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The Hundred Group
of Finance Directors

Tax Committee

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Dear Sir

Tax and Procurement: Discussion Document and Draft Guidance

We welcome the opportunity to contribute to the proposal in respect of promoting tax compliance within the Government procurement process. Whilst we are supportive of measures that encourage companies to cease engagement in abusive tax avoidance schemes we have serious concerns about the proposals being made in this document.

Who we are

The 100 Group represents the views of the finance directors of FTSE 100 and several large UK private companies. Our member companies represent almost 90% of the market capitalisation of the FTSE 100, collectively employing over 7% of the UK workforce and in 2012, paid or generated, taxes equivalent to 14% of total UK Government receipts. Our overall aim is to promote the competitiveness of the UK for UK businesses, particularly in the areas of tax, reporting, pensions, regulation, capital markets and corporate governance.

Our views

As representatives of responsible businesses we welcome proposals focused on reducing the use of abusive and wholly artificial arrangements lacking business substance. We appreciate that the stated purpose of these rules to promote tax compliance is well founded however, we do not believe that the guidance as currently drafted will achieve this. In our view it would be sensible to take some more time to ensure that these guidelines are designed and implemented properly first time. At present, it does not provide clear, bright lines which would enable companies to be confident that they would appropriately navigate the regime and remain competitive within the government procurement process. We are further concerned that applying the rules as drafted will significantly slow-down and add material cost and unnecessary complexity to the procurement processes – both for industry and government. We are also extremely concerned that the very short consultation period and subsequent time before the proposed implementation will not allow for a sufficiently robust debate.

The concerns we have with the current drafting are as follows:

- It is not clear whether the self certification will apply to a specific legal entity or to the tax compliance history of a wider group. Please can you clarify this point?

- No definition of a TAAR is provided; therefore it is unclear what transactions may be within scope. Only one example of breach of a TAAR has been listed within Chapter 2, "*Examples of occasions of non-compliance*". There needs to be a clear statutory definition or list of TAARs and its overseas equivalents.

- The application of a TAAR can be a matter of fine judgment. There will be circumstances in which it could reasonably be considered that a TAAR should apply while it might also reasonably be considered by someone else that it does not apply Provided that the taxpayer has a reasonable basis for arguing that it does not apply in a particular case, and HMRC agrees that the case is arguable either way, the case should not fall within the new rules even if HMRC prefers to argue that the TAAR is applicable.

- The guidance applies retrospectively to activity that might have taken place many years ago: 10 years plus the time taken to conclude litigation (as it is the date of litigation, not the offence, which would drive non-compliance). Given the purpose of the guidelines is to "use the procurement process for government contracts to promote tax compliance" we fail to see the need for a retrospective review of a company's compliance record if you are trying to influence future behaviour. We would advocate that the guidelines are forward looking as opposed to the retrospective proposals. If for some reason a retrospective review was deemed appropriate we do not understand why it would need to be for as long as 10 years. This would place a significant burden on businesses required to review 10 years or more worth of activity and they may not have the necessary records as the statutory time limit to keep these records may have expired particularly in relation to past acquisitions where items were old and cold at the time of purchase. This could also result in significant delays in contract negotiation and tendering. If you insist on applying a retrospective review, the reference point for any date of non-compliance should be the accounting period in which the arrangements were entered into rather than the date that the non-compliance is recognised and the length of retrospective review should be no longer than the statutory six year time limit required for record keeping.

- The guidance is unclear regarding transitional arrangements of the 10 year retrospective review and the practical application to companies and their subsidiaries. We are concerned there will be an inconsistency in application when trying to use this one size fits all approach. In particular:

    - To achieve sufficient oversight of companies that have been acquired by UK subsidiaries, would the acquiring group be required to understand their acquired entities tax settlements (and planning) from 10 years ago or would transitional rules apply such that consideration only occurs on a prospective basis from the date of acquisition and therefore any occasion of non-compliance in the target company will not impact the acquiring groups record?

    - If the acquiring group was aware of an occasion of non-compliance which had occurred before it acquired the target company and it had put in place new processes whereby the non-compliance would not recur the occasion of non-compliance which occurred under previous ownership should not be relevant; the objective of encouraging compliance cannot be met in these circumstances.

    - There is a lack of clarity and guidance around the applicability to sub contractors. For example, if you involve a sub contractor within any particular year, does the primary contractor have responsibility to go back 10 years in the tax history of the sub contractor? If the primary contractor is to be responsible for certifying in respect of sub-contractors, would entities have to understand sub-contractors tax planning or assuming the primary contractor can't self-certify for sub-contractors, it is presumably under an obligation to

make sure all sub-contractors do self-certify independently. Again, these areas could be extremely administratively burdensome.

- Any amended return by reason of the three specific non-compliance occasions detailed under the heading "Definition of "occasion of non compliance"" would be constituted as non-compliance. This would be irrespective of whether the amendment was driven by the outcome of litigation or a simple agreement with HMRC and may discourage taxpayers from settling outstanding matters with HMRC outside of litigation. A voluntary amendment of a return or, in particular, an agreement with HMRC may well be without prejudice to the contentions of either party in which case it would be inappropriate for either to assume that there has been an occasion of 'non-compliance' or indeed that any such adjustment is specifically by reason of GAAR, TAAR etc. In such circumstances it would be reasonable for a supplier to self-certify that they have not had 'an occasion of non-compliance'.

- Non-compliance also includes non-compliance with 'any equivalents in foreign jurisdictions'. It is not reasonable to expect multinational enterprises with activities and tax obligations throughout the world to establish what are 'equivalent foreign tax rules'.

- With many countries not having GAARs or DOTAS regimes, non-UK based suppliers may gain a competitive advantage where their home country tax regime is less onerous than the UK. With less to self certify against, British-based companies may, thus, become disadvantaged in comparison to, for example, European and US based multinationals. Given the governments growth agenda we believe that it is important that British businesses remain competitive. Would non-UK entities of a UK Group would be allowed to bid for contracts and to self certify under the equivalent foreign tax rules?

- Although we acknowledge "Annex B Guidance to Suppliers" within the Cabinet Office draft procurement *information note 03/13 14 February 2013* states that if entities are unable to self certify that there have been no "occasions of non compliance", they are offered the chance to supplement the response with an explanatory statement, it is difficult to understand how this would be assessed by the relevant procurers, whom we assume would police such review. Furthermore, within this document, for the proposed pass/fail basis of assessment, ambiguity is introduced when considering how "aggravating factors" will be evaluated against "mitigating factors" in determining the final assessment.

- We also request that there be a clearance procedure for genuine cases of uncertainty in order to avoid wasting a vast amount of government and contractor time and expense in tendering processes.

We would welcome the opportunity to engage further with HMRC through the consultation period as we believe it is in all our interests to ensure that any reform applicable to business taxes should continue to give businesses confidence in the tax regime of the United Kingdom and to allow a competitive environment for them to operate in.

Yours faithfully

Andrew Bonfield
Chairman
The 100 Group Tax Committee