

Criminal Finances Act: a summary for charities

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What is the CFA?

It has for some time been unlawful for a person to evade tax personally and for a person to knowingly facilitate tax evasion by another. The Criminal Finances Act 2017 (the 'CFA'), in force from 30 September 2017, now applies in certain circumstances to make it a criminal offence for certain organisations, including charities, to fail to prevent those who act on its behalf from doing so.

There are two offences under the CFA: failure to prevent facilitation of UK criminal tax evasion offences and failure to prevent facilitation of 'foreign' criminal tax evasion offences, meaning the facilitation and the evasion of non-UK tax which is criminal in both the UK and the non-UK jurisdiction. This first applies to all companies (and partnerships) wherever located, the second only to those incorporated, carrying on business or committing an offence by their associated persons in the UK.

These offences will only apply to companies and partnerships, so that there is no potential liability for charitable trusts (although its corporate trustee could be liable). The CFA offences contain three essential elements:

- criminal tax evasion by a taxpayer (whether of UK or foreign taxes);
- an '*associated person*' (e.g. an employee, consultant or agent) to the company criminally facilitating this evasion; and
- the company failing to prevent the associated person from committing the facilitation.

These are 'strict liability' offences so that an entity can be guilty regardless of whether it acted knowingly or unknowingly and may be responsible for the actions of a 'rogue' member of staff or consultant. The only defence to the CFA offence is to have '*reasonable prevention procedures*' in place to '*identify and mitigate*' the tax evasion facilitation risks in company or partnership.

What do charities need to know?

There is nothing in the CFA to exclude charities established as companies and so charities should consider their internal processes and the adequacy of controls in the light of these new potential offences.

While most charity trustees would never knowingly facilitate criminal tax evasion they should be alive to the risk of an 'associated person' doing so. For example, a charity whose employee was made aware that a prospective donor has paid insufficient UK tax to cover all of the charitable donations they have made/are making in a year but would sign the Gift Aid declaration in any event, could be liable for facilitating criminal tax evasion under the CFA.

An alternative example would be a situation in which a corporate sponsor asks to be given a receipt confirming that an amount paid was a donation when in fact it was sponsorship for a benefit or service provided. If an employee of the charity provided such a receipt, with or without the trustees' knowledge, the charity might be liable for assisting the sponsor's criminal tax evasion.

What can charities do?

The impact of the CFA, and the '*reasonable prevention procedures*' which might provide a defence to the offences it has introduced, will vary according to its circumstances and operations.

HMRC has published helpful guidance on the application of the CFA, offering six *'guiding principles'* to prevention procedures which charities should consider in developing policies and practical steps to address criminal finance risk:

- Risk assessment – The first step for a charity should be to carry out and document a risk assessment of its operations, to identify where *'tax evasion facilitation'* might occur within the organisation.
- Proportionality of risk-based prevention procedures – Charities should then consider how these risks can be mitigated, by a combination of policies and practical steps. While the HMRC guidance suggests these procedures must be *'bespoke'* for each organisation *'burdensome procedures designed to perfectly address every conceivable risk'* will thankfully not be required. In rare circumstances where the risks are extremely low there may be no need to implement procedures at all.
- Top level commitment – Trustees and senior management should be made aware of and understand the new offences so they can commit to preventing a CFA offence and implementing appropriate internal procedures. This could include maintaining a written statement setting out the Charity's *'position on involvement in the criminal facilitation of tax evasion, including the provision of services which pose a high risk of being misused to commit a tax evasion offence.'*
- Communication (including training) – Charities should consider how to communicate their policies on 'tax evasion facilitation' behaviour to all their 'associated persons', what staff training might be required and what whistleblowing procedures are open to staff who identify risks.
- Monitoring and review – Finally, charities should consider compliance with the CFA as an ongoing process, not a one-off check, and implement periodic reviews to ensure their procedures are effective and enforced.