

## IBB Charities Team 5 minute guide to...

# The Fit and Proper Persons Test

### What is the issue?

HMRC has introduced a new test to determine whether persons who are in a position of financial responsibility within charities are fit and proper persons. Charities and CASCs (community amateur sports clubs) must take action to ensure that their managers meet this requirement or they risk losing their charity tax reliefs.

### What is the test?

The test was introduced by section 6 of the Finance Act 2010 as part of the new definition of charities and other organisations that are entitled to claim UK charity tax reliefs. This formed part of the Government's response to EU case law which had established that a member state cannot confine charitable tax reliefs to organisations established only in that member state. The consequent extension of charitable tax reliefs to certain bodies in the EU, Norway and Iceland required the Government to define which charities would qualify for tax reliefs.

The new Section 6 definition requires that to qualify a charity must:

- be established for charitable purposes only (this matches the definition in the Charities Act 2006);
- meet the jurisdiction condition (it has to fall within the jurisdiction of the UK courts or equivalent in the member state);
- meet the registration condition (to comply with any local obligations to be registered); and
- meet the management condition.

It is as part of the fourth limb of the definition that the 'fit and proper person' test has been introduced.

### Why has it been introduced?

HMRC claims that the fourth limb is needed in order to help them prevent abuse and fraud in the use of charity tax reliefs.

### Who needs to be fit and proper?

The managers of the organisation need to be fit and proper. Whilst the Act uses the Charities Act 1993 definition of charity trustees i.e. those person having the general control and management of the administration of the body or trust, HMRC's Guidance goes much further.

It defines managers as 'the trustees of charities, directors of corporate charities, CASC officials, any other officials having day to day control over the running of the charity and any other persons who are able to exert direction or influence over the running of the charity or the application of its assets.'

The examples given in the guidance mean that cheque signatories and financial controllers are likely to be included within the definition of managers. Charities will need to ensure that all managers are suitable persons and are fit and proper persons.

### **So, what does 'fit and proper' mean?**

It is not defined in the legislation. HMRC's Guidance is widely drawn. Anyone who the relevant charity commission does not consider suitable would not pass the test. After that, HMRC will be looking at a series of risk factors to determine whether a manager presents a heightened risk of prejudice to the charity's tax position. These include: a history of tax fraud, a history of fraudulent behaviour, HMRC's knowledge of their abuse of the tax system and information or evidence suggesting involvement in financial impropriety.

HMRC says that it will apply the test on a case by case basis in a proportionate manner and it acknowledges that some charities (eg those who work with ex-offenders) may wish to appoint managers who may have a criminal record.

### **What are the consequences if the management condition is not fulfilled?**

If HMRC decides that even one of the charity's managers are not fit and proper, then the management condition will not have been satisfied. In such cases HMRC will have a discretion to decide whether or not the test is to be regarded as having been satisfied in the period. For example, if HMRC identifies a financial controller as not being fit and proper and the charity acts quickly to remove them, the tax reliefs may be preserved. It may also indicate that it is willing to use its discretion to deem the condition met and the charity's tax reliefs preserved, provided the charity meets certain specified conditions. But if HMRC does not exercise its discretion, the charity will lose its entitlement to charity tax reliefs throughout the period of the unfit manager being in office. This could result in a significant liability arising in the charity.

### **What should you be doing?**

HMRC will expect all charities to be able to show that their managers are fit and proper persons and that managers have been vetted appropriately. They suggest that all managers be asked to make a Declaration that they are fit and proper and have provided a template for charities to use. We suggest that all charities ask new managers to sign the Declaration and keep a copy safely with their records. In our view however, self-certification is not a substitute for undertaking appropriate checks on new managers.

All changes to the managers will also need to be notified to HMRC on a form which is available at [insert].

### **Are HMRC keeping a list of unfit and improper persons?**

Probably, but they will not be operating a clearance service. Where HMRC has concerns about the identity of a manager they will notify the charity and the relevant manager.

### **Have the changes been welcomed?**

Concern has been expressed in the sector at the way the changes were brought about without proper consultation, there are concerns that it will have created a separate charities test and that it does not comply with the principles of natural justice. It is unlikely however that any significant changes will be made.



### **Where can you find out more?**

A series of Questions and Answers are available at <http://www.hmrc.gov.uk/budget2010/char-tax-rel-qa.pdf>, though you should note that these pre-date the Guidance.

Guidance on the Fit and Proper Persons test is available at <http://www.hmrc.gov.uk/charities/guidance-notes/chapter2/fp-persons-test.htm>.

A model declaration for use by new managers can be found at <http://www.hmrc.gov.uk/charities/guidance-notes/chapter2/model-dec-ff-persons.pdf>.

### **If you would like to talk to us about the issues raised by this note, please contact:**

Tim Rutherford  
01895 207828  
[tim.rutherford@ibblaw.co.uk](mailto:tim.rutherford@ibblaw.co.uk)

Peter Burnett  
01895 207887  
[peter.burnett@ibblaw.co.uk](mailto:peter.burnett@ibblaw.co.uk)

Jo Coleman  
01895 207809  
[Jo.coleman@ibblaw.co.uk](mailto:Jo.coleman@ibblaw.co.uk)

IBB Solicitors  
Capital Court  
30 Windsor Street  
Uxbridge UB8 1AB  
Tel: 08456 381 381  
Fax: 08456 381 351  
[www.ibblaw.co.uk](http://www.ibblaw.co.uk)

*This briefing note is only intended to provide general guidance and is not intended to constitute legal advice. © IBB Solicitors 2010*