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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In the October edition of Technical Newsdesk I reported on the Charity Commission's consultation on the use of its powers to disqualify individuals from acting as Trustees, and the CIOT and ATT's joint submission. The Charity Commission has considered the various representations made by respondents and has published its own response.

Under the relevant legislation, the Charity Commission can disqualify individuals if three cumulative tests are met:

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

Of particular interest to us was condition C in test 1 – 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'. We were particularly concerned that the latest published guidance on HMRC's fit and proper persons test indicated that an individual may not be a fit and proper person if they 'have been involved in designing and/or promoting tax avoidance schemes'.

The Charity Commission response, together with our ongoing engagement with HMRC on the fit and proper person test, represent positive developments.

HMRC has been updating its guidance on the fit and proper person test and, whilst it has not yet been published on GOV.UK, we understand the references to tax avoidance will be much more specific, focusing on more 'abusive' arrangements such as those counteracted by the General Anti Abuse Rules (GAAR), or have featured abuse of charitable reliefs.

Even if an individual is considered not to be a fit and proper person by HMRC that is not the end of the story as far as the Charity Commission is concerned. In the Charity Commission's explanatory statement, they say that 'where condition C is met, and there is a finding by HMRC that the person is not a fit and proper person using condition C, the commission may:

- request information from HMRC about why they made a finding the person is not a fit and proper person to be a manager of a charity under tax law
- consider when the finding was made
- take into account what and how much information has been or can be provided to the person by HMRC about why HMRC made their finding and are considered not a fit and proper person
- consider any information provided by HMRC in relation to any finding made by them relevant to whether they are unfit for the purposes of the Charities Act 2011.'

So, the Charity Commission will still undertake its 'bigger picture' review before serving a disqualification order on the individual.

We would be keen to hear from members about any action (or proposed action), either by HMRC or the Charity Commission, where this condition C is being applied. Please do contact us at technical@ciot.org.uk.

The Charity Commission's response documents, which comprise an analysis of the consultation responses, the explanatory statement, and a questions and answers paper, can be found on GOV.UK. HMRC's current guidance on the fit and proper person test can be found on GOV.UK and the revised guidance will be published on GOV.UK at some stage in the future.