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# Corporate offences of failure to prevent facilitation of UK and foreign tax evasion – CFA 2017

August 2017

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# 1. Tax evasion, facilitation and the new corporate offence

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# What constitutes tax evasion?

- A **dishonest** and **deliberate** act that results in defrauding the public revenue by **failing to pay sums lawfully due**.
- It does not include:
  - Tax avoidance
  - Unintentional non-compliance
- Evading taxes is illegal and it is considered a crime in the UK
- That includes the evasion of all **type of taxes**, such as corporation tax, income tax, VAT, National Insurance Contributions, Stamp Duty, Other duties and levies etc.
- Who is liable?
  - The **taxpayer** who takes action with a view to evade tax
  - The **facilitator**, i.e. any person that enables or facilitates tax evasion

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# What constitutes facilitation of tax evasion?

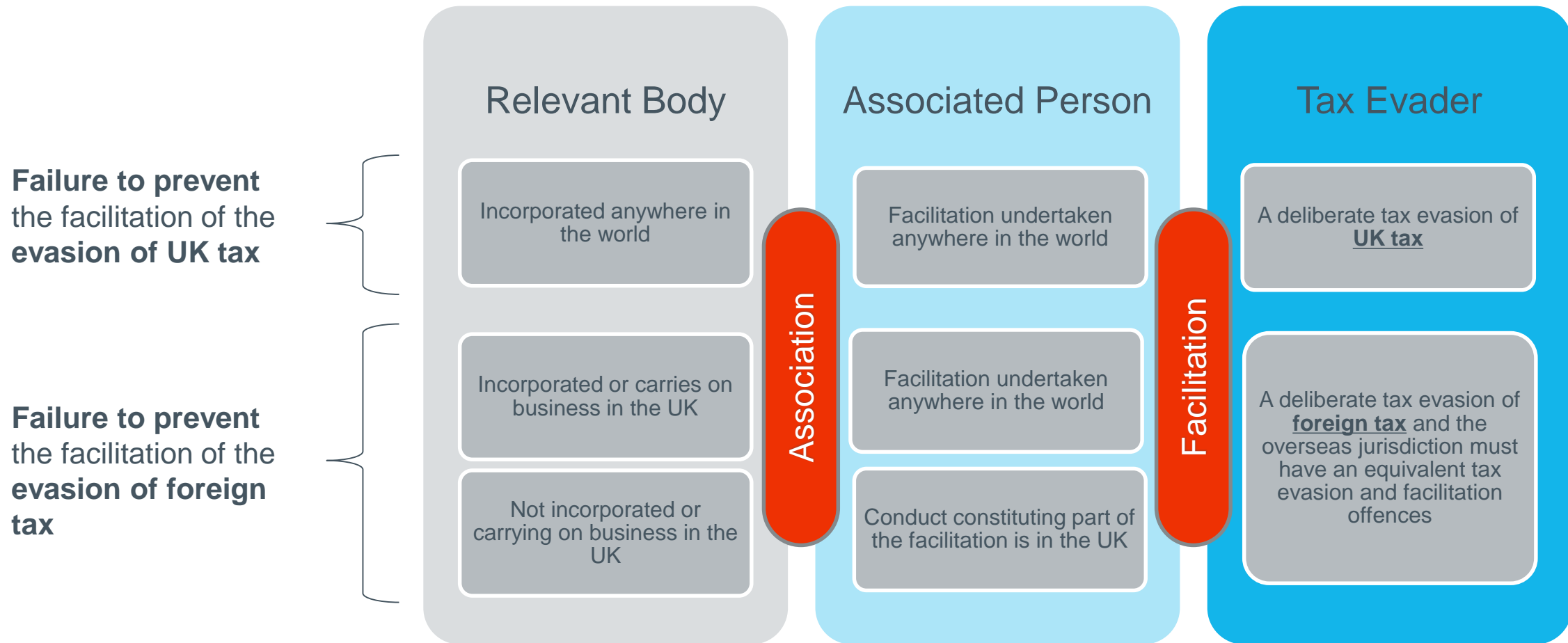
- A **deliberate and dishonest action** from a person anticipating to **assist a taxpayer to evade UK tax**.
- A person will commit a tax facilitation offence if that person is:
  - involved or
  - knowingly concerned in, or
  - takes steps with a view to or aids, abets, counsels or procures tax evasion.
- Common examples:
  - Delivery and maintenance of infrastructure – e.g. trust and company formation and setting up and maintaining bank accounts.
  - Financial assistance – helping an evader move money around, providing banking services.
  - Acting as a broker or conduit – i.e. arranging access to others in the supply chain.

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# What are the corporate tax offences introduced by the Criminal Finances Act 2017?

- The Criminal Finances Act 2017 establishes two categories of offence:
  - a) The **failure to prevent** the facilitation of the **evsion of UK tax**
  - b) The **failure to prevent** the facilitation of the **evsion of foreign tax**
- A **relevant body (B)** is guilty of an offence if a person commits a tax evasion facilitation offence when acting in the capacity of a **person associated with B**.
- A person (P) acts in the capacity of a person associated with a relevant body (B) if P is:
  - a) an employee of B who is acting in the capacity of an employee,
  - b) an agent of B (other than an employee) who is acting in the capacity of an agent, or
  - c) any other person who performs services for or on behalf of B who is acting in the capacity of a person performing such services.
- The Criminal Finances Act will be effective from **30 September 2017**

# What are the corporate tax offences introduced by the Criminal Finances Act 2017?



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# Consequences of being found guilty

- A relevant body guilty of an offence may face a criminal conviction and unlimited fine.
- Implications of criminal conviction: ***“From a regulatory perspective, a criminal conviction in the UK is likely to be disclosable to the regulator of the manager, with potential adverse implications on the manager’s regulatory status and ability to carry on business as usual.”*** AIMA Guidance
- Potential future issues as a red flag for investors and likely to be identified on due diligence
- Serious reputational risks



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## Defence for the relevant person: adequate procedures

- It is a defence to demonstrate that, despite the criminal facilitation of tax evasion taking place, the organisation had “**adequate procedures**” in place to prevent it or that it was unreasonable to expect such procedures.
- The adequacy of the procedures will depend on the size, complexity, industry focus and risk profile of an organisation. HMRC have made it clear that the financial services sector is considered high risk.
- The guidance published by HMRC has established specific principles to assist organizations in developing robust policies and procedures.
  1. Risk assessment
  2. Proportionality
  3. Top level commitment
  4. Due diligence
  5. Communication (including training)
  6. Monitoring and review

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# The 6 principles to mitigate the tax facilitation risk

## 1. Risk assessment:

Thorough assessments of the risks faced by the organisation should be conducted on an ongoing basis. These assessments should take into account both the internal and external tax evasion facilitation risks.

## 2. Proportionality:

Risk-based prevention procedures will depend on the levels of control and supervision that a business is able to exercise over a person acting on its behalf and the proximity of that person.

## 3. Top level commitment:

Senior management should be committed to prevention and should foster a culture in which facilitation of tax evasion is never acceptable.

## 4. Due diligence:

Due diligence procedures should take an appropriate and risk-based approach.

## 5. Communication (including training):

Prevention policies and procedures should be communicated throughout the business.

## 6. Monitoring and review:

The business monitors and reviews prevention procedures and makes improvements where necessary.

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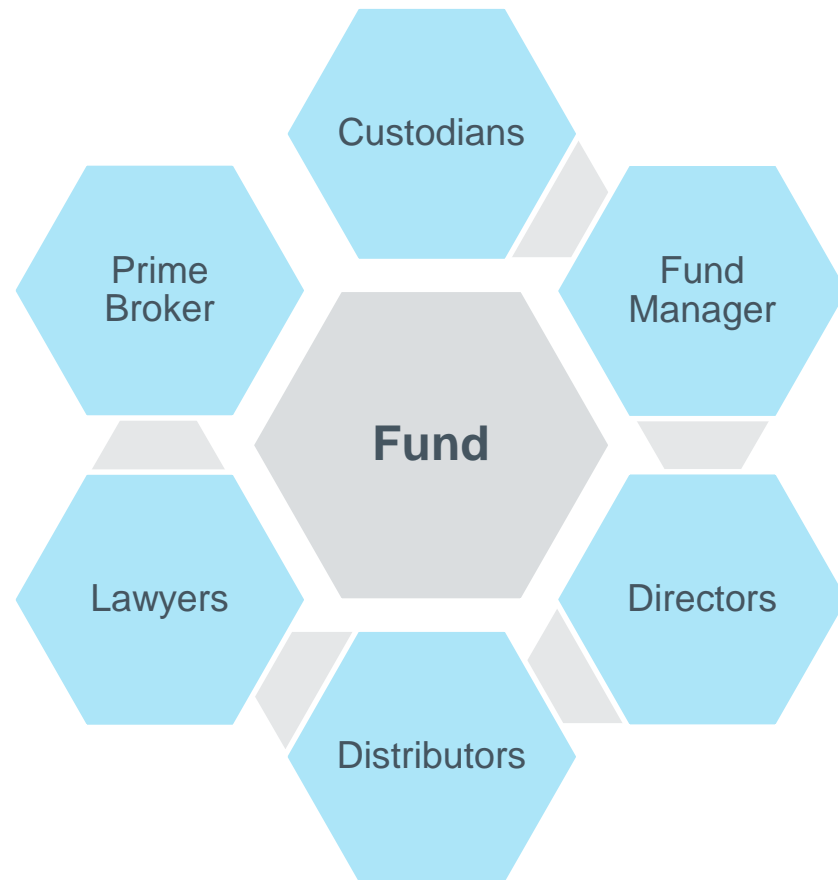
## 2. Application to asset management

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# What will the asset management industry need to consider?

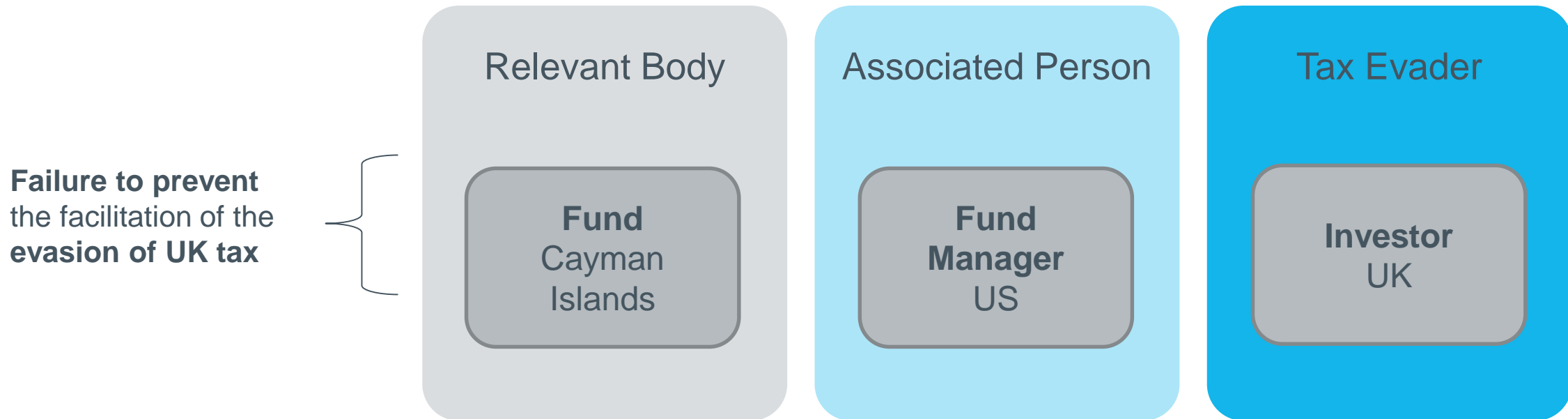
- HMRC have made it clear that the financial services sector is considered high risk therefore **best practice will be for all financial services companies to develop adequate procedures.**
- Industry guidance suggests that both the **fund and the fund manager need to be considered separately.**
- Entities should look at both of the two offences and their context in relation to the asset management industry.
- Need to consider **where opportunities to facilitate tax evasion may occur**, what the **motive** might be and the **means** to facilitating the investor
- Assess what level of **due diligence** is required in undertaking a risk assessment on associated persons and the risks.

# Who are the associated persons to the fund and manager?



# Where might an example of facilitation occur?

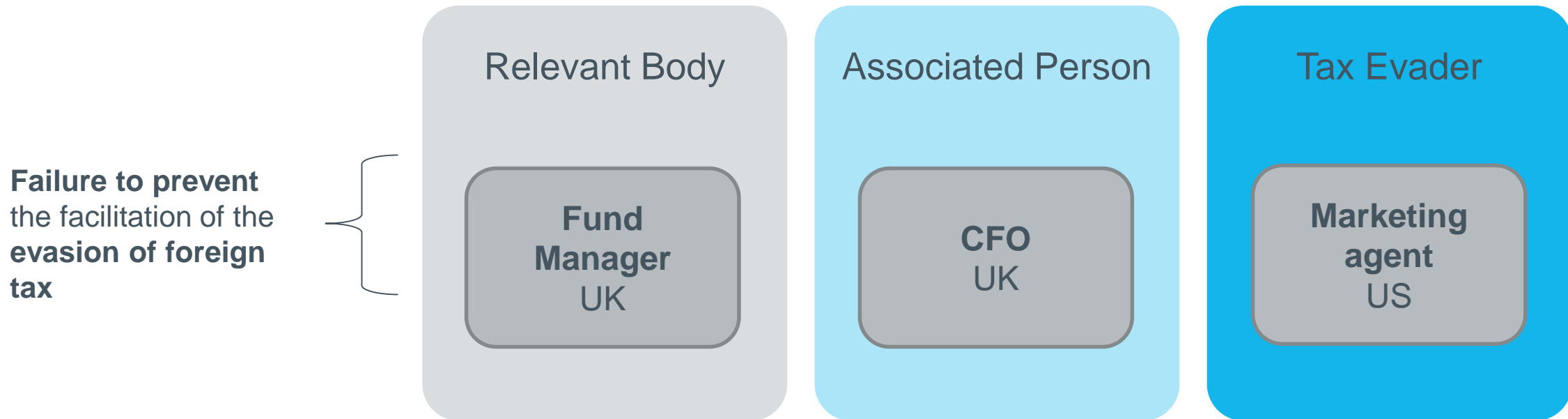
- **Example 1 – Fund guilty of failure to prevent** the facilitation of the **evasion of UK tax**



- **Opportunity** – Assist investor with non disclosure of fee rebates taxable in the UK
- **Motive** – To encourage future investment in the fund and generate greater fees for the fund manager
- **Means** – Pay rebates direct from manager to offshore account of investor

# Where might an example of facilitation occur?

- **Example 2 – Fund guilty of failure to prevent** the facilitation of the **evasion of foreign tax**



- **Opportunity** – Assist marketing agent with non disclosure of fees taxable as income in the US
- **Motive** – To negotiate a lower fee for capital introductions to the fund
- **Means** – Pay fees direct to offshore nominee account at the request of the marketing agent

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### 3. D&P tailored solution for asset managers



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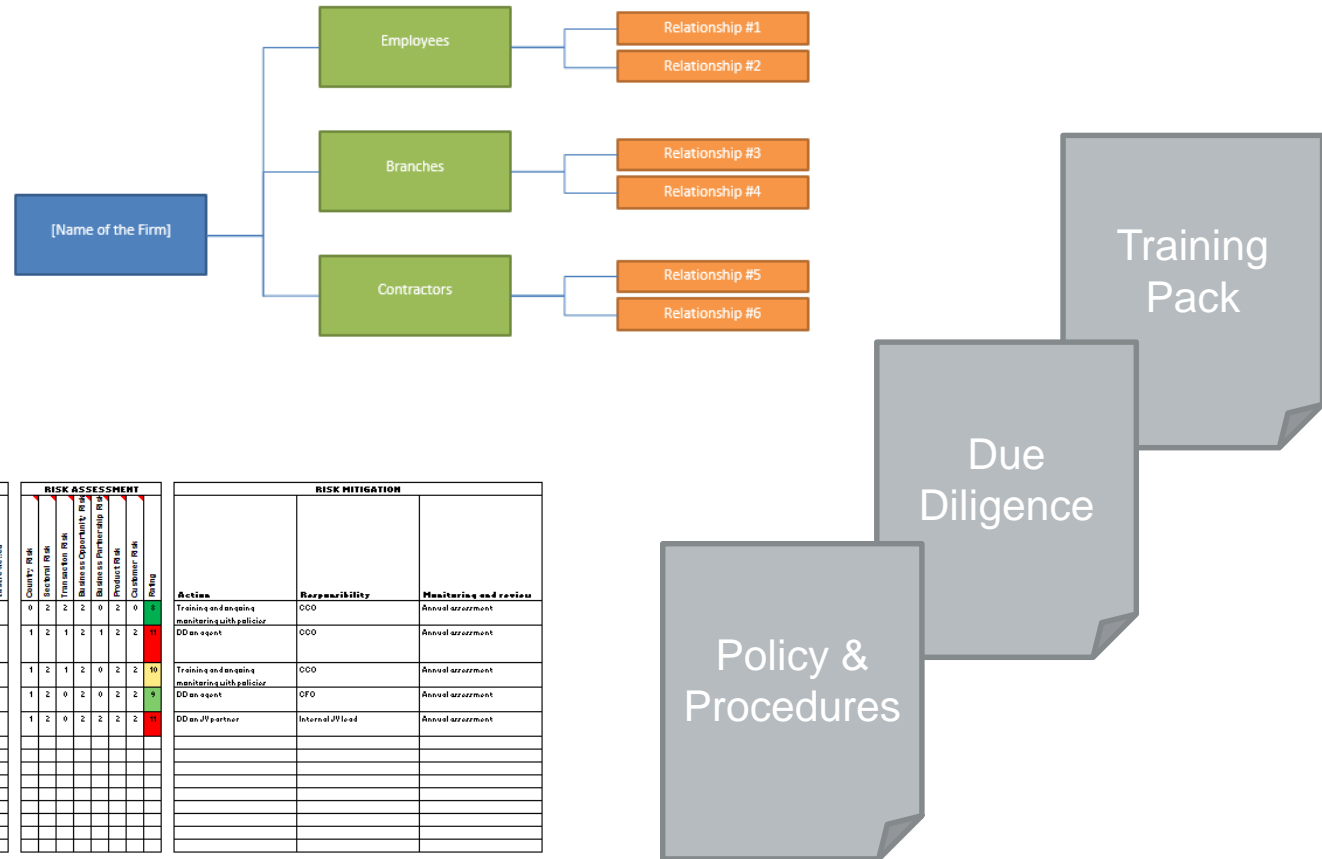
# Why Duff & Phelps?

- The Duff & Phelps tailored solution seeks to **support an entity in developing the policies and procedures** required by a relevant body to mitigate against a conviction for **failure to prevent** the facilitation of the **evasion of tax**.
- The approach has been developed by the **Duff & Phelps Regulatory Tax Team**, a team of professionals with extensive tax and compliance experience in the asset management and financial services industries.
- The **specific industry expertise** provides both an understanding of asset management structures and risks associated within the industry
- The **specific tax expertise** provides a comprehensive appreciation how and where tax arises and therefore the potential for it to be evaded.

# What is the D&P tailored solution?

- The Duff & Phelps tailored solution provides a combination of **technical resources** and **consulting time** required to support an entity in developing the policies and procedures required.

- Technical resources:
  - Relationship mapping framework
  - Due Diligence Questionnaires
  - Risk Matrix with rating system
  - Policy and Procedures
  - Training Pack



RELATIONSHIP MAPPING			RISK			DUE DILIGENCE						RISK ASSESSMENT						RISK MITIGATION				
Relevant Body / Bodies	Associated person	Relationship	Opportunity	Motive	Means	Sanctions Check	DD Questionnaire	Research	Follow-up	Commitment	Letterhead	Country Risk	Structural Risk	Transaction Risk	Business Opportunity Risk	Business Relationship Risk	Product Risk	Customer Risk	Rating	Action	Responsibility	Monitoring and review
[Name of the Firm]	Employee	Investor	Risk: investor with unreported sale	Secure future investments	Splitting of red-emption proceeds between accounts							0	2	2	2	0	0	0	10	Training and ongoing monitoring with policy	COO	Annual assessment
	Fundraising agent	Investor	Risk: investor with non-reporting of rollover	Secure future investments	Redirecting rollover payments to undisclosed accounts							1	2	1	2	1	2	2	11	DD on agent	COO	Annual assessment
	GP	Researcher	Risk: researcher with non-disclosure of fees	Secure ongoing services	Payments to undisclosed accounts							1	2	1	2	0	2	2	10	Training and ongoing monitoring with policy	COO	Annual assessment
	Entity agent	Sub-tenant	Risk: sub-tenant in non-reporting rent	Secure fee for the agent	Falsifying sub-let agreements							1	2	0	2	0	2	2	9	DD on agent	OFO	Annual assessment
	Joint venture	Fundraising agent	Risk: fundraiser in under-reporting of income	Secure services at better rate	Payments to undisclosed accounts							1	2	0	2	2	2	2	11	DD on JV partner	Internal JV lead	Annual assessment

# What are the steps is the D&P tailored solution?

- The Duff & Phelps approach is a stepped process based on the HMRC guidance and understanding of the industry.

<b>Step 1 - Relationship Mapping</b>	Map out the relevant bodies, associated persons and the relationships they hold
<b>Step 2 - Due Diligence</b>	Undertake appropriate due diligence as a precursor to risk identification and assessment
<b>Step 3 - Risk identification</b>	Identify relationships where an opportunity, motive and means to facilitate may exist
<b>Step 4 - Risk Assessment</b>	Perform risk assessment and rate the risks based on scoring system
<b>Step 5 - Policies and Procedures</b>	Develop policies and procedures (P&P) proportionate to the risk assessment
<b>Step 6 - Communication</b>	Provide training materials to communicate the new P&P
<b>Step 7 - Commitment</b>	Seek commitment to P&P at both top level and with associated persons
<b>Step 8 - Monitoring and review</b>	Embed an appropriate monitoring and review system into the business

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# Packages and indicative pricing

- Exactly what constitutes adequate procedures under the legislation will vary from business to business with a number of factors being taken into account. Therefore the Duff & Phelps solution will be tailored for each business.
- Duff & Phelps are providing various packages based on the level of support required, these include a combination of **technical resources** and **consulting time**. Ranging from a base package where the consulting time will be limited to a pre-implementation review to a more in-depth assignment leading on the project to completion.
- Precise fees will need to be tailored based on the size, structure and operational nature of the business. Please contact the **Duff & Phelps Regulatory Tax Team** for more information.

# Contacts



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Marie is a managing director in the Regulatory Tax Advisory team within the Compliance and Regulatory Consulting Practice and has over 12 years experience advising businesses in the asset management community on UK tax issues. She assists clients with tax issues when establishing businesses in the UK and provides tax advisory at various stages of their lifecycle.

Her expertise encompasses issues surrounding the offshore funds legislation including the impact of the offshore fund provisions, applications and compliance for reporting fund status, transfer pricing and related issues and provision of tax compliance services to UK based businesses.

Marie was named as one of the UK Tax Journal's Top 40 under 40 for 2015.



## Michael Beart - Director

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Michael is a director at Duff & Phelps and has spent his entire professional career in the investment management industry in which he has extensive practical experience both as a professional advisor and in-house specialist. The breadth of his experience spans from structuring start-up owner managed businesses all the way to working with FTSE 100 asset managers.

Prior to joining Duff & Phelps, Michael was the in-house tax advisor at Man Group plc, one of the world's largest independent alternative investment managers, focusing on group tax rate forecasting and reporting, tax compliance and tax risk management.

For more information about our global locations and services, please visit:  
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