The Code of Practice on Taxation for Banks – consolidated guidance

This draft consolidated guidance replaces 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 includes new material on the “intentions of Parliament”, the Annual Report, identifying the Code population, the application of the Code to overseas entities and 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.

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Chapter 1 – Introduction

1.1 The Code of Practice on Taxation for Banks (“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 3.16).

1.2 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.

1.3 The Code (reproduced in Appendix A) describes the approach expected of banks with regard to governance, tax planning and engagement with HMRC. It encourages banks operating in the UK to adopt best practice in relation to their own UK tax affairs, and not to promote or knowingly facilitate UK tax avoidance by others. Part 1 of the Code sets out the commitments that banks adopting the Code have made. These are to:

1.4 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.

1.5 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 to have a fully documented tax strategy. Small bank is defined at paragraph 2.6 of this guidance below.

1.6 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.

1.7 As announced at Budget 2013, legislation was introduced in Finance Act 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.

1.8 Following consultation, HMRC invited all banks to unconditionally confirm or re-confirm 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.
Chapter 2 - Governance Protocol

2.1 HMRC’s Governance Protocol on a Bank’s Compliance with the Code of Practice on Taxation for Banks (“the Protocol”), first published in March 2012, sets out the escalation process for managing concerns over an individual bank’s Code compliance.

2.2 HMRC published an updated version of the Protocol on 5 December 2013. This has subsequently been revised to ensure references are up to date and was published alongside this draft consolidated guidance in November 2016.

2.3 In accordance with section 288 FA2014, any future changes to the Protocol will be subject to consultation before being introduced.

2.4 The Protocol covers “participating groups and entities”. These are defined in section 286 FA2014 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.

2.5 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).

2.6 In accordance with section 285(11) FA2014, small banks are only required to adopt Part 1 of the Code.1 A small bank is a group or entity which has not been assigned a Customer Relationship Manager (CRM) 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 CRM). 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. The considerations and processes set out in the Protocol will apply equally to all banks.

2.7 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.

2.8 The Protocol explains that at any time HMRC may have one of the following views about a bank’s compliance with the Code:

- it considers the bank to be compliant with its Code commitments;
- it has initial concerns over the bank’s compliance with the Code;

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2.9 Where HMRC considers the bank is fully complying with its Code commitments, the Protocol requires the Customer Relationship Manager (CRM) or equivalent to notify the bank of this view either as part of the annual risk review process or on another suitable occasion.

- For non-low risk banks 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 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.

(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

2.10 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 CRM 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.

2.11 This guidance does not repeat the detailed information within the Protocol but the following paragraphs include more on the role of the Independent Reviewer and the circumstances where HMRC Commissioners can override the Independent Reviewer.

2.12 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. However, before determining whether there has been a breach, HMRC must first commission an Independent Reviewer to give an opinion on whether there has been a breach of the Code, and if so whether HMRC’s Commissioners should publish the name of a bank as having breached the Code.

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2 The risk review process is set out in the tax compliance risk manual (TCRM3000+)
2.13 The legislation requires that both the independent reviewer and Commissioners consider the particular bank’s conduct when determining whether they have breached the Code – section 287 FA 2014.

Circumstances in which HMRC can override the Independent Reviewer

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

2.15 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.

2.16 Those questions are 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 reviewer’s determination.

2.17 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 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.

2.18 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 4, 5 and 6.
Chapter 3 - The Annual Report

S285 FA2014

3.1 Section 285 FA2014 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 the next 31 December following the reporting period.

3.2 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”).

3.3 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.

3.4 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 2 and Appendix B).

List of Adopters

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

3.6 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 FA2014 but in practice these groups or entities are referred to as banks which have adopted the Code.)

3.7 Where the adoption covers all 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 lists\(^3\) 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.

3.8 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.

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

3.9 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.

3.10 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

3.11 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.

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

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

(a) Banks which have a chargeable period ending in the reporting period or deemed to end at the end of the reporting period (s285(4)(b)(ii)) and are chargeable to the bank levy, or would be chargeable if it were not for the £20 billion de minimis.

(b) Banks that are not in (a) which meet the definition of a bank in section 991(2)(b) or (c) of Income Taxes Act 2007 (subject to subsection (3) of that section) during some or all of the reporting period.

3.13 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

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\(^3\) The Prudential Regulation Authority lists are the lists of UK deposit takers published monthly on the Bank of England website (see para 3.15)
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.

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

**Deposit Takers**

3.15 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 Income Taxes Act 2007.

3.16 An entity meets the definition of a bank in section 991(2)(b) or (c) of Income Taxes Act 2007 if it is:

- a person who has permission under Part 4A of FSMA 2000 to accept deposits, or

- an EEA firm of the kind mentioned in para 5(b) of Schedule 3 to FSMA 2000 which has permission under para 15 of that Schedule to accept deposits. These are banks within the European Economic Area regulated by their home state regulator and authorised by the Prudential Regulatory Authority to accept deposits in the UK.

Any entity which meets this definition will be included on the list of banks authorised to accept deposits in the UK which is published monthly on the Bank of England website. http://www.bankofengland.co.uk/pra/pages/authorisations/banksbuildingsocietieslist.aspx

3.17 If an entity is on the Bank of England list and is accepting deposits, it is in 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 in the Code population, we would not regard that entity as in the Code population until it begins banking activity.

3.18 A building society which is authorised to take UK deposits and is undertaking that regulated activity will always be in the Code population. The Bank of England list also includes Building Societies.

**Investment Banks**

3.19 An entity which is an investment bank as defined in para 70, Schedule 19 FA2011 will be in the Code population if it has permission to accept UK deposits
and is undertaking that activity or is a member of a relevant group for the purpose of the bank levy (BKLM220000 and part 3, 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 Prudential Regulation Authority under article 3 of the Financial Services and Markets Act 2000 (PRA-regulated Activities) Order 2013 (S.I. 2013/556)

3.20 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.

3.21 Where an entity which meets the definition of an investment bank in para 3.19 does not accept deposits and is either

- not part of a group or,
- is part of a group which does not have any other UK resident bank or relevant foreign bank (see para 78, schedule 19 FA 2011)

it will only come within the definition of a bank for the bank levy if it is a UK resident bank as defined in para 80, schedule 19 FA2011.

The entity will not meet the definition of a UK resident bank if it is an excluded entity (see BKLM250000 and para 73, Schedule 19, FA2011) or if it (and other relevant entities in the group) has a capital resource requirement of less than £100million (see BKLM243160 and para 72, Schedule 19 FA2011).

Other information included in the Annual Report

3.22 The Annual report also covers other issues and topics of relevance to the operation of the Code. For example, the first report in 2015 included information on:

- HMRC’s compliance work with banks (see chapter 7 paras 7.27 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 chapter 7, paras 7.2 -7.26 for more information on Code Approaches).
Chapter 4 - The Code Commitments - Governance

4.1 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, new material has been included on the “intentions of Parliament”.

Governance

4.2 Small banks\(^4\) that adopt part 1 of the Code ‘should adopt adequate governance to control the types of transactions they enter into’.

4.3 The commitment made by a bank which is not a small bank 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.

4.4 Para 7.34 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.

For a small bank:

4.5 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.

\(^4\) As defined in para 2.6
4.6 Many of these small banks are part of a group with a global turnover of more than €750m and will be required to publish their tax strategy for financial years beginning after Finance Bill 2016 receives Royal Assent. See chapter 8 for further details on the interaction between the Code and the requirement for large businesses to publish their tax strategy.

Application to overseas entities

4.7 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.

4.8 If the UK parent is aware that its overseas subsidiary is promoting or facilitating arrangements which aim to achieve a 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 facilitating tax avoidance. (see chapter 5, para 5.48)

4.9 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 5)

4.10 Examples of applying the Code to the activities of overseas entities without a UK parent or sub-parent

- 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 facilitate 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.
4.11 Banks adopting the Code are required to comply fully with all their tax obligations.

Application of the Code to actions taken by regulators

4.12 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 (section 1 of the Code).
Chapter 5 - The Code Commitments – Tax Planning

5.1 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.

5.2 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.

5.3 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.

5.4 Para 7.35 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.

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

- “intentions of Parliament” (paras 5.6-5.33)
- “reasonably believes” (paras 5.34-5.35)
- “tax result for the bank” (para 5.45)
- “promotion and facilitation” (paras 5.46-5.49)
- “proper amounts of tax” in section 3.3 (para 5.50-5.51)
The “intentions of Parliament”

5.6 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.

5.7 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

5.8 Transactions are acceptable under the Code if it is reasonable to believe the outcome or 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.

5.9 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.

5.10 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.

5.11 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.

5.12 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

5.13 The following sections sets out HMRC’s approach to discerning the intentions of Parliament and apply these to a transaction.
5.14 HMRC will first consider the arrangements with particular focus on whether they support genuine commercial activity and the tax outcome is consistent with the underlying economic consequences. These are considered further below.

5.15 Neither of these points are decisive, and will not on their own mean that HMRC believes the transaction is Code Red or Code Green. However, these help to understand the effect of the transactions.

5.16 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.

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

5.18 If after reviewing the legislation, and supporting documents where relevant, it is clear 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. If it hasn’t then the transaction will be Code Red.

Supporting genuine commercial activity

5.19 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.

5.20 This section will be revisited and expanded in the next review of guidance.

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

5.21 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.

5.22 An example of a transaction that may give a result that is inconsistent with the underlying economic consequences of the transaction include one which results 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.

5.23 Sometimes Parliament intends the tax result to be different to the economic consequences. An example of this is the enhanced deduction for Research & Development expenditure.
5.24 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.

5.25 Conversely if the tax result follows the economics of the transaction this would indicate that the transaction is Code compliant. It would only be Code Red if there is legislation clearly intended to counter this tax result, for instance a Targeted Anti-Avoidance rule.

The Legislation

5.26 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.

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

5.28 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.

5.29 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.

5.30 In contrast an election is a choice given to the taxpayer by Parliament and a transaction will not be contrary to the Code if the taxpayer has only taken that choice, even if the situation is different to what was initially envisaged when the legislation was enacted.

5.31 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:

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- Written Ministerial Statements;
- Ministerial Speeches (including Hansard);
- Consultation Response Documents;
- Technical Notes;
- Explanatory Notes; and
- Explanatory Memoranda
5.33 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 section 5.37 on established practice). This is because the government cannot make laws without Parliament’s agreement.

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

Reasonable belief test

5.35 A transaction will be Code Green if it is reasonable for the bank to believe that the tax result is not contrary to the intentions of Parliament. Even if HMRC disagrees with the bank’s tax analysis, the transaction may therefore be Code Green if HMRC concludes the bank’s assessment about the intentions of Parliament is reasonable.

5.36 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.

Established Practice

5.37 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.

5.38 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.

5.39 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.

Code approaches

5.40 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 paras 7.2 - 7.26)
Is the transaction within the GAAR?

5.41 For arrangements:

- that the 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.

5.42 Examples of when the GAAR might or might not apply can be found via the following link http://www.hmrc.gov.uk/avoidance/gaar-partd-examples.pdf.

Technical challenge and legislative change

5.43 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.

5.44 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.

5.45 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.

Examples
The following general examples are included to illustrate the above concepts. These will be reviewed and improved with industry in the next guidance publication. GAAR considerations are not included as extensive examples can be found via the link contained in para 5.41 of this guidance.

**Examples 1 and 2 – Bank Levy, High Quality Liquid Assets “HQLA”**

HMRC becomes 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 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, would 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.

**Example 1**

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.

**Example 2**

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 and the interpretation although different to HMRC’s was based on a reasonably held belief that their view was correct. This is consequently Code Green in Year 1. 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).

Example 3 – Capital allowances, deferral of balancing charge

Company A within Group B ceases trading and is left with a balancing charge and cash to settle the tax liability. Group B wants to exit the line of business undertaken by company A. Group B can exit from this line of business by paying the balancing charge and liquidating company A, or selling the shares of company A, among other options.

If group B sells company A, the purchaser acquires company A with a net liability of NIL. The purchaser believes it can use the cash towards a new asset and defer the balancing charge. Therefore, the purchaser is willing to pay additional consideration for company A and the price negotiated reflects the sharing of the benefit of the deferred balancing charge between the parties.

HMRC considers such arrangements are unlikely to achieve the desired result due to anti-avoidance legislation preventing deferral of the balancing charge. The presence of anti-avoidance legislation makes it implicit that deferral of the balancing charge is only available to the group that owned the company when the balancing charge arose. This was confirmed by statements in Hansard that the provision was to apply for reinvestment.

For Code purposes, HMRC therefore concludes that the arrangement involves tax planning to result in a tax benefit not intended by Parliament. Such arrangements would be Code Red.

Example 4 – Factoring of business receipts

HMRC has encountered transactions by companies that were looking to obtain finance for development projects. They were doing so by transferring the right to income on an existing development to a tax transparent entity. These transactions were designed to give tax relief for not only the ‘finance charge’ but also the principal of the loan, a tax outcome that is inconsistent with the underlying economics. Some of these transactions aimed to sidestep oil ring fence trade rules.

Anti-avoidance legislation (s.774A-G ICTA 1988) was introduced to tax structured finance transactions on the basis of their economics. That is to say where a transaction is accounted for as debt the tax will follow this.

If a bank is considering entering into a transaction where the tax outcome is inconsistent with the underlying economics, then unless there is specific legislation designed to give such a result, and they can reasonably believe that this result is not contrary to the intentions of Parliament, this is a Code Red transaction. However, if
the bank reasonably believes that it is following established practice, the transaction is Code Green.

In this case the introduction of anti-avoidance legislation made clear Ministers’ and Parliament’s intention to ensure that businesses could not obtain tax advantages by the factoring of their business receipts. It also made it clear that they intended that the transactions should be taxed on the basis of their economics. In addition there was nothing to suggest that the structuring of transactions in this way was established practice – on the contrary they were challenged by HMRC.

If a scheme was structured or promoted by a bank which was seeking to get around the ring fence tax rules in respect of income that was in substance ring fenced trade income, by using arrangements that also circumvented the structured finance rules, this transaction would clearly be against the intentions of Parliament and therefore be Code Red.

Example 5 – tax credit schemes

A customer considers a scheme seeking to exploit certain tax provisions to generate the repayment of tax (whether directly or through set off against other liabilities) that has never been paid.

The proposed transaction follows earlier similar transactions that sought either to transform overseas tax into UK tax (tax convertors) which can be repaid, or that produce repayable tax credits where no tax has been paid (tax generators).

Such a scheme clearly gives a tax result that is inconsistent with the underlying economic consequences and so unless there was specific legislation designed to give such a result and the bank can reasonably believe that this result is not contrary to the intentions of Parliament the bank should conclude that this is a Code Red transaction – unless the bank reasonably believes that it is following established practice, in which case the transaction is Code Green. In this case the bank does not just have to rely upon the absence of any document sanctioning the tax result to make a judgment on whether the tax result of the transaction is contrary to the intentions of Parliament - there is clear documentary evidence that such a result is expressly contrary to the intentions of Parliament.

In particular the following documents set the position out clearly:

1. Budget Press Notice 3 of June 2010 which 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.

2. Written Ministerial Statement of 15 September 2011 contained the statement: “...The amendment will ensure that MODs cannot be used to obtain repayment or set off income tax that the UK Exchequer does not receive”.

3. Written Ministerial Statement of 27 February 2012 contained the statement “...previous action and this government’s action in the present case makes it clear that the government considers that... arrangements involving financial products designed to create tax credits that can be repaid or offset against a bank’s other income where the tax in question has not been paid are wholly unacceptable, against the intentions of Parliament and the spirit of the law”...

Therefore any such transaction with such a tax outcome would be clearly contrary to the intentions of Parliament.

Tax results for the bank

5.47 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 ....’ The ‘tax results for the bank’ covers all the transactions and structures that have a significant impact upon the bank’s own tax position.

Promotion and Facilitation

5.48 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.

5.49 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.

5.50 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 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 tax position of a UK 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.

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.

5.51 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.

Remuneration packages and the meaning of “proper amounts of tax”

5.52 Para 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. 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.

5.53 As with sections 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.

Chapter 6 - The Code Commitments – Relationship

6.1 Small banks that adopt part 1 of the Code Banks should maintain a transparent relationship with HMRC

6.2 The commitment made by a bank which is not a small bank is set out 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.

6.3 Paras 7.2-7.22 provide guidance on approaching HMRC under paragraph 4.2.

6.4 Para 7.36 of chapter 7 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.

6.5 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.

6.6 We will include an example illustrating what this looks like in practice in the next version of the guidance.
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.

Code Approaches

7.2 Section 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 HMRC Customer Relationship Manager before it takes place.

7.3 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.

7.4 The bank should also set out its analysis of the intentions of Parliament in enacting the relevant legislation and explain how this analysis applies to the proposed transaction.

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

7.6 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.

7.7 HMRC will agree with the bank an expected timeframe for response at the outset. HMRC may need more time for complex issues. HMRC will work with the bank within a reasonable timeframe that recognises the commercial pressures. 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.
7.8 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.

7.9 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

7.10 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.

7.11 The CRM 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.

7.12 To ensure consistency, all Code approaches and decisions are recorded and every approach is overseen by two HMRC Officers at Senior Civil Service grade, one from Large Business and one from CTIS (Corporation Tax, International and Stamps). 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.

7.13 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

7.14 If HMRC decides that a transaction is Code Red then the CRM will communicate this to the bank at the earliest opportunity. HMRC will not tell the bank not to carry out the transaction; that will always remain a business decision for the bank. Instead the CRM 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.

7.15 Based on these discussions, the responsible HMRC officers (explained in Paragraph 7.11) will decide whether to escalate the decision in line with the Governance Protocol.

7.16 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 from Paragraph 2.14 onwards.

7.17 If the bank decides to proceed with a transaction, despite the Code Red decision, it should be aware that this automatically disqualifies the bank from being classified as a Low Risk business in HMRC’s Business Risk Review.

7.18 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**

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

7.20 As explained in Paragraphs 5.25 and 5.26 HMRC assumes that the bank’s technical analysis is correct when deciding whether a transaction is Code compliant.

7.21 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 CRM.

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

**The Code and DOTAS**
Disclosure under the Code does not remove the statutory obligations under the DOTAS and POTAS regimes.

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.

These exemptions do not apply to Code Red transactions and banks will need to consider whether the hallmark conditions are met to determine whether they need to notify the arrangement under DOTAS.

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

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 Business Risk Review (BRR) carried out by CRM led teams dealing with banks, and HMRC carries out some targeted Code compliance activity.

The BRR 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
- does not undertake tax planning that aims to achieve a tax result that is contrary to the intentions of Parliament

The CRM 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. CRM teams will address gaps in knowledge through direct engagement with the customer for example requesting a demonstration of the governance process a particular transaction went through.

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5 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
7.30 The tables at paras 7.34 to 7.36 provide suggestions of what ‘good’ looks like for each of the commitments and what may cause the CRM to be concerned that a bank is not meeting its Code commitments.

7.31 The CRM 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 CRM will advise the bank accordingly at the BRR.

7.32 If the CRM 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.

7.33 Code compliance is part of the risk assessment process for smaller banks dealt with outside of Large Business and will be addressed as part of the normal enquiry process.
## Governance

<table>
<thead>
<tr>
<th>What Code compliant governance looks like</th>
<th>Where governance arrangements may give cause for concern</th>
</tr>
</thead>
<tbody>
<tr>
<td>The bank’s strategy for tax management reflects the commitments made under the tax planning part of the Code</td>
<td>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).</td>
</tr>
<tr>
<td>There is a clear policy and process in place for ensuring that the bank’s strategy for tax management is applied in practice</td>
<td>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.</td>
</tr>
<tr>
<td>The bank’s policy and process for tax risk management is well understood within all parts of the bank</td>
<td>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.</td>
</tr>
<tr>
<td>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</td>
<td>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.</td>
</tr>
<tr>
<td>The bank’s policy and process for tax risk management applies to all heads of tax – CT, PAYE &amp; NIC, VAT, Stamps and more</td>
<td>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.</td>
</tr>
<tr>
<td>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</td>
<td>HMRC has concerns over the bank’s attitude towards the openness, transparency and professionalism of its relationship with HMRC.</td>
</tr>
</tbody>
</table>

See para 7.38 for an example of concerns over poor Code governance.
### Tax Planning

<table>
<thead>
<tr>
<th>What Code compliant tax planning looks like</th>
<th>Where a bank’s tax planning may give cause for concern</th>
</tr>
</thead>
<tbody>
<tr>
<td>The bank does not engage in tax planning other than that which supports genuine commercial activity.</td>
<td>The bank undertakes tax planning which does not support genuine commercial activity.</td>
</tr>
<tr>
<td>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.</td>
<td>The bank has failed to adhere to the tax planning strategy envisaged by the Code in its formal operations and policy.</td>
</tr>
<tr>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td>The bank has failed to prevent implementation of or the facilitation or promotion of transactions where the tax management function was not satisfied that: 1. they supported genuine commercial activity, 2. they produced tax results for the bank that are consistent with the underlying economics of the arrangements, or if not, 3. 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</td>
<td></td>
</tr>
<tr>
<td>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.</td>
<td>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.</td>
</tr>
</tbody>
</table>

See paras 7.39 and 7.40 for examples of concerns over a bank's tax planning.
<table>
<thead>
<tr>
<th>What a Code compliant relationship looks like</th>
<th>Where a bank’s relationship with HMRC may give cause for concern</th>
</tr>
</thead>
<tbody>
<tr>
<td>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</td>
<td>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</td>
</tr>
<tr>
<td>The bank fully discloses significant uncertainties re tax matters</td>
<td>The bank fails to disclose fully significant uncertainties regarding tax matters</td>
</tr>
<tr>
<td>The bank focuses on significant issues when making disclosures to or seeking clearances from HMRC</td>
<td>The bank fails to focus on significant issues</td>
</tr>
<tr>
<td>The bank seeks to resolve issues before returns are filed where practicable</td>
<td>The bank does not seek to resolve issues where practicable before returns are filed</td>
</tr>
<tr>
<td>The bank engages in a co-operative, supportive and professional manner</td>
<td>The bank does not engage with HMRC in a co-operative, supportive and professional manner</td>
</tr>
<tr>
<td>The bank works collaboratively with HMRC</td>
<td>The bank is not working collaboratively with HMRC</td>
</tr>
<tr>
<td>The bank is fully committed to the undertakings it has given under the Code</td>
<td>The bank is not fully committed to the undertakings it has given under the Code</td>
</tr>
<tr>
<td>The bank is fully committed to a shared plan to resolve any delivery concerns</td>
<td>The bank is not fully committed to a shared plan to resolve any delivery concerns</td>
</tr>
</tbody>
</table>

See chapter 6, paras 6.5-6.11 for an example of what is meant by ‘relationships with HMRC should be transparent and constructive’

See para 7.41 for an example of concerns over a bank’s relationship with HMRC. An earlier version was included in the Strengthening the Code consultation document published in May 2013.
The consultation document in respect of the 2013 proposal to strengthen the Code included a number of examples of what might give rise to a concern under the Code and the expected escalation process under the governance protocol. A number of changes were made to the escalation process as a result of the consultation and the examples included in the following paragraphs have been updated to reflect these changes.

### 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 would suggest that:
- 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 says this is Code Red and have already given the same bank Code Reds on previous transactions. 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 CRM or equivalent will raise these concerns with the bank at the earliest opportunity. If discussion between the CRM and the bank does not resolve the concerns, HMRC will seek to arrange a meeting between a HMRC Director and senior Finance representatives from the bank.

If there is no indication that a bank is attempting to implement strategic or governance change the case will be referred on to the Tax Disputes Resolution Board Independent Reviewer and Tax Commissioners to consider the bank for naming as non-compliant in the next annual report.
**Example 2 – A one off transaction**

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.
### Example 3 – Relationship between bank and HMRC

A bank may have adopted the Code but not have an open and transparent relationship with HMRC. HMRC might indicate concern to the bank about delivery of or commitment to its Code undertakings for the following reasons:

- Failure to disclose potentially contentious transactions at the earliest reasonable date
- Failure to provide adequate information for HMRC to understand potentially contentious transactions
- Failure to work with HMRC to agree reasonable timelines for enquiries or potential disputes to be brought to decision point
- Failure to discuss in advance transactions when the bank is unsure whether they are contrary to the intentions of Parliament, if it is reasonable to assume a primary reason for that is to leave Parliament uninformed about the impact of the transaction until completed.

In these circumstances the CRM or equivalent will raise them with the bank at the earliest opportunity, once this action has been approved at HMRC Deputy Director level. If discussion between the CRM and the bank does not resolve the concerns, HMRC (normally at or above Deputy Director level) will escalate them to a senior member of Finance personnel in the bank for further discussion at this level.

If there is no indication that a bank is attempting to implement strategic or governance change, further action will be taken under the Governance Protocol with a view to determining if the bank is not compliant and if it is whether it should be named in the next annual report.
Chapter 8 - Code and Large Business Tax Strategy

8.1 Finance Bill 2016 includes a requirement for large businesses to publish their tax strategy in so far as it relates to UK taxation.

8.2 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 FB 2016 and will include the majority of banks which have adopted the Code. HMRC published guidance on the requirement on 31 March 2016.

8.3 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.”

8.4 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.

8.5 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.

8.6 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.
and may also include further information.

8.7 Obligations on the bank under the large business tax strategy requirements equate to the obligations under the Code, in fact the Code is more stringent in places. The more general rules are not therefore expected to impose new obligations on banks who have adopted and adhere to the Code.

8.8 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 paras 2 and 2.2 of the Code, para 1.1 for small banks.

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

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

8.11 If a bank, which has adopted the Code, does not include the information outlined in paragraphs 8.7 to 8.9 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**

8.12 The Government introduced Special Measures in Finance Bill 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.”

8.13 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.

8.14 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.
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.