# Calling all senior accounting officers: are you ready for your additional roles and responsibilities?

BY CHARLOTTE SALLABANK
partner,
Jones Day

BY IAN REID
associate,
Jones Day

THE BUDGET 2009 INTRODUCED SEVERAL unexpected reforms to the current tax regime with arguably the greatest surprise to businesses and advisers being the introduction of legislation relating to senior accounting officers (SAO). Specifically, Schedule 46 to the Finance Act (FA) 2009 was introduced to make SAOs of large companies liable to taxes and duties in the UK, responsible for ensuring and certifying that appropriate tax accounting arrangements have been established and are maintained on an annual basis.

This particular measure had not been previously raised or contemplated by HM Revenue & Customs (HMRC) in any discussions or focus groups with businesses and/or their advisers, and therefore, it would not be an understatement to say that the introduction of these measures was somewhat of a surprise to all. It is our understanding that the new regime was introduced at the instigation of HM Treasury (HMT) as their response to the considerable coverage given to corporate regulation and governance at the G20 summit held in London in 2009, and throughout the various forms of media. Although these reforms did not technically originate from within HMRC, the new regime builds on HMRC's current approach of working co-operatively with large businesses and ensuring that tax corporate governance is given greater emphasis by directors and officers.

This article provides an overview of the revised legislation and considers how the rules may operate in practice. Further, the article considers whether these rules are in fact necessary to address any concerns of HMT and/or HMRC, and finally, we discuss whether affected companies should be doing anything now to prepare for this new regime.

## COMMENCEMENT DATE AND APPLICATION

The SAO legislation will only apply to companies in relation to the financial year beginning on or after 21 July 2009 (the date on which the Finance Bill 2009 received Royal Assent). The legislation is not subject to a transitional period; however, please refer below for details of the 'light touch' approach that will be administered by HMRC with respect to the first financial year following the introduction of the new regime.

This new legislation is intended to apply to a 'qualifying company', as defined in paragraph 15 of Schedule 46 to the FA 2009. A qualifying company for purposes of these rules is a UK-incorporated company that in the preceding financial year, either alone or when its results are aggregated with other UK companies in the same group, has a turnover of more than £200m or has a relevant balance sheet total of more than £2bn.

The legislation defines group membership by reference to the relationships between 'relevant bodies'. A relevant body, which is a company or other corporate body, will be a member of a group where it is a 51% subsidiary of another relevant body, or it has a 51% subsidiary. Two or more relevant bodies will be members of a group where one is the 51% subsidiary of the other, or both are 51% subsidiaries of a third relevant body.

Turnover will be taken to have the same meaning as in section 474 of the Companies Act 2006 and will be the turnover or revenue recognised in the relevant company's statutory accounts. Consequently, adjustments made in tax computations for the purposes of calculating a company's corporation tax liability will not be included in the turnover figure, and therefore they will not be included in the aggregation.

The provisions only apply to UK-incorporated companies. Consequently, partnerships and branches of foreign companies are not caught by the new legislation. The rules will, however, apply to foreign branches of UK companies and dormant companies. The new regime will only apply to UK incorporated but not UK-resident companies to the extent that the relevant company is trading, or has some taxable activity, in the UK.

Banks and insurance companies do not generally show turnover in the statutory accounts, and therefore the asset test alone will determine whether or not they are a qualifying company for the purposes of this legislation.

When establishing whether a company will be treated as a qualifying company, consideration needs to be given to the

aggregated turnover or assets of the company and other companies in the same group. The legislation does not provide for any adjustment mechanism when aggregating or consolidating the assets and turnover, and accordingly, there is the opportunity for double counting.

If a qualifying company ceases to meet the size criteria, then it will no longer be subject to this measure. There is no requirement to formally notify HMRC in these circumstance. However, HMRC expect that this would form part of the normal communication with the customer relationship manager (CRM).

### WHO WILL BE THE SENIOR ACCOUNTING OFFICER?

The SAO should be the director or officer with overall responsibility, as appropriately delegated, for the company's financial accounting arrangements. It is the responsibility of the company to determine who best fits this role and it is expected that in the majority of cases this will be evident from the established corporate governance arrangements. Where a company is a member of a group, the SAO for any one company may fulfil that role for some or all of the UK companies within the group providing that they are an officer or director of a group company and do actually have overall responsibility for the company's financial accounting arrangements.

There will only be one SAO at any one time for any given company. Should personnel or responsibilities change during the course of the financial year, it is possible that the company or group will have more than one SAO for the period.

Where a company is a member of a group, the SAO for any one company may fulfil that role for some or all of the UK companies within the group providing that they are an officer or director of a group company and this person does actually have overall responsibility for the company's financial accounting arrangements.

A qualifying company is required to notify HMRC of the name of the person acting as the SAO for each financial year. There is no standard notification form. However, the notification should include the name of the SAO, the period to which the notification relates and the companies for which the SAO is acting. It is expected that such notification will normally be made to the CRM for the particular qualifying company.

***'The legislation covers the entire end-to-end process from the initial data input into accounting systems to arriving at the numbers that form the basis for the completion of the tax return.'***

### OVERVIEW OF THE NEW RULES

As outlined above, the purpose of the new regime is to require the SAO of all qualifying companies to provide personal certification that they have taken reasonable steps to ensure that the accounting systems of the company are adequate for the purposes of accurate tax reporting. The main duty of the SAO is set out in paragraph 1(1), which indicates that the primary role of the SAO will be to take reasonable steps to ensure that the company establishes and maintains appropriate tax accounting arrangements.

Pursuant to paragraph 1(2), the SAO will be required to take reasonable steps to ensure that they monitor the tax accounting arrangements of the company and identify any respects in which those arrangements may not be considered appropriate tax accounting arrangements. The legislation applies to arrangements for accounting for transactions and the processes by which the correct figures are produced to enable tax liabilities to be calculated. Therefore the legislation covers the entire end-to-end process from the initial data input into accounting systems to arriving at the numbers that form the basis for the completion of the tax return.

For the purposes of these rules, 'reasonable steps' is taken to mean the steps that a person in the same situation would normally be expected to take to ensure that risks to tax compliance are properly managed and to enable the various returns to be prepared with an appropriate degree of confidence. HMRC have confirmed that such steps could also include consideration of the relevant evidence to provide assurance that systems' objectives are being met, and that the financial accounting systems are fit for purpose and enable correct completion of the tax returns.

What is considered 'appropriate' and 'reasonable' will differ between taxpayers, and will also vary across taxes and duties. For example, the arrangements that would need to be put in place to deal with a high-frequency/high-volume transaction, such as VAT, will be very different to those required to calculate a one-off amount as stamp duty land tax (SDLT), and an SAO will need to take such factors into account in deciding what is reasonable.

HMRC have issued guidance that sets out in detail how the new regime will operate in practice. The guidance includes several practical examples in which HMRC suggest what might constitute reasonable steps in various specific scenarios. Although HMRC acknowledge that the examples are in no way exhaustive nor do they provide a complete list of what might be expected in such scenarios, the following principles could be considered to constitute reasonable steps:

**i)** processes to periodically check and test, as appropriate, systems, controls, process flows and transactions;

**ii)** policies and processes to ensure the retention and maintenance of required records (in whatever form);

**iii)** ensuring that staff are appropriately trained and qualified and have the knowledge and experience required to undertake their functions;

**iv)** ensuring that the introduction of new systems and processes, or changes to them, are supported by appropriate planning, risk assessment,

implementation and evaluation activities; and

**v)** processes to ensure compliance with all relevant legal requirements.

**Certification process**

The SAO of a qualifying company is required to provide to HMRC a certificate (as set out in paragraph 2 of Schedule 46 to the FA 2009) stating whether the company has appropriate tax accounting arrangements, or where it does not, provide an explanation.

> ***'The introduction of the new regime will facilitate HMRC in continuing its risk-based approach by identifying those companies that do not have robust accounting arrangements.'***

In those cases where the SAO will fulfil the role for several UK companies in the group, the legislation permits the SAO to certify the appropriateness of the tax accounting arrangements for more than one company.

The certificate must be submitted no later than the end of the period for filing the accounts for the financial year.

Paragraph 14 of Schedule 46 to the FA 2009 sets out the taxes and duties covered by the legislation. These are corporation tax, VAT, PAYE, insurance premium tax, SDLT, petroleum revenue tax, customs duties and excise duties. Any tax not included in the above list will be excluded from the scope of the new legislation. Accordingly, national insurance contributions, income arising from the Construction Industry Scheme and certain other taxes, such as landfill tax and aggregate levy, are also excluded.

**Penalties and assessment**

Although the objective of the new regime is not to raise the tax compliance yield through the assessment of penalties, in circumstances where the obligations placed on the company or an SAO by the new regime are not met penalties will arise. The following three penalties may arise for failure to comply with these rules:

**i)** a penalty of £5,000 can be assessed on the SAO if they fail to comply with the main duty;

**ii)** a penalty of £5,000 can also be assessed on the SAO if they continue to fail to produce a certificate or provide an incorrect certificate; and

**iii)** a penalty of £5,000 may also arise where a company fails to notify HMRC of the name of the person who was the SAO throughout the financial year.

Penalties can be assessed no later than 6 months after the failure or inaccuracy comes to the attention of an HMRC officer, or not more than six years after the end of the period for filing the company's accounts for the financial year. The SAO does have a right of appeal against a penalty assessed on them under this legislation. The appeal should be made to an officer of HMRC, which in practice will be the CRM within 30 days and will be treated for procedural reasons in the same way as an appeal against an assessment to tax.

No penalties will be payable for the failure by an SAO to comply with the requirements of the legislation if they have a reasonable excuse for not doing so and they put it right without unreasonable delay after the excuse ends.

## ARE THE RULES NEEDED?

Prior to the introduction of this new regime, there was no requirement on anyone within a qualifying company to ensure that the underlying tax arrangements were fit for purpose. In HMRC's view this measure addresses that potential 'accountability gap' by ensuring that a senior company representative (ie the SAO) is responsible for ensuring that adequate reporting systems are in place.

While the above statement may be correct, many qualifying companies already have transparent and open relationships with HMRC via their CRM. Many of these will already have robust tax accounting arrangements. However, HMRC have identified that there are some qualifying companies that do not have robust systems and processes, and accordingly it is difficult for these companies and HMRC to know whether or not the right amount of tax is being paid. This measure makes the SAO accountable for rectifying this.

The introduction of the new regime will facilitate HMRC in continuing its risk-based approach by identifying those companies that do not have robust accounting arrangements. This will enable HMRC to specifically focus resources on such companies, while reducing burdensome compliance checks on companies that have robust accounting systems.

This new regime builds upon the work that HMRC have already commenced to improve general tax governance procedures. In HMRC's view the new legislation should not significantly increase a qualifying company's compliance costs and should clearly improve the standards of tax reporting. In HMRC's view, the legislation should lead to improvements in systems and governance through open discussions with the CRM about systems and processes.

Although the new regime may well lead to long-term improvements in systems and processes, in the author's view, the new regime will obviously have a negative impact on tax compliance costs for many qualifying companies in the short-to-medium term. In the short-to-medium term it is likely that some qualifying company's will incur additional costs as a consequence of being required to review and update existing systems as necessary and hiring additional personnel to comply with the legislation.

Thankfully, the new regime does not require the introduction of Sarbanes-Oxley Act 2002 (SOX) procedures for UK companies. In those circumstances, where a UK company is required to be SOX 2002 compliant, then the SAO may find that some elements of the SOX 2002 compliance contribute to ensuring that the conditions of the new legislation have been satisfied.

The guidance issued by HMRC clearly states that the intention of the new legislation is not to increase tax compliance costs through the assessment of penalties. It will be interesting to see whether HMRC maintain their stated objective of using this new regime to work co-operatively with large businesses to improve systems and processes, or whether the new regime will simply provide HMRC with another mechanism to pursue additional tax assessments and enquiries.

### PREPARATION REQUIRED

It is likely that some work will be required by most qualifying companies to make the requisite certification. The precise level and nature of work required will ultimately be dictated by the current state of the particular company's tax reporting systems and processes.

At a minimum all companies should be assessing the current state of their tax reporting systems and processes to identify any shortcomings in the systems. To the extent that any shortcomings in the systems are identified, the company will have to take active steps to ensure that the systems are updated with a view to complying with SAO certification.

Although the new regime will not apply retrospectively, certain data and information that has already been inputted or retained relating to earlier periods will be used in the calculation of tax liabilities for the periods covered by this legislation. In particular, brought forward balances and standing data will be key in calculating later periods' tax liabilities. HMRC have confirmed in the guidance that while some general level of checking of this data might be appropriate at commencement it is unlikely that companies would generally need to revisit this.

**Light-touch approach in the first year of operation**

Any SAO who begins a review of the appropriateness of the tax accounting arrangements during the first financial year immediately following the introduction of this measure will be treated as having taken reasonable steps in respect of that period. It follows that in these circumstances the SAO would not be penalised in respect of any failure in that first year. There is still a requirement to submit a certificate and this should fairly reflect the state of the tax accounting arrangements at least to the extent that these have been established during that first period.

This 'light-touch' approach will only apply to the first financial year after the introduction of the legislation. It will not apply to any later period even if a company only comes within the legislation for the first time within any subsequent financial year.

***'At a minimum all companies should be assessing the current state of their tax reporting systems and processes to identify any shortcomings in the systems.'***

*By Charlotte Sallabank, partner, and Ian Reid, associate, Jones Day.*
*E-mail: csallabank@jonesday.com; ireid@jonesday.com.*