



Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures

Questions and Answers

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What is the purpose of the new mandatory disclosure rules?

The purpose of the new rules is to provide tax administrations with information on arrangements that (purport to) circumvent the Common Reporting Standard (CRS Avoidance Arrangements) and on structures that disguise the beneficial owners of assets held offshore (Opaque Offshore Structures). The information required to be disclosed includes the taxpayers using such structures or arrangements and those involved with their design and set-up. This information will provide tax administrations both with additional intelligence for their tax compliance activities as well as for designing future tax policy. It is also expected that the rules will have a deterrent effect against the design, marketing and use of these arrangements and schemes and bolster the overall integrity of the Common Reporting Standard.

How do the rules operate?

The rules require any person that is an *Intermediary* in respect of an arrangement, which has the hallmarks of a *CRS Avoidance Arrangement* or *Opaque Offshore Structure*, to disclose certain information on that arrangement or structure to the tax authorities.

As described in further detail below, Intermediaries are those persons responsible for the design or marketing of the arrangement or structure (“Promoters”) as well as certain persons that provide assistance or advice with respect to the design, marketing, implementation or organisation of that arrangement or structure (“Service Providers”).

The model mandatory disclosure rules only impose disclosure obligations on Intermediaries that have a sufficient nexus with the reporting jurisdiction. This will include an Intermediary operating through a branch located in that jurisdiction as well as those that are resident in, managed or controlled, incorporated or established under the laws of that jurisdiction.

An Intermediary is required to file a disclosure when the arrangement or structure is first made available for implementation, or whenever the Intermediary provides services in respect of the arrangement or structure. The information required to be disclosed includes design details as well as the users and any other Intermediaries involved in the supply of that arrangement or structure.

The rules do not require the Intermediary to disclose information that is subject to obligatory professional secrecy rules. There are also rules that limit the need for the Intermediary to make duplicate disclosures in respect of the same arrangement or structure. In the event there is no Intermediary that is within the territorial scope of the disclosure obligations, or the Intermediary is not required to disclose due to professional secrecy rules, the disclosure obligation falls on the user of that arrangement or structure.

The high level overview of the operation of the new rules is illustrated in a flowchart in Annex 1.

What arrangements are covered?

The rules cover both CRS Avoidance Arrangements and Opaque Offshore Structures

CRS Avoidance Arrangements are arrangements that are designed to circumvent, or are marketed as, or have the effect of, circumventing the Common Reporting Standard, as implemented in relevant domestic laws. An arrangement circumvents the Common Reporting Standard where it avoids the reporting of CRS information to all jurisdictions of tax residence of the taxpayers in a way that undermines the policy intent of the CRS.

Opaque Offshore Structures are structures that involve the use of a passive entity in a jurisdiction other than the jurisdiction of tax residence of one or more of the beneficial owners and that are designed to, marketed as or have the effect of disguising the identity of the beneficial owner(s). Amongst others, this may include the use of nominee shareholders, the exercise of indirect control over entities or the use of jurisdictions with weak rules for the identification of beneficial owners. In order to minimise reporting in low-risk situations there is a carve-out from the definition of Offshore Structure for Institutional Investors.

Which Intermediaries are subject to the new rules?

The rules cover both Promoters and Service Providers. These terms are defined, not by reference to the role or occupation of the person, but by the role they play in the design, marketing, implementation or organisation of the arrangement or structure.

Promoters are those persons that are responsible for the design or marketing of the scheme or arrangement. This in particular includes instances where the Promoter has introduced features into the arrangement in light of its Common Reporting Standard treatment or for preventing the identification of the beneficial owners or where the Promoter has marketed the scheme or arrangement as having such outcomes. This definition would include a wealth planner or financial advisor that encouraged their client to enter into an arrangement on the basis that it was not subject to CRS reporting.

Service Providers are persons that provide assistance or advice with respect to the design, marketing, implementation or organisation of the scheme or arrangement. This may for instance include the advice provided by a lawyer, accountant or financial advisor, as well as account management or compliance services. A Service Provider is, however, only required to disclose an arrangement or scheme under the rules when that person knows or can be reasonably expected to know that the arrangement or scheme is subject to disclosure. This would typically be the case when the Service Provider, based on the information that is on file or readily available, has knowledge, or can be expected to have such knowledge in light of the expertise required for the services provided, that the arrangement or scheme has the effect of circumventing the Common Reporting Standard or disguising the beneficial owners. The definition would not be expected to apply to financial institutions carrying out routine transactional banking functions where the financial institution could not be expected to have the requisite knowledge or expertise to determine whether those services were being supplied in respect of an arrangement or structure that was disclosable under the rules.

What information will be reported?

The information to be disclosed by the Intermediary with respect to a CRS Avoidance Arrangement or Opaque Offshore Structure includes all the steps and transactions that form part of the Arrangement or Structure including key details of the underlying investment, organisation and persons involved in the Arrangement or Structure and the relevant tax details of the Clients and users of the Arrangement or Structure as well as any other Intermediaries, but only to the extent that such information is within the Intermediary's knowledge, possession or control).

The description may include references to marketing materials, structure diagrams, presentations and other documents that provide context or explain the structure or arrangement in further detail. It should also include information on all jurisdictions where a CRS Avoidance Arrangement or Opaque Offshore Structure has been made available for implementation.

Where is information required to be reported?

The Intermediary has to disclose the information to the tax authorities of each jurisdiction with which the Intermediary has a nexus. The reporting nexus is either (i) the jurisdiction in which the Intermediary has a branch through which the arrangement or structure was made available or through which the services were provided; (ii) the jurisdiction where the Intermediary is resident or has its place of management; and/or (iii) the jurisdiction where the Intermediary is incorporated or established .

When must the information be reported?

A Promoter must disclose the CRS Avoidance Arrangement or the Opaque Offshore Structure within thirty days from the moment it makes the arrangement or structure available for implementation to either other Intermediaries or taxpayers, i.e. when the Promoter has completed material design elements of the arrangement or structure and has communicated these elements to its client and/or taxpayer.

A Service Provider must disclose the arrangement or structure within thirty days once it provides Relevant Services with respect to the arrangement or structure, but only where the Service Provider knows or can reasonably be expected to know that the arrangement or structure is a CRS Avoidance Arrangement or an Opaque Offshore Structure.

In addition, Promoters are required to disclose CRS Avoidance Arrangements entered into prior to the effective date of the rules, but after 29 October 2014, but only when the value or balance of the relevant Financial Account equals or exceeds USD 1,000,000. In these instances, the Promoter is required to disclose the arrangement within 6 months (of the effective date of the rules).

Are the exceptions to the disclosure obligations for Intermediaries?

In order to avoid duplicate disclosures, the rules provide that an Intermediary shall not be required to disclose any information on an arrangement or structure that has previously been disclosed to that tax authority by that Intermediary or another Intermediary.

Furthermore, the rules do not require an attorney, solicitor or other admitted legal representative to disclose any information that is protected by legal professional privilege or equivalent professional secrecy obligations, but only to the extent that an information request for the same information could be denied under Article 26 of the OECD Model Tax Convention and Article 21 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

Are there also disclosure obligations imposed on taxpayers?

The rules impose a direct disclosure obligation on Reportable Taxpayers where the Intermediary is not required to comply with equivalent disclosure obligations due to the fact that the Intermediary is outside the scope of the rules or bound by the requirements of professional secrecy. In these cases, the Reportable Taxpayer has to provide all relevant information on the arrangement or structure that is within its knowledge, possession or control. The

reason for imposing a secondary disclosure obligation on the taxpayer in these cases is to support the integrity of the rules and to prevent the taxpayer from insulating itself from the effect of the rules .

Will the information that is reported by Intermediaries be exchanged with other jurisdictions?

In order for the new rules to meet their objective of providing additional information to tax authorities for their tax compliance activities and of having a deterrent effect against the design, marketing and use of the targeted arrangements and schemes, it is crucial that the jurisdiction(s) of tax residence of the taxpayers using the arrangements and schemes have access to the information.

For that purpose, it is necessary that the jurisdiction where the Intermediary makes the disclosure and the jurisdiction where the taxpayer is resident have a reliable exchange of information relationship in place to ensure that the relevant information reaches the jurisdiction of tax residence of the relevant taxpayer in a timely and structured manner.

To this end, the OECD is currently working on an exchange of information framework for the new rules, to be developed under the multilateral Convention on Mutual Administrative Assistance, which with currently over 115 participating jurisdictions offers the most global international legal basis for the exchange of the information disclosed under the new rules.

Does it make sense to impose mandatory disclosure obligations in cases where taxpayers may deliberately seek to avoid reporting?

Yes. Evidence from compliance work of tax administrations including through the Panama papers JITSIC network shows that the supply chain for such arrangements typically includes a number of regulated service providers that are likely to comply with reporting obligations. Also, research on the wealth management industry suggests that, rather than overtly failing to declare income, many high net worth individuals prefer to use (complex) offshore structures that seek to comply with all relevant, formal regulatory requirements, both for themselves and their advisors.

What are the chances that these rules will be implemented quickly?

The work was initiated based on a G7 declaration. Many countries are actively considering their introduction. The EU is in advanced discussions to implement the rules as part of a wider directive that would also implement Action 12 on Mandatory Disclosure more broadly. Finally, chapter IX of the CRS, to which over jurisdictions countries have committed, requires these jurisdictions to have rules in place to prevent CRS avoidance arrangements and clearly the MDR can play an important role here.



ANNEX 1

HIGH LEVEL OVERVIEW OF THE OPERATION OF THE MDR FOR A PARTICULAR JURISDICTION

