

Mandatory Disclosure Rules

Insights - 02/03/2023

The Taxation (Implementation) (International Tax Compliance) (Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures) (Jersey) Regulations 2020 (the **Regulations**) are expected to come into force soon in Jersey. The Regulations will primarily affect 'promoters' and 'service providers' of certain arrangements, implementing a 30 day window to report disclosable arrangements to the Jersey Comptroller of Revenue (the **Comptroller**). Failure to comply may lead to financial penalties and in some instances, criminal sanctions. It is important that intermediaries and certain taxpayers become astute to the requirements of the Regulations and ensure that they are ready and able to comply with the new reporting obligations.

Background

The Regulations will implement a mandatory disclosure regime which is closely aligned to the OECD's Mandatory Disclosure Rules of Common Reporting Standard (**CRS**) Avoidance Arrangements and Opaque Offshore Structures (the **MDR**). Considered to be the international standard for mandatory disclosure rules, the MDR reflects the OECD's wider strategy of monitoring and acting upon attempts to avoid the CRS. The Regulations do not follow the EU model enacted as DAC 6 (EU Council Directive 2011/16) (**DAC 6**). This corresponds with the approach of the UK government; the UK has transitioned away from DAC 6 and will instead soon adopt the MDR. The Regulations will fulfil the political commitment given by the Government of Jersey to the EU Code of Conduct in July 2018 to implement a new mandatory disclosure regime.

Which arrangements are affected by the regulations?

There are two types of structures that must be disclosed to the Comptroller (each, a **Reportable Arrangement** and together, the **Reportable Arrangements**):

1. 'CRS Avoidance Arrangements': an arrangement that it is reasonable to conclude is designed to, or has the effect of, circumventing the CRS or otherwise avoiding accurate reporting by exploiting the absence of legislative provisions in the CRS.

Any such arrangement must undermine the policy of the CRS in order for it to be deemed a Reportable Arrangement.

2. 'Opaque Offshore Structures': a 'passive offshore vehicle' that is held through an 'opaque' structure.

This comprises a two-part definition:

- a passive offshore vehicle is a legal person or arrangement that does not have economic substance (i.e. does not carry on substantive economic activity in the jurisdiction where is established or taxed); and
- an opaque structure is considered to be a structure for which it is reasonable to conclude is designed to or has the effect of concealing its beneficial ownership

Although compliance with the substance requirements set out in the Taxation (Companies – Economic Substance) (Jersey) Law 2019 may assist in demonstrating compliance with the first limb, it is not conclusive and a case by case analysis should nonetheless be undertaken as to whether the company is a 'passive offshore vehicle' for the purposes of the Regulations.

A structure will not be considered to be a passive offshore vehicle merely because it is owned by one or more institutional investors or because all beneficial owners are resident for tax purposes in the same jurisdiction as where the structure is incorporated.

When considering whether beneficial ownership has been obscured, the Comptroller will review a number of factors including:

- the use of nominee shareholders with undisclosed nominators
- the use of means of indirect control beyond formal ownership
- the use of arrangements that provide a reportable taxpayer with access to assets held by, or income derived from, the structure without being identified as a beneficial owner of such structure
- the use of legal persons in a jurisdiction where there is no requirement to keep or mechanism to obtain beneficial owner information and basic information which is accurate and up to date, no obligation on shareholders to disclose the persons on whose behalf shares are held and no obligation or mechanism for shareholders to notify the legal persons of any changes

in ownership or control; and

- the use of legal arrangements in a jurisdiction that does not require the trustees to hold or be able to obtain adequate, accurate and current beneficial ownership information regarding the legal arrangement

Who has an obligation to report?

The responsibility to report is predominantly placed upon intermediaries. This includes 'promoters' who are responsible for the design or marketing of either a CRS Avoidance Arrangement or an Opaque Offshore Structure.

Importantly, 'service providers' are also included within the scope of the Regulations. Intermediaries who provide services relating to the design, marketing, implementation or organisation of a relevant structure or arrangement will be required to report where it is considered that the service provider can reasonably be expected to know that the arrangement is a Reportable Arrangement.

In some instances, such as where an intermediary is not subject to the mandatory disclosure requirements, taxpayers may also be obliged to disclose Reportable Arrangements.

Disclosure may not, however, be required where the information is protected by legal professional privilege or if an intermediary is aware that the information has been previously disclosed in Jersey or a partner jurisdiction.

What are the reporting requirements?

A report to the Comptroller by an intermediary or taxpayer must be made within 30 days of the implementation of the Reportable Arrangement or the supply of services in connection with the arrangement.

The following details must be included in the report:

- a factual description of the features of the CRS Avoidance Arrangement or the Opaque Offshore Structure
- the name, address, jurisdiction, tax identification number of the disclosing intermediary, the client of the intermediary, the user of the CRS Avoidance Arrangement or beneficial owner of the Opaque Offshore Structure and any person that is an intermediary in relation to the Reportable Arrangement (other than the disclosing intermediary); and
- the jurisdiction where the CRS Avoidance Arrangement or Opaque Offshore Structure has been implemented

Is the reporting requirement retrospective?

Promoters of CRS Avoidance Arrangements that were implemented on or after 29 October 2014 but before the implementation of the Regulations with a value of £600,000 or more will be required to disclose within 180 days of the Regulations coming into force, regardless of whether that promoter is still actively promoting the Reportable Arrangement. Intermediaries who are deemed to be 'service providers' under the Regulations will not be required to report retrospectively.

What are the ramifications for failing to comply?

Intermediaries and taxpayers who fail to report or knowingly provide inaccurate information to the Comptroller may be liable for penalties reaching up to £3,000. The Regulations also stipulate criminal sanctions, including imprisonment, for obstructing an authorised person from entering a business for the purposes of investigating suspected contraventions of the Regulations and for altering, suppressing or destroying certain business documents identified in a 'notice' under the Regulations.

Next steps

Prior to the Regulations being brought into effect, intermediaries should seek to adapt their systems and policies to be able to identify Reportable Arrangements. Where an intermediary identifies as being a 'promoter', they should consider reviewing historic arrangements to ensure they do not fall foul of the retrospective reporting requirement. We are awaiting the supplementary guidance from the Comptroller which will provide further guidance on the important "reasonable to conclude" decision that industry will need to make when deciding whether or not to report specific arrangements and structures. It will be important to monitor any such guidance and developments in the legislation so that businesses are ready and able to comply with the Regulations once effective, especially in light of the short 30 day disclosure window.

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