

OECD Mandatory Disclosure Rules (MDR) on CRS Avoidance Arrangements

OECD closes loopholes by obliging intermediaries, under threat of significant penalty, to report avoidance arrangements and offshore structures, naming actual and potential clients and other intermediaries. The rule is retroactive since July 2014. In effect, all current exemptions and exclusions are revoked. **It is critical to know the MDR before they are effective.**

Mark Morris, CRS specialist, Mark Morris Consulting, Zurich

On 11 December 2017, the OECD released a document called «Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures». The document contains proposed new mandatory disclosure rules that target advisors and promoters with «material involvement in the design, marketing or implementation of CRS avoidance arrangements or offshore structures».

Purpose and goal of MDR

- MDR to deter marketing and implementation of arrangements
- Legality of exchanging information on information beyond current CRS and retroactive
- Spontaneous exchange differs from automatic
- How is the net expanded to non CRS assets?
- Are all previous exemptions and exclusions revoked?
- Transfer to non CRS Financial Institutions compared to current anti avoidance

Hallmarks of Arrangements

- What is bright-line test on avoidance schemes?
- What is acceptable collateral evidence that avoidance is intended?
- When is a legal opinion considered avoidance?
- Which accounts are functionally equivalent to financial account?
- Transferring to domestic non-reporting FI. What about non CRS jurisdiction FI?
- Is any transfer of money to non-reporting account avoidance?
- When is exploiting weak due diligence to identity of Controlling Persons or Account holders an arrangement?
- When is acceptance and marketing of residence certificates to disguise tax residence an arrangement?
- When is manipulating entities into an Active NFE an arrangement?
- When the use of trusts as holding, asset overvaluation, creation of a new company are an arrangement?
- When is investing through other entities to avoid reporting an arrangement?
- When is a contrived setup to avoid Controlling Persons an arrangement?
- When is the concealment of reportable payments through loans, payments on behalf of, debit card an arrangement?

Hallmarks of offshore structures held through opaque structures

- How do structures apply to Active NFE, Passive NFE, Investment entities?
- Which structures are excluded even if opaquely held?
- How can structures include holding non CRS assets such as real estate?

Who is an Intermediary?

- Promoters, service providers, directors, wealth managers, administrators?
- Does it matter if no taxpayer enters in arrangement or structure?
- When not intermediary?
- How are dual resident intermediaries covered?
- Lawyers with and without confidentiality privilege?
- What is collateral evidence that intermediary or arrangement exists?
- What if intermediary is unpaid?
- If intermediary merely refers someone to another intermediary without explaining the arrangement?

What triggers reporting?

- Within two weeks of when? When extended to 6 months?
- Report if unaware if any taxpayer enters arrangement?
- Report if aware taxpayer has exited the arrangement?
- Difference on exclusions to report for promoter vs. service provider
- Is there a value threshold for reporting for promoter, for service provider?
- What if taxpayer has moved to non CRS jurisdiction?
- Must report before and / or after arrangement implemented?
- Which reporting is duplicated and which is not?

Reporting and Penalty for non-compliance

- Is a taxpayer only an actual end-user or also a potential customer?
- What is meant by jurisdictions where arrangement is available but not implemented?
- Intermediary does not have details on potential customer?
- What is difference in information reported retroactively?
- What is difference between reportable client and taxpayer?
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- Must potential taxpayer information really be reported?
- If no intermediary involved, how is there still reporting obligation?
- Is it legal to apply penalty on retroactively helping taxpayer if it was not illegal prior?
- Penalty on not reporting if only a potential client, no crime done
- Penalty even if no report required due to infringement on person's self-incrimination?

How arrangements & structures are weakly, strongly or not covered

Clarifications or confusion on MDR

- MDR excludes moving to USA if subject to FATCA IGA – so when is it an arrangement?
- Non participating Custodian or Fund to hide structure owner?
- When is real estate, gold captured? Different to e-money?
- What happens when no intermediary is obligated to report on arrangement?

- Does arrangement include Singapore trusts reporting zero value for settlors of irrevocable trusts?
- When is a legal opinion an arrangement?
- When is a service provider not an intermediary?
- When is a foreign promoter captured, foreign service provider?
- When is trigger for promoters different for service providers?
- Why are retroactive triggers different?
- Are there flaws in retroactive triggers?
- What is purpose of capturing lawyers if no reporting required?
- What is infringement on person's privilege against self-incrimination?
- Retroactive (ex post facto) obligations and penalties on promoters - legitimacy of ex post facto criminal laws?
- Can OECD encourage partner jurisdictions to override prohibited ex post facto laws?
- Compare with UK Promoter on Tax Avoidance Schemes legislation, EU MDR, OECD Action 12 MDR
- Who cannot escape MDR under any circumstances?

PRACTICAL INFORMATION

Venue

Five Star Hotel in CBD, Hong Kong

How to register

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REGISTRATION FORM

I register for the seminar «OECD Mandatory Disclosure Rules on CRS Avoidance Arrangements» in Hong Kong on tuesday 13 February 2018.

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