


Tori Magill

Tax investigations
director, Mazars
Email: tori.magill@
mazars.co.uk
Tel: 020 7063 4834

What has changed?

HMRC has updated the civil investigation of fraud (COP 9) guidance following a relatively low key announcement that revisions to the contractual disclosure facility (CDF) procedure apply from 30 June 2014. The amended CDF contains two quite fundamental changes, namely:

- removing the requirement to admit to behaviour HMRC may suspect to be fraud; and
- removing the 'denial with cooperation' (DWC) route.

This latest COP 9 refresh demonstrates the department's continuing appetite to toughen its stance on avoidance and evasion, but may have far reaching consequences for taxpayers.

Why has HMRC made the change?

HMRC claims the changes clarify the terminology used during a civil fraud investigation, by replacing the admission of fraud with the arguably less contentious phrase 'loss of tax brought about by your deliberate conduct', which in itself sounds innocuous enough. The rationale is to 'ensure all CDF products have accurate definitions of terminology that accord with tribunal decisions' and to 'make it clearer and fairer for all customers.'

Admission of deliberate behaviour sounds much less serious than admitting to fraud. How is that bad thing?

Dropping the bar for entry into the CDF club from 'fraudulent' behaviour to 'deliberate' behaviour may be semantics that make it easier to encourage taxpayers to sign up, but it also means HMRC could potentially widen the scope of who they issue the COP9 to in the first place. The Hansard statement confirms COP 9 is only appropriate for cases of serious fraud, but we are seeing cases where HMRC are issuing COP 9 to some avoidance scheme users. HMRC obviously consider these schemes to be fraudulent, to justify the issuing of the COP 9 in the first place. Whether they are in fact fraudulent schemes remains to be seen.

The recipient of the COP 9 now has to admit to the arguably lesser deliberate behaviour to obtain CDF assurance that he will not be criminally investigated, but deliberate behaviour includes wider 'offences' than those with fraudulent intent. Under old CDF rules, he may be confident the scheme was not 'fraudulent' and does not need to be put on the outline disclosure form, as HMRC could not successfully prosecute the scheme where there was no intent to defraud. Under new CDF rules, however, we need to look at HMRC's guidance on what it considers is 'deliberate'. HMRC's guidance (*Compliance handbook* CH53700) states that 'a person who sends us a document containing a deliberate inaccuracy may assert that they did not intend to cause a loss of tax. For the purposes of assessing that loss of tax, the person will be treated as having deliberately brought about the loss of tax which resulted from the inaccuracy, whether or not it was their intention.'

How does this affect clients receiving the new CDF?

The change from fraudulent admission to deliberate admission means the outline disclosure needs to include all aspects of deliberate conduct to be considered a complete disclosure. The document is

only supposed to provide certainty that HMRC will not prosecute the offences detailed on the form. To prosecute fraud, HMRC must successfully show both the fraudulent act and intent beyond all reasonable doubt. The bar to criminally prosecute the actual offence has not changed, but HMRC can prosecute where a disclosure is considered to be incomplete. Leaving a deliberate act that brought about a loss of tax off the disclosure is potentially a separate prosecutable offence. And that will fundamentally change the advice we give to clients who receive a COP 9 and have participated in a marketed avoidance scheme.

How does the removal of DWC change the CDF?

The second change appears to be a curious move away from HMRC's behaviour based methodology. The three options previously available to the recipients of the COP 9 have been simplified to two. The process can now be summarised as: 'Did you do it? Yes or No?' It is undoubtedly simplified, but has this simplification been implemented at the expense of an important safeguard designed into the original CDF process?

The original DWC was added as part of the CDF summer 2011 consultation process to give the profession confidence that, amongst other things, HMRC could politely withdraw from the cases where it had picked up the wrong end of the stick. The original CDF consultation stakeholders felt this safeguard was needed, based on HMRC's now infamous reputation for getting it wrong, and for issuing COP 9 where there was insufficient evidence to proceed with a criminal investigation. HMRC itself acknowledged in the July 2011 consultation document that: 'It is possible that HMRC could suspect a taxpayer of fraud, but no fraud has in fact been committed' (section 1.11).

Case selection procedure should arguably have formed part of the post-implementation review, and we have not yet had access to the statistics to support the need to withdraw the DWC route. It would be interesting to know how many COP 9 investigations HMRC initiated where no 'deliberate' behaviour was ultimately established, and how many successful prosecutions have originated from COP 9, post CDF.

The NAO originally recommended that HMRC needed to create a credible deterrent for non-cooperation and certainty for those who want to work with HMRC. HMRC has not yet clearly explained why the DWC route compromises the delivery of those policy objectives.

How will the changes be implemented by HMRC?

The lack of proper consultation and evidence to support the need for the changes to CDF will come as no surprise in the current climate. Controversial measures designed to enable HMRC to be more efficient at tackling avoidance, with an apparent lack of appropriate safeguards built in, are becoming the norm. It remains to be seen how the new CDF will be implemented but, on recent trends, it is not unreasonable to predict that this may be beyond the scope of the original Hansard statement, which limited COP 9 to cases of serious fraud. Clients that have purchased schemes where HMRC has challenged the implementation may potentially end up caught by the new potentially wider-reaching CDF.

For the full text of HMRC's updated COP 9, see www.bit.ly/1mJny3R. A more extensive Q&A is available on taxjournal.com.