt adequate governance to control the types of transactions they enter into;
(2) not undertake tax planning that aims to achieve a tax result that is contrary to the intentions of Parliament;
(3) comply fully with all their tax obligations; and
(4) maintain a transparent relationship with HMRC.

1.13. Parts 2, 3 and 4 of the Code expand upon the above principles and place specific obligations on banks to ensure these principles are being followed throughout the organisation.

1.14. Small banks are only required to adopt Part 1 of the Code. This means that while small banks are expected to fully adhere to the Code's principles they are not required by the Code to have a fully documented tax strategy. Small bank is defined at paragraph 2.5 of this guidance below.

[1] https://www.gov.uk/government/publications/code-of-practice-on-taxation-for-banks-governance-protocol
[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/566165/Code_-_List_of_Adopters.pdf

Chapter 2 – Code Population

2.1. The annual report HMRC publishes on the operation of the Code includes a list of each bank within the Code population. This is made up of the banks which have adopted the Code and the banks which have not adopted the Code but satisfy the definition in section 285 FA 2014.

Adopting the Code

2.2. Banks which have adopted the Code are described in the legislation (section 286 FA 2014) as "participating groups and entities". These 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.

2.3. The adoption covers all entities within the charge to UK corporation tax. It therefore does not include overseas entities without a branch in the UK. However, UK entities are required to ensure their governance prevents overseas subsidiaries promoting arrangements to avoid UK tax. There is more detail about this in paragraphs 3.7-3.10.

2.4. Small banks are only required to adopt Part 1 of the Code (section 285(11) FA 2014)[3]. This means that while small banks are expected to adhere to all strands of the Code, for Code purposes they are not required to have a fully documented tax strategy.

2.5. A small bank is a group or entity to which HMRC has not assigned a Customer Compliance Manager (CCM). This definition is modified for banks in non-banking groups. In these cases, the bank is a small bank if the banking entity or entities would not be large enough on their own to be assigned a CCM.

Identifying banks in the Code population for the List of Non-Adopters

2.6. The Code population for a particular reporting period is broadly the following:

(a) Deposit takers,
(b) Investment firms that are chargeable to the bank levy, or would be chargeable if it were not for the £20 billion de minimis.

2.7. Part 3 of Schedule 19 FA 2011 outlines the relevant groups and entities on which the bank levy is chargeable and Part 8 contains definitions. Any groups and entities on which the bank levy is chargeable, or would be chargeable if it were not for the £20 billion de minimis, are in the Code population if they are also within the charge to corporation tax.

2.8. There is detailed guidance on groups and entities subject to the bank levy in the Bank Levy Manual. See BKLM240000+.

[3] A copy of the statement published by HMRC in accordance with section 285(11) FA 2014 can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249644/Small_Banks.pdf

Deposit Takers

2.9. In practice a company (including a foreign company operating in the UK through a permanent establishment) which is authorised to accept deposits in the UK and is undertaking that regulated activity at the end of the reporting period will be in the Code population. If the company does not come within the bank levy population, for example because it is part of a non-banking group and is let out under the exempt activities test (see BKLM242600+), it is brought within the Code population as it meets the definition of a bank in section 991(2)(b) or (c) of ITA 2007.

2.10. An entity meets the definition of a bank in section 991(2)(b) or (c) of ITA 2007 if it is:

- a person who has permission under Part 4A of the Financial Services & Markets Act 2000 (FSMA 2000) to accept deposits, or
- a European Economic Area (EEA) firm of the kind mentioned in paragraph 5(b) of Schedule 3 to FSMA 2000 which has permission under paragraph 15 of that Schedule to accept deposits. These are banks within the EEA regulated by their home state regulator and authorised by the PRA to accept deposits in the UK.

2.11. Any entity which meets this definition will be included on the list of PRA regulated banks which is published monthly on the Bank of England website[4].

2.12. If an entity is on the Bank of England list and is accepting deposits, it is within the Code population. An entity may receive authorisation to accept deposits before it begins banking activity. If that entity is not part of a group which is already within the Code population, we would not regard that entity as within the Code population until it begins banking activity.

2.13. A building society which is authorised to take UK deposits and is undertaking that regulated activity will always be within the Code population. The Bank of England publishes a separate list of PRA regulated building societies on the same page as the list of PRA regulated banks.

Investment Firms

2.14. The starting point for determining whether an investment firm is within the Code population is whether it meets the definition of an investment bank in paragraph 70 Schedule 19 FA 2011 (see paragraph 2.16 below).

2.15. Investment banks that are chargeable to the bank levy, or would be chargeable if it were not for the £20 billion de minimis, are in the Code population. This will include an investment bank that is:

(a) a member of a relevant group for the purpose of the bank levy (BKLM220000 and part 3 Schedule 19 FA 2011) or
(b) not a member of a relevant group for the purpose of the bank levy, but is either a UK resident bank (BKLM243000 and paragraph 80 Schedule 19 FA 2011) or a relevant foreign bank (BKLM245000 and paragraph 78 Schedule 19 FA 2011).

[4] https://www.bankofengland.co.uk/prudential-regulation/authorisations/which-firms-does-the-pra-regulate

Definition of Investment Bank

2.16. Paragraph 70 Schedule 19 FA 2011:

> "investment bank" is defined as an entity which—
> (a) is both an IFPRU 730k firm and a full scope IFPRU investment firm, or
> (b) is designated by the PRA under article 3 of S.I. 2013/556.

2.17. The terms 'IFPRU 730k firm' and 'full scope IFPRU investment firm' are both taken from the FCA handbook[5]. These terms describe the type of regulated entity and the activities it can undertake.

2.18. A full scope IFPRU investment firm which is also an IFPRU 730k firm has regulatory permissions that allow it to undertake the core activities of investment banking, namely dealing as principal, holding client money, making markets and placing/underwriting financial instruments. However, these activities can also be carried out by investment firms that do not meet the definition of a UK resident bank or relevant foreign bank (see paragraph 2.15 above). An entity may be let out because:

- it is an excluded entity (see BKLM250000 and paragraph 73 Schedule 19, FA 2011);
- it (and other relevant entities in the group) has a capital resource requirement of less than £100million (see BKLM243160 and paragraph 72 Schedule 19 FA 2011); or
- its income is not derived wholly or mainly from these regulated activities (see BKLM243140 and paragraph 80(1)(d) Schedule 19 FA2011).

2.19. Where a company's registered office (or, if it does not have a registered office, its head office) is not in the UK and but for this the company would, by virtue of activities carried on in the UK, be an IFPRU 730k firm and a full scope IFPRU investment firm, then, for bank levy purposes, it is treated as being a IFPRU 730k firm and a full scope IFPRU investment firm.

2.20. The PRA designated firms are investment firms with more than £15bn of assets. The Bank of England publishes a list of these firms on its website. https://www.bankofengland.co.uk/prudential-regulation/authorisations/which-firms-does-the-pra-regulate

[5] https://www.handbook.fca.org.uk/handbook/IFPRU/1/

Chapter 3 – The Code Commitments – Governance

3.1. This and the next two chapters consider each of the commitments in turn providing some further guidance on what that commitment means in practice. Much of this information is taken from the Supplementary Guidance and Frequently Asked Questions published in December 2009. Additional material has been included on the intentions of Parliament, meeting all tax obligations, genuine commercial activity, reasonable belief, and purpose tests.

Governance

3.2. All banks that adopt the Code 'should adopt adequate governance to control the types of transactions they enter into'.

3.3. The additional commitment made by a bank which is not a small bank[6] is set out in part 2 of the Code:

> *2. The bank should have a documented strategy and governance process for taxation matters encompassed within a formal policy. Accountability for this policy should rest with the UK board of directors or, for foreign banks, a senior accountable person in the UK.*
>
> *2.1. This policy should include a commitment to comply with tax obligations and to maintain an open, professional, and transparent relationship with HMRC.*
>
> *2.2. Appropriate processes should be maintained, by use of product approval committees or other means, to ensure the tax policy is taken into account in business decision-making. The bank's tax department should play a critical role and its opinion should not be ignored by business units. There may be a documented appeals process to senior management for occasions when the tax department and business unit disagree.*

3.4. Paragraph 7.47 of Chapter 7 covering HMRC's operation of the Code has a table setting out what Code compliant governance looks like and what may give HMRC cause for concern. Where HMRC has a concern over a bank's compliance with the governance commitment it will take action under the Governance Protocol (see chapter 6).

For a small bank:

3.5. The governance requirements for a small bank are not set out in detail in the Code. This is to provide these institutions with a more flexible and appropriate approach to documenting and governing their strategy towards tax which 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.

3.6. Many of these small banks are part of a group with a global turnover of more than €750 million and are required to publish their tax strategy for financial years beginning after 15 September 2016. See chapter 9 for further details on the interaction between the Code and the requirement for large businesses to publish their tax strategy.

[6] As defined in paragraph 2.5

Application to overseas entities

3.7. Where an overseas entity is part of a UK group or sub-group, HMRC expects the UK parent's governance arrangements to cover any activities of the overseas entity which give rise to a UK tax advantage to the bank or its customers. The governance arrangements should be sufficient to ensure the subsidiary is not entering into transactions or promoting arrangements which aim to achieve a tax result that is contrary to the intentions of Parliament.

3.8. If the UK parent is aware that its overseas subsidiary is promoting arrangements which aim to achieve a UK tax result that is contrary to the intentions of Parliament, this will give rise to concerns over the tax planning part of the Code because the bank is knowingly promoting UK tax avoidance. (See chapter 4, paragraph 4.71)

3.9. Where a bank has adopted the Code and an overseas member of that group is not part of a UK group or sub-group, then HMRC accepts it would not be appropriate or practical for the UK business to extend Code governance to the activities of that overseas entity. However, if the UK arm of the business is actively involved in the activities of that overseas entity e.g. advising, sourcing customers or setting up the arrangements, this may give rise to concerns under the tax planning part of the Code. (See chapter 4)

3.10. Examples of applying the Code to the activities of overseas entities without a UK parent or sub-parent include the following:

- The Code will apply if a customer approaches any part of the bank operating in the UK and is put in touch with an overseas entity and the bank knows the overseas entity is going to promote tax avoidance or evasion by that UK customer.

- The Code will not apply if a transaction is promoted to third party customers in the UK directly by the overseas entity and does not require any input from the bank's UK companies.

- The Code will not apply if a customer approaches the overseas entity directly and there is no contact with the bank's UK operations even though the customer gets a UK tax advantage as a result of the transaction they undertake with that overseas entity.

Comply fully with all tax obligations

3.11. A Code adopter is expected to have governance in place to make sure it meets all its tax obligations, which include, but are not limited to, taking reasonable care to ensure all tax returns are complete, correct and filed on time.

3.12. Where a bank makes an error in a return, HMRC will potentially look at the bank's governance to see if it has any concerns. HMRC will take into account the behaviour that led to the error. Errors can arise despite reasonable care, and such isolated failures will not generally lead to escalation under the Governance Protocol. HMRC will not generally escalate isolated incidents of late returns or payments.

3.13. Deliberately incorrect returns or multiple failures indicating a lack of effective governance controls are likely to raise concerns that would be escalated in accordance with the Governance Protocol.

Application of the Code to actions taken by regulators

3.14. Failures in governance, resulting in regulatory fines for example, would not constitute a breach for Code purposes unless the failure was linked to the tax affairs of the bank and indicated that the bank was unable to comply with its tax obligations in a material way (part 1 of the Code).

Chapter 4 - The Code Commitments – Tax Planning

4.1. Part 1 of the Code requires banks to comply with the spirit, as well as the letter, of tax law by discerning and following the intentions of Parliament. HMRC views the spirit of the law as being synonymous with following the intentions of Parliament.

4.2. Banks that have adopted the Code should not therefore undertake tax planning that aims to achieve a tax result that is contrary to the intentions of Parliament.

4.3. Part 3 provides further clarification about what this means in practice:

> *3. The bank should not engage in tax planning other than that which supports genuine commercial activity.*
>
> *3.1. Transactions should not be structured in a way that will have tax results for the bank that are inconsistent with the underlying economic consequences unless there exists specific legislation designed to give that result. In that case, the bank should reasonably believe that the transaction is structured in a way that gives a tax result for the bank which is not contrary to the intentions of Parliament*
>
> *3.2. There should be no promotion of arrangements to other parties unless the bank reasonably believes that the tax result of those arrangements for the other parties is not contrary to the intentions of Parliament.*
>
> *3.3. Remuneration packages for bank employees, including senior executives, should be structured so that the bank reasonably believes that the proper amounts of tax and national insurance contributions are paid on the rewards of employment.*

4.4. Paragraph 7.47 of chapter 7 covering HMRC's operation of the Code has a table setting out what Code compliant tax planning looks like and what may give HMRC cause for concern. Where HMRC has a concern over a bank's compliance with the tax planning commitment it will take action under the Governance Protocol (see chapter 6).

4.5. See the following paragraphs for further guidance on the wording used in the Code:

- "intentions of Parliament" (paragraphs 4.6-4.18)
- "supporting genuine commercial activity" (paragraphs 4.19-4.24)
- "tax result for the bank" (paragraph 4.25)
- "tax consequences and economic consequences" (paragraphs 4.26-4.31)
- "reasonably believes" (paragraphs 4.45-4.53)
- "promotion" (paragraphs 4.70-4.75)
- "proper amounts of tax" in paragraph 3.3 (paragraphs 4.76-4.78)

The "intentions of Parliament"

4.6. This section sets out guidance on the interpretation of the phrase the "intentions of Parliament" as it is used in the Code and replaces the original supplementary guidance published when the Code was introduced on 9 December 2009.

4.7. For the purposes of this guidance, transactions that HMRC consider to be unacceptable transactions under the Code are called "Code Red" transactions. All other transactions are called "Code Green" transactions.

Background

4.8. Transactions are acceptable under the Code if it is reasonable to believe the outcome or UK tax result is not contrary to what Parliament intended. Understanding and being able to discern the intentions of Parliament is therefore critical to compliance with the Code.

4.9. The Code requires banks to follow the spirit of the law as well as the letter of the law. Although HMRC believes that a taxpayer follows the spirit of the law by understanding how Parliament intended the law to apply and abiding with this intention, it is nonetheless useful to understand why the Code was introduced and the history of this distinction.

4.10. In the consultation document issued on 29 June 2009, the Financial Secretary to the Treasury stated that it was "clear that some banks have been involved in tax avoidance that goes well beyond reasonable tax planning" and that the Code was intended to change the behaviour of banks and their attitudes towards tax avoidance.

4.11. The consultation document attempted to identify common traits of tax avoidance schemes. These included "exploiting loopholes in legislation, artificially creating the conditions for tax relief, or using different parts of the tax code together to get a result that was never intended by the legislation". The tax advantage often depended upon applying a literal construction of the legislation and using particular words and ambiguity in specific provisions to achieve a tax effect that was incongruous with the broader principles of that part of the legislation. These transactions were often designed mainly to exploit these weaknesses and had little commercial consequence.

4.12. Since 2009 the courts have increasingly adopted a purposive approach to statutory interpretation and have often ruled against schemes that attempt to obtain a tax outcome that was clearly not intended by Parliament. There is a growing body of legal rulings that clarify how to assess the intentions of Parliament.

Methodology

4.13. The following sections sets out HMRC's approach to discerning the intentions of Parliament and applying these to a transaction.

4.14. HMRC will first consider the arrangements with particular focus on whether they support genuine commercial activity and whether the tax outcome is consistent with the underlying economic consequences. These are considered further below.

4.15. HMRC will then look at the legislation purposively; this is not limited to consideration of the particular provision or provisions producing the tax outcome in isolation. It also includes consideration of those provisions in a broader context.

4.16. HMRC may refer to supplementary materials provided to Parliament when it considered the legislation.

4.17. If after reviewing the legislation, and supporting documents where relevant, HMRC conclude that the tax result is contrary to the intentions of Parliament then HMRC will check to see whether this tax result has become permissible through established practice.

4.18. If the tax result is contrary to the intentions of Parliament and the type of planning has not become permissible through established practice, then the transaction is Code Red unless the bank had a reasonably held belief that this is not the case. If HMRC agree that this belief was reasonably held, then the transaction will be Code Green. If HMRC takes the view that the bank's interpretation isn't reasonable, or material facts have been ignored, then it will remain Code Red.

Supporting genuine commercial activity

4.19. The Code requires banks not to engage in tax planning that does not support genuine commercial activity. The consultation document published on 29 June 2009 said "tax planning in support of commercial transactions is normal and appropriate. But the government does not condone tax planning which goes beyond support for genuine commercial activities."

4.20. Before the introduction of the Code, there was a concern that some banks might be entering into transactions that had little or no commercial consequence, and were put in place purely to obtain a tax advantage.

4.21. Genuine commercial activity will often have been entered into with a view to a realisation of a pre-tax profit which reflects the assets and staff effort employed. In some cases genuine commercial activity might be targeted at the minimisation of an expected loss. There can be other genuine commercial reasons for entering into a transaction, beyond pre-tax profit or loss minimisation. As banks are subject to regulation, commercial activity may include, but is not limited to, things such as capital optimisation, complying with liquidity and balance sheet constraints, reducing funding costs and market and political risks. The question of whether there is genuine commercial activity will be determined by reference to all relevant facts, including the regulatory framework within which banks operate.

4.22. In order to make these assessments, it may be necessary to consider the position both at the individual entity level and across the group as a whole, taking account of the reality that the company is a member of a group and may be used by the group's management to carry out a group-level commercial purpose. A transaction does not necessarily represent genuine commercial activity simply because it uses financial instruments etc. which are used in the normal course of the business.

4.23. If the bank would not enter into a transaction but for it creating a tax advantage, then it is likely that the planning does not support genuine commercial activity. Further, while banks might be expected to carry out commercial transactions in a tax efficient manner,

if a bank would not structure a transaction in the way it has done other than to create a tax advantage, it will be necessary to consider whether the planning merely supports genuine commercial activity or has a separate objective of creating a tax advantage.

4.24. Where banks are looking to unwind transactions that have previously been entered into, either as part of an avoidance scheme prior to adopting the Code, or as part of normal commercial activity, and there is a tax saving as a result of the unwind, HMRC will consider whether the unwind itself supports genuine commercial activity.

Tax results for the bank

4.25. Paragraph 3.1 of the Code begins by saying 'Transactions should not be structured in a way that will have tax results for the bank ….' In this context, the 'tax results for the bank' covers all the transactions and structures that have a significant impact upon the bank's own tax position.

Are the tax consequences of the proposed transaction inconsistent with the underlying economic consequences?

4.26. The Code requires banks not to structure transactions to give a tax result inconsistent with the underlying economic consequences of the transactions, unless there is specific legislation designed to give that result and the bank reasonably believes that the transactions are structured to give a result that is not contrary to the intentions of Parliament.

4.27. Examples of transactions that may give results that are inconsistent with their underlying economic consequences include ones which result in:

- more than one relief for the same expenditure without an equivalent inclusion of income;
- the benefit of a tax credit for tax never suffered;
- relief at more than the marginal rate for expenditure; or
- no tax or tax below the relevant marginal rate suffered on trading profits, investment income or employment income.

4.28. Sometimes Parliament intends the tax result to be different from the economic consequences. An example of this is the enhanced deduction for research & development expenditure.

4.29. For this reason, it does not necessarily follow that a transaction will be Code Red just because the tax result differs from the underlying economic consequences. In this situation, HMRC will consider whether the legislation and/or supporting documents sanction this result.

4.30. Conversely if the tax result follows the economics of the transaction this would indicate that the transaction is likely to be Code compliant. But it would not be Code compliant if, for example, it sought to obtain an effective deduction for a type of expenditure where Parliament had legislated to deny a deduction.

4.31. All banks that adopt the Code commit to Part 1 of the Code. This means banks that have adopted the Code should not undertake tax planning that aims to achieve a tax result that is contrary to the intentions of Parliament. Therefore, being consistent with

economic outcomes is not the final test and the tax result of the transaction must always be consistent with the intentions of Parliament or have become established practice.

The Legislation

4.32. HMRC will consider what the relevant legislative provisions were intended to achieve and compare this with the transaction, both in terms of the steps involved and the end tax result.

4.33. To do this HMRC will consider how the relevant provisions interact with one another and what their function is within that chapter or part.

4.34. For instance, anti-avoidance legislation is normally introduced to counter or prevent a particular tax outcome. Transactions are likely to be contrary to the intentions of Parliament where they exploit a weakness or ambiguity in the precise wording of the anti-avoidance rule and in doing so obtain the same tax result that the rule was introduced to counter.

4.35. Likewise, transactions that use an anti-avoidance rule to obtain a tax advantage may be contrary to the intentions of Parliament. For example, an anti-avoidance rule might create a tax charge and allow a corresponding tax deduction to ensure a symmetrical treatment. If a taxpayer entered into arrangements in order to obtain this tax deduction, then this is likely to be Code Red.

4.36. In contrast an election is a choice given to the taxpayer by Parliament and will not be contrary to the Code if the taxpayer has merely taken that choice, provided that the outcome of making the election is not contrary to the intentions of Parliament.

4.37. The wording of the legislation alone may not point clearly to the intentions of Parliament so HMRC should consider the policy statements relevant to the legislation. These include:

- Written Ministerial Statements;
- Ministerial Speeches (including Hansard);
- Consultation Response Documents;
- Technical Notes;
- Explanatory Notes; and
- Explanatory Memoranda

4.38. Other documents not taken into consideration by Parliament, for example HMRC guidance, should not be used to determine whether a transaction is Code compliant (although see paragraph 4.41 below on established practice). This is because the government cannot make laws without Parliament's agreement.

4.39. If the intentions of Parliament are not clear from the legislation and the supporting documents, then the transaction defaults to being Code Green even if it gives, or potentially gives, a counter-intuitive tax result.

Established Practice

4.40. The transaction may still be Code Green even if it the tax result is contrary to the intentions of Parliament. This will be the case where the tax planning has become established practice.

4.41. The established practice test will be met when HMRC has indicated its acceptance of that practice, for instance in guidance or in correspondence with a taxpayer or an adviser. In such circumstances, until such time as HMRC has withdrawn that guidance or there is a statement by the government that such practice is no longer acceptable such a transaction defaults to Code Green.

4.42. However, an arrangement is not established practice just because the Government has not yet changed the law. The bank has to be able to reasonably believe that HMRC has accepted this practice. This would typically be evidenced by some form of action by HMRC.

4.43. If the bank makes a Code approach (see paragraph 4.54 for more information) and HMRC believes that while the tax result is contrary to the intentions of Parliament the tax planning has become established practice, it will consider the transaction to be Code Green. HMRC will notify the bank that it considers the tax result to be contrary to the intentions of Parliament but the transaction is considered to be Code compliant because it has become established practice.

4.44. Guidance about Code approaches where HMRC believes that a tax result is contrary to the intentions of Parliament and that the planning has not become established practice is set out in paragraphs 4.49 to 4.53 below.

Reasonable belief test

4.45. Both paragraphs 3.1 and 3.2 of the Code include a 'reasonable belief test'.

> *3.1 Transactions should not be structured in a way that will have tax results for the bank that are inconsistent with the underlying economic consequences unless there exists specific legislation designed to give that result. In that case, the bank should reasonably believe that the transaction is structured in a way that gives a tax result for the bank which is not contrary to the intentions of Parliament*
>
> *3.2 There should be no promotion of arrangements to other parties unless the bank reasonably believes that the tax result of those arrangements for the other parties is not contrary to the intentions of Parliament.*

4.46. The test of reasonableness is no more than what a reasonable person with the relevant experience and training would believe given the facts and circumstances, having considered the proposed transaction in the round. It is a common sense test.

4.47. The bank may form a different reasonable belief from HMRC.

4.48. If, following a Code approach, (see paragraph 4.54 for more information) HMRC believes that a tax result is contrary to the intentions of Parliament and that the planning

has not become established practice, the CCM or equivalent[7] will inform the bank about HMRC's reasoning leading to the conclusion that it considers the potential transaction would be Code Red.

4.49. If after considering HMRC's reasoning the bank still considers the transaction to be Code Green, HMRC will usually be willing to enter into further discussion with the bank, around forming a common view of the intentions of Parliament or whether planning has become established practice. This will not be possible in all cases, and there will be instances where the bank and HMRC continue to disagree.

4.50. If the bank and HMRC continue to disagree about the intentions of Parliament or whether planning has become established practice, and the bank wishes to continue with the transaction, it will then be given an opportunity to make written representations on why it still believes the transaction was Code Green. This should take into account the bank's discussions with HMRC, and should explain how the bank came to its conclusion.

4.51. HMRC will then consider whether the bank's belief about the intentions of Parliament or established practice is a reasonable one, and communicate its reasoned conclusions to the bank. If HMRC concludes that the bank's belief is reasonable, then the transaction will be considered Code Green, and there would generally be no escalation of the issue under the Governance Protocol, unless the transaction forms part of a series of Code Red transactions (see paragraphs 6.26 to 6.28).

4.52. If HMRC concludes the bank did not have a reasonable belief that the tax result of the transaction is not contrary to the intentions of Parliament or that the planning has become established practice, the transaction will continue to be considered Code Red and the concern will be escalated under the Governance Protocol (see paragraphs 6.27 to 6.28).

4.53. This is a change in how HMRC considers a bank's reasonable belief when responding to a Code approach. Previously, HMRC would assess whether a potential transaction was intended to give a tax result contrary to the intentions of Parliament and assess whether a bank had a reasonable belief that the result was not contrary to the intentions of Parliament at the same time. If HMRC concluded that the bank did have a reasonable belief, it would provide a Code Green assessment, which did not provide the bank with the opportunity to reconsider the transaction in light of the fact that HMRC viewed it as contrary to the intentions of Parliament.

Code approaches

4.54. Where a bank has any doubts about how the Code applies to any proposed transaction or arrangement, it can approach HMRC before the transaction is undertaken. Where all the relevant information is provided and the approach is made in good time before the transaction is carried out, HMRC will provide the bank with its views on whether what is proposed would give a tax result that is contrary to the intentions of Parliament. (Further details about how to make a Code approach and what information should be provided are included in chapter 7 at paragraphs 7.4-7.12)

[7] References in this guidance to CCM or equivalent reflect the fact that Code has been adopted by banks dealt with by Wealthy and Mid-sized Business Compliance (WMBC). These banks do not have a CCM.

4.55. HMRC commits to responding to Code approaches within 28 days. Where there is a commercial imperative to agree the Code position more quickly than this, HMRC will endeavour to meet this requirement. Where the complexity of the issues raised means that more time may be needed, HMRC will indicate to the bank at the outset that a decision is likely to take longer. If HMRC needs to ask for more information, the time taken by the bank to provide that information is excluded from the response time.

Is the transaction within the GAAR?

4.56. For arrangements:

- that the General Anti-Abuse Rule (GAAR) Advisory Panel have concluded are not a reasonable course of action, and
- where the designated officer of HMRC has given a notice of proposed counteraction under paragraph 12 of Schedule 43 FA 2013; then

as set out in the Governance Protocol, undertaking or promoting such a transaction is a breach of the Code, and HMRC will not need to look any further at the intentions of Parliament.

4.57. Examples of when the GAAR might or might not apply can be found via the following link https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules.

4.58. The GAAR will not be considered in responses to pre-transaction approaches under the Code.

4.59. More information on potential GAAR transactions and HMRC's approach to the Code around such transactions can be found in Chapter 6 from 6.35-6.41.

Technical challenge and legislative change

4.60. HMRC decisions on Code compliance relate exclusively to the provisions of the Code. For the purposes of determining whether a transaction is Code compliant, HMRC will assume that the bank's technical analysis is correct.

4.61. Therefore, even in circumstances where a transaction is determined to be Code Green, it is possible that the government or HMRC may seek to take action outside of the Code process to address any undesirable Exchequer or policy consequences. In particular, a Code Green determination does not mean that:

- Ministers may not seek to change the law if they deem the transaction, and any precedent it sets, undesirable from a policy perspective; or
- HMRC cannot dispute the claimed tax result, open an enquiry or ultimately make an assessment on the basis that the right amount of tax to pay is higher than claimed.

4.62. If HMRC does identify technical concerns with the proposed transactions it will normally communicate these to the bank. However, it is unlikely HMRC will have had the time and evidence needed to make a detailed technical assessment of the transaction by the time it communicates the Code decision.

Purpose Tests

4.63. Tax legislation contains a number of purpose tests. These are often in anti-avoidance legislation. Typically, the relevant condition is whether avoidance of tax is a main purpose of a transaction or arrangement. Parliament intended that taxpayers should not enter into a transaction with a main purpose of utilising a particular piece of tax legislation to avoid tax. Where a transaction does have such a main purpose, then it will usually be Code Red. The transaction would, however, be Code Green if the bank had a reasonable belief that tax avoidance was not a main purpose of the transaction, or that the anti-avoidance legislation in question was not intended by Parliament to apply to it.

4.64. Whether a main purpose of a bank entering into a transaction is to achieve a reduction in tax due is a question of fact. Where a bank makes a pre-transaction Code approach and one or more purpose tests are in point, HMRC will accept the bank's representations about its purpose as fact and give its view on whether the transaction is Code compliant based on the stated purpose.

4.65. Where a bank's doubts on whether a transaction is contrary to the intentions of Parliament involve a purpose test, a Code approach will not provide the bank with certainty about the transaction's compliance with the Code, as HMRC assumes that a bank's analysis of its purpose is correct when dealing with these approaches. HMRC will consider a bank's representations about its purpose critically and in any case where HMRC has concerns, it will go on to test the bank's main purpose for entering into a transaction or arrangements, as described below.

4.66. HMRC will test a bank's purpose for entering into a transaction, where this is relevant, as part of the process of checking the result of the transaction included in a return, or sooner if necessary. This is part of HMRC's continuous assessment of the bank's compliance with the Code, and applies to concerns identified from Code approaches and through HMRC's usual compliance activity. If HMRC then found the transaction had a "bad" main purpose, HMRC's view of the transaction would become Code Red unless the bank had a reasonable belief that tax avoidance was not a main purpose of the transaction, or that the anti-avoidance legislation in question was not intended by Parliament to apply to it.

4.67. If the bank self-assessed that the relevant anti-avoidance rule applied and made the appropriate tax adjustment, there will be no concern that the transaction achieved a tax result that is contrary to the intentions of Parliament, and it will not be necessary to test the purpose of the transaction, as that is indicated by the bank's self-assessment. However, the CCM may wish to discuss with the bank whether the transaction itself is indicative of any inadequacies in the bank's governance processes that need to be addressed.

4.68. On occasion, in order to test a bank's compliance with the Code, it may be necessary for HMRC to test the bank's purpose in entering into a transaction before it results in a tax advantage for the bank. For example, a bank may make an intra-group tax neutral transfer of an asset from a banking company to a non-banking company. At the time of the transfer, the bank had an expectation of subsequently selling the asset at a significant gain. A later third party disposal from the non-banking company would create a tax advantage as no bank surcharge would be payable on the gain. The surcharge has an anti-avoidance rule (TAAR) which would negate the tax saving if the main purpose of the intra group transfer was to avoid surcharge. For Code purposes, HMRC would test

the purpose of the transfer to the non-banking company shortly after it was undertaken, rather than wait until the third party disposal, which is when the surcharge TAAR might have effect. If the main purpose or one of the main purposes for transferring the asset out of the banking company was to avoid paying surcharge on a future third party disposal, the transaction could be Code Red. This is because it is tax planning aiming to achieve a tax result contrary to the intentions of Parliament. If the bank had a reasonable belief that the surcharge TAAR would not be triggered on a future disposal, or that it did not have a main purpose of avoiding surcharge on a future disposal, then it would be Code Green.

Examples

4.69.

Examples 1 and 2 – Bank Levy, High Quality Liquid Assets "HQLA"

The bank levy was introduced in 2011 and is an annual levy on the chargeable equity and liabilities of the largest UK and foreign owned banking groups operating in the UK. Part 4, Schedule 19 FA 2011 sets out detailed rules for identifying chargeable equity and liabilities with the final step being to reduce the amount otherwise chargeable by high quality liquid assets (HQLA).

HMRC became aware that the definition of HQLA had, in some cases, been interpreted to include assets which would not qualify for the regulator's liquid assets buffer. In particular, this alternative interpretation included assets which had been provided as collateral to a third party and were therefore encumbered.

The intentions of Parliament with regard to the HQLA deduction in determining a bank's bank levy liability could be discerned from the government's bank levy consultation response document published on 21st October 2010, in particular at paragraphs 3.12 – 3.14. This made it clear that a deduction for HQLA was included within the bank levy rules because the government did not want to disincentivise the holding of assets that were eligible for the regulatory liquid assets buffer, by bringing the funding for these relatively low yielding assets into the bank levy base.

Tax planning based on an interpretation of HQLA which allowed assets that were not eligible for the regulatory liquid assets buffer to be deducted for bank levy purposes, did not meet the express policy objective of the deduction and was thus clearly not within the intentions of Parliament. Any arrangement undertaken with the purpose of exploiting this interpretation would clearly be a Code Red transaction.

<u>Example 1</u>
Bank 1 is aware of Parliament's intention regarding the interpretation of the definition of HQLA and is considering undertaking a number of transactions to take advantage of the bank's alternative interpretation and reduce its bank levy charge.
This tax planning and the structuring of the proposed transactions are contrary to the intentions of Parliament so would be Code Red.

<u>Example 2</u>
Bank 2 carries out its normal commercial transactions without any tax planning in respect of the bank levy. After the end of an accounting period the bank's lawyers suggest applying a different interpretation to the HQLA deduction from that set out in the government's response to the consultation document. The bank completes its tax return on this basis as it believes this is the correct interpretation.

In example 2 there is no tax planning, therefore it is not necessary to consider whether the tax result is contrary to the intentions of Parliament. This is consequently Code Green. HMRC would expect banks to approach HMRC under the Code if it intends to interpret legislation differently to that publicly stated (paragraph 4.1 of the Code).
In 2013 the definition of HQLA was amended with retrospective effect to make it clear that only HQLA which were eligible for the regulatory liquid assets buffer could be deducted in arriving at chargeable equity and liabilities.

Example 3 – Factoring of business receipts

Factoring of business receipts involves a company borrowing money against a future income stream. Where the company obtains finance by way of a loan it normally gets tax relief for the interest shown in its accounts but not for the principal.

In the early to mid-2000s a number of companies entered into structured transactions with banks in which they borrowed money against future income streams but claimed a deduction for both interest and principal. These included transactions by companies that were looking to obtain finance for development projects and involved transferring the right to income on an existing development to a tax transparent entity.

Anti-avoidance legislation was introduced in Chapter 2 Part 16 CTA 2010 to tax these structured finance transactions on the basis of their economics i.e. following the accounts, rather than the legal form of the transaction.

The relevant Explanatory Note states "This Chapter… stops a number of schemes which are intended to enable taxpayers to borrow money and obtain effective tax relief for both interest and repayment of principal."

A bank that had adopted the Code considered entering into an innovative factoring transaction with a client, with the bank receiving a share of the expected tax advantage. The transaction circumvented the structured finance anti-avoidance rules by adding an additional step to change the accounting treatment. The bank's technical analysis showed this would result in tax relief for both interest and repayment of principal.

In this case the introduction of anti-avoidance legislation and the wording of the Explanatory Note made clear Ministers' and Parliament's intention that businesses that factor their business receipts should not get tax relief for both interest and repayment of principal.

These arrangements would give a tax result for the client that is contrary to the intentions of Parliament and so would be Code Red.

Example 4 – Tax credit schemes

A bank considers a scheme seeking to exploit certain tax provisions to generate a repayment of tax that has never been paid. The scheme requires the bank to invest a sum of money in an authorised investment fund (AIF) for a few months. In return the bank receives interest on the sum invested and a tax credit which it uses to offset other liabilities, providing the bank with a return well above that it would receive by investing the same sum on normal commercial terms. The AIF has not and will not pay any UK tax.

Such a scheme clearly gives a tax result that is inconsistent with the underlying economic consequences. Unless there is specific legislation designed to give such a result the bank will need to consider if the transaction gives it a tax result which is contrary to the intentions of Parliament.

The proposed transaction follows earlier similar transactions that sought to produce repayable tax credits where no tax has been paid (tax generators). The government had introduced legislation to prevent similar schemes and the following document clearly set out Parliament's intention at the time this anti-avoidance legislation was introduced:

Budget Press Notice 3 of June 2010 states "The government today announces, with immediate effect, an anti-avoidance measure to prevent corporate investors using Authorised Investment Funds for avoidance schemes designed to create a credit for UK tax where no UK tax has been paid."

In this case there is clear documentary evidence that the tax result of the proposed transaction – a corporate investor using an AIF designed to create a credit for UK tax - is expressly contrary to the intentions of Parliament. Therefore, this is Code Red.

Promotion

4.70. The Code makes clear (paragraph 3.2) that there should be no promotion of tax planning to other parties unless the bank reasonably believes that those arrangements will not give tax results for other parties which are contrary to the intentions of Parliament.

4.71. In the case of tax avoidance, the following guidance covers situations where the bank is a party to transactions or arrangements which have an impact on the tax position of the customer and the bank has some knowledge of the tax effect of the transactions or arrangements.

4.72. HMRC's view is that that the Code will cover transactions (and should therefore be brought within a bank's Code of Practice governance process) where any of the following apply:

- The bank has been actively promoting tax-motivated arrangements which have an impact on the UK tax position of a customer and the bank has some knowledge about the tax effect of the transactions or arrangements, excluding arrangements which a bank believes are widely available in the market. It will be for the bank to demonstrate that such arrangements are widely available.
- The bank is acting in conjunction with a 3rd party promoter who is marketing arrangements which have an impact on the tax position of a customer and the bank has some knowledge about the tax effect of the transactions or arrangements. For example, this would include the situation where a bank agrees with a promoter to source customers or to provide finance to participators in a marketed avoidance scheme and does so with some knowledge of the effect of that avoidance scheme.
- The bank is acting in conjunction with an overseas affiliate who is marketing arrangements which have an impact on the UK tax position of a customer and the bank has some knowledge about the tax effect of the transactions or arrangements, even if this falls short of complete understanding of the tax provisions engaged and their intended application to the transaction. This would include situations where the bank is actively involved in advising, sourcing customers or setting up the arrangements with the overseas affiliate.
- The bank actively engages with a customer to design or tailor a financial structure or transaction which has an impact on the tax position of a customer and the bank has some knowledge about the tax effect of the transactions or arrangements (that is active and intended engagement in the customer's tax planning)
- The bank is providing lending or other facilities to a customer on terms which vary significantly from standard market terms, either in respect of the fees (e.g. incorporate an element of the tax advantage sought, or are significantly above market rates) or the structure of the facility provided and the bank has some knowledge about the tax effect of the transactions or arrangements. This would not include standard commercial leasing arrangements.

4.73. The Code requires that the bank's governance arrangements are sufficient both to identify these transactions and to reach a reasonable decision on whether the tax advantage from the transaction was intended by Parliament.

4.74. HMRC does not consider that the Code would in the normal course of events cover transactions where the bank is providing lending facilities or other banking services to

customers which do not vary significantly from standard market terms. In circumstances where a bank is facilitating (not designing/tailoring) a one-off, bespoke, transaction which may not have directly comparable market rates, HMRC's view is that this will not be covered by the Code unless, for example, the fees include an element of the tax advantage sought. Therefore a bank is not obliged to enquire into lending transactions or other banking services where these are on standard terms or where non-standard terms are not obviously to allow a client to achieve an unintended tax benefit, if it is neither promoting (or acting in conjunction with a 3rd party promoter) nor taking an enhanced fee or margin linked to the customer's tax benefit.

4.75. A bank may be compliant with the Code, but could still be a financial enabler or an enabling participant to abusive tax arrangements (Schedule 16, Finance (No 2) Act 2017. More information on this can be found in the guidance on what makes a person an enabler of tax avoidance[8]. Further information can be found in paragraphs 9.17-9.19.

Remuneration packages and the meaning of "proper amounts of tax"

4.76. Paragraph 3.3 of the Code says, 'Remuneration packages for bank employees, including senior executives, should be structured so that the bank reasonably believes that the proper amounts of tax and national insurance contributions are paid on the rewards of employment.'

4.77. In the past, there were many examples of arrangements whereby employees were remunerated in ways which were intended to escape tax and/or national insurance contributions. These types of arrangement are contrary to the Code.

4.78. As with paragraphs 3.1 and 3.2, the test is whether the bank reasonably believes that the proper amounts of tax and national insurance contributions are being paid. In practice, this will involve asking whether or not the result of a proposed arrangement is contrary to the intentions of Parliament.

[8] https://www.gov.uk/guidance/tax-avoidance-enablers-who-is-classed-an-enabler

Chapter 5 - The Code Commitments – Relationship

5.1. All banks that adopt the Code should maintain a transparent relationship with HMRC

5.2. The relationship commitment made by a bank which is not a small bank is set out in further detail in part 4 of the Code:

> *4 Relationships with HMRC should be transparent and constructive, based on mutual trust wherever possible.*
>
> *4.1 The features of this relationship should include:*
>
> - *disclosing fully the significant uncertainties in relation to tax matters*
> - *focusing on significant issues*
> - *seeking to resolve issues before returns are filed whenever practicable*
> - *engaging in a co-operative, supportive and professional manner in all interactions*
> - *working collaboratively to achieve early resolution and hence certainty.*
>
> *4.2 Where the bank is in doubt whether the tax result of a proposed transaction is contrary to the intentions of Parliament, it may discuss its plans in advance with HMRC.*

5.3. Paragraphs 7.2-7.16 provide guidance on approaching HMRC under paragraph 4.2.

5.4. Paragraph 7.47 covering HMRC's operation of the Code has a table setting out what a Code compliant relationship with HMRC looks like and what may give HMRC cause for concern.

5.5. The Code seeks to build and maintain a relationship between the bank and HMRC that fosters openness and a willingness to resolve areas of difference.

5.6. Below is an example of a relationship that is consistent with a bank's Code commitments. It considers how HMRC and a bank could work together in a transparent and constructive way to correct errors and address weaknesses in the governance controlling the types of transactions they enter into, discovered during the compliance process.

Example

Example

Following a risk assessment, HMRC opened an enquiry into a bank's tax computations, explaining that there were concerns around intra-group cross-border transactions. The bank provided the requested details of the relevant transactions, as well as the underlying documents.

HMRC discovered two separate transfer pricing errors. These errors related to transactions having different treatment in the tax computations of the group entities to the treatment in the entities' accounts. The bank was required to make significant adjustments to its tax computations.

The bank worked with HMRC and jointly agreed a plan to review and improve its procedures going forward. The bank created a proposal of how the objectives would be met, and this proposal was shared with HMRC for comment and suggestions. The bank agreed to share the findings of the review.

The bank brought in an outside consultant to review its transfer pricing and tax computation procedures. The consultant identified that the errors had been made due to the tax department making assumptions about the treatment of the transactions in the accounts which proved to be incorrect. The consultant concluded that these were isolated errors, and not an indication of systematic failures, but did make recommendations for improvements to the bank's internal guidance.

The consultant and tax department gave a joint presentation to HMRC on the findings of the review and collaborated with HMRC on updating the internal guidance. A meeting was arranged for the following year to evaluate the impact of the changes.

Chapter 6 - Governance Protocol

6.1. The Protocol sets out the escalation process for managing concerns over an individual bank's Code compliance. The latest Protocol can be found on the Code of Practice on Taxation for Banks collection page[9] on GOV.UK

6.2. In accordance with section 288 FA 2014, any future changes to the Protocol will be subject to consultation before being introduced.

6.3. The Protocol covers "participating groups and entities". These are defined in section 286 FA 2014 as banks which have notified the Commissioners, in writing, that they have unconditionally committed to complying with the Code on or after 31 May 2013.

6.4. Where a participating group or entity is part of a larger worldwide group the Code and Protocol only applies to those entities within the charge to UK corporation tax (see chapter 3 for further details on the Code population).

6.5. In accordance with section 285(11) FA 2014, small banks are only required to adopt Part 1 of the Code[10]. A small bank is a group or entity which has not been assigned a Customer Compliance Manager (CCM) within HMRC (or in the case of banks that are sub-groups or entities of non-banking groups, would not, on a stand-alone basis, be assigned a CCM). This means that while small banks are expected to adhere to all aspects of the Code, for Code purposes they are not required to have a fully documented tax strategy. The considerations and processes set out in the Protocol will apply equally to all banks.

6.6. As part of the Protocol, HMRC undertakes to engage with banks in a co-operative, supportive and professional manner and in return expects banks to comply with their commitments under the Code.

6.7. The Protocol explains that at any time HMRC may take one of the following views about a bank's 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.

6.8. Where HMRC considers the bank is fully complying with its Code commitments, the Protocol requires the CCM or equivalent to notify the bank of this view either as part of the annual risk review process[11] or on another suitable occasion.

6.9. The reference to CCM[12] or equivalent reflects the fact that the Protocol applies to all banks that have adopted the Code and not just those with CCMs.

---

[9] https://www.gov.uk/government/collections/the-code-of-practice-on-taxation-for-banks

[10] A copy of the statement published by HMRC in accordance with s285(11) FA 2014 can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249644/Small_Banks.pdf

[11] The risk review process is set out in the tax compliance risk manual (TCRM3000+) https://www.gov.uk/hmrc-internal-manuals/tax-compliance-risk-management/tcrm3000

[12] The Protocol uses the term "Customer Relationship Manager (CRM)", the name by which CCMs were known when the Protocol was issued.

- For banks which are not low risk this will normally be done as part of the annual risk review.
- For low risk businesses this will normally be done as part of the triennial risk review.
- For banks dealt with outside Large Business (LB) this will be done at the end of an enquiry which has included a review of whether the bank is fully complying with its Code commitments within the context of the issues discussed.

6.10. When HMRC identifies concerns about a Bank's Code compliance outside of the annual or triennial risk review process, HMRC will not wait for the scheduled risk review meeting to inform the bank of its concerns.

6.11. HMRC will also use the annual or triennial risk review process to notify a bank that:

- the bank's compliance with the Code has been reviewed and there are no current concerns;
- the bank's compliance with the Code is under review;
- there are initial concerns over the bank's compliance with its Code commitments; and
- there is an interim view that the bank has breached the Code

6.12. A bank will be included in the second category where HMRC has insufficient information to determine if the bank is compliant with its Code commitments.

6.13. A bank will only be included in the third category where Senior Civil Servant (SCS) grade staff in LB and BAI (Business, Assets and International) have given approval to discuss the concerns with the bank.

6.14. A bank will only be included in the fourth category when the case has been considered by the Tax Disputes Resolution Board and the Board has concluded that the bank has breached the Code.

6.15. When a bank is being investigated for potential fraudulent or criminal activity, then a Code review may not be carried out until that investigation is complete.

6.16. See chapter 7 for further details on how HMRC will check if a bank is fully complying with its Code commitments.

Process for determining non-compliance

6.17. The Protocol sets out in detail the way in which HMRC will interact with a bank where it has concerns about a bank's compliance with its commitments under the Code. This covers the role of the CCM or equivalent and the escalation route where HMRC suspects that a bank may not have met its commitments under the Code. It also covers 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.

6.18. This guidance does not repeat the detailed information within the Protocol but the following paragraphs include more on:

- when a case will be escalated to HMRC directors (paragraphs 6.19-6.30)

- the rationale for not normally escalating single instances of tax planning where HMRC regards the tax outcome as contrary to the intentions of Parliament (paragraphs 6.31-6.34)
- what is a potential GAAR transaction (paragraphs 6.35-6.37)
- revisiting a Code decision following GAAR counteraction (paragraphs 6.38-6.41)
- the role of the Independent Reviewer (paragraphs 6.42-6.43)
- the circumstances where HMRC Commissioners can override the Independent Reviewer (paragraphs 6.44-6.49)
- the impact of a criminal investigation on the escalation process (paragraph 6.50)

When a case will be escalated to HMRC directors

6.19. This section provides guidance on the factors HMRC's Responsible Officers (as defined in paragraph 6.21) will take into account in deciding whether a case should be escalated to directors.

6.20. Where HMRC has concerns that a bank is not complying with its commitments under the Code, HMRC's primary aim is to achieve a change in behaviour. In some cases this will only be achieved following escalation to HMRC directors and their engagement at board level in the bank. If the bank doesn't change its behaviour following this engagement, it may be found in breach of the Code after further escalation in line with the Protocol, and the bank could be named in the next annual report on the Code. In some cases a bank may be found in breach of the Code and may be named even though it has changed its behaviour.

6.21. The Protocol sets out what should happen at each stage of the escalation process. The first stage of escalation involves the responsible SCS in LB and BAI (Responsible Officers) making a judgement about whether a case should be escalated to HMRC director Level. This guidance sets out the approach HMRC will take in deciding whether a case should be escalated to directors.

6.22. The Protocol says that, if concerns remain after discussions between the CCM or equivalent and the bank, the case will be escalated to HMRC directors and the bank's board. If, after this, HMRC's concerns remain unresolved the case will be referred to TDRB. One exception from escalation is mentioned: normally a single transaction where the concern is about tax planning will not be escalated to the HMRC director unless it is part of an emerging pattern of behaviour or is a potential GAAR transaction. There is more information on this from paragraph 6.26 onwards.

6.23. As the objective of the Code is to bring about changes to the bank's behaviour, HMRC consider it appropriate to take into account the bank's current and future behaviour in deciding whether 'concerns remain after discussions between the CCM or equivalent and the bank'.

6.24. If the concerns related to the bank's governance or relationship with HMRC, HMRC's view is that concerns will be allayed and escalation to directors will not be needed when the bank has made the changes to its governance or its relationship with HMRC that are needed to comply with its Code commitments.

6.25. HMRC's view is that escalation to directors will be necessary when:
- the bank has not made the changes to its governance or its relationship with HMRC that are needed to comply with its Code commitments; or

- the CCM or equivalent and the Responsible Officers doubt that changes will endure without a director-level meeting (for example, this could be the case where there appear to have been multiple and significant failures by a bank to comply with its Code commitments, or a single apparent failure of particular significance)

6.26. If the concern related to a single tax planning transaction that HMRC concluded gave a tax result contrary to the intentions of Parliament, escalation to directors is only necessary where

- the bank has undertaken a potential GAAR transaction; or
- there is an emerging pattern of the bank undertaking transactions (or promoting arrangements) which the Responsible Officers consider to have a tax result contrary to the intentions of Parliament, because this could indicate that the bank is not forming its views about the intentions of Parliament reasonably

6.27. In any other case where the concern related to a single tax planning transaction that HMRC concluded gave a tax result contrary to the intentions of Parliament, escalation to directors will not be needed where the bank demonstrates that it considered the transaction under adequate governance and reasonably concluded that it was not contrary to the intentions of Parliament or that the tax planning had become established practice.

6.28. There are a number of other circumstances involving a single planning transaction where HMRC considers escalation to directors is likely. These are where:

- the bank has provided misleading information or otherwise concealed information either at the time the transaction was undertaken or in seeking to address concerns;
- the bank has not demonstrated a change in attitude in relation to tax planning (it may have unwound the transaction or taken other steps to ensure it no longer gets a tax advantage, but this is to avoid a continuing dispute with HMRC rather than reflecting an acceptance that the transaction was not Code compliant);
- a tax planning transaction went ahead and HMRC consider the bank not to have formed a reasonable belief that it was not contrary to the intentions of Parliament, unless the bank's governance has been strengthened so that it will in future consider the intentions of Parliament in a reasonable manner; or
- a bank wilfully ignored its existing governance processes in reaching a decision to go ahead with a tax planning transaction

6.29. If the concern relates to a bank's tax obligations, escalation is likely where there are multiple or significant failures by a bank to comply with its tax obligations, indicating a failure to take reasonable care.

6.30. HMRC expects similar criteria to apply in deciding whether an issue should be escalated from director level to TDRB. If the TDRB determines that the bank has breached the Code, the matter will be escalated to the Commissioners – who, prior to making their determination, must refer to the Independent Reviewer to report on whether there has been a breach. Each of these is required to take any remedial action into account in deciding whether to name a bank that has breached the Code.

Rationale for not normally escalating single instances of tax planning

6.31. HMRC will not normally escalate a single tax planning transaction where it considers the tax outcome is contrary to the intentions of Parliament.

6.32. In consultations with stakeholders prior to the introduction and the strengthening of the Code, it was acknowledged that HMRC was not uniquely positioned to determine the intentions of Parliament. In adopting the Code, a bank commits not to enter into or promote tax planning with an outcome inconsistent with the economic position, unless it reasonably believes that outcome to be consistent with the intentions of Parliament.

6.33. Where HMRC reviews an arrangement either as a Code approach or post-transaction and considers the outcome contrary to the intentions of Parliament, it will advise the bank of its view. However, as long as the bank considered the transaction under adequate governance arrangements and reasonably concluded that it was not contrary to the intentions of Parliament, this will not indicate a potential breach of the Code.

6.34. Repeatedly proceeding with such transactions, however, indicates that the bank is not considering the intentions of Parliament reasonably, or not in fact operating its purported governance. This is likely to require escalation, unless the bank can demonstrate that it has brought its governance into order.

What is a potential GAAR transaction?

6.35. The Protocol states that escalation to HMRC directors is required where a transaction is a potential General Anti –Abuse Rule (GAAR) transaction.

6.36. A potential GAAR transaction will include any case where any of the following notices envisaged by the GAAR legislation has been issued and counteraction under the GAAR is still being considered. These notices are:

- a notice of proposed counteraction under paragraph 3 of Schedule 43 FA 2013,
- a provisional counteraction notice under section 209A FA 2013,
- a pooling notice under paragraph 1, or
- a notice of binding under paragraph 2 Schedule 43A FA 2013.

Where a notice has been issued but a point has been reached where no further steps will be taken under the GAAR to counter a tax advantage, this will no longer be considered to be a potential GAAR transaction.

6.37. A potential GAAR transaction will not include cases where SCS in LB and BAI are considering escalation under the Code, but the point has not yet been reached where a decision has been made about issuing notices under the GAAR. This will include pre-transaction or pre-filing situations, in many of which insufficient information will be available to make a decision about the GAAR.

Revisiting the Code decision following GAAR counteraction

6.38. As authorised by section 287(4) and (5) FA 2014 the Governance Protocol provides that there is a breach of the Code if certain action is taken under the GAAR. This is 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 that it would be appropriate to apply the GAAR and a notice has been given under paragraph 12 of Schedule 43 FA 2013.

6.39. In such a case the role of the Code Independent Reviewer and the HMRC Commissioners is limited to considering whether the bank should be named in the HMRC annual report. The HMRC director will notify the bank that it is in breach of the Code and ask for representations about remedial or mitigating action or exceptional circumstances to be taken into account by TDRB, the Independent Reviewer and the HMRC Commissioners in considering whether the bank should be named.

6.40. The Governance Protocol envisages that there could be a breach of the Code in cases referred to the GAAR Advisory Panel which do not lead to the issue of a counteraction notice. In such cases the Responsible Officers will consider whether any further action should be taken bearing in mind the reasons for the GAAR Advisory Panel's decision. The next step is likely to be escalation to a meeting between the HMRC director and the customer.

6.41. A notice of proposed counteraction or other GAAR notice may be issued after the Responsible Officers have decided not to escalate a transaction under the Code. Although this will mean that it is a potential GAAR transaction under the interpretation suggested above, HMRC will usually wait for the GAAR Advisory Panel decision before escalating under the Code. This is because the Code action necessarily will depend on the Panel decision and reopening Code discussions may be a distraction from the GAAR and other action being taken.

Role of the Independent Reviewer

6.42. Before determining whether there has been a breach, HMRC's Commissioners must first commission an Independent Reviewer to give an opinion on whether there has been a breach of the Code (subject to no GAAR notice having been given: see paragraph 6.39), and if so whether HMRC's Commissioners should publish the name of a bank as having breached the Code. The matter will be referred to the Independent Reviewer once the bank is notified of TDRB's conclusion.

6.43. The legislation requires that the Independent Reviewer consider the particular bank's conduct when determining whether they have breached the Code – section 287 FA 2014. The Independent Reviewer has an obligation to follow the Protocol as far as it is relevant to their functions.

Circumstances in which HMRC can override the Independent Reviewer

6.44. The final decision on whether a bank is in breach of the Code, and if so whether to name that bank, is made by HMRC's Commissioners. The legislation requires that the Commissioners consider the particular bank's conduct when determining whether they have breached the Code – section 287 FA 2014.

6.45. The circumstances in which HMRC can override the Independent Reviewer are set out in section 287(10) FA 2014.

6.46. These provisions limit the circumstances in which the Commissioners are legally entitled to make a different determination from the Independent Reviewer in a case where the

reviewer has determined that the bank should not be named. Specifically, HMRC may reach a different determination from the Independent Reviewer only in two limited and exceptional circumstances:

- if the Independent Reviewer's opinion is flawed when considered in the light of the principles applicable in proceedings for judicial review (the Wednesbury test of unreasonableness); or
- there are other compelling reasons for HMRC reaching a different conclusion. These compelling reasons must relate to specific actions of the bank and be in relation to tax matters.

6.47. The question of whether either of those exceptional circumstances arise is to be determined objectively. If, as a matter of fact, the decision was not flawed or there are no other compelling reasons, the Commissioners are not entitled to do anything apart from accept the Independent Reviewer's determination.

6.48. If the Commissioners do make a different determination which the bank challenges by judicial review on the grounds that it is ultra vires, the effect of section 287(11)(b) FA 2014 is that the burden of proof is on the Commissioners to show that the Independent Reviewer's determination was flawed or other compelling reasons exist. In deciding that issue, the court will apply an objective test to determine whether in its view the determination was flawed or other compelling reasons exist.

6.49. Full details of the behaviours or circumstances that might lead HMRC to have concerns over a bank's compliance with the Code are included in chapter 7 covering HMRC's operation of the Code. Further guidance on HMRC's views on how the Code applies including the "intentions of Parliament" are included in chapters 3, 4 and 5.

Impact of criminal investigation on escalation process

6.50. Where there is an ongoing criminal investigation relating to a tax matter (for example where a bank is under criminal investigation for a failure to prevent the facilitation of tax evasion), HMRC will normally postpone any consideration of whether a bank has breached the Code until the criminal proceedings conclude. This is to prevent the investigation and proceedings from being prejudiced. Any Code concerns that remain will be addressed once the outcome of the proceedings is known.

Chapter 7 - HMRC Operation of the Code

7.1. This chapter provides guidance on the way in which HMRC responds to approaches under the Code and how it checks that banks are keeping their commitments under the Code.

Adopting the Code

7.2. Banks with a HMRC Customer Compliance Manager (CCM) should speak to their CCM about adopting the Code. A bank which does not have a CCM should approach its usual point of contact or make a submission to the following email address: midsizebanks.wmbc@hmrc.gsi.gov.uk

7.3. HMRC regularly monitors the Prudential Regulatory Authority and Financial Conduct Authority authorisations for those businesses that fall within the Code population (as described in Chapter 2), and will attempt to contact newly authorised businesses with information on how to adopt the Code.

Code approaches

7.4. Part 4 of the Code encourages the bank to disclose to HMRC any proposed transaction where, on the bank's analysis, the tax result may be contrary to the intentions of Parliament. The bank can discuss the proposed transaction with its CCM before it takes place. A bank which does not have a CCM should approach its usual point of contact or make a submission to the following email address: midsizebanks.wmbc@hmrc.gsi.gov.uk

7.5. A Code approach can be made on behalf of a bank by an agent, but any such approach must name the bank involved.

7.6. The bank should provide sufficient information to enable HMRC to understand the proposed transaction, and at the very least this should include the sort of details required for a disclosure under the Disclosure of Tax Avoidance Schemes, Part 7 Finance Act 2004 (DOTAS) regime:

- a summary of the proposed transaction or transactions;
- information explaining the elements of the proposed transaction and how the expected tax advantage arises;
- and the statutory provisions on which the tax advantage is based.

7.7. In addition, the bank should:

- set out the commercial purpose of the transaction
- set out its analysis of the intentions of Parliament in enacting the relevant legislation and explain how this analysis applies to the proposed transaction.

7.8. The bank should be prepared to help HMRC understand how the tax advantage arises if HMRC wishes to discuss the proposed transaction.

7.9. Where the approach is made before a transaction takes place, the disclosure should be made as far in advance as is practical to allow HMRC time to review the available information and comment on it. How far in advance will be a matter for the bank's judgement, taking account of the circumstances and the complexity of the proposed

transaction. HMRC may wish to discuss the proposed transaction in detail before commenting. HMRC recognises that commercial transactions sometimes happen very quickly and, in these cases, there may be little opportunity to disclose the transaction in advance.

7.10. HMRC will generally respond to Code approaches within 28 days. Where there is a commercial imperative to agree the Code position more quickly than this, HMRC will endeavour to meet this requirement. Where the complexity of the issues raised means that more time may be needed, HMRC will indicate to the bank at the outset that a decision is likely to take longer. If HMRC needs to ask for more information, the time taken by the bank to provide that information is excluded from the response time. The bank should make reasonable efforts to give HMRC sufficient time to comment, but banks do not need permission or clearance from HMRC and are under no obligation to await a response where commercial considerations require a business decision.

7.11. However, banks should be aware of the potential consequences of undertaking a transaction that may be determined by HMRC to be Code Red. In particular, under the arrangements set out in the Governance Protocol, the issue may be escalated to HMRC Commissioners to make a final determination on whether there is Code non-compliance, and if so, whether the bank concerned should be named.

7.12. HMRC acknowledges that it is not commercially practicable or realistic for banks to seek to discuss every single transaction with HMRC and there will be occasions where banks will need to exercise judgement when considering their Code obligations. Where a bank has carried out reasonable and proportionate due diligence of the legislation, underlying policy and supporting statements, and reasonably concludes that a transaction was not contrary to the intentions of Parliament, the bank will be compliant with the Code even if HMRC subsequently disagrees with this assessment. HMRC will take into account any evidence that the bank provides which shows it has conducted this assessment.

HMRC response to Code approach

7.13. HMRC will comment on the question that arises under the Code, namely whether the proposed transaction, in HMRC's view, gives rise to a tax result contrary to the intentions of Parliament. When HMRC receives an approach under the Code it will expect the bank to have carried out a tax analysis and be satisfied that this analysis fully supports the tax outcome presented. HMRC will assume for this purpose (but for this purpose alone) that the bank's legal/tax analysis is correct.

7.14. The CCM or equivalent will be responsible for identifying who in HMRC needs to be involved in considering the Code question, co-ordinating the work within HMRC, and ensuring that the bank is kept informed of progress.

7.15. To ensure consistency, all Code approaches and decisions are recorded and every approach is overseen by two HMRC officers at SCS grade, one from LB and one from BAI. They must review the approach and agree whether the transaction is Code Red or Code Green. They are also responsible for deciding whether the bank's actions require escalation in line with the Governance Protocol.

7.16. If a bank has any concerns about how it has been treated under the Code, it should raise these with the LB regional lead.

Code Red decision

7.17. If HMRC decides that a transaction is Code Red, then the CCM or equivalent will communicate this to the bank at the earliest opportunity providing details of HMRC's reasoning. If after considering HMRC's reasoning the bank still considers the transaction to be Code Green, HMRC will usually be willing to enter into further discussion with the bank around forming a common view of the intentions of Parliament or whether planning has become established practice. This will not be possible in all cases, and there will be instances where the bank and HMRC continue to disagree.

7.18. If the bank and HMRC continue to disagree about the intentions of Parliament or whether planning has become established practice, and the bank wishes to continue with the transaction, it will then be given an opportunity to make written representations on why it still believes the transaction was Code Green. This should take into account the bank's discussions with HMRC, and should explain how the bank came to its conclusion.

7.19. HMRC will not tell the bank not to carry out the transaction; that will always remain a business decision for the bank. Instead the CCM or equivalent will try to establish through discussion whether the bank remains committed to the Code principles and whether the bank's governance processes are compliant with its Code commitments. The bank will have the opportunity to make its representations which HMRC will take into account.

7.20. Based on these discussions, the Responsible Officers (explained in paragraph 6.21) will decide whether to escalate the decision in line with the Governance Protocol. See paragraphs 6.26 to 6.28 for the factors the Responsible Officers will take into account in deciding whether to escalate a single planning transaction.

7.21. If the bank decides to proceed with a transaction, despite the Code Red decision, HMRC will first form a view about the bank's reasonable belief. If the Responsible Officers consider the bank did have a reasonable belief that the transaction is not contrary to the intentions of Parliament or has become established practice as defined in paragraphs 4.40-4.44, then it will not normally be escalated to the HMRC director unless it is part of an emerging pattern of behaviour or is a potential GAAR transaction.

7.22. However, if it appears the bank had no such reasonable belief, the bank should be aware that this automatically disqualifies it from being classified as a Low Risk business in HMRC's Business Risk Review, and the transaction is likely to be escalated to HMRC director level.

7.23. The Governance Protocol explains in detail the next stages in the escalation process. The bank will be given the opportunity to make representations at each stage of the process and this evidence will be taken into account throughout. The HMRC Commissioners are required to take into consideration the opinion of an Independent Reviewer before they decide whether to name the bank in the Annual Report. While the final decision rests with the HMRC Commissioners there are only very limited circumstances in which they can deviate from the Independent Reviewer's decision, which is explained in more detail in paragraphs 6.44-6.49.

7.24. Regardless of whether the bank had a reasonable belief, if HMRC believes a transaction obtains a tax result contrary to the intentions of Parliament it may approach the

Treasury, and if appropriate Ministers, with a view to potentially changing the law. The government has a track record of acting to close avoidance opportunities of which it becomes aware, often announcing proposals to change the law with immediate effect.

Code Green decision

7.25. HMRC will tell the bank if it concludes the transaction is Code Green.

7.26. As explained in paragraphs 4.60-4.62, HMRC assumes that the bank's technical analysis is correct when deciding whether a transaction is Code compliant.

7.27. The bank should not therefore assume that a Code Green decision means HMRC agrees with the bank's tax analysis or will not seek to challenge the arrangements. If the bank wishes to discuss the legal/tax analysis with HMRC it should speak to the CCM or equivalent. .

7.28. A Code Green decision does not mean HMRC regards the arrangements as acceptable transactions or that Ministers will not seek to change the law.

7.29. As explained in paragraph 4.63-4.64 where one or more purpose tests are relevant to a transaction HMRC accepts the bank's purpose as fact and gives its view on whether the transaction is Code compliant based on the stated purpose. If, HMRC subsequently find the bank had a "bad" main purpose the transaction would be Code Red unless the bank had a reasonable belief that tax avoidance was not a main purpose of the transaction, or that the anti-avoidance legislation in question was not intended by Parliament to apply to it. Code Green decisions will include a note to this effect.

7.30. HMRC will not be able to comment on the GAAR position at the time of the Code approach, and decisions will include a note to this effect.

The Code and DOTAS

7.31. Disclosure under the Code does not remove the statutory obligations under the Disclosure of Tax Avoidance Schemes (DOTAS) and Promoters of Tax Avoidance Schemes (POTAS) regimes.

7.32. However, banks do not need to notify arrangements under the Financial Products hallmark of the DOTAS regime if HMRC has confirmed, or could reasonably be expected to confirm, that the arrangements are acceptable under the Code. If a transaction is exempted from the Financial Products hallmark, it also does not need to be notified under the Standardised Tax Products hallmark.

7.33. These exemptions do not apply to arrangements that HMRC has advised are Code Red unless HMRC subsequently accept that the bank did have a reasonable belief that the transaction is not contrary to the intentions of Parliament or has become 'established practice' (as defined in paragraphs 4.40-4.44). Where the exemption does not apply banks will need to consider whether the hallmark conditions are met to determine whether they need to notify the arrangement under DOTAS.

7.34. A bank cannot assume a scheme that has been disclosed (whether under DOTAS or not) but not legislated against is acceptable. There may be a number of reasons why the law has not been changed.

Ensuring banks keep their Code commitments

7.35. The commitments banks make under the Code represent good practice in large business tax compliance and for the most part HMRC builds Code compliance monitoring into its day to day dealings with banks in respect of their own tax affairs, their level of engagement and openness with HMRC and their dealings with customers. Code compliance is also an additional element integrated into the annual risk review[13] carried out by CCM led teams dealing with banks, and HMRC carries out some targeted Code compliance activity.

Business Risk Review

7.36. The annual or triennial risk review carried out as part of the BRR+ process enables teams to establish a good understanding of the tax risk profile in a particular business. For a bank this process requires the team to consider what evidence HMRC has that the bank:

- has been open and transparent in its dealings with HMRC;
- has appropriate governance arrangements to ensure that all parts of the bank are complying with its commitments under the Code and that these arrangements are applied in practice; and
- does not undertake tax planning that aims to achieve a tax result that is contrary to the intentions of Parliament.

7.37. The CCM team does this by reviewing information from a range of sources including information HMRC already holds in respect of a business from pre- or post-transactions' discussions and information held in the public domain. CCM teams will address gaps in knowledge through direct engagement with the customer, for example by requesting a demonstration of the governance process a particular transaction went through.

7.38. The tables at paragraphs 7.47 to 7.49 provide suggestions of what 'good' looks like for each of the commitments and what may cause the CCM to be concerned that a bank is not meeting its Code commitments. HMRC would have concerns where a bank fell into any one of the boxes in the right-hand column of these tables.

7.39. The CCM team will use the information gathered during the review and in any follow up engagement with the customer to make a judgement on whether the bank is fully complying with its Code commitments. If they are satisfied that it is, the CCM will advise the bank accordingly at the BRR.

7.40. If the CCM has any concern that a bank is not meeting its Code obligations, they will discuss this with the business in line with the Governance Protocol.

Code compliance for banks dealt with outside Large Business

7.41. Code compliance is part of the risk assessment process for smaller banks dealt with outside of LB and will be addressed as part of the normal enquiry process.

[13] The risk review process is set out in the tax compliance risk manual (TCRM3000+) https://www.gov.uk/hmrc-internal-manuals/tax-compliance-risk-management/tcrm3000

Potential tax planning issues identified during risk assessment

7.42. Case teams in LB or Mid-Size may identify transactions in the course of risk assessment or risk working which have not been the subject of a Code approach but need to be considered under the tax planning part of the Code.

7.43. Where the case team is concerned that a transaction it identifies in this way could involve tax avoidance, then in addition to any investigation of the issue under HMRC's usual compliance powers, the CCM or equivalent will raise the question of Code compliance with the bank. This will include finding out if the transaction was considered as part of the bank's Code governance and, if it was, the outcome. If the bank didn't consider the Code in relation to the transaction, this may give rise to a concern under the governance commitment.

7.44. When the case team has more understanding of the transaction, the CCM or equivalent will consider if they are still concerned that it may give a tax result that is contrary to the intentions of Parliament. If they are, the case team will undertake a comprehensive review of the bank's compliance with the Code, including its governance.

7.45. When this is complete and the views of HMRC technical and policy specialists have been obtained, the Responsible Officers (see paragraph 6.21) will reach a decision on whether in their view the tax planning gave a result that was contrary to the intentions of Parliament and has not become established practice. If they conclude it did, they will investigate the governance process employed by the bank and the reasonableness of the beliefs it formed about the transaction's compliance with the Code, and then consider whether the transaction should be escalated for a director level meeting. See paragraphs 6.19-6.30 for the factors to be taken into account in making this decision.

7.46. If the Responsible Officers reach a decision that the tax planning does not give a result that was contrary to the intentions of Parliament but finds there are unaddressed concerns in respect of the governance and/or relationship commitments, it is likely that Responsible Officers will conclude this case should be escalated for a director level meeting with the bank. At each stage, there will be discussion between the bank and HMRC, and the bank will have reasonable opportunities to rectify their position in line with the Governance Protocol.

Governance

7.47.

What Code compliant governance looks like	Where governance arrangements may give cause for concern
The bank's strategy for tax management reflects the commitments made under the tax planning part of the Code.	There are weaknesses in the bank's tax risk management framework (e.g. there is no policy reflecting the tax planning part of the Code).
There is a clear policy and process in place for ensuring that the bank's strategy for tax management is applied in practice.	The bank's policy is not clear because it does not directly reflect the commitments made under the Code and there is no documented process in place for considering the tax implications of major transactions and tax sensitive transactions.
The bank's policy and process for tax risk management is well understood within all parts of the bank. The bank's policy and process for tax risk management is applied in practice by all parts of the bank.	HMRC has concerns over whether the bank's tax strategy for tax risk management is understood and operated within the bank regarding major transactions and transactions that may need to be referred to HMRC under the Code.
The bank's policy and process for tax risk management covers all tax sensitive transactions which generate a UK tax advantage for the bank or its customers including transactions undertaken or promoted by overseas subsidiaries.	HMRC has concerns over whether the bank is fully committed to the undertakings in its strategy. HMRC has concerns over whether the bank has an adequate policy in place. HMRC has concerns over whether the policy has been implemented fully with a comprehensive process
The bank's policy and process for tax risk management applies to all heads of tax – CT, PAYE & NIC, VAT, Stamps and more.	The bank's policy and process for tax risk management does not apply to all heads of tax or the process has not been implemented.
The bank's attitude towards the openness, transparency and professionalism of its relationship with HMRC reflects the commitments made under the relationship part of the Code	HMRC has concerns over the bank's attitude towards the openness, transparency and professionalism of its relationship with HMRC.

HMRC would have concerns where a bank fell into any one of the boxes in the right-hand column. See paragraph 7.50 for an example of concerns over poor Code governance.

Tax Planning

7.48.

What Code compliant tax planning looks like	Where a bank's tax planning may give cause for concern
The bank does not engage in tax planning other than that which supports genuine commercial activity.	The bank undertakes tax planning which does not support genuine commercial activity
Transactions are not structured in a way that will have tax results for the bank that are inconsistent with the underlying economic consequences unless there exists specific legislation designed to give that result. In that case, the bank reasonably believes that the transaction is structured in a way that gives a tax result for the bank which is not contrary to the intentions of Parliament. The bank is only involved in promotion of arrangements to other parties where the bank reasonably believes that the tax result of those arrangements for the other parties is not contrary to the intentions of Parliament.	The bank has failed to adhere to the tax planning strategy envisaged by the Code in its formal operations and policy. The bank has failed to 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. The bank has failed to 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. The bank has failed to prevent implementation of or the promotion of transactions where the tax management function was not satisfied that: 1. they supported genuine commercial activity, 2. 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; or if not, 3. the tax planning involved has become established practice. The bank failed to take reasonable views in coming to decisions under points 1 to 3 above.

Remuneration packages for bank employees, including senior executives, are structured so that the bank reasonably believes that the proper amounts of tax and national insurance contributions are paid on the rewards of employment.	The bank has failed to ensure remuneration packages for its employees are structured so that it reasonably believes that the proper amounts of tax and NIC are paid.

HMRC would have concerns where a bank fell into any one of the boxes in the right-hand column.

Relationship

7.49.

What a Code compliant relationship looks like	Where a bank's relationship with HMRC may give cause for concern
Where HMRC is conducting enquiries it will take the time to fully explain the risks and suggest to the bank the information that it thinks could be used to address those risks. HMRC expects banks that have adopted the Code to be transparent and proactive in their relationship with HMRC.	The bank exploits the information bias between HMRC and the bank by answering only the narrow question asked without considering whether a broader explanation might be more appropriate and useful to HMRC.
The bank fully discloses significant uncertainties re tax matters.	The bank fails to disclose fully significant uncertainties regarding tax matters.
The bank focuses on significant issues when making disclosures to or seeking clearances from HMRC.	The bank fails to focus on significant issues.
The bank seeks to resolve issues before returns are filed where practicable.	The bank does not seek to resolve issues where practicable before returns are filed.
The bank engages in a co-operative, supportive and professional manner.	The bank does not engage with HMRC in a co-operative, supportive and professional manner.
The bank works collaboratively with HMRC.	The bank is not working collaboratively with HMRC.
The bank is fully committed to the undertakings it has given under the Code.	The bank is not fully committed to the undertakings it has given under the Code. In particular the bank has provided misleading information or otherwise concealed information either at the time a transaction was undertaken or in seeking to address concerns in respect of that transaction.
The bank is fully committed to a shared plan to resolve any delivery concerns.	The bank is not fully committed to a shared plan to resolve any delivery concerns.

HMRC would have concerns where a bank fell into any one of the boxes in the right-hand column. See paragraph 7.52 for an example of concerns over a bank's relationship with HMRC.

Examples

7.50.

Example 1 – Poor Internal Governance
A serious lack of internal governance that in HMRC's opinion is not consistent with a bank's Code commitments
Scenario 1 Transactions are undertaken before Code compliance is considered and HMRC only become aware of issues post transaction. This could be because ● the bank's strategy for and governance of risk management for tax matters does not include all key personnel; ● in large organisations, the key tax department/advisers are not sighted on all aspects of the business (such as wealth units or private banks). **Scenario 2** A bank approaches HMRC about a planned change involving PAYE. HMRC considers this to be Code Red and has already informed the bank that it considered previous transactions to be Code Red (were it not for the bank's reasonable belief that they are not). A repeated difference of opinion could be an indication that the bank's internal governance processes do not adequately reflect the principles of the Code and are not, therefore, deterring the bank from entering into transactions that achieve outcomes which are contrary to the intentions of Parliament. This would suggest that the bank's strategy for and governance of risk management for taxation matters is not fully understood and operated within the bank. In both scenarios HMRC would be concerned that the bank's internal governance does not adequately support its obligations under the Code. HMRC's actions in response to these concerns are all subject to the Governance Protocol. Initially the CCM or equivalent will raise these concerns with the bank at the earliest opportunity. If discussion between the CCM and the bank does not resolve the concerns, HMRC will seek to arrange a meeting between an HMRC Director and senior finance representatives from the bank. If, following that meeting, there is still no indication that the bank is attempting to implement strategic or governance change, the case will be escalated to the Tax Disputes Resolution Board (TDRB). If the TDRB takes an interim view that the bank has breached the Code it will commission a report from an Independent Reviewer whose views will be taken into account when the Tax Commissioners consider the bank for naming as non-compliant in the next annual report.

7.51.

Example 2 – A one off transaction counteracted under the GAAR
A bank implements a transaction to achieve a tax advantage on its own account, and also markets the product to a number of clients. The bank does not approach HMRC under the Code pre-transaction but does submit a DOTAS disclosure in respect of the transaction(s). The GAAR panel decides that entering the arrangements was not a reasonable course of action and following this opinion, the designated officer in HMRC sends a notice of proposed counteraction to the bank.
Once the GAAR panel has reached agreement that the arrangements are not a reasonable course of action and the designated officer has sent a notice of proposed counteraction, then the action by the bank in entering into and promoting this transaction is a breach of the Code. As this is an automatic breach of the Code, HMRC will immediately instruct the Independent Reviewer to consider whether the bank should be named in the next annual report. The Commissioners will then decide whether to name the bank in line with the Governance Protocol.

7.52.

Example 3 – Relationship between bank and HMRC
A bank may have adopted the Code but not have an open and transparent relationship with HMRC.
During risk assessment the case team identified a transaction with significant tax at risk which they considered may give a tax result that is contrary to the intentions of Parliament. The case team opens an enquiry and asks questions about the transaction and how the bank considered the Code in relation to this transaction. The bank is very slow to respond and unwilling to agree timelines for delivery of information. When information is provided this is not sufficient for HMRC to understand the transaction. During the course of the long-running enquiry, the case team discover the bank had considered the application of the Code to the transaction and were unsure whether the tax result was contrary to the intentions of Parliament. The bank had not brought this to HMRC's attention. HMRC determined that the tax result was not contrary to the intentions of Parliament. However, this scenario gives rise to concerns about the bank's commitment to the Code for the following reasons: • The bank only disclosed this significant uncertainty to HMRC after prompting and even then failed to disclose it fully, despite considering the application of the Code and being uncertain about its application. • The bank did not engage with HMRC in a cooperative, supportive and professional manner. • The bank did not work collaboratively with HMRC. • The bank failed to work with HMRC to agree reasonable timelines. In these circumstances the CCM or equivalent will raise the concerns with the bank at the earliest opportunity, once this action has been approved at Responsible Officer[14] level. If discussion between the CCM and the bank does not resolve the concerns, HMRC will seek to arrange a meeting between an HMRC director and senior representatives from the bank. If there is still no indication that the bank is attempting to implement strategic or governance change including a commitment to an open and transparent relationship with HMRC, further action will be taken under the Governance Protocol with a view to determine if the bank is not compliant and if it is whether it should be named in the next annual report.

[14] See paragraph 6.21

Chapter 8 - The Annual Report

Section 285 FA 2014

8.1. Section 285 FA 2014 introduced a legal requirement for HMRC to publish an annual report on the operation of the Code during the period covered by the report. The first reporting period began on 5 December 2013 and ended on 31 March 2015. Subsequent reporting periods are for years ending 31 March. All reports must be published by 31 December following the reporting period.

8.2. The report must include:

- a list of those banks which are regarded as having adopted the Code during some or all of the reporting period ("list of adopters"); and
- a list of those banks which HMRC considers to be in the Code population that are not on the list of adopters ("list of non-adopters").

8.3. The report may include:

- the name of any bank which HMRC determines breached the Code during the reporting period; and/or
- the name of any bank which HMRC determines breached the Code during any earlier reporting period where it was not reasonably practicable for information relating to the breach to be included in the report for the period when the breach occurred.

8.4. HMRC can only name a bank as having breached the Code when it has completed all the steps set out in the Governance Protocol (see chapter 6).

List of Adopters

8.5. The List of Adopters is a list of those banks which have adopted the Code during some or all of the reporting period.

8.6. Where, on or after 31 May 2013, a bank has notified HMRC in writing that it is unconditionally committed to complying with the Code that bank becomes a "participating" group or entity for the purposes of the Code and will appear on the List of Adopters until it ceases to be a participating group or entity. ("Participating" group or entity is the wording used in FA 2014 but in practice these groups or entities are referred to as banks which have adopted the Code.)

8.7. Where the adoption covers all of a group's operations in the UK, the List will normally include only an agreed principal name for the overall adopting group. Where requested, HMRC will include names in addition to the principal group name if:

- the names on the Prudential Regulation Authority (PRA) lists[15] are so different that it would not be obvious that they are connected and covered by the same adoption; or
- a group operating in the UK does so through separately named and independently managed entities and their names are so different that it would not be obvious that they are connected.

[15] The PRA lists are the lists of banks and building societies regulated by the PRA published on the Bank of England website (see paragraph 2.11).

8.8. There are two circumstances where a bank ceases to be regarded as having adopted the Code:

(a) when it notifies HMRC in writing that is no longer unconditionally committed to complying with the Code; and

(b) when it is named in the annual report on operation of the Code as having breached the Code.

8.9. If a bank in category (a) later decides it wants to readopt the Code, it can do this by making a new written notification to HMRC saying that it is unconditionally committed to complying with the Code.

8.10. If a bank in category (b) later decides it wants to readopt the Code and makes a new written notification to HMRC to that effect, it will only be regarded as having adopted the Code again if HMRC is satisfied that the bank is committed to complying unconditionally with the Code.

List of Non-Adopters

8.11. The List of Non-Adopters is a list of those banks which HMRC considers to be in the Code population that are not on the List of Adopters. See chapter 2 for further information on how HMRC determines which banks are in the Code population.

Other information included in the Annual Report

8.12. The annual report also covers other issues and topics of relevance to the operation of the Code including:

- HMRC's compliance work with banks (see paragraphs 7.35 onwards for more information on the work HMRC does to review whether banks are meeting their Code commitments); and
- HMRC's response to Code approaches (see paragraphs 7.4-7.16 for more information on Code approaches).

Chapter 9 – Interaction of the Code with other measures

Large Business Tax Strategy

9.1. Part 2 of Schedule 19 FA 2016 includes a requirement for large businesses to publish their tax strategy in so far as it relates to UK taxation.

9.2. The requirement applies to all qualifying UK groups, UK sub-groups and qualifying companies and includes UK permanent establishments. These terms are defined in part 1 of Schedule 19 FA 2016 and will include the majority of banks which have adopted the Code. HMRC published guidance on the requirement on 31 March 2016[16].

9.3. The policy objective is set out in the Explanatory Note published at Autumn Statement 2015:

> "The publication of tax strategies will ensure greater transparency around a business's approach to tax to HMRC, shareholders and consumers. Board level oversight of those strategies will embed tax strategy in existing corporate governance processes. Taken together this should drive behavioural change around tax planning and therefore enhance tax compliance."

9.4. The Code was introduced with a similar objective (i.e. to drive behavioural change around tax planning and therefore enhance tax compliance) and we have seen a behavioural shift by banks since it was introduced.

9.5. The government requires all qualifying businesses to publish a tax strategy regardless of whether or not they are already exhibiting low risk behaviour and banks who have adopted the Code will be required to publish their tax strategy if they are a qualifying group or company.

9.6. For qualifying UK groups, UK sub-groups and qualifying companies the tax strategy should cover:

(a) their approach to risk management and governance arrangements in relation to UK taxation,
(b) their attitude towards tax planning (so far as affecting UK taxation),
(c) the level of risk in relation to UK taxation they are prepared to accept, and
(d) their approach towards its dealings with HMRC,
(e) and may also include further information.

9.7. The obligations required by the Code are more stringent than those under the large business tax strategy. The more general rules are not therefore expected to impose new obligations on banks who have adopted and adhere to the Code.

9.8. For (a) we expect a bank which has adopted the Code to be able to demonstrate that it has adequate governance in place to ensure it meets all its Code commitments including the commitment to comply fully with all its UK tax obligations. Its published tax strategy should include sufficient information to enable customers and shareholders or members to recognise this is the case. See paragraphs 2 and 2.2 of the Code, paragraph 1.1 for small banks.

9.9. For (b) and (c) we expect a bank's entries to reflect its obligations the Code.

[16] https://www.gov.uk/guidance/large-businesses-publish-your-tax-strategy

9.10. For (d) we expect a bank which has adopted the Code to state that it maintains a transparent relationship with HMRC.

9.11. If a bank, which has adopted the Code, does not include the information outlined in paragraphs 9.7 to 9.9 above in its published tax strategy, HMRC will ask the bank to explain this and provide reassurances that it remains committed to the Code.

Code and special measures

9.12. The Government introduced special measures in Part 3 of Schedule 19 FA 2016 *"to impact a small section of Large Businesses who persistently engage in aggressive tax planning and/or who refuse to engage with HM Revenue and Customs (HMRC) in an open and collaborative way."*

9.13. Compliance with the Code requires a bank to maintain an open and collaborative relationship with HMRC and to refrain from engaging in aggressive tax planning. It is therefore unlikely that a Code compliant bank would be subject to special measures.

9.14. However, a bank does not have to be found to be in breach of its obligations under the Code in order to be subjected to special measures. The two regimes are independent of each other.

Code and Senior Accounting Officer Regime

9.15. The Senior Accounting Officer (SAO) regime was introduced in 2009 to ensure large companies have the appropriate tax arrangements in place to deliver correct and complete tax returns. Unlike the Code it makes no judgement on the nature of the transactions those companies undertake. The Code and the SAO regime are seeking to address different issues: avoidance of tax and incorrect reporting of tax.

9.16. The Code applies to the bank and failure to keep the commitments under the Code may result in a bank being named. The SAO regime applies to the company or group but failure to meet its requirements may result in a personal penalty on the SAO. It is the SAO that failed in his duty and not the company of which he is a director or officer. However, where an SAO main duty failure penalty is imposed on the SAO of a bank which has adopted the Code, it is likely to be evidence of weaknesses in governance issues and may give rise to concerns under the Code.

Enablers of tax avoidance

9.17. Schedule 16 Finance (No.2) Act 2017 introduced penalties for any person who enables the use of abusive tax arrangements that are later defeated. An enabler is any person who is responsible, to any extent, for the design or marketing of, or otherwise facilitating another person to enter into, abusive tax arrangements. When such arrangements are defeated in court or at the tribunal, or are otherwise counteracted, each person who enabled those arrangements may be liable to a penalty.

9.18. The enablers legislation only applies to a person if they enable abusive tax arrangements that are entered into on or after 16 November 2017, which is the date of

Royal Assent to the Finance (No.2) Act 2017. The enabling activity must also have been undertaken on or after this date.

9.19. A bank may be compliant with the Code, but could still be a financial enabler or an enabling participant to abusive tax arrangements. More information on this can be found in the guidance on what makes a person an enabler of tax avoidance[17].

Corporate offences for failing to prevent criminal facilitation of tax evasion

9.20. Part 3 of the Criminal Finances Act 2017 introduced corporate offences for failing to prevent criminal facilitation of tax evasion.

9.21. Before the introduction of these corporate offences, attributing criminal liability to a relevant body required prosecutors to show that senior members of that relevant body were involved in and aware of the illegal activity. This meant that those bodies that refrained from implementing good corporate governance and reporting procedures were harder to prosecute, and lacked incentive to invest in preventative procedures.

9.22. The legislation aims to tackle crimes committed by those who act for or on behalf of a relevant body. The Government introduced guidance on these corporate offences on 1 September 2017[18].

9.23. The legislation does not hold relevant bodies to account for the crimes of their customers, nor does it require them to prevent their customers from committing tax evasion. Nor is the legislation designed to capture the misuse of legitimate products and services that are provided to customers in good faith, where the individual advisor and relevant body did not know that its products were intended to be used for tax evasion purposes.

9.24. As stated in paragraph 6.49, where a bank is under criminal investigation in relation to a tax matter, any consideration of the Code will normally be postponed until the criminal proceedings are concluded.

9.25. Where a bank is prosecuted under the corporate offence for failing to prevent criminal facilitation of tax evasion, HMRC will subsequently review the bank's compliance with the Code.

[17] https://www.gov.uk/guidance/tax-avoidance-enablers-who-is-classed-an-enabler
[18] https://www.gov.uk/government/publications/corporate-offences-for-failing-to-prevent-criminal-facilitation-of-tax-evasion

Annex A: The Code of Practice on Taxation for Banks

OVERVIEW

1. The Government expects that banking groups, their subsidiaries, and their branches operating in the UK, will comply with the spirit, as well as the letter, of tax law, discerning and following the intentions of Parliament.

1.1 This means that banks should:

- adopt adequate governance to control the types of transactions they enter into
- not undertake tax planning that aims to achieve a tax result that is contrary to the intentions of Parliament
- comply fully with all their tax obligations
- maintain a transparent relationship with HM Revenue & Customs (HMRC).

GOVERNANCE

2. The bank should have a documented strategy and governance process for taxation matters encompassed within a formal policy. Accountability for this policy should rest with the UK board of directors or, for foreign banks, a senior accountable person in the UK.

2.1 This policy should include a commitment to comply with tax obligations and to maintain an open, professional, and transparent relationship with HMRC.

2.2 Appropriate processes should be maintained, by use of product approval committees or other means, to ensure the tax policy is taken into account in business decision-making. The bank's tax department should play a critical role and its opinion should not be ignored by business units. There may be a documented appeals process to senior management for occasions when the tax department and business unit disagree.

TAX PLANNING

3. The bank should not engage in tax planning other than that which supports genuine commercial activity.

3.1 Transactions should not be structured in a way that will have tax results for the bank that are inconsistent with the underlying economic consequences unless there exists specific legislation designed to give that result. In that case, the bank should reasonably believe that the transaction is structured in a way that gives a tax result for the bank which is not contrary to the intentions of Parliament.

3.2 There should be no promotion of arrangements to other parties unless the bank reasonably believes that the tax result of those arrangements for the other parties is not contrary to the intentions of Parliament.

3.3 Remuneration packages for bank employees, including senior executives, should be structured so that the bank reasonably believes that the proper amounts of tax and national insurance contributions are paid on the rewards of employment.

RELATIONSHIP BETWEEN THE BANK AND HMRC

4. Relationships with HMRC should be transparent and constructive, based on mutual trust wherever possible.

4.1 The features of this relationship should include:

- disclosing fully the significant uncertainties in relation to tax matters
- focusing on significant issues
- seeking to resolve issues before returns are filed whenever practicable
- engaging in a co-operative, supportive and professional manner in all interactions
- working collaboratively to achieve early resolution and hence certainty.

4.2 Where the bank is in doubt whether the tax result of a proposed transaction is contrary to the intentions of Parliament, to help the bank form its reasonable belief under section 3, it may discuss its plans in advance with HMRC.