



Bar Council response to the HMRC consultation on the Draft International Tax Compliance (Client Notification) Regulations 2016

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the the Draft International Tax Compliance (Client Notification) Regulations 2016 (“the Draft Regulations.”).

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4.1 The Bar Council wishes to raise four issues arising out of the Draft Regulations and the accompanying draft Guidance published by HMRC.

- a. The Draft Regulations will impose too wide and disproportionate a burden on barristers.
- b. As a fundamentally referral profession, notices served by barristers will in almost all cases do no more than duplicate notices which will necessarily have been served by another professional with a much closer and longer-lasting relationship with the client.
- c. The exemptions from having to notify clients do not have the effect contended for by HMRC in the Draft Guidance.

- d. It is unclear how the exclusion from having to notify where the adviser has insufficient information to enable the client to be contacted will operate in the case of barristers.

Background

5.1 The Draft Regulations are intended to implement the client notification obligations contained in section 222(2)(ca) of the Finance Act 2013, inserted by section 50 of the Finance (No 2) Act 2015. The provisions of section 222(2)(ca) impose obligations on certain financial institutions and on “specified relevant persons” to give “specified information” to “clients or specified clients.”

5.2 Once the Draft Regulations are in force, they will implement section 222(2)(ca) by inserting Regulations 12A to 12I and a new Schedule 3 into the International Tax Compliance Regulations 2015 (the Principal Regulations).

5.3 The wording for Schedule 3 of the Principal Regulations has not yet been published, but it is clear from the draft Guidance that specified relevant persons will have to write letters to clients (and former clients) in a form partly prescribed in Schedule 3 to explain that HMRC will be receiving information from overseas tax authorities about offshore assets. The letters will have to enclose a document under HMRC branding providing information and links to the Guidance.

5.4 The Draft Regulations impose the obligation to communicate with clients on two kinds of persons, being (1) certain financial institutions and (2) “specified relevant persons” that have provided “offshore advice or services.” This Note only deals with “specified relevant persons”.

5.5 A “relevant person” includes a “tax adviser” (as defined, which clearly applies to barristers who give tax advice) and “any other person who in the course of a business (i) gives advice to another person about that person’s financial or legal affairs, or (ii) provides other financial or legal services to another person.”

5.6 All practising barristers will fit within one or both of these categories.

5.7 A “*specified* relevant person” is a relevant person who has provided “offshore advice or services in the course of a business”. The definition of “offshore advice or services” has nothing to do with tax. It is:

“advice or services relating to the administration of [five specified categories of asset] in a participating jurisdiction or the United States of America.”

5.8 There is no requirement for the advice or services to have *any* connection with tax at all. A barrister giving advice to a UK resident client on his legal rights in respect of an asset situated in one of the participating jurisdictions would fall squarely within the definition if

the advice or services relate to the “administration” of the asset. This undefined term is of potentially wide application. An obvious example would be advice given by a chancery barrister to a UK resident individual who is a beneficiary of a Jersey resident trust governed by English law where there is a potential dispute with the trustees or a fellow beneficiary on the running of the trust. Another possible example would be where a family law practitioner advises on divorce proceedings where significant family property is located overseas.

6. The Bar Council’s concerns

The obligation is too wide and too burdensome

6.1 The Bar Council is concerned that the Draft Regulations impose obligations on barristers to write to lay clients in the specified form and manner (which are not yet in the public domain) in circumstances which cannot have been intended and that it will be impractical in many cases for barristers to comply.

6.2 The width of the definition of “specified relevant person” in effect requires all barristers to consider, in the case of all clients they have advised or acted for in the last year, whether they have provided “offshore advice or services” in the last three years.

6.3 Barristers do not, however generally organise their practices in a manner that readily permits them to carry out a systematic review of all clients for whom they have acted. Where instructions to counsel are delivered in hard copy form, counsel will usually return those instructions at the conclusion of the case. In such circumstances, the barrister may not have any documents to review and will not be able to say with any certainty whether “offshore advice or services” were provided, especially where the location of assets was of no (or of limited) relevance to the main issue on which advice or services were being provided.

6.4 Even where barristers do have sufficient documentation relating to clients’ affairs, it is unduly burdensome for them to have to trawl through frequently voluminous paperwork to decide whether or not “offshore advice or services” were provided within the preceding three years. As the three year period ends on 6 April 2016 and the Draft Regulations and Guidance were only issued in the last few days, barristers cannot have known about these requirements and cannot have prepared for them. It is accordingly grossly unfair and disproportionate for the Draft Regulations to place this burden on barristers, particularly the vast majority of barristers whose practices are unconnected with the provision of tax advice.

6.5 The obvious solution to this is to confine the definition of “offshore advice or services” to advice or services having some direct connection with United Kingdom taxation. We note that the Draft Guidance says at page 5

“... the Regulations provide an exemption where either a group of clients do not receive tax advice, or where part of the business does not provide tax advice.”

6.6 We do not agree that that statement is a correct reading of the exemptions contained in the Draft Regulations, but it does reinforce the point that we are making here – that it is

disproportionate for the draft Regulations to oblige advisers who do not advise on tax to search through client documentation (where they still have it) to identify relevant clients.

The obligation on barristers will produce unnecessary duplication

6.7 The vast majority of work performed by barristers is as a result of instructions from solicitors. In certain fields (for example, taxation) a significant proportion of instructions are from accountants. But in either case, the barrister deals with the lay client through the solicitor or accountant. It is almost inevitable that, if the barrister has an obligation under the Draft Regulations, the solicitor or accountant will have such an obligation also.

6.8 The effect of this is that, on the wording of the Draft Regulations, lay clients may receive multiple notifications in respect of the same matter.

6.9 We do not see what purpose this serves. In addition, we have already made the point that the obligation that the Draft Regulations impose on most barristers is disproportionate. That point is reinforced where the obligation leads to multiple notifications to the same client by barrister and solicitor/accountant.

6.10 It accordingly seems to us that, where a barrister provides the offshore advice or services on the instructions of another who falls within the definition of “specified relevant person”, the barrister should not have any duty to notify the lay client.

The exemptions do not have the effect contended for in the draft Guidance

6.11 The Draft Guidance suggests that the potential exclusions in Draft Regulations 12D and 12E will provide an exemption where no tax advice was given. At page 5, it states:

“... the Regulations provide an exemption where either a group of clients *do not receive tax advice*, or where part of the business *does not provide tax advice*.” [Emphasis added].

6.12 Pages 9 to 10 of the Draft Guidance state:

“Where the Relevant Person chooses to notify all its clients, it may then exempt any clients or groups of clients where it reasonably believes that they are not UK tax resident or that they have not received any offshore advice or services in the last three years. *This is designed to allow firms who are principally legal advisers to exempt most of their client base, and only send to those dealt with by their tax specialists. Similarly, where a tax advisory firm has a team or department that deals wholly with legal or other non-tax advice, they may exclude that client base.*” [Emphasis added]

6.13 We cannot see any justification for the suggestion that the exemptions in the Draft Regulations do anything of the sort. They operate by reference to “offshore advice or services”, which has (as per paragraphs 3.7 and 3.8 above) no necessary connection to tax at all.

6.14 But since HMRC consider that an absence of tax advice should mean that the exemptions apply, then we take the view that the matter should be clarified by a simple change in the drafting of Regulation 12E so as to achieve that.

The exclusion for lack of contact details is potentially unclear

6.14 Regulations 12D and 12E both contain an exclusion from having to notify. In both cases it operates where:-

“Despite maintaining proper records, the relevant offshore adviser holds insufficient information on 6th April 2016 to be able to contact the individual.”

6.15 When instructed by solicitors or other intermediaries, barristers may not be given contact details for the lay client. Even where the barrister is obliged to comply with money laundering regulations before accepting instructions to act, reliance will usually be placed on the intermediary’s certification to the barrister that the intermediary has satisfactorily performed their own due diligence. Barristers’ fee notes will usually be addressed to the intermediary. Accordingly, in a very large number of cases, the barrister will not have the lay client’s address. Even where the barrister has the address (for example, because it is mentioned in the instructions) the barrister will not generally make a separate record of it and will not generally know whether it has changed.

6.16 We are concerned that it might be said that a barrister who does not have the address of the lay client might be said not to have maintained proper records, notwithstanding that in many cases the lay client’s address has no relevance to the barrister’s work. The same concern arises where a lay client’s address is mentioned in a barrister’s instructions, but is not separately recorded by the barrister because there was no operational need for the barrister to do so. We should accordingly be grateful for HMRC’s assurance that they will not regard a barrister’s failure to ascertain or record a lay client’s address as a failure to maintain proper records where there is no operational need for the barrister to make such a record.

Bar Council¹
12 February 2016

For further information please contact
Adrian Vincent, Head of Policy: Remuneration and Employed Bar
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 020 7611 1312
Email: avincent@barcouncil.org.uk

¹ Prepared for the Bar Council by the Taxation Panel of the Bar Council’s Remuneration Committee.