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**How will the Criminal Finances Act affect universities' procurement?**



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## What is it?

The Criminal Finances Act 2017 is part of a wider attempt by the Government and HMRC to tackle tax evasion and avoidance. Historically, it has been difficult to pin suppliers with liability for tax evasion as the senior management of the company , (its "directing mind") need to have been involved to ensure that a corporate is found liable for a criminal tax offence. The Criminal Finances Act ("CFA"), which received Royal Assent on 27 April 2017 and comes into force on 30 September 2017, has addressed this by creating two new offences for companies which fail to prevent facilitation of tax evasion in the UK or overseas.

The CFA imposes strict liability on companies that fail to prevent facilitation. To avoid corporate liability a company must show that it has reasonable procedures in place to prevent persons associated with it from facilitating tax evasion.

A company guilty of an offence is liable to an unlimited fine. So getting it wrong could be expensive for the supplier and negatively impact on their ability to bid for and deliver contracts.

## How does this affect you?

There are two possible impacts of the CFA. The first is in procurement activity, where suppliers may have committed an offence under the CFA. It may be that the Public Contracts Regulations 2015 will be further amended to introduce these offences as a mandatory ground of exclusion – up to five years from the date of the offence and subject to the "self cleaning" regime. This has not currently been proposed by Government and so universities will want to consider how else these offences could be captured in procurement law terms. The strongest option to consider appears to us to be the mandatory and discretionary exclusion grounds for "*breach of obligations relating to the payment of taxes or social security contributions*" under regulation 57(3) of the Regulations. The practical limitation to this is that exclusion under this ground will require a court or similar tribunal judgment "*having final and binding effect*". This means that investigations (or appealed court judgments) will not fall within this definition and so could not be used as a ground for exclusion.

Secondly, the CFA will apply to members who own, body corporates or partnerships and capture facilitation of tax evasion by any of their "associated persons." In essence, this means anyone who performs services for the company or partnership. This includes employees, agents and subcontractors. Tax is widely defined and includes national insurance. As a result, it could capture an employee who subsequently becomes self employed and provides services through a corporate vehicle (which is particularly relevant given the recent changes to IR35 affecting many contractors to universities). It would also, for example, apply to an overseas marketing agent employed to recruit students.

## What should you do?

For your own companies, first of all, you should conduct a risk assessment of the areas where your organisation is potentially exposed and the services provided by third parties.

Having done so you should then implement prevention procedures so that you can take advantage of the statutory defence. This applies where at the time an offence is committed an organisation had reasonable procedures in place to prevent its associated persons from committing facilitation offences. The defence operates in much the same way as the existing defence of having adequate procedures in place to prevent bribery.

HMRC has published draft guidance on the kind of procedures that need to be implemented. The measures need to reflect six guiding principles;

* Risk assessment
* Proportional risk based prevention procedures
* Top level commitment
* The exercise of due diligence
* Communication of the policy and training
* Continuing ongoing monitoring and review.

For procurements, your standard template documents may need to be updated to reflect the change and guidance provided to procurement teams to ensure that this is applied consistently.

Our recommendation is to focus on major risk areas and have a clear timetable and implementation plan by 30th September 2017.

## Need more help?

If you would like to know more about CFA and its implications for procurement and the higher education sector then please contact Clare Hatcher, Partner at Clyde & Co via clare.hatcher@clydeco.com.



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