Charity Commission: consultation on power to disqualify trustees and senior managers – including HMRC's fit and proper person test

General Features

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The CIOT and ATT welcome the Charity Commission's powers to remove trustees or senior managers, but warns that reliance on HMRC's 'fit and proper persons' test, as published, could be problematic.

The CIOT and ATT jointly responded to the Charity Commission's consultation Power to Disqualify from Acting as a Trustee, announced on 23 May 2016.

We welcome the commission's power, introduced by The Charities (Protection and Social Investment) Act 2016 (CPSIA), to remove trustees or senior managers, together with the body's consultation on the use of the power. We also welcome the tone of the commission's description of its policy, which is to set a high standard of objective evidence for using the power.

CPSIA gives the Charity Commission powers to make orders disqualifying individuals from acting as trustees under particular circumstances. Three cumulative tests must be met for a disqualifying order to be made:

1. At least one of six conditions applies;
2. The person is unfit to be a trustee; and
3. The order is desirable in the public interest to protect public trust and confidence in charities.

One of the six conditions in test 1 (condition C) is that 'the person has been found by Her Majesty's Revenue and Customs not to be a fit and proper person to be a

manager of a body or trust, for the purposes of paragraph 4 of Schedule 6 to the Finance Act 2010 (definition of charity for tax purposes), and the finding has not been overturned'. Therefore, the application of this condition lies solely with HMRC.

HMRC has published guidance on how it would use its powers to designate someone as not 'fit and proper'. The most recent version, dated 20 November 2013, added a test that an individual may not be a fit and proper person if they 'have been involved in designing and/or or promoting tax avoidance schemes'. We raised concerns with HMRC that, if applied strictly on at least one interpretation, this could prevent many highly competent and ethical people from serving as trustees or senior managers of a charity. This could apply if they happened to have been partners in a large professional firm or directors of a company in a large group which had some formal involvement, at some point in the past, with tax planning that might now be thought egregious, and in which the individual had no, and might legitimately have been expected to have had no, involvement.

HMRC recognised this risk and it was not its intention to debar partners in professional firms from serving as trustees of charities as a result of a colleague doing something in the past of which the Revenue disapproved. HMRC is refining its guidance, and CIOT and ATT are working with it on this. Updated guidance has yet to be published, but may be soon. We are not aware of HMRC having used this test yet, but pressure to do so may increase by virtue of the Charity Commission's new powers.

Finally, we encouraged the Charity Commission to use its power, and is seen to use its power, to protect the public interest so that those with the most to contribute feel supported and encouraged to volunteer.

See our full submission on the CIOT website and the ATT website.