



Civil Investigation of Fraud- Contractual Disclosure Facility

Discussion document

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Closing date for comments: 20th September 2011

Subject of this discussion:	This discussion document looks at the concept of a contractual disclosure facility within the framework of the civil investigation of fraud.
Scope of this discussion:	Since the Civil Investigation of Fraud procedure was redesigned in 2005 a significant number of changes have taken place within HMRC. This document explores one option for toughening and tightening HMRC's approach to civil investigation of fraud through the concept of a contractual disclosure facility.
Who should read this:	We would like to hear from anyone who may be affected by the way in which HMRC tackle tax fraud but we would particularly like to hear from accountants, tax agents and lawyers who specialise in civil tax fraud work.
Duration:	20 th July to 20 th September 2011
Lead Official:	Tori Magill from Criminal Enforcement Policy and Juliet Roche from Specialist Investigations are leading this work and can be contacted at cepris.cifconsultation@hmrc.gsi.gov.uk
How to respond or enquire about this consultation:	Criminal Enforcement Policy 4th Floor - Room 4E/11 100 Parliament Street London SW1A 2BQ E Mail: cepris.cifconsultation@hmrc.gsi.gov.uk
Additional ways to become involved:	Workshops will be held and if you would like to take part in one of these we will be pleased to hear from you.
Getting to this stage:	With the merger of the old Inland Revenue and HM Customs & Excise the civil investigation of fraud procedures were reviewed and a new code for tackling this work was issued in 2005. HMRC continuously reviews its processes and as part of that work we now think we can take steps to tighten the civil investigation of fraud procedures. No legislative change will be needed to do this and this is the first consultation on one option for modernising that process.
Previous engagement:	There is ongoing engagement with agents about operational procedures through the Compliance Reform Forum and other specialist groups.

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1. Introduction

- 1.1 This discussion document examines tightening the procedures for dealing with a minority of taxpayers who commit frauds that HMRC could have pursued criminally but it decides to pursue civilly either on the grounds of cost or public interest.

Criminal Investigation Policy

- 1.2 HMRC's ability to criminally investigate tax fraud with a view to prosecution underpins compliance with the tax system. Those who would otherwise seek to deliberately understate their tax are mostly deterred by the knowledge that if they are discovered they may face prosecution. And the majority of people who pay the right tax are reassured that those who flout the law will be caught and will face tough sanctions, including prison sentences.
- 1.3 Under our criminal investigation policy, HMRC operates a selective approach to the cases that are investigated to a criminal standard, and with reinvestment following the Government's spending review we are currently increasing the number of criminal investigations we undertake. At the same time the selective nature of the criminal investigation policy allows us to choose a civil investigation route where this will be more effective or appropriate. One such civil route is the Civil Investigation of Fraud Procedure (CIF).

Civil Investigation of Fraud (CIF)

- 1.4 HMRC chooses to operate CIF in order to address cases where criminal investigation is not considered the most cost effective way to tackle the fraud or for situations where a prosecution is unlikely to be in the public interest.

The Issue

- 1.5 The National Audit Office (NAO) report "HMRC: Managing Civil Tax Investigations" commended CIF for the money it recovers in a cost effective way but challenged HMRC to continue to improve its operational effectiveness. In our ongoing work with tax professionals we have also been told that we could toughen the CIF process further.
- 1.6 Whilst the current procedure works well, HMRC is constantly looking at new ways to improve its processes. For example an updated Code of Practice 9 was issued on 18th July to bring it up to date with legislative changes and make it easier to follow. However HMRC considers that there is also scope to tighten the way that CIF operates particularly for those who do not engage honestly with the CIF procedure.
- 1.7 The NAO report noted that in 20% of CIF cases there was no disclosure. From a case examination we have seen ways that the

existing procedure can be misused by those who have no intention of making a disclosure but who simply wish to cause delay, for example professional and organised criminals who are increasingly participating in tax fraud. HMRC therefore needs to be able to quickly identify those who will work with us and to immediately start investigations into those who will not. Doing this would reduce the length of time it takes to deal with these cases which will benefit both HMRC and taxpayers.

- 1.8 Ideally we are looking for a situation where a framework would commit both the taxpayer under investigation and HMRC to clear delivery standards which would also improve the perception of the transparency of HMRC's operations.

Scope of this discussion paper

- 1.9 The purpose of this discussion paper is to seek views on the need to further improve our process for tackling suspected tax fraud through civil investigation.
- 1.10 The option proposed will reduce the operational time spent dealing with cases of serious tax fraud by speeding and improving the identification of those who are not honestly engaged with the system. It will clarify the consequences of such behaviour by making clear the continued option of criminal proceedings, but at the same time it will clarify HMRC's operational commitments making our Charter commitment specific.
- 1.11 It is possible that HMRC could suspect a taxpayer of a fraud but no fraud has in fact been committed. In such cases the taxpayer should explain to HMRC why they do not consider a fraud has taken place. HMRC then has to consider whether to accept the explanation or investigate their suspicions. These circumstances are not specifically considered as part of this discussion but HMRC would be happy to hear comments on this topic.
- 1.12 The option (discussed later in this paper and described as the Contractual Disclosure Facility) does not require legislative change. Depending on the responses to this discussion paper the next stage of operational policy development would be to develop guidance and publish the new Code of Practice which we would aim to expose for comment.

Operational Policy Objective

- 1.13 The aim of changing our operational approach in cases where we suspect fraud but consider that the best approach would be a civil rather than a criminal investigation would be to:
 1. Encourage those who have committed tax fraud to make a full disclosure of irregularities by giving a clear message that full disclosure will not result in prosecution; and

2. Deter non disclosure or partial disclosure by improving the ability to prosecute for fraud following non disclosure or partial disclosures.

- 1.14 The proposed contract will also have a preset time for making the outline disclosure which will speed up the working of the case for HMRC and the taxpayer.
- 1.15 Those who want the contract and co-operate within its terms will be given better certainty. At present HMRC is bound by the Charter but we will also be bound by the contract up to the point of disclosure and will be expected to work within an agreed framework. Finally taxpayers who disclose and co-operate with the contract will see reduced penalties as they will be entitled to penalty reductions for disclosure and co-operation.

Question 1: Do you agree the operational policy objective?

Outline Proposal

- 1.16 The main proposal is designed to make it easier to work with those who wish to co-operate, and easier for HMRC to identify and tackle those who do not wish to cooperate.

The proposal provides:

- a formal “contract” for the CIF procedure, offered by HMRC to a taxpayer suspected of tax fraud, which would provide more certainty to those who wanted to work with HMRC
- formality that would make it easier for HMRC to terminate the contract and short circuit the process for a taxpayer who refused to co-operate
- a facility for a taxpayer to make a spontaneous offer to HMRC to enter a contract to disclose

Those who have not committed fraud will be able to say that they do not want a contract as fraud is not in point.

Chapter 4 looks at this in more detail.

How to comment

- 1.17 We welcome views on the proposal and comments should be received by 20th September 2011.

Comments should be sent to:

HMRC, Criminal Enforcement Policy,
4th Floor - Room 4E/11,
100 Parliament Street
London SW1A 2BQ

Email: cepris.cifconsultation@hmrc.gsi.gov.uk

2. Current Procedure for Civil Investigation of Fraud (CIF)

- 2.1 Following the merger of the former Inland Revenue and HM Customs & Excise in 2005 the newly formed HMRC introduced the CIF procedure to bring a consistent and cost effective approach to investigating serious fraud across taxes and duties.
- 2.2 In cases of serious fraud where HMRC considers a possible criminal investigation is not necessary or appropriate, HMRC can apply the civil investigation of fraud procedure. This offers the taxpayer an opportunity to make a full and complete disclosure of irregularities in their tax affairs, at their own expense. They do so in the knowledge that HMRC will not pursue criminal charges for the tax offences being investigated and can reduce penalties to reflect disclosure and cooperation.

2005 Civil investigation of fraud statement

The practice of HM Revenue & Customs (HMRC) in cases of suspected serious tax fraud is as follows:

- The Commissioners reserve complete discretion to pursue a criminal investigation with a view to prosecution where they consider it necessary and appropriate.
- Where a criminal investigation is not considered necessary or appropriate, the Commissioners may decide to investigate using the Civil Investigation of Fraud procedure.
- Where the Commissioners decide to investigate using the Civil Investigation of Fraud procedure they will not seek a prosecution for the tax fraud which is the subject of that investigation. The taxpayer will be given an opportunity to make a full and complete disclosure of all irregularities in their tax affairs.
- However, where materially false statements are made or materially false documents are provided with intent to deceive in the course of a civil investigation, the Commissioners may conduct a criminal investigation with a view to a prosecution of that conduct.
- If the Commissioners decide to investigate using the Civil Investigation of Fraud procedure the taxpayer will be given a copy of this statement by an authorised officer.

- 2.3 This approach was recently endorsed by the National Audit Office (NAO) report “HMRC: Managing Civil Tax Investigations”¹ but a number of areas were identified whereby the process could be improved. In particular the NAO recommended that HMRC should ensure that there is a credible deterrent to non-co-operation. In most cases, the possibility of much higher penalties for non-co-operation is enough to persuade taxpayers to make a disclosure but that is not always the case.
- 2.4 Former procedures relied on the concept that the taxpayer committing the tax fraud would rather pay their tax on challenge than be subjected to a criminal investigation and the possibility of prosecution. The current procedure relies on the concept that the person committing the tax fraud will be incentivised by the prospect of reduced penalties to make a full and complete disclosure of what they have done. The guarantee of no criminal investigation gives them the assurance they need in order to do this.
- 2.5 While the current process is underway HMRC suspends investigations while any disclosure is being prepared. This is attractive to taxpayers as third party enquiries to banks and business associates are potentially embarrassing. For some there is an incentive to avoid HMRC investigations by co-operating but for others the suspension of HMRC activity merely buys time.
- 2.6 The current CIF procedure removes the threat of prosecution very early in the investigation process, before HMRC knows whether or not the person will work with them to put things right. This can have the effect that fraudulent taxpayers are brought within the CIF process although they do not intend to disclose. Although this means they will face a much higher penalty on irregularities uncovered by HMRC’s investigations they are protected from prosecution.
- 2.7 In these cases HMRC’s leverage to encourage disclosure and co-operation is limited. HMRC cannot withdraw from the CIF process unless a materially false statement has been made or materially false documents have been provided to create a new offence to tackle. This means HMRC has to use powers which can be costly and time consuming to operate fully and effectively. If there were still a possibility that HMRC might revert to a criminal investigation in such cases, then fewer taxpayers would see non disclosure as being in their interests.
- 2.8 In complex cases the only way to verify a fraudulent tax position without the taxpayer’s assistance may be through third parties. HMRC approaches to third parties may put those third parties to unnecessary expense and such approaches could even cause them concern where they are an individual rather than a business. Where the third parties

¹ The NAO Report can be found at www.nao.org.uk/Civil-Tax-2010

are abroad exchanges of information with other tax authorities may be required which can take time to process and respond to.

Example

A taxpayer set up a bank account in his mother's name in order to bank discounts from a supplier in Hong Kong. The discounts were not returned.

In order to verify the position, without the taxpayer's assistance, HMRC would have had to serve a formal notice on the bank asking for details about the account and how it was set up. Depending on the bank's response they would then need to write to the taxpayer's mother to ask for details about the account in her name and the money deposited in it. Separately an exchange of information or correspondence with the supplier in Hong Kong would be needed to establish the total amount of discounts credited. Finally other suppliers would need to be contacted to ensure that they had not given discounts that had not been declared.

- 2.9 Separately there are an increasing number of cases, for example those involving excise evasion or missing trader intra-community fraud (MTIC) where CIF is not appropriate because the fraud is ongoing and needs a more direct approach to disrupt and prevent it continuing. Approaches for dealing with this group of cases are outside the scope of this discussion paper.

3. Other drivers for change

A changing landscape

3.1 The tax fraud landscape changes constantly as fraudsters find new ways to undermine the tax system. HMRC is responding to those changes but it is often difficult to know what sort of fraud is being dealt with at the outset. For some their tax fraud is the only criminal activity that they have engaged in and they would prefer to work with HMRC to quantify their fraud rather than face criminal investigation and potential prosecution. In other cases tax evasion is a target for professional and organised criminals, who (with their associates) are unlikely to respond to the co-operative approach offered by CIF.

HMRC NEWS RELEASE

4 April 2011

Illegal tobacco factory - gang of four jailed

Four men who were part of a major international smuggling operation that had the potential to manufacture illicit tobacco on a commercial scale were jailed on Friday.

The plot was uncovered over 100 HMRC officers supported by Police and Serious Organised Crime Agency (SOCA) raided premises in Suffolk, Leicestershire, Nottinghamshire and Essex in July 2008. At a farm in Leicestershire, officers discovered over sixteen tonnes of raw leaf tobacco which would have been manufactured into hand rolling tobacco. The gang evaded on this amount of tobacco alone is estimated at £1.9 million. The scam is linked to Bulgaria and in a major operation, officers from the Bulgarian National Coast Guard and the Organised Crime Agency searched premises in Bulgaria.

HMRC NEWS RELEASE

23 February 2011

£48m money laundering gang jailed for 24 years

A group of criminals who have laundered more than £48m of organised gangs' criminal proceeds have been jailed at the Crown Court yesterday in an international operation by HM Revenue & Customs (HMRC).

The gang used an online money business as a front to launder huge amounts of cash which was sent to the UK. It is believed the money was stolen from a British bank.

HMRC NEWS RELEASE

22 March 2011

£140m VAT fraudsters jailed for 37½ years

Five men have been jailed for 37½ years for their part in stealing £140m in a 'missing trader' (MTIC) Value Added Tax (VAT) fraud.

The men from London, Berkshire & Gloucester were jailed for their involvement in failing to pay over £140m of VAT due to HM Revenue & Customs (HMRC) after HMRC investigators uncovered their multi-million pound fraudulent activities.

HMRC NEWS RELEASE

5 April 2011

£1.3m fraudster jailed for tax credit and identity theft

A woman who helped to steal hundreds of identities and fraudulently claimed over £1.3m of tax credits has been jailed for four years.

- 3.2 HMRC is not always in a position to be sure which category a taxpayer falls into at the start of an investigation. Checks are made with other organisations, such as the Serious and Organised Crime Agency (SOCA) in cases of suspected fraud but these do not always reveal whether the suspected tax fraud is linked to other criminality. So while we have information that suggests a tax fraud has taken place it is not always clear whether the individuals are suitable for a CIF process.

New powers

- 3.3 Since HMRC formed in 2005 the Review of Powers, Deterrents and Safeguards has modernised a number of the investigative tools and sanctions. Powers for inspecting and requiring the production of information have been modernised and aligned including more effective powers for seeking information from third parties. Sanctions for committing tax fraud have also been increased with the new penalties. An incentive to disclose has also been introduced under provisions for publishing the details of deliberate tax defaulters where the amount of the fraud exceeds £25,000. This also acts as a deterrent to those who were considering deliberate default of their tax.
- 3.4 In some cases though, the threat of penalties is not enough. That is particularly true where there is no intention to pay any additional tax or penalty. It is not unusual for a company to become insolvent once liabilities are known. Whilst the Insolvency Act provides a remedy in these particular types of case this further prolongs recovering the proceeds of the fraud. The risk of prosecution deters those who would otherwise try to manipulate the system.

Managing Deliberate Defaulters

- 3.5 Operationally new procedures have been introduced to manage deliberate defaulters' affairs following settlement of tax fraud offences. Such procedures will help to ensure that any fraud, once dealt with does not recur.

New Information Sources

- 3.6 With improved technology and the establishment of new tax information treaties HMRC is receiving and data-matching increasing volumes of intelligence and information. This means that officers are able to identify suspected fraud at an earlier stage than they were in the past. This in turn means that more streamlined processes are needed to tackle these cases if they are to be challenged quickly and effectively.
- 3.7 For example HMRC is already receiving thousands of pieces of data about assets held offshore by UK residents. Where cases are seen as having potential for prosecution they are being worked as criminal investigations but that still leaves many cases where criminal investigation is not considered appropriate. HMRC not only needs to

find a way of approaching all the individuals involved but also a way of making them take the need to disclose seriously.

Comprehensive Spending Review

- 3.8 As part of the Comprehensive Spending Review HMRC has been tasked with focussing on evasion and fraud and recovering significantly more tax. To do this HMRC will need new processes for tackling this work and will need to be able to work more cases in less time.
- 3.9 Putting all of these factors together the time is right to review how we deal with cases of tax fraud, where criminal investigation does not appear the most appropriate route at the outset. Chapter 4 explores one option for changing the way that we deal with suspected fraud.

4. An option for change – Contractual Disclosure Facility (CDF)

- 4.1 HMRC has been looking at options for toughening and tightening the current CIF process and the main option is referred to as the contractual disclosure facility.

Other options considered

- 4.2 A number of other options were considered. These included
- the use of Police and Criminal Evidence Act (PACE) procedures and tape-recorded interviews at the opening of civil investigations; or
 - increasing the number of cases initially pursued criminally; or
 - taking a security for non-payment at the start of an investigation.
- 4.3 All of these options have merits. However those who have made deliberate understatements of tax but who will put things right on challenge are affected by the knowledge that they have been found out and a desire not to be prosecuted. They often have fears about engaging with HMRC. Evidence from reviewing old cases opened under the Police and Criminal Evidence Act (PACE) procedures shows that this group is intimidated by a criminal-style approach and this can reduce the chances of disclosure. The PACE approach works with individuals where criminal investigation was appropriate from the outset.
- 4.4 Taking a new power for security across taxes could be effective in certain circumstances. But as part of a tax investigation it could also lead to wasted effort establishing the correct level of potential debt and security, when efforts would be better focussed on quantifying and correcting the tax underpaid. Where appropriate, VAT and PAYE security and payments on account can already be considered.
- 4.5 We think that the proposed contractual disclosure facility cost effectively avoids some of these issues.

Outline of CDF

- 4.6 We do not intend to change our policy of considering cases of suspected tax fraud for criminal investigation before any civil procedure is considered.
- 4.7 Under the proposed CDF HMRC would contact the taxpayer in writing telling them that they were suspected of tax fraud and offering them the opportunity to enter into a contract to disclose that fraud in exchange for certainty that HMRC would not carry out a criminal investigation.

- 4.8 The contract would require the taxpayer to make an outline disclosure of all known irregularities within a short time. The outline disclosure would need to cover:
- a general description of what had happened
 - entities affected and other parties involved
 - time span
 - an indication of the amounts involved
 - an admission of fraud
- 4.9 A period of time (suggested at sixty days) would be allowed to accept the contract and make the outline disclosure. This would allow the taxpayer to seek advice, particularly on whether any irregularities were fraudulent.

Question 2: Is sixty days reasonable for the taxpayer to talk to their adviser and make an outline disclosure of their tax irregularities?

- 4.10 The taxpayer would confirm in writing that they wished to take advantage of the CDF and sign and return the contract.
- 4.11 Provided this contract was taken up and entered into fully by the customer then the frauds disclosed would not be the subject of a criminal investigation by HMRC.
- 4.12 Once the outline disclosure had been made, HMRC would seek to agree with the taxpayer the best way forward to make a complete detailed disclosure, and to pay outstanding duties, interest and penalties. This would vary from case to case.
- 4.13 The outline disclosure would normally be made in writing but would often be followed by a meeting as this would allow questions to be asked that would ensure the disclosure covered all areas of concern.
- 4.14 For those who disclosed in outline and then in detail, HMRC would aim to verify the disclosure within a short period of time and conclude matters quickly.

Example of simple disclosure

Discounts from a particular supplier had not been declared and had all been banked into one account. Here the disclosure would be a brief explanation of the fraud, a statement of tax for each year with an appendix copying the bank statements

- 4.16 If on the other hand the taxpayer decided not to accept the contract, or took up the contract but then failed to disclose or made a false or partial outline disclosure, HMRC would reserve the option to proceed with a criminal investigation, or to take other civil enforcement action. Where the outline disclosure did not accord with the information held by HMRC, then we might notify the taxpayer that this was the case and give a certain number of days to review the position before the contract was withdrawn and investigations commenced. Or, if the breach of contract was clear enough, HMRC might proceed directly to its own investigation, either criminal or civil.
- 4.17 Failure by the taxpayer to co-operate after the outline disclosure would result in higher penalties, and possible publication of details. The contract would bind HMRC not to pursue a criminal investigation if all of the fraud had been disclosed in outline.

Spontaneous Disclosures

- 4.18 A new feature is proposed so that taxpayers could in future make a spontaneous offer to HMRC to enter into a contract to disclose. The process would work in the same way as the CDF, except that the offer of a contract would come from the taxpayer or their agent. HMRC would normally accept such offers unless, for example information was held that indicated the disclosure was likely to be materially incomplete, or a criminal investigation was already underway.

Certainty

- 4.19 The new procedure would give people **who wanted to work with HMRC** certainty from the outset that HMRC would not conduct criminal investigations. It would also be clear that they could optimise penalty reductions if they kept to the terms of the contract.
- 4.20 From the Liechtenstein Disclosure Facility (LDF) we know that one of the primary concerns stopping some individuals disclosing their tax irregularities is a fear of prosecution. By removing the threat of prosecution from those who work with us they will be encouraged to put their affairs in order.

Example from LDF

Over a period of fifty years two connected individuals extracted millions in profits from their business, a UK company, which they did not return for tax. The company always submitted its Corporation Tax and Value Added Tax returns on time and despite HMRC checks the carefully disguised extractions, banked offshore were not uncovered.

The individuals, despite having retired for 10 years, became increasingly concerned about succession planning in the event of their deaths because their activities had been concealed from their family. To facilitate the transfer of the funds to other family members, and in order to maintain easy access to the capital, the directors, unbeknown to their relatives, opened offshore accounts in their children's names. The issues surrounding the concealment of the funds and the problems in securing long term access became a significant concern to the directors, who were anxious to achieve peace of mind for their families.

They disclosed the full extent of their activities under the LDF because the facility provided peace of mind that, as a result of making a prompt and full disclosure, neither they nor their children would face criminal prosecution.

Flexibility

- 4.21 By offering the person the choice of entering into a contract there would be more flexibility. Those taxpayers who did not consider they had committed fraud could explain their position and would not sign the contract. HMRC would undertake investigations to verify the explanations given where this was considered necessary. Those who ignored the contract would be investigated using the most appropriate powers, which could include criminal investigation or civil enforcement powers.
- 4.22 HMRC would only offer CDF in selected cases. But, unlike now, if someone wished to disclose fraud and felt that the CDF process was appropriate they would be able to ask for a contract arrangement regardless of the size of fraud. We hope that this would encourage more people to disclose fraud.

Fraud Only

- 4.23 The contract would only be available where fraud was the issue.
- 4.24 People who have not fraudulently understated their tax would gain nothing from the CDF as we would not be seeking to prosecute them. HMRC would not offer the contract to those that were not suspected of fraud. Equally if someone was offered a contract but felt HMRC's suspicions were groundless they could reject the contract. HMRC would then have to decide whether to investigate or whether the taxpayer's explanation could be accepted.

- 4.25 The current CIF procedure is only available for cases of suspected **serious** fraud and there appears to be a view from outside HMRC that it is only for the wealthy i.e. those who can afford to put things right. This is not the case. But we think that the new proposals will make it clear that anyone who knows they have committed tax fraud and wants to work with HMRC to correct their tax can come forward to sort things out in an environment where criminal investigation by HMRC is no longer a risk.
- 4.26 In the past HMRC and agents have debated whether CIF is appropriate in cases of tax avoidance. Where a taxpayer has honestly and carefully followed appropriate professional advice when entering into tax avoidance arrangements there can be no question that the taxpayer has committed fraud in relation to those arrangements. CDF would therefore not be appropriate, although HMRC will strongly challenge the avoidance scheme's effectiveness. However, sometimes arrangements are described as tax avoidance but are in fact fraud. An example could be where the customer is aware that transactions which are said to have taken place to form part of the scheme did not in fact take place, or the customer has deliberately misrepresented the transactions. In cases such as these, CDF might be appropriate if it was likely to encourage a disclosure.
- 4.27 The contract will make clear that it deals with fraud and only those who accept that they have or may have committed fraud should enter into the contract. In the great majority of cases, taxpayers know whether or not they have been dishonest and there should be no confusion. Exceptionally, an early admission of fraud might be found to have been incorrect, after a full investigation examines all the evidence. In such cases, the evidence would not support penalties for fraudulent conduct, and the incorrect admission would not disadvantage the taxpayer.

Strengthening the link to potential prosecution

- 4.28 The process of entering into a contract to disclose will mean that the person who is offered the contract acknowledges the seriousness of their behaviour and will understand that their behaviour is something HMRC would want to put forward for prosecution if it does not change.
- 4.29 They will have a very clear choice from the outset: they enter the contract and do what is required to avoid criminal sanctions; they enter the contract and risk prosecution if they make false statements or breach the contract; or they stay outside the contract and risk HMRC carrying out its own further investigation.

Length of Investigation

- 4.30 Agreeing a timetable for accepting the contract process and making an initial outline disclosure would mean that time currently lost waiting for initial meetings and disclosure reports would be removed.

- 4.31 Management of progress after the initial terms of the contract were fulfilled would continue as it does now with HMRC commencing investigations. Clarity about the penalty position, if the CDF terms are met, should also lead to less debate about penalties at the point of settlement.
- 4.32 Taking all these factors together should make investigations more focussed and reduce the overall investigations time from the point that the contract is offered.

Question 3: Do you think that there are benefits to the contractual disclosure facility and do you think the proposed structure is reasonable?

Human Rights

- 4.33 The CDF would aim to ensure that the taxpayer who does not intend to co-operate with the procedure is identified at an early point of the process. The contract in essence means the taxpayer has a set period of time to formally notify HMRC if he wishes to co-operate and benefit from the terms of the process.
- 4.34 Silence or notification of non-cooperation means investigations can be started quickly, and gives the taxpayer certainty that this is what HMRC intends to do, if they decide not to co-operate.
- 4.35 The European Court of Human Rights confirmed in *Allen* (2002)² that the “Hansard warning” which informed taxpayers of the “practice of the Inland Revenue of taking into account the co-operation of the taxpayer in deciding whether to bring any prosecution for fraud” was not an “improper inducement” and there was “no indication that the applicant was misled to the effect of the warning, accepting that it could not be interpreted as any kind of freedom from prosecution.”
- 4.36 The CDF would apply the same principle. A Code of Practice would set out clearly that the decision to co-operate was wholly for the taxpayer, and that there was no obligation to co-operate. It would however make clear that the process whereby HMRC would not pursue a criminal investigation would only apply to full, true and accurate disclosures made under the process. The Code of Practice would also set out the taxpayer’s rights.

² Application 76574/01 ECHR 2002-VIII

How is the CDF compatible with Regina v Gill and Gill and the requirement to use PACE?

Regina v Gill and Gill

The appellants ran a business together in partnership. The Revenue considered that the appellants had failed to disclose the existence of various bank and building society accounts in the United Kingdom and abroad thus concealing the extent of their financial assets and evading payment of tax that would otherwise have been payable. When investigating cases of tax fraud it was the Revenue's practice, as set out in a statement given by the Chancellor of the Exchequer to Parliament in October 1990, to accept a money settlement instead of instituting criminal proceedings in respect of the fraud and that, in deciding whether to accept such a settlement, they would be influenced by the fact that the taxpayer being investigated had made a full confession and had co-operated with the Revenue. (The interview where this practice was explained to the person being investigated was known as a 'Hansard' interview.) However, the Revenue reserved the right to institute criminal proceedings even if the taxpayer had confessed and had given full facilities for investigation of the facts. In March 1995, officers from the Revenue's Special Compliance Office (SCO), which was charged with investigating serious fraud, carried out a Hansard interview with the appellants. The appellants were subsequently charged with cheating the public revenue. At the appellants' trial in March 2002, the Revenue sought to rely on the answers given by the appellants at their Hansard interview as evidence of the appellants' dishonesty. The appellants submitted that Code C of the Police and Criminal Evidence Act 1984 (PACE) applied to the interview and that para 10.1a of that code, which provided, inter alia, that a person whom there were grounds to suspect of an offence must be cautioned before any questions about it were put to him for the purpose of obtaining evidence which might be given to a court in a prosecution, had not been complied with. Accordingly, they claimed, their answers should be excluded by the trial judge under s 78b of PACE on the ground that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. The trial judge dismissed that submission holding that, having regard to the history and practice of Hansard interviews, they were part of a civil procedure to collect tax and not part of a criminal investigation. The appellants were convicted. They appealed to the Court of Appeal contending, inter alia, that under s 67(9)c of PACE, persons charged with the duty of investigating offences or charging offenders were to follow the relevant Code of Practice.

Held

(1) The SCO officers were charged with investigating serious fraud. Since serious fraud inevitably involved the commission of an offence or offences, it followed that the officers were charged with the duty of investigating offences when they conducted the Hansard interview. Further, since the Revenue expressly reserved the right to prosecute for fraud, one of the purposes of asking the questions must have been the obtaining of evidence which might be given to a court in a prosecution, even if the Revenue's main aim was to arrive at a monetary settlement. For those reasons, Code C applied to the Hansard interview and the appellants should, accordingly, have been cautioned and the interview recorded on tape.

(2) The admission of the statements made in the Hansard interview did not have such an adverse effect on the fairness of the proceedings that the court ought not to have admitted it. The breach of Code C was significant, but it was not caused by any bad faith and could not fairly be regarded as involving a flagrant disregard of the code's provisions. The principle purpose of the caution under para 10.1 was to ensure that interviewees did not make admissions unless they wished to do so and were aware of the consequences. It was not to prevent them from telling lies. That was not to say that lies told by a person at an interview to which Code C applied would always be admissible where there was a breach of the code. Each case depended on its own facts. However, in the instant case, there was no unfairness in admitting the statements as lies, provided that they were otherwise admissible and an appropriate direction had been given (as it had by the trial judge).

- 4.37 The distinction for PACE purposes, as set out in R v Gill is that HMRC is obliged to use PACE and caution taxpayers when there is “a possibility of criminal proceedings in mind in respect of the fraud about which [HMRC is] asking questions.” In the case of CDF the fraud would be disclosed. This would mean there is no need for PACE, as at the stage the CDF is accepted HMRC accepts in good faith that a complete disclosure will now be made and thus there is no longer an intention to proceed criminally.
- 4.38 If later the investigator considers that the disclosure is materially incomplete or misleading, or the customer withdraws from the contract, the case would be reconsidered for further investigation and this would include criminal investigation. At the point that HMRC then decides a criminal investigation is appropriate PACE is once more in point.
- 4.39 The CDF would compel the taxpayer to acknowledge that they are aware that the agreement not to investigate criminally would only apply to true and accurate disclosures, thus removing the need for PACE.

5. Impact

The nature of this change means that it should have no impact on compliant taxpayers, those who have made mistakes or failed to take reasonable care.

Summary of Impacts

<p>Economic impact</p>	<p>The measure is not expected to have any significant economic impacts.</p> <p>In 2009-10, HMRC finalised 350 settlements for civil fraud which generated £115 million of tax yield. This could have been obtained through traditional investigation but would have taken longer and have been at greater expense to HMRC. If the CDF encourages a reduction in the time investigations take there may be some improvement in funds from these cases flowing to the exchequer.</p>
<p>Impact on individuals and households</p>	<p>There is no impact on individuals or households who are compliant or who make mistakes in their tax because of errors or carelessness. Individuals who have committed fraud and choose not to work with HMRC to put their affairs in order will have an increased risk of criminal investigation. This impact is seen as negligible</p>
<p>Equalities impacts</p>	<p>An equality impact screening exercise has been completed for this measure. No specific group has been identified as being adversely affected.</p>
<p>Impact on businesses and Civil Society Organisations</p>	<p>The impact has been assessed as negligible with only around 350 individuals and businesses a year being dealt with under the civil investigation of fraud process.</p> <p>The changes would affect a minority of businesses that are both fraudulent and subsequently fail to work with HMRC to put their affairs in order within the terms of a contract. Such non-compliant businesses and their costs are out of scope.</p> <p>There may be some very small costs retraining staff but this will be limited to tax professionals who represent fraudulent businesses that are under investigation by HMRC.</p> <p>Competition assessment: by deterring businesses from acting fraudulently with an increased risk of prosecution HMRC will help honest businesses to compete against those who seek an unfair advantage.</p> <p>Small firms impact test: Generally small firms with fewer than 20 employees will be not be affected by this change. We will however ensure that during the discussion phase we speak to small firms (particularly small firms of</p>

	<p>accountants who represent fraudulent taxpayers) who might be affected.</p> <p>Charities will similarly only be affected if they have acted fraudulently and do not accept the contract terms.</p>
<p>Impact on HMRC or other public sector delivery organisations</p>	<p>Other government departments will be unaffected.</p> <p>We do not envisage any costs for HMRC as CIF training and guidance were planned for rewrite as part of normal business activities.</p> <p>We expect some reduction in elapsed time of CIF cases as a result of the CDF and some small increase in prosecutions from those who do not engage with or breach the contract.</p>
<p>Other impacts</p>	<p>Privacy: this measure will give HMRC access to no more information than at present</p>

Question 4: Do you agree HMRC's assessment of impacts?

6. Summary of Questions

- Question 1:** Do you agree the operational policy objective?
- Question 2:** Is sixty days reasonable for the taxpayer to talk to their adviser and make an outline disclosure of their tax irregularities?
- Question 3:** Do you think that there are benefits to the contractual disclosure facility and do you think the proposed structure is reasonable?
- Question 4:** Do you agree HMRC's assessment of impacts?

7. The consultation process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

- Stage 1 Setting out objectives and identifying options.
- Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
- Stage 3 Drafting legislation to effect the proposed change.
- Stage 4 Implementing and monitoring the change.
- Stage 5 Reviewing and evaluating the change.

This discussion paper combines stages 1 and 2 of the operational policy development. Stage 3 will not be appropriate as legislation is not required in order to implement the proposals.

The purpose of the consultation is to seek views on the detailed operational policy design of a specific proposal, rather than to seek views on alternative proposals.

How to respond

A summary of the questions in this consultation is included at chapter 6.

Responses should be sent by 20th September 2011, by e-mail to cepris.cifconsultation@hmrc.gsi.gov.uk or by post to:

Criminal Enforcement Policy
4th Floor - Room 4E/11
100 Parliament Street
London
SW1A 2BQ

For detailed queries about the proposal contact Juliet Roche & Tori Magill on the e mail address above.

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from the HMRC Internet site at <http://www.hmrc.gov.uk/consultations/index.htm>. All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HMRC.

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

The Consultation Code of Practice

This consultation is being run in accordance with the Code of Practice although it has been necessary for it to run for 2 months. This consultation is being run for this shorter time because it is a minor operational change and does not require detailed consideration of policy. To ensure that people are able to contribute as fully as possible to this consultation HMRC will be holding meetings of groups of people to supplement the discussion document. A copy of the Code of Practice criteria and a contact for any comments on the consultation process can be found in Annex A.

Annex A: The Code of Practice on Consultation

About the consultation process

This consultation is being conducted in accordance with the Code of Practice on Consultation.

The consultation criteria

1. When to consult - Formal consultation should take place at a stage when there is scope to influence the policy outcome.
2. Duration of consultation exercises - Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Clarity of scope and impact - Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Accessibility of consultation exercise - Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. The burden of consultation - Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Responsiveness of consultation exercises - Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Capacity to consult - Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

If you feel that this consultation does not satisfy these criteria, or if you have any complaints or comments about the process, please contact:

Richard Bowyer, Consultation Coordinator, Better Regulation and Policy Team, H M Revenue & Customs, Room 3E13, 100 Parliament Street, London, SWA 2BQ

020 7147 0062 or e-mail hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk