



# Finance Act 2014

## 2014 CHAPTER 26

### PART 6

#### OTHER PROVISIONS

##### *Code of Practice on Taxation for Banks*

#### **287 The Code of Practice on Taxation for Banks: operation & breaches of the Code**

- (1) The Commissioners must—
  - (a) publish a protocol, to be called “the Governance Protocol”, setting out how the Commissioners are going to operate the Code and section 285(2), and
  - (b) follow the Governance Protocol when operating the Code and section 285(2).
- (2) The Governance Protocol must require the Commissioners, before determining for the purposes of section 285(2) whether a group or entity has breached the Code at a time during a reporting period, to commission a person (an “independent reviewer”) who is independent of the Commissioners and the group or entity to report on—
  - (a) whether the group or entity has breached the Code, and
  - (b) whether the group or entity should be named in a report under section 285 were the Commissioners to determine that the group or entity has breached the Code.
- (3) The independent reviewer—
  - (a) must give the group or entity a reasonable opportunity to make representations about the matters being considered by the independent reviewer,
  - (b) subject to subsection (8), must have regard to the group or entity’s representations and may have regard to any other matter which the independent reviewer considers to be relevant,
  - (c) must give the group or entity a copy of the independent reviewer’s report, and
  - (d) must otherwise follow the Governance Protocol but only so far as it is relevant to the independent reviewer’s functions.

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*Status: This is the original version (as it was originally enacted).*

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- (4) The Governance Protocol may provide that, in the case of any conduct of a group or entity to which subsection (5) applies, the independent reviewer is to assume that the conduct constitutes a breach of the Code and, accordingly, is to report only on the matter mentioned in subsection (2)(b).
- (5) This subsection applies to any conduct—
- (a) in relation to which there has been given—
    - (i) an opinion notice under paragraph 11(3)(b) of Schedule 43 to FA 2013 (GAAR advisory panel: opinion that conduct unreasonable) stating the joint opinion of all the members of a sub-panel arranged under paragraph 10 of that Schedule, or
    - (ii) one or more such notices stating the opinions of at least two members of such a sub-panel, and
  - (b) in relation to which there has been given a notice under paragraph 12 of that Schedule (HMRC final decision on tax advantage) stating that a tax advantage is to be counteracted.
- (6) The Governance Protocol must make provision—
- (a) for the Commissioners, in determining whether a group or entity has breached the Code or should be named in a report under section 285—
    - (i) to have regard to the independent reviewer’s report, and
    - (ii) to give the group or entity a reasonable opportunity to make representations about the matters being considered by the Commissioners,
  - (b) for the Commissioners to notify the group or entity in writing of their determination,
  - (c) if the Commissioners’ determination is different from the independent reviewer’s determination, for the Commissioners to include in the notification of their determination to the group or entity their reasons for making a different determination, and
  - (d) if the Commissioners determine that the group or entity should be named in a report under section 285, for the Commissioners to hold off including in a report under that section any information relating to the breach of the Code—
    - (i) until the notification of the determination is given to the group or entity, and
    - (ii) for at least 90 days after the day on which that notification is given.
- (7) The Governance Protocol must make provision for the independent reviewer and the Commissioners, in determining whether a group or entity should be named in a report under section 285, to have regard to—
- (a) any action taken by the group or entity to remedy the breach of the Code or otherwise to mitigate its effect, and
  - (b) any exceptional circumstances which might justify not naming the group or entity.
- (8) In determining whether a group or entity has breached the Code or should be named in a report under section 285, the independent reviewer and the Commissioners—
- (a) may have regard to any conduct of the group or entity occurring on or after 5 December 2013, but

- (b) must not have regard to any conduct of the group or entity occurring before that date or at a time when the group or entity is not a participating group or entity.
- (9) Subsection (10) applies if the independent reviewer determines—
  - (a) that a group or entity has not breached the Code, or
  - (b) that a group or entity should not be named in a report under section 285.
- (10) The Commissioners may make a determination which is different from the independent reviewer’s determination only if—
  - (a) the independent reviewer’s determination is flawed when considered in the light of the principles applicable in proceedings for judicial review, or
  - (b) there are other compelling reasons for making a different determination.
- (11) If the Commissioners make a different determination in a case where subsection (10) applies—
  - (a) their reasons notified under subsection (6)(c) must set out (in particular) why the independent reviewer’s determination is flawed or (as the case may be) the other compelling reasons,
  - (b) in any proceedings in which an issue arises as to whether it was lawful for them to make the different determination it is for them to show that it was lawful for them to make the different determination, and
  - (c) subsection (12) applies in relation to any proceedings for judicial review of the different determination instituted by a member of the group or by the entity.
- (12) If the proceedings are instituted no later than the end of the 90 day period mentioned in subsection (6)(d)(ii)—
  - (a) they are to be treated as having been instituted within any applicable time limit (if that would not otherwise be the case),
  - (b) the court must give permission or leave for the proceedings to proceed (if the court’s permission or leave is required), unless that would lead to multiple proceedings dealing with the same issues, and
  - (c) any hearing (including any hearing on appeal) must be held in private, unless (having regard to the risk that holding the hearing in public might undermine to any extent the purpose of the instituting of the proceedings) the court is satisfied that there are exceptional circumstances requiring the hearing to be held in public.
- (13) If a determination of the Commissioners is different from the independent reviewer’s determination, they must mention that fact—
  - (a) in the report under section 285 for the reporting period in question, or
  - (b) if it was not reasonably practicable for that fact to be mentioned in that report, in the first subsequent report under section 285 in which it is reasonably practicable for that fact to be mentioned.
- (14) In determining for the purposes of section 285(3) or subsection (13)(b) of this section when it is reasonably practicable for any information to be included in a report under section 285, regard must be had (in particular) to the requirements of subsections (1) to (12) of this section.
- (15) The Commissioners must disclose to an independent reviewer such information held by them as they consider appropriate to enable the independent reviewer to carry out the independent reviewer’s functions.

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- (16) If the Commissioners disclose information to an independent reviewer under subsection (15), section 18 of CRCA 2005 (confidentiality) applies in relation to the independent reviewer's holding and use of the information as if the independent reviewer were an officer of Revenue and Customs and the independent reviewer's functions were functions of the independent reviewer as such an officer.