Compilation of comments

Public comments on the discussion draft on Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

18 January 2018
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By email to: mandatorydisclosure@oecd.org

15 January 2018

Dear Sir,

AFME\(^1\)/UK Finance\(^2\) response to the OECD Discussion Draft on Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

Introduction and Executive Summary

1. AFME/UK Finance welcome the opportunity to respond to the OECD’s public discussion draft entitled “Mandatory disclosure rules for addressing CRS avoidance arrangements and offshore structures” published on 11 December 2017. We wish to make clear that while AFME and UK Finance have separate and distinct memberships, for the purposes of the OECD discussion draft, both organisations have decided to submit a single, combined response since our respective members share the same concerns with respect to the proposals in the discussion draft.

2. We welcome that the OECD is consulting with business on its proposals. We believe that this approach is to the benefit of both policymakers and business and helps to avoid any unintended consequences arising from the OECD’s initial proposals.

3. We recognise the importance of increasing transparency in cross-border transactions and promoting compliance with tax obligations. This is

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\(^1\) AFME represents a broad range of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks and other financial institutions. AFME advocates stable, competitive and sustainable European financial markets, which support economic growth and benefit society. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

\(^2\) UK Finance is a new trade association which was formed on 1 July 2017 to represent the finance and banking industry operating in the UK. It represents around 300 of the leading firms providing finance, banking, markets and payments-related services in or from the UK. UK Finance has been created by combining most of the activities of the Asset Based Finance Association, the British Bankers’ Association, the Council of Mortgage Lenders, Financial Fraud Action UK, Payments UK and the UK Cards Association.
demonstrated by the significant investment financial institutions have made to ensure that they comply with the CRS and FATCA.

4. In order to maintain the integrity of the CRS regime, the banking industry recognises it is important to detect and deter avoidance schemes that are used to artificially circumvent CRS. It is, however, imperative that any rules enacted to identify and report on such avoidance schemes are certain and targeted.

5. We believe that it is vital that there is sufficient opportunity for the OECD to consult with member states and industry before the final recommendations are published. This will help to ensure that the OECD’s final rules will be applied consistently across participating jurisdictions. We also note that the first information exchange under CRS took place in September 2017. We may therefore have further feedback on the OECD’s proposals in due course with the benefit of further experience following the introduction of the CRS.

6. Some jurisdictions have included general anti-avoidance rules within their CRS legislation, which require arrangements entered into to avoid CRS to be disregarded. We believe that the OECD should carefully consider how the mandatory disclosure rules would interact with existing general anti-avoidance rules.

7. We note that the OECD’s discussion draft does not refer to the opportunities and challenges posed by digitalisation/technological innovation. Given the ongoing rapid development in this space, the OECD may benefit from considering the responses to this consultation alongside the recent ‘invitation for public input on the tax challenges of digitalisation’ published on 22 September 2017.

8. While CRS reporting is objective and factual, the proposed mandatory disclosure rules appear to require service providers and promoters (“Intermediaries”) to make a judgment call on whether there is in fact an avoidance arrangement to circumvent the CRS. Reporting that identifies persons who have engaged in an arrangement to circumvent the CRS is therefore pejorative. We believe that reporting should be limited to circumstances where there is knowledge that the arrangements are for the purpose of and result in the avoidance of reporting of the CRS. It is important that the disclosure rules do not create an environment where Intermediaries must second guess clients and peers based on mere suspicion. The OECD should give clear and definitive guidance in this regard.

9. We believe that the disclosure rules should not impact on ordinary course business activity for financial institutions or restrict the provision of banking products and services.

3 The OECD consultation is available here.
10. In our response, given our significant involvement with and responsibilities in the implementation of CRS, we have primarily focused our comments on the CRS aspects of the consultation. We would note that the many of the concerns and themes identified should also apply to Offshore Structures.

11. The comments in this paper address aspects of the draft rules where the scope is uncertain or their application may be impractical. Our comments have been organised into three sections, mirroring the sections of the rules themselves:
   
   a. Avoidance arrangements and offshore structures;
   b. Intermediaries; and
   c. Information reporting.

A. Avoidance Arrangements and Offshore Structures

Avoidance arrangements – a standard of knowledge

12. Avoidance arrangements are those that are designed to, marketed as, or have the effect of circumventing the CRS. Due to the seriousness of the behaviours given as indicia of an avoidance arrangement or offshore structure for the purposes of the rules, we believe that a clear standard of knowledge should be set out and that standard must be met before an Intermediary identifies an avoidance arrangement or offshore structure. A standard of knowledge requirement would ground the disclosure requirements in a foundation of fact, rather than mere suspicion.

13. We believe that the relevant standard should be ‘actual knowledge’, which would align with the standard required in the existing CRS ‘Relationship Manager Inquiry’. Such an alignment may be practical given many of the example behaviours and arrangements provided in the commentaries are unlikely to be known to those in a financial institution who are not relationship managers.

14. Examples of behaviours that should require an ‘actual knowledge standard’ include:
   
   a. Use of tax residence certificates for one jurisdiction while in fact being tax resident in another jurisdiction.
   b. ‘Sham’ payments to disguise reportable payments.
   c. Indirect control via nominees with undisclosed nominators or taking instructions from someone who is not an account holder.
   d. Entities that do not in fact meet all the requirements to be classified as a type of Active NFE, but falsely classify themselves as an Active NFE.
15. We note that paragraph 77 states that intermediaries are “only required to disclose information that is within their knowledge, possession or control”. The OECD also states that “an intermediary would not be expected to go beyond the requirements of the applicable professional standards and existing know-your-customer rules when collecting and reporting information under these rules”. We welcome this approach and we believe that it is important that the OECD makes this clear in its final recommendations.

**Genuine commercial transactions**

16. We believe that it would also be useful for the OECD to make clear in section 1.1 (Definition of a CRS avoidance arrangement) of the rules that individuals or entities that simply do not meet the definition of Controlling Person or Passive NFE, and have not engaged in any artificial arrangements to achieve that result, will not have engaged in avoidance. For example:

   a. *If an entity restructures its holdings such that it genuinely earns 50 percent or more active income and holds 50 percent or more active assets, this should not be seen as engaging in an avoidance arrangement.*

   b. *Individuals who genuinely hold an interest below the Controlling Person ownership threshold (generally 25%) in a Legal Person and do not otherwise control the entity via other, hidden means should not be seen as avoiding identification as a Controlling Person.*

We believe that the above examples, where they are genuine commercial arrangements or transactions, should not be considered CRS avoidance schemes and that the OECD should make that clear in the rules.

**Excluded accounts and assets outside the scope of the CRS**

17. We note that there may be examples of ordinary course of business arrangements that result in the transfer of money or assets to an account excluded from the scope of CRS reporting or the purchase of excluded assets which should not fall within the scope of a CRS avoidance arrangement.

18. For example, we note that the transfer of money from a current account into a pension account should be viewed as a legitimate transaction that has the effect of taking the money transferred outside the scope of CRS reporting. This should not be viewed as an avoidance arrangement given that governments have expressly defined pension accounts to be out of scope of the CRS and that there are clear policy reasons for the non-reportable and tax favoured status of pension accounts.
Transfer of money or assets to the US

19. At paragraph 14 of the discussion draft, the OECD states that an arrangement that results in information being exchanged by the US under a FATCA IGA would not fall within the definition of a CRS Avoidance Arrangement. This would imply that under normal circumstances the transfer of money or assets from an IGA jurisdiction to the USA would not be a CRS Avoidance Arrangement, unless there was some active promotion on the part of the bank, or the bank otherwise knew about the active third-party promotion of such a scheme. It would be helpful if the OECD would confirm that our understanding here is correct.

“Design, marketing or has the effect of”

20. We note that arrangements which are “designed” to avoid reporting under the CRS are defined to be those with features included to facilitate a non-reporting outcome. However, there does not appear to be a requirement for some deliberate act in the structuring i.e. someone has actively turned their mind to implementing features that facilitate a non-reporting outcome. We believe that it would be helpful if the OECD would confirm that for an arrangement to be “designed” to avoid reporting requires a deliberate act.

21. The inclusion of such a requirement is important because without it the threshold for “design” becomes a bare test as to whether an arrangement has features that give a non-reporting outcome. That would broaden the scope such that any arrangement that causes non-reporting, whether intended or not, will have been ‘designed’ to avoid the CRS.

22. We note that in the discussion in paragraph 15 of the discussion draft, regarding whether an arrangement is marketed, there is helpful commentary outlining that a legal opinion stating that a product or structure is not reportable is not evidence of marketing per se.

23. We believe it would be useful if that confirmation could be extended to statements of fact made by financial institutions to their clients about how CRS works, what jurisdictions are reportable, and when exchange of information will occur. Aside from the fact it is important to educate the public about CRS, some jurisdictions expressly require that information to be provided to reportable clients via pre-reporting notification and others still require certain information to be published on a bank’s website.

24. Unless an Intermediary is actively promoting certain structures or arrangements to clients, it should be clearly stated that bare statements of fact made by an Intermediary about CRS implementation should not result in a person being found to have promoted a CRS avoidance arrangement or offshore structure.
25. We note that the inclusion of the phrase “has the effect of” avoiding the CRS is broad and essentially negates the requirements of “design” and “marketing”; a scheme that is neither designed nor marketed to avoid the CRS would still be an avoidance scheme if it has the effect of avoiding the CRS, even by chance. We note that one way to address the broadness of the phrase “has the effect of” would be to include a dominant purpose test.

A ‘dominant purpose’ test

26. We note that the drafting of some aspects of the mandatory disclosure rules is similar to the domestic tax general anti-avoidance rules ("GAARs") in jurisdictions such as the UK. Given the similarities, we believe that it would be consistent to introduce a ‘dominant purpose’ test when assessing whether an arrangement has been entered into to avoid the CRS. When applying the ‘dominant purpose test’, we believe that a requirement to consider counterfactuals would limit the application of the disclosure rules to the targeted arrangements that “have the effect of” avoiding CRS.

27. The addition of a ‘dominant purpose’ test would remove the requirement to report an arrangement to the extent an intermediary does not have knowledge that the arrangement has been promoted or designed to avoid reporting under the CRS. This could be because, in considering the counterfactual, it is clear that the structure is in place for legitimate commercial reasons. For example:

A US Financial Institution that is a fund distributor/nominee may aggregate the holdings of underlying investors has the effect of meeting the minimum capital subscription requirements for a CRS Reporting Fund. Such aggregator arrangements have been in place prior to CRS and are commercially necessary because they allow investors to invest into funds for which they may not otherwise be able to meet the minimum capital requirement.

Such arrangements, so long as they are not marketed as CRS avoidance arrangements, should not be seen as avoidance schemes implemented either by the CRS Reporting Fund or the US distributor/nominee.

Carve out for certain arrangements

28. We believe that arrangements should not be in scope of the mandatory disclosure rules where the burden to report merely shifts from one entity to another (assuming there is no ultimate avoidance, delay or obscuring of the reporting). E.g. An arrangement where reporting obligations are shifted from one entity in a CRS reporting jurisdiction to another entity in that same jurisdiction or a third one where the financial account information, timeliness of reporting and the reportable account holders are materially the same, should not need to be reported.
B. Intermediaries

Retrospective application

29. We note that the clawback period until 15 July 2014 appears to have been included to allow the disclosure rules to apply to FATCA, which, in many jurisdictions, is enacted under the same law as CRS. We note that retrospective application of legislation may be difficult for Intermediaries to implement, particularly where specific past behaviours or arrangements must be identified.

The scope of Relevant Services

30. The definition of Relevant Services, as drafted, could be interpreted broadly and it would be useful if the examples provided in paragraph 59 could be expanded to include scenarios where a bank plays no part in design or marketing, but, for example, simply opens an account for a client or executes transactions based on client instructions and there is no reason to know that these activities form part of an avoidance arrangement. We ask the OECD to provide greater reassurance that the provision of routine banking services will not fall within scope of the rules.

Reportable Taxpayers exclusion

31. We believe that the exclusion for Reportable Taxpayers in Paragraphs 72 and 75 (i.e. where the relevant party can provide a certified or notarised copy of a tax return proving that they have paid tax in all their jurisdictions of tax residence in respect of the income and assets subject to the arrangement) requires greater clarity from the OECD with respect to how it should apply in practice.

32. For example, we note that it is likely to be difficult for a party to demonstrate that it has met all its tax obligations in relation to specific assets and income subject to a particular arrangement in advance of the CRS information exchange (e.g. in the UK this takes place whilst the enquiry window for a return is still open). In addition, the OECD should confirm that the exclusion can apply in a jurisdiction where there is a self-assessment regime in place.

Exclusion for arrangements where no end users are reportable

33. We believe that it may be helpful for the OECD to include an exclusion from the rules in situations where no Reportable Person is de-scoped from reporting. This would only be relevant where the end user of an arrangement is in fact resident in a non-reportable jurisdiction (e.g. a UK person holding assets at a UK
bank through a particular arrangement). We would be happy to discuss this further with the OECD.

C. Information Reporting

Overlap with existing reporting obligations

34. Examples provided in the commentaries of behaviour that are indicia of an arrangement to circumvent CRS obligations include:
   a. Sham or back-to-back payments to disguise reportable payments as non-reportable ones;
   b. Indirect control of entities, e.g. via nominees or straw directors; and
   c. Use of tax residence certificates that do not reflect a person's “true” tax residence.

35. We note that some of the above behaviour might already trigger existing reporting requirements – e.g. obligations on financial institutions to file suspicious activity reports with their local regulator. We believe that it would be beneficial for the OECD to identify and minimise any inconsistency between the proposed CRS disclosure rules and other, existing reporting obligations.

Overlap with general anti-avoidance rules within current CRS legislation

36. Some jurisdictions have included general anti-avoidance rules within their CRS legislation, which already require arrangements entered into to avoid the CRS to be disregarded. It is unclear how the draft mandatory disclosure rules would interact with existing general anti-avoidance rules, particularly as regards to the following features:

   a. whether the same definition of ‘avoidance arrangement’ should be applied;
   b. whether a dominant purpose test (a hallmark of most GAARs) will apply equally across both rules;
   c. whether the standard of knowledge will be the same across both rules; and
   d. whether an Intermediary that becomes aware of an avoidance arrangement under the disclosure rules is required to take any action under the general anti-avoidance rules contained in the CRS legislation.

Data protection and confidentiality considerations

37. We note that it is crucial that any reporting requirements must respect existing rules relating to data protection and client confidentiality.

Timing of reporting
38. We note that reporting is required within 15 working days of the CRS Avoidance Arrangement or Offshore Structure being made available for implementation or of the supply of the Relevant Services. We should be grateful if the OECD would confirm the purpose of the 15-working day deadline and confirm that this is suitable to meet the OECD’s objectives.

39. If reporting is designed to allow the monitoring of arrangements to establish if urgent legislative or procedural action is to be taken to curtail their effectiveness, then a short time frame is appropriate. However, if the objective is to allow audit and due diligence to be performed on high risk tax returns, then the purpose served by the short time frame is unclear.

40. We are grateful for the opportunity to share our comments with the OECD on the discussion draft and would be pleased to contribute further as the OECD’s work develops.
Dear Sirs

Public Discussion Draft on Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

The Alternative Investment Management Association (AIMA)\(^1\) welcomes the opportunity to provide comments on the discussion draft.

We appreciate OECD’s continued work in developing the common reporting standard (CRS) and, by way of these draft rules, to create deterrents for circumventing necessary CRS reporting.

We accept that it is desirable to have an international framework to require disclosure of structures that are set up with a purpose to hide beneficial ownership. However, we are concerned that the draft rules are too broad which may result in disclosure of many structures which are inoffensive – or, indeed, which are disclosed out of caution when not required to be disclosed. Disclosures in excess of what is reasonably required would place a burden on professional advisers and intermediaries, while tax authorities would receive a significant amount of unnecessary information which they would be required to process in order to use properly. This is likely to arise in particular in the context of collective investment schemes.

We set out in the annex to this letter an example of a legitimate offshore structure for an alternative investment fund and illustrate how it may trigger disclosure requirements.

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\(^1\) AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA’s fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 80 members that manage $500 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA’s website, www.aima.org.
The discussion draft states (at paragraph 40) that the offshore structure definition is intended to apply to private investment vehicles which are closely held and excludes persons or arrangements that are, or are wholly owned by, institutional investors. It is not clear to us where the restriction to closely held vehicles arises, as the draft rules do not take express account of whether the ultimate beneficial ownership of an offshore structure is widely held or not. It may be that this is to be implied from the meaning of Beneficial Owner if this requires that there should be one or a number of individuals who have ownership or control of the structure. We request that this point should be clarified in the final rules or accompanying commentary and guidance.

Further, the first limb of the definition of an institutional investor, in chapter two of the draft rules, extends to financial institutions including collective investment vehicles that are “regulated” but without defining this. Alternative investment funds are typically lightly regulated in their jurisdiction of domicile, since they are intended to be marketed to institutional and other sophisticated investors. They, of course, remain subject to anti-money laundering, anti-terrorism and financial crime regimes and to transparency provisions. We are concerned that the apparent focus under the draft rules on (financial) regulation would not permit alternative funds based in offshore jurisdictions to qualify under the exclusion for institutional investors. We consider that collective investment vehicles should qualify as institutional investors if they are registered with the financial services authority in the jurisdiction in which they are established.

We would be pleased to provide any further explanation you may require.

Yours faithfully,

Paul Hale
Managing Director, Global Head of Tax Affairs
Annex

In this Annex we illustrate how a typical alternative investment fund will be a Passive Offshore Vehicle that is held through an Opaque Ownership Structure and so subject to the disclosure obligations.

The diagram depicts a typical structure for an alternative investment fund which is marketed to institutional and private investors worldwide. There are probably several tens of thousands of similar structures in existence.

The four fund entities - feeders, master fund, special purpose vehicle - within the red-outlined box are potentially (together and individually) a Passive Offshore Vehicle within the meaning of the draft rules while the investors outside the red-outlined box may hold their interests through arrangements which may include Opaque Ownership Structures within the meaning of the draft rules. We consider this in more detail below.

Passive Offshore Vehicle

The fund entities will be a Passive Offshore Vehicle.
they are Institutional Investors – this can be met only if the entity is regulated as a collective investment vehicle which it is unclear will be satisfied since the required level of regulation is not specified in the draft rules; or

they are wholly owned by Institutional Investors – the fund entities are unlikely to be so owned, since their direct investors may include individuals and entities that are not Institutional Investors. It should be noted that endowment funds and charities which are important investors in alternative investment funds would not fall within the definition of Institutional Investor.

Therefore, we conclude that an alternative investment fund will almost invariably be a Passive Offshore Vehicle - unless the definition of regulation can be satisfied.

Opaque Ownership Structure

An Opaque Ownership Structure is an arrangement concerning the direct or indirect ownership or control of a person or asset for which it is reasonable to conclude that it is designed to have, marketed as having, or has the effect of allowing a natural person to be a Beneficial Owner of a Passive Offshore Vehicle while obscuring such person's Beneficial Ownership or creating the appearance that such person is not a Beneficial Owner (emphasis added to note that there need be no intention to create an Opaque Ownership Structure).

A Beneficial Owner is to be interpreted in a manner consistent with the Financial Action Task Force Recommendations. These provide that:

“Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.

Reference to “ultimately owns or controls” and “ultimate effective control” refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.

This definition should also apply to beneficial owner or a beneficiary under a life or other investment linked insurance policy.”

Investors in an alternative investment fund may hold their interests indirectly in a number of ways:

- the interests may be part of an investment portfolio managed on a discretionary basis by a financial intermediary who holds the interests (with other investments made by its clients) through a nominee shareholder
- the investor may be an investor in a fund of funds which is itself the investor in the alternative investment fund
- the interests may be held by an insurance company as part of the assets attributable to an insurance policy funded by the investor.

Such arrangements would exist outside the red-outlined box in the diagram and would be outside the control of the alternative investment fund and its manager. The extent to which the alternative investment fund and its manager would have knowledge of the existence of these arrangements would depend upon the circumstances.

The draft rules are concerned with Offshore Structures, i.e. Passive Investment Vehicles that are held through an Opaque Ownership Structure. It is not clear whether the extent of such ownership is a relevant factor.

Disclosure obligation

An Intermediary with respect to an Offshore Structure is subject to a disclosure obligation. An Intermediary may be:
- a Promotor – the person who is responsible for the design or marketing of an Offshore Structure; or
- a Service Provider – a person who provides assistance or advice with respect to the design, marketing, implementation or organisation of an Offshore Structure in circumstances where that person could reasonably be expected to know that the arrangement is an Offshore Structure.

In the context of an alternative investment fund, it would seem that any Promotor and Service Provider should be identified in relation to any Opaque Ownership Structure through which an investor owns interests in the fund, on the basis that persons concerned only with the Passive Investment Vehicle are not acting with respect to the Offshore Structure. However, it is certainly possible that a person acting in respect of the Passive Investment Vehicle could have sufficient knowledge or information about an independent Opaque Ownership Structure that the person could be considered to be giving assistance with respect to the implementation of the Opaque Ownership Structure and so of the Offshore Structure as a whole.
Projet de communication obligatoire d'informations relatives aux dispositifs de contournement de la NCD et aux structures extraterritoriales opaques

Madame, Monsieur,

La présente est une réponse à la consultation publique que l’OCDE a ouverte le 11 décembre 2017 sur le projet de texte cité sous rubrique.

Les banques privées suisses sont bien sûr pleinement engagées pour appliquer la NCD et ont commencé à collecter les données des résidents des 82 juridictions auxquelles la Suisse a accordé l’échange automatique de renseignements à des fins fiscales (EAR). Elles soutiennent aussi tous les efforts pour que la NCD soit correctement appliquée dans chaque juridiction, afin d’éviter que sa mise en œuvre fasse l’objet d’arbitrages.

Le projet de l’OCDE est prématuré

Cela étant, pour tous les pays qui se sont engagés à un premier échange en 2018, comme la Suisse, la mise en œuvre de l’EAR pour l’année 2017 n’est même pas encore terminée, puisque le délai pour identifier les personnes de contrôle des entités juridiques court jusqu’à fin 2018. La quantité de renseignements qui vont être échangés va encore croître massivement et il convient de laisser aux autorités fiscales le temps de les analyser et de constater s’il y a des déficiences ou non. Rajouter à ce stade des obligations supplémentaires de communication surchargerait tant les institutions financières que les autorités fiscales, qui sont déjà au maximum de leur capacité de traitement des données.

Les règles sont trop subjectives

Le projet de l’OCDE prévoit d’obliger à communiquer les dispositifs et structures dont il est « raisonnable de conclure » qu’ils servent à contourner la NCD. Il s’agit d’une appréciation totalement subjective, qui non seulement implique un travail manuel et non automatique, mais qui sera aussi mise en œuvre de façon différente dans chaque juridiction.
Les institutions financières doivent être exonérées

Il n’est pas clair si les institutions financières sont aussi des « intermédiaires » qui devraient appliquer ces nouvelles obligations. Nous partons du principe que les institutions financières qui appliquent la NCD et dont les annonces seront vérifiées par des audits n’y seront pas soumises, car cela serait vite détecté si elles aidaient leurs clients à contourner la NCD. Ce sont bien plutôt les conseillers professionnels qui ne sont pas des institutions financières qui devraient communiquer leurs éventuelles mauvaises idées.

Les lacunes de la NCD doivent être comblées

L’obligation d’annoncer les cas où la NCD pourrait être contournée nous semble une mauvaise approche tant que la NCD elle-même contient des situations où une annonce n’a pas à être effectuée. Puisque la NCD est un filet qui doit recueillir des renseignements, et que ce filet a des trous, il est plus logique de boucher ces trous plutôt que de placer des seaux en-dessous pour essayer d’attraper les renseignements qui passent à travers.

Nous voyons trois types de situation où l’application de la NCD conduit les banques suisses à ne pas effectuer d’annonce, alors même qu’elles auraient les renseignements qui pourraient intéresser une juridiction partenaire, et où aucune annonce ne sera effectuée :

1) **Lorsque l’institution financière étrangère, cliente de la banque suisse, ne respecte pas ses obligations découlant de la NCD.** Cela peut aussi être le cas lorsqu’une entité d’investissement se qualifie à tort de « active NFE », alors qu’elle est en réalité une institution financière, puisque la banque suisse n’a pas à revoir la qualification de ses clients selon la NCD (elle ne doit qu’en vérifier la plausibilité). Il est donc essentiel que chaque Etat vérifie que ses institutions financières appliquent correctement la NCD, y compris une identification des personnes de contrôle conforme aux Recommandations du GAFI, et que l’OCDE s’assure de cela au travers de ses « peer reviews ». Dans ce contexte, un registre public des institutions financières enregistrées dans chaque pays serait une aide appréciable.

2) **Lorsque le client d’une banque suisse est une institution financière établie dans une juridiction partenaire de la Suisse.** En vertu de la NCD, la banque suisse ne doit procéder à aucune déclaration. C’est l’institution financière à l’étranger qui doit transmettre les données relatives au compte bancaire suisse. Mais elle ne le fera que si l’EAR a été activé entre son pays d’incorporation et celui de résidence de ses « Equity Owners ». Même si le nombre d'activations bilatérales continue d’augmenter régulièrement, il y aura toujours des cas où l’institution financière étrangère ne sera pas tenue d’effectuer une annonce, faute d’accord entre les juridictions concernées. Par exemple, si une société monégasque se classe comme institution financière auprés de la banque suisse où elle a un compte, la Russie ne recevra aucun renseignement sur les personnes de contrôle résidentes russes de cette société. Ceci dans le respect total de la NCD, jusqu’à ce que Monaco et la Russie activent l’EAR entre elles. Puisque la NCD est ainsi faite, il ne faudra pas reprocher ensuite à la banque suisse d’avoir connu les personnes de contrôle résidentes en Russie et de n’avoir rien communiqué.
3) Lorsque l’institution financière cliente de la banque suisse applique d’autres règles d’identification des personnes de contrôle que la banque suisse. Les banques suisses sont en effet soumises à la Convention de diligence des banques, qui les oblige depuis 1977 à connaître tous les ayant droit des sociétés de domicile « stand-alone », indépendamment du seuil de détention. Tandis que de nombreux pays, tout comme une fiduciaire suisse par exemple, appliquent dans ce cas le seuil de détention de plus de 25% proposé comme exemple par le GAFI. Cela signifie qu’une société « stand-alone » détenue par au moins quatre personnes sera complètement transparente si c’est la banque suisse qui est tenue d’effectuer une annonce selon la NCD, tandis qu’elle sera opaque si c’est la société elle-même en tant qu’institution financière qui doit l’effectuer. Est-ce à dire que la banque suisse devrait renoncer à tout mandat de gestion confié par la société, si celle-ci n’est pas gérée professionnellement et ne devient une institution financière qu’en raison de ce mandat de gestion ? Ce n’est bien sûr pas raisonnable.

Les exemples qui précèdent montrent qu’il existe des cas où des comptes bancaires suisses, notamment ceux détenus par des entités situées dans des juridictions auxquelles la Suisse accorde l’EAR, ne seront pas annoncés par les banques suisses aux pays de résidence de leurs personnes de contrôle, et ce conformément à la NCD. Ce sont des cas où les banques suisses auront des informations susceptibles d’intéresser ses juridictions partenaires, mais ne les échangeront pas. Il est important que cette particularité, qui concerne d’ailleurs toutes les places financières, soit bien comprise par tous les pays et qu’aucun reproche ne soit adressé à l’avenir aux institutions financières qui n’auront fait qu’appliquer la NCD.

Pour que les renseignements pertinents parviennent aux pays de résidence des personnes de contrôle, il est donc essentiel que le réseau d’activations bilatérales de l’EAR soit aussi complet que possible et que chaque pays s’assure du respect des obligations de la NCD par les institutions financières sises sur son territoire. Dans ce contexte, nous ne pouvons que réitérer la ferme nécessité pour les Etats-Unis d’adopter la NCD en lieu et place de leur loi FATCA, afin de fermer le maillage de l’EAR.

Ce n’est que lorsque tous ces éléments seront en place que des obligations de communication telles soumises en consultation pourraient être considérées et affinées, en les comparant avec une modification directe de la NCD pour accroître son efficacité.

En vous remerciant par avance de l’attention que vous porterez à la présente, nous vous prions d’agréer, Madame, Monsieur, nos salutations distinguées.

ASSOCIATION DE BANQUES PRIVEES SUISSES

Jan Langlo     Jan Bumann
Directeur    Directeur adjoint
Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

The Austrian Bar (Österreichischer Rechtsanwaltskammertag) is the legal representation of lawyers in Austria and as such is responsible for safeguarding the rights and affairs as well as representing the Austrian lawyers at national, European and international level.

From the point of view of the Austrian Bar, it should be highlighted that professional secrecy of lawyers is as a fundamental principle imperative for the rule of law and the proper administration of justice, without it there would be no proper protection of the clients' fundamental rights and lawyers could not practice. The relationship of professional confidentiality covers everything clients confide in a lawyer, whatever its nature, in order to be best advised and defended. Indeed, once clients step into a law firm, they have the guarantee that they are allowed to say anything to their advisor. This is the condition upon which the advisor will be able to provide them with the best advice or representation. It would be impossible for lawyers to provide such advice or representation if clients withhold information from the lawyer because of a fear of betrayal of the lawyer-client confidentiality.

Regarding paragraph 2.1. (p. 29) the Austrian Bar suggests to replace the word "communication" by the word "information" as the term "communication" is far too restrictive. The relationship of professional confidentiality covers everything a client confides in a lawyer, whatever its nature, in order to be best advised and defended. Besides, also facts which the legal professional has learned not only directly from but also about a party are covered by the professional secrecy.

Regarding 2.2. (a) (p.29), according to which an Intermediary that is not required to disclose information under Section 2 shall provide written notice to the tax authority that the Intermediary has information on a CRS Avoidance Arrangement or Offshore Structure that is not required to be disclosed under the Section 2 and to any Reportable Taxpayer of its disclosure obligation under Section 4, this provisions does
not seem acceptable. It ultimately impairs respectively circumvents, and in essence disregards the confidentiality of the lawyer, as the Reportable Taxpayer is in further consequence made identifiable. This provision should therefore be deleted.

Vienna, 15 January 2018

DER ÖSTERREICHISCHE RECHTSANWALTSKAMMERTAG

Dr. Rupert Wolff
President
For the attention of the International Co-operation an Tax Administration Division, OECD/CTPA

Dear madam! Dear sir!

Concerning the consultation draft concerning „mandatory disclosure rules“, the Austrian chamber of civil law notaries takes the opportunity to communicate its position and therefore addresses the following comments on this consultation draft to the OECD.

The professional secrecy of both lawyers and notaries is as a fundamental principle imperative for the rule of law and the proper administration of justice, without which there would be no proper protection of the clients’ fundamental rights and lawyers/notaries could not practice and perform their duties. It would be impossible for lawyers/notaries to provide advice or representation in a proper and suitable way if the clients, due to fear of betrayal of that essential precondition of confidentiality, withhold information from the lawyer/notary.

Having that in mind, several amendments to Paragraph 2.1. should be made.

First of all, the term "communications" is far too restrictive. So, the term "information" should be used. In fact, as client information is concerned much more can fall under the professional secrecy. The relationship of professional confidentiality covers everything a client confides in a legal professional, whatever its nature, in order to be advised and represented in the best way. Besides, also facts which the legal professional has learned not only directly from but also about a client / a party are covered by the professional secrecy.

It has to be mentioned that, regarding the notarial profession, the focus on the term „client“ is too narrow. Concerning notaries, the term „party“ (as used in the professional law for the Austrian notaries) instead of „client“ should be used.

The term „admitted legal representative“ is not suitable for the notarial profession. Instead of „admitted legal representative“, the term „legal professional“ should be used. It has to be mentioned that the term „legal professional“ is for example used in the 4th anti-money laundering directive of the European Union (2015/849).

Paragraph 2.1. therefore should read as follows:

“2.1. The Intermediary (the legal professional) shall not be required to disclose any information set out under Section 1 above to the extent that the disclosure would reveal confidential communication between the legal professional and the parties or reveal facts which the legal professional has learned from or about a party for the purposes of seeking or providing legal advice or for the purposes of representing the party in existing or contemplated legal proceedings and that the information is protected from disclosure under domestic law.”

Furthermore Paragraph 2.2., according to which an Intermediary that is not required to disclose information under Section 2 shall provide written notice to the tax authority that the Intermediary has information on a CRS Avoidance Arrangement or Offshore Structure that is not required to be disclosed under the Section 2 und to any Reportable Taxpayer of its disclosure obligation under Section 4, is not acceptable. It respectively circumvents and in essence disregards the confidentiality of the legal professional, as the Reportable Taxpayer is in further consequence made identifiable. This provision should therefore be deleted.

The Austrian chamber of civil law notaries points out that the above-mentioned amendments are absolutely necessary and hopes that these amendments will be carried out.

Yours sincerely

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January 15, 2018

International Co-operation and Tax Administration Division,  
OECD /CTPA  
Via e-mail: mandatorydisclosure@oecd.org

Re: Public Discussion Draft / Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structure

Dear Sirs,

We are writing to respectfully and timely submit our comment with respect to the document in re.

It is our understanding that the MDR is intended primarily to impose the obligation of disclosure by “Intermediaries” to the competent authorities of their jurisdictions of tax residence, of such schemes [namely, “CRS Avoidance Arrangements” and “Offshore Structures”] that could have the effect of circumventing the CRS; unless the information is protected by client confidentiality or would result in duplicate disclosure to the same tax administration.

In this line of thought, it is also our understanding that the disclosure obligation would arise where it is “reasonable to conclude” that the particular arrangement has the effect of circumventing the CRS. The MDR further states that the “reasonable to conclude test” “will be satisfied where a reasonable person in the position of a professional adviser with a full understanding of the terms and consequences of the arrangement and the circumstances in which it is designed, marketed and used, would come to this conclusion”.

Our comment focuses, then, on the “reasonable to conclude test” as stated in the paragraph above. We are of the opinion that a standard of “actual knowledge” should be substitute for the proposed “reasonable to conclude test”. The standard of “actual knowledge” is already widely used for FATCA and the CRS and is a truly objective one. Moreover, Reporting Financial Institutions, in general, already deal with the standard of “actual knowledge”, particularly, within the context of due diligence of preexisting high value accounts, which are also accounts of specific interest within the context of the MDR. In our view, the “reasonable to conclude test” would not add legal certainty to the global market place but add unnecessary complexity by creating a legal presumption based on the hypothetical of a professional advisor with full understanding of all the implications of the scheme, including its potential for CRS avoidance. We see this hypothetical as impractical and necessarily subjective rather than objective. The “reasonable to conclude” standard would most probably be measured and applied differently in each jurisdiction which would in turn be counterproductive to the intent of setting standard rules that all jurisdictions could apply in equal footing. Therefore, we respectfully suggest that an “actual knowledge” standard be adopted in the MDR rather than a “reasonable to
conclude test”, because the “actual knowledge” standard is based on certainty of knowledge by a real person and not on a legal presumption of knowledge possessed by a hypothetical expert.

Thank you very much for your time and consideration.

Sincerely,

Jose Andres Romero-Angrisano
International Tax Partner
BDO Panama
jromero@bdo.com.pa
Dear Achim,

Business at OECD’s (BIAC’s) response to the public discussion draft regarding Mandatory Disclosure Rules (MDRs) for Addressing CRS Avoidance Arrangements and Offshore Structures is enclosed. To summarize very briefly:

- We strongly support the Standard for Automatic Exchange of Financial Account Information in Tax Matters (Common Reporting Standard or CRS). The CRS’ administrable procedures and detailed guidance make it a key tool for addressing the important and valid public policy concerns regarding tax evasion and money laundering.

- We also strongly support efficient and targeted mechanisms for addressing CRS avoidance arrangements, where these are shown to be necessary. Such mechanisms will ensure a fair and transparent financial system, and will benefit compliant firms.

- However, while we recognize that the rules must be crafted to stop abusive behaviour by “bad actors”, a number of our members have expressed concerns that introducing MDRs with immediate effect while CRS itself is still being implemented will result in unnecessary burdens. We suggest that either the scope of the immediately effective rules is reduced substantially to cover only scenarios where there is evidence of abuse, or the effective date is postponed pending full implementation of CRS and a more detailed review of its effectiveness in practice. We believe that this approach will not put CRS at risk, but will increase certainty and thereby reduce compliance burdens on low-risk taxpayers and financial institutions (FIs).

- Rules targeted to actual abuses will also prevent tax administrations from being overwhelmed with information, only some of which will be useful; a significant volume of extraneous or irrelevant information would inhibit enforcement efforts by making it harder to find abusive behaviour.
Operationalizing these rules will be critical for FIs with extensive commercial activities and thousands of employees who service a large client base. Consequently, FIs will need:

- clear and easy-to-understand rules;
- bright line tests;
- prospective-only application with sufficient lead time to develop effective systems;
- rules that prevent duplicative reporting arising from common business arrangements; and
- rules that are consistently implemented worldwide (i.e., not more or less than the OECD standard).

Our specific, high-level, recommendations are that:

- an actual knowledge standard be applied;
- a main purpose test be applied;
- penalty protection be provided for reporting FIs (not acting as product developers/promoters) when they make a good faith effort to develop and implement effective policies and procedures; and
- protection from legal actions initiated by clients whose transactions have been reported under the MDRs be provided for reporting FIs and other tax intermediaries acting in good faith.

Finally, we recognize that achieving the correct balance—so that the rules are both effective and targeted—can be challenging. To that end, we would be pleased to discuss our comments with you in greater detail.

Sincerely,

Will Morris  
Chair BIAC Tax Committee

Keith Lawson  
Chair BIAC Business Advisory Group on CRS

Enclosure

cc: John Peterson  
Philip Kerfs
Business at OECD Comments on

Public Discussion Draft on Mandatory Disclosure Rules
for Addressing CRS Avoidance Arrangements and Offshore Structures

Chapter 1 – Definition of CRS Avoidance Arrangement

Comments on the Commentary:

Para. 13 – The generic definition of a “CRS Avoidance Arrangement,” for the reasons below, is overly inclusive. A more targeted approach would benefit both tax administrations and financial institutions (FIs) seeking to comply with these important rules.

We believe, for example, that it is “reasonable to conclude” that any transfer from a reportable depository account to any retirement account that is an Excluded Account “has the effect of” circumventing CRS information reporting requirements. That, combined with the definition of Relevant Services as offering any assistance with respect to the implementation of a CRS Avoidance Arrangement, could mean that every Reporting FI is required to report all such transfers.

Because we do not believe that all such transfers should be reportable under these rules, we recommend that a dominant purpose or similar standard be required for an arrangement to be a CRS Avoidance Arrangement. In determining purpose, the steps taken to achieve an outcome and whether feasible alternatives existed to achieve the same commercial goal should be considered.

In addition, as described in more detail below, we believe that the definition of Relevant Services should be limited to situations in which it is reasonable for the service provider to conclude that the intent of the arrangement is to avoid reporting under the CRS (and see also below our comments on Para, 16 regarding this test). The term Relevant Services should not include commercial relationships such as cash management, payment services, financing, or execution-only brokerage.

Para. 14 – It is unclear when an exchange by the United States under FATCA constitutes “the same Financial Account” information as would have been reported and exchanged under the CRS. In almost no circumstance would a Reporting Financial Institution be in a position to know whether a transfer to an account in the United States would meet this standard. Does this mean that no transfer to the United States is a CRS Avoidance Arrangement, or that every transfer to the United States is a CRS Avoidance Arrangement? Would other types of arrangements be implicated? If so, how?

Para. 15 – We believe that this paragraph should make clear that factual statements from FIs about CRS, how it works, etc. (without more) should not be evidence of marketing (similar to the legal opinion example).

Para. 16 – The “reasonable to conclude” standard appears to assume that an FI has knowledge of all relevant facts. This standard thus could be read to require detailed
training across large segments of a financial institution. We recommend that the standard be applied based upon actual knowledge. Under this revised standard, the question would be whether it is reasonable to conclude, based upon what the FI knows, whether the arrangement is an attempt to specifically avoid reporting under the CRS. This standard of knowledge would align with the CRS’ Relationship Manager Inquiry.

Para. 17 – Clarification is needed regarding the “core functionality” of a financial account and the “features” that are designed to take a financial product outside the definition of financial account.

Para. 17 – Without additional guidance, all e-money transactions and/or all derivatives transactions might be reported. This would result in reporting tens of millions of accounts and millions of transactions per day – which would make it harder for governments to identify abusive transactions.

Para. 17 – Any reporting will exacerbate client relationship difficulties as CRS avoidance has pejorative implications. Providing FIs with express immunity from litigation for good faith reporting will be necessary to enable the rules to function.

Para. 18 – Would transfers from a bank account to a retirement account or other form of nonreportable account be covered? If so, this “over-reporting” would make it harder for governments to identify abusive transactions. Does the FI need to check each time it transfers money cross border if the account holder would be reportable in the jurisdiction to which the money is moving to? If the account holder was not reportable in the first place, would there be a need to check? If the account holder would be reportable in that other jurisdiction, would there be a need to check if the transfer is to an exempt account (low risk product, etc.)?

In addition, we are confused by the reference to a $250,000 limitation at the end of paragraph 18, because there is no such limitation for new accounts.

Para. 19 – Paragraph 19 seems to state that a simple transfer (presumably from a reportable account to a non-reportable account) in itself would not be a CRS Avoidance Arrangement because it is not “an arrangement between the bank and the customer to circumvent CRS legislation.” We would very much welcome such a limitation, but we do not see a basis for it in the draft rules.

Consistent with the statement in Paragraph 19, a similar statement should be provided for collective investment vehicles (CIVs) when a CIV investor instructs the CIV (or its service provider) to transfer funds from the CIV investment to a bank account which may be outside the scope of CRS reporting.

Para. 26 – It seems the movement from a trust to a company will always be an avoidance scheme regardless of the reason for doing so. In addition to our suggestions above in relation to paragraphs 13 and 16, there should be a specific carve-out for widely held funds that might merge or migrate to another entity form.
Para. 30 – The definition of the term “Arrangement” captures legal arrangements that are (a) Institutional Investors or (b) owned by one or more Institutional Investors. A paragraph like Para. (3) of the Definition of Offshore Structure should be added.

Chapter 2 – Definition of an Offshore Structure

Comments on the text of the draft hallmark:

In section 1.4(a), it is typical that brokers will invest in shares on behalf of their clients “in street name” and not disclose the nominator to the fund or company that issues the shares. Under the CRS, the brokers would be disclosing these custodial accounts if maintained for non-residents. It would be helpful to have an example that excludes such Reporting Financial Institution brokers from the scope of this definition where they maintain financial accounts for the beneficial owners.

In section 1.4(d), we would recommend the creation of a list of jurisdictions, or the use of an existing list (e.g., the FATF high-risk and non-cooperative jurisdictions list), that meet one or more of the three criteria maintained by the OECD and agreed by all participating countries. To leave the decision to each FI would very likely result in each FI taking separate counsel and using different lists of jurisdictions that they believe meet one of the three criteria.

In section 1.4(e), the definition of what is “adequate” in terms of information collected and maintained by trusts is subjective. Is a name and address adequate without more? Is it adequate to use a risk based approach and only collect and maintain information on beneficial owners of more than 20% of the trust? We recommend, like above, that the OECD maintain a list agreed to by all Partner Jurisdictions.

Section 1.4(e) should not include the use of a Legal Arrangement if it is incorporated, resident, managed, controlled, or established, in a jurisdiction that does require the trustees (or functional equivalents) to obtain and hold the relevant information regarding the Legal Arrangement, even if it organized under the laws of a jurisdiction that does not do so.

Comments on the Commentary:

Para. 37 – A definition of the term “substantive economic activity” should be added. We also note that the definition of “passive” is different than under the CRS, so Reporting Financial Institutions may have no way of knowing whether this new standard is met.

Para. 39 – The definition of “offshore” is very broad (and would cover a family trust when one beneficiary moves to another jurisdiction). A more targeted definition (e.g., one that identified specific factors, such as bearer shares) would reduce overreporting. In addition, the definition of offshore structure in paragraph 39 does not seem to be consistent with the definition in section 1.2, which says that “offshore” is an entity set up in a jurisdiction “other than” the jurisdiction of one or more of the beneficial owners.
Said another way, if the entity is set up in a jurisdiction of any of the beneficial owners, it will not be offshore. Additional clarity is needed.

Para. 41 – Text should be added to clarify that “obscure” is not the opposite of “fiscally transparent” (as used, e.g., in Article 1(2) of the OECD Model Tax Convention), but rather of “the lack of transparency regarding ownership.”

Should the “undisclosed nominee” in the penultimate sentence of paragraph 41 actually be an “undisclosed nominator” structure to be consistent with section 1.4(a)? Alternatively, should the phrase be changed to “where the nominator is undisclosed?” Perhaps, in lieu of an “undisclosed nominator,” should the commentary use the phrase “undisclosed beneficiary”?

Para. 42 – A definition of the term “beneficial ownership” should be added, even if it is (a) an open definition or (b) a definition by reference to the FATF Guidance on Transparency and Beneficial Ownership (October 2014), as (i) that term is a common law (as opposed to civil law) term and (ii) a domestic definition of that term may not exist in some civil law jurisdictions.

Para. 43 – We have the same question here as in paragraph 41. Specifically, should the phrase be changed to “where the nominator is undisclosed?” Perhaps, in lieu of an “undisclosed nominator,” should the commentary use the phrase “undisclosed beneficiary”?

Para. 46 – We would recommend that the review of options to be limited to those options that are not publicly traded, or those options written involving at least one publicly traded group affiliate. To do otherwise would likely result in a significant volume of reporting, which would raise privacy considerations and make identification of abusive transactions more difficult.

Para. 47 – The use of credit cards should also be included. We also would recommend making clear that the prepaid debit cards are not those of a particular merchant or those tied to a Financial Account at a Reporting FI. It may also be helpful to tie this into the overpayments on credit cards rules to eliminate those other prepaid debit cards with less than a certain balance. Please note that the review of all prepaid debit cards may cut against the access to banking goals for developing countries. We also are confused by the reference to interest free loans, as those are not financial accounts in the first instance.

New paragraphs – We recommend that the Commentary discuss Sections 1.4(d) and (e). A few clarification points are included in our comments, above, on the text of the draft hallmark.

Para. 48 – The relevant update, revision, or date, of the FATF Recommendations referred to in the definitions of the terms “Basic information” and “Beneficial Owner” should be explicitly included (as, e.g., in Para. 132 of the Comm. on Section VIII of the CRS). Moreover, the Commentary that “the guidance that has been developed in the
FATF context can be used to interpret those terms” should be explicitly included in the text proper (i.e., Para. 33).

Para. 49 – The definition of the term “Institutional Investor” should also include a Legal Person or Legal Arrangement (a) that is regulated as a mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buy-out fund, real estate investment trust, master limited partnership, or any similar investment vehicle (see, in such regard, Para. 20 of the Comm. on Section VIII of the CRS); (b) the shares or interests of which are widely held (i.e., not only publicly traded); and (c) that is wholly owned by one or more of the foregoing. We also would suggest that the CRS-defined term "entities regularly traded on an established exchange” be used in lieu of “publicly traded entities.”

Chapter 3 – Disclosure Requirements on Intermediaries

Comments on the text of the draft hallmark:

Section 5.2 – We would recommend adding the word “knowingly” before “providing assistance...” in the definition of Relevant Services. Adding the word “knowingly” will tie the definition of Relevant Services back to the definition of a CRS Avoidance Arrangement, which should require a full understanding of the terms and consequences of such an arrangement in order to make it reasonable to conclude one exists.

Section 5.3 – We are struggling to understand how the certified or notarized copy of the most recent tax filing of a Reportable Taxpayer would work in practice, and recommend that it be eliminated. For example, does each government where the taxpayer is resident provide those certificates to give to the Intermediary? Is the Intermediary intended to study each tax filing and make that determination, or is the certification or notarization meant to be done by a third-party tax advisor at the expense of the Reportable Taxpayer? Is the Intermediary expected to collect and maintain them on an annual basis? How would the Intermediary evaluate whether the documents represented all relevant filings? What would a taxpayer resident in a country that does not levy income tax be expected to produce?

Section 5.4 – We believe it would make the Service Provider definition clearer and more consistent to use the phrase “reasonable to conclude” in lieu of “reasonably be expected to know” and refer back to paragraph 16.

Comments on the Commentary:

Para. 55 – A definition of the term “person” should be added, even if it is (a) an open definition or (b) a definition by reference to, e.g., Article 1(a) of the OECD Model Tax Convention, as the lack of definition may be exploited to avoid falling within the definition of the terms “Promoter” and “Service Provider”.

Para. 57 et seq.; Para. 73 – Additional guidance and examples are needed regarding the types of “advise or assistance” that constitute “relevant services” in respect of a scheme. A broadly-applied standard could lead to substantial overreporting.
Para. 57 et seq. – “Reasonable person/reasonably expected to know” standards are problematic for large financial institutions (same comment in Chapter 1). Main (or dominant) purpose should be required.

Similarly, an Intermediary be required to have reasonable grounds for suspicion or know that there is a deliberate attempt to avoid CRS obligations (because there may be substantial legitimate reasons for implementing such structures).

Para. 62 – We believe the subjective aspect of the requirement – i.e., which jurisdictions lack the globally accepted AML/KYC rules that could lead to obscuration of natural persons – could result in inconsistent application. Consequently, we restate our recommendation above to make available a globally agreed list of these countries.

Para. 64 – Usually, foreign Intermediaries do not offer their services to domestic clients “through a branch”, but do so in situ through, e.g., visits, meetings (in, e.g., an “office hotel”), (international tax) conferences, emails, and social media (e.g., LinkedIn).

Para. 70 – It may be useful to deem the (properly defined) Relevant Services to have been provided if consideration has been paid, credited, or received, with respect to such Relevant Services.

Para. 74 – Reporting should not be required when the end users are not reportable.

Para. 75 – Standard that intermediary holds a “certified or notarized copy of the most recent tax filing that shows that the Reportable Taxpayer is compliant with its tax obligations” is so high as to make the exception essentially useless. How is the intermediary to know that the taxpayer is compliant if the tax return is in a foreign language and/or so complicated that compliance cannot be determined? (Same comment provided for section 5.3 of the text of the draft hallmark).

**Chapter 4 – Information Reporting**

**Comments on the text of the draft hallmark:**

Section 3.1 – When relying on another Intermediary’s disclosure, they will need to collect and maintain some sort of proof. A copy of the filing would contain PII of the Reportable Taxpayers, so how would this work in practice?

**Comments on the Commentary:**

Para. 77 – How are the details to be reported? Free form narrative or a checklist of items/categories? In addition, we believe that the sentence that states that information is within a person’s control if it can be obtained by asking for it creates a duty to investigate every non-reportable Financial Account and even transactions (e.g., options) that are not Financial Accounts. We suggest that it be clear that this standard only
applies for purposes of determining what information must be reported, not what information a Financial Institution is deemed to know.

Para. 77 – More guidance is welcome regarding when information can be obtained by “asking” for it. Is there any limit on how many inquiries (to the same or different persons) must be made?

Para. 78 – We appreciate that the model rule information requirements are intended to reduce compliance burden. Nevertheless, as described in this submission, the Commentary must be modified and clarified in numerous respects for the compliance burden to be proportionate.

Para. 79 – The obligation to report on persons with whom the FI does not have a business relationship/contractual privity is problematic as the parties do not have a data protection agreement. If Intermediaries are intended to use the definition of “control” from paragraph 77, then is a web search for similar Arrangements or a review of government databases (if made available) also required? If so, what are the key terms or other data elements that should be searched?

Para. 87 – Duplicative reporting also can be prevented by not requiring reporting of transactions (a) for which suspicious activity reports have been filed or (b) that have been otherwise disclosed or reported (e.g., through a tax return).

If a second Intermediary relies upon the disclosure of the first Intermediary in a Partner Jurisdiction, how do the tax authorities identify the Arrangement when the second Intermediary only reports the Reportable Taxpayers and nothing else because it would be duplicative?

Para. 88 – We would strongly recommend a central database of Partner Jurisdiction relationships for Intermediaries to draw from.

Para. 91 – Disclosure by a taxpayer should not be required where disclosure would be limited by any (i.e., not only domestic) protections against self-incrimination (e.g., under international law or the laws of another jurisdiction).

Para. 91 – Disclosure by an Intermediary should not be required to the extent it would infringe that Intermediary’s privilege against self-incrimination (e.g., under domestic law, international law, or the laws of another jurisdiction).

Para. 93 – The expression “with the intention of” should be substituted, at least, by “and it is reasonable to conclude that it will.”

Para. 95 – An expectation that each jurisdiction will have a publicly-available list of Partner Jurisdictions should be added.
Chapter 5 - Penalties

Comments on the Commentary:

In General – We would recommend using the CRS penalties for non-filing that are already in place. If there is not already an account holder penalty in particular jurisdiction, then the FI penalty could be extended to the Reportable Taxpayer.

Para. 96 – Penalties should reflect relative degree of culpability. Promoters, for example, should suffer greater penalties than a large FI subject to a “reason to know” standard. A similar distinction should be made, for example, between “fraudulent” behavior and transactions based upon “equivalent” financial products.

Para. 96 – Penalty relief should be provided when an FI establishes appropriate policies and procedures that generally are followed. This standard would prevent penalties for inadvertent reporting errors.

Para. 97 – Consistency in implementation (i.e., not more or less than the OECD standard), penalty amounts, interpretation (i.e., guidance), and application, across jurisdictions will ensure a level playing field.

Para. 97 – The Commentary should state that certain jurisdictions should implement penalties in primary legislation.

Para. 99 – The Commentary should recognize that, in any case, penalties should be determined by each jurisdiction considering its circumstances (e.g., its constitutional rights and guarantees).

Para. 102 – The Commentary should recognize that a tax administration should not publicize names where contrary to obligations of confidentiality.
Dear Ladies and Gentlemen,

Circumvention of Common Reporting Standards (CRS)

May I respectfully suggest that the OECD has set itself an impossible task in endeavouring to curtail circumvention of common international reporting standards.

Just as national accounting and legal professions have proven to be extremely creative in seeking to reduce or avoid their clients’ payment of income tax, it has been proven they will also find ‘clever’ means to reduce or avoid payments internationally.

Additionally, some countries will be found unwilling to partake in CRS.

Whilst your current effort remains worthy and earnest, history has proven the efficient and fair taxation of income is so fraught with insoluble issues that the OECD is seeking CRS to perform ‘the impossible’.

There were very good reasons, for the sake of practicality, equity and unavoidability, why the likes of Adam Smith, David Ricardo, John Stuart Mill, Thomas Paine and Henry George argued that land rents, not incomes, need to be taxed away. In fact, the following equation adapted from the official outline in "Australia’s Future Tax System" demonstrates that if unearned economic rent is captured for public purposes, the taxation of labour and capital is unnecessary:-

\[ Y_t - rR_t = wL_t + iK_t \]

Where land (R), labour (L) and capital (K) are the factors of production, and their respective factor incomes are rent (r), wages (w) and interest (i) for a given time period (t). (Y) represents the national income.

The adequacy of rent has been proven by professors Mason Gaffney (ATCOR) and Joseph Stiglitz (The Henry George Theorem), so it is arguably the unavoidable of taxing economic rent which has seen the tax-avoiding 0.1% consign it to an afterthought in taxation considerations.

Yours sincerely,

Bryan Kavanagh AAIV
1 Introduction

1.1 In response to the Bari Declaration issued by the G7 Finance Ministers in May 2017, and in light of information on offshore tax planning released by media organisations, combined with information collected through the compliance activities of a number of tax administrations, the OECD discussion paper proposes disclosure by certain intermediaries (promoters and service providers) of:

- Common Reporting Standard (CRS) avoidance arrangements – any arrangement for which it is reasonable to conclude that it is designed for, marketed as or has the effect of, circumventing CRS Legislation or exploiting an absence thereof. This general hallmark is then followed by a list of specific hallmarks.

- Certain offshore structures – an Offshore Structure means a Passive Offshore Vehicle that is held through an Opaque Ownership Structure. An Opaque Ownership Structure is an Ownership Structure for which it is reasonable to conclude that it is designed to have, marketed as having, or has the effect of allowing a natural person to be a Beneficial Owner of a Passive Offshore Vehicle while obscuring such person’s beneficial ownership or creating the appearance that such person is not a Beneficial Owner.

Information will then be exchanged between tax administrations.

1.2 The OECD state that the purpose of the model Mandatory Disclosure Rules (MDR) is to provide tax administrations with intelligence on both the design and supply of CRS Avoidance Arrangements and Offshore Structures as well as to act as a deterrent against the marketing and implementation of these type of schemes.
The proposed model MDR is intended to apply to arrangements and structures that are used for tax evasion purposes. However, the Chartered Institute of Taxation (CIOT) notes that in many cases these arrangements are used for legitimate purposes. Therefore the challenge will be to design a system that gives tax authorities the information they want without placing excessive administrative burdens on compliant taxpayers and their advisers, or duplicating existing reporting arrangements.

As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

Our response to the OECD paper is made with our stated objectives for the tax system in mind. The CIOT’s objectives with particular relevance to the OECD proposals are:

- A legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences.
- Greater certainty, so businesses and individuals can plan ahead with confidence.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

2 General comments

2.1 Transparency and confidentiality

2.1.1 It will be important to ensure that tax authorities that introduce the new disclosure rules have and enforce full confidentiality of taxpayer information.

2.1.2 There can often be very good, non-tax reasons for taxpayers to want to keep their personal financial information secret. Not all secrecy is designed to allow tax evasion. But we accept that some secrecy is motivated by tax and that there is a need for transparency to tax authorities. However, a balance needs to be struck between taxpayers’ right to secrecy for legitimate reasons (e.g. fear of crime) and tax authorities’ right to information; neither can be total.

2.1.3 Tax authorities should be – and usually are – under a duty of confidentiality when they receive personal financial information from taxpayers. This works well in many countries including the UK where the tax authority can be relied upon not to release the information. But unfortunately our members’ experience is that not all tax authorities are as secure as the best; they therefore have understandable concerns about passing confidential client information to tax authorities in some countries. The concern is that disclosure to tax authorities could lead to sensitive information leaking into the public domain, with potentially serious consequences for individuals and their families. This is a rational concern that is nothing to do with tax evasion.

2.1.4 We therefore suggest that absolute confidentiality must be guaranteed to make these proposals work. Taxpayer confidentiality must be assured and concerns about the risks of leakage of data satisfactorily addressed. It is likely that lessons can be learnt
2.2 Compliance

2.2.1 We can foresee two potential problems tax authorities will have to confront in legislating to force intermediaries to disclose information:

1. Any intermediary who knowingly provides the sort of advice that is being targeted (secrecy structures for the purpose of avoiding CRS or concealing beneficial ownership for the purpose of evading tax) is already guilty of aiding and abetting tax evasion. Is it likely that this intermediary, who is already committing a criminal offence, is going to comply with new disclosure requirements?

2. Compliance requires the taxpayer to provide the intermediary with truthful information. Is a taxpayer who is intending to tell lies to tax authorities going to tell the truth to their adviser if they know it will undermine their purpose?

2.2.2 But the proposal will at least make it harder for taxpayers to succeed in telling lies to tax authorities so the aim in designing the new regime must be to make it as effective as possible.

2.3 The role of tax professionals

2.3.1 The vast majority of professional tax advisers would never knowingly advise on any structure in relation to tax evasion. Professional Conduct in Relation to Taxation,¹ the guidance written by seven UK accountancy and taxation bodies (including CIOT) for their members working in tax is completely clear on this. A member must never be knowingly involved in tax evasion. We accept that it is possible that a structure, onshore or offshore, could be used for evasion by someone determined to break the law, but it is extremely unlikely that they would be doing it with a professional alongside.

2.4 Defining the hallmarks

2.4.1 If a new notification system can be designed which successfully provides tax authorities with information about offshore tax evasion that they would not otherwise receive and which helps their investigatory work, then this deserves consideration. But since tax evasion or fraud can take place regardless of the form in which a taxpayer’s business is, or investments are, organised, the challenge will be to define what it is that tax authorities really want and to ensure that the legislation/hallmarks are appropriate and clearly defined, so that advisers and tax authorities alike do not face an onerous compliance burden and tax authorities are not inundated with information they neither need nor want (and makes it hard to identify and respond to the information they are seeking – the needles and haystacks problem).

2.5 Duplication

2.5.1 Any new disclosure system should not duplicate existing reporting obligations, in particular, advisers should not be obliged to provide tax authorities with information that they will already be receiving from other sources, such as under international

¹ Professional Conduct in Relation to Taxation effective from 1 March 2017
https://www.tax.org.uk/sites/default/files/PCRT%20Effective%201%20March%202017%20FINAL_211216.pdf
Exchange of Information Agreements. One example is the amendment to the EU administrative cooperation directive aimed at preventing tax evasion and money laundering which came into force on 1 January 2018. The new rules grant national tax authorities access to data on the beneficial owners of companies, trusts and other entities.2

2.5.2 There is already a danger of having more than one regime to achieve the same objective, given that some of the target will be within UK’s new ‘criminal offence of corporate failure to prevent the criminal facilitation of tax evasion’ or one of the other tax avoidance/tax evasion/anti-money laundering regimes. This will be disproportionate given that a lot of the target will likely just ignore the new regime and the only ones complying will be those that are doing nothing wrong.

2.6 Notification

2.6.1 There must be no stigma, or unforeseen consequences, attached to notification. The requirement must be to disclose arrangements on a wholly non-judgemental basis in order to provide the tax authorities with information, which they can then check and decide what, if any, action to take with the intelligence.

2.6.2 However, we would anticipate that reputable advisers will be wary of putting clients on a notification list. This is in part due to recent experiences of how UK DOTAS has changed since its introduction from being a non-judgemental notification exercise into a trigger for other consequences, such as accelerated payment notices.

2.6.3 It also appears that the proposals could require an intermediary to notify information about arrangements or structures that are made available for implementation but are not actually implemented, along with information about users or potential users. We think this could mean that notification is required if advice is given to a client who asks about CRS avoidance even though the adviser recommends against it and the client follows their recommendation and does not act on the advice. If this is the case, this seems excessive.

2.7 UK law

2.7.1 Further consultation by the UK Government will be essential to determine how the proposals will be implemented in the UK. One observation we would like to make at this stage is that it would be helpful to use language that is already in use in UK legislation rather than introducing a new term, such as ‘circumvent’ which to our knowledge has not been used before in UK anti-avoidance legislation.

3 CRS avoidance hallmark

3.1 The hallmark for CRS Avoidance Arrangements captures any arrangement where it is reasonable to conclude that it has been designed to circumvent or marketed as, or has the effect of [our underlining], circumventing the CRS. This generic test is supplemented by specific hallmarks that target known features of CRS Avoidance Arrangements.

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3.2 In our view, the words “has the effect of” are too broad and widen the scope of the hallmark enormously, for example would this mean that advising a client on making an investment or undertaking a commercial transaction in the USA (which is not a CRS jurisdiction) could perversely trigger the disclosure requirement because the effect is that capital moves from a CRS location to a non-CRS location? Paragraph 14 seems to indicate not, but does not explain why not and we do not think this is at all clear.

3.3 We understand why tax authorities would prefer as broad a regime as possible to limit the scope for argument about whether arrangements are caught. But this increases the number of false positives – it will collect haystacks, not just needles. We wonder whether the scope can be narrowed by having a second filter for ‘has the effect of’ transactions that excludes those where it is reasonable to conclude that there is no CRS avoidance.

3.4 In any event, tax authorities need to identify and define what they definitely want to catch (eg egregious schemes) and what they definitely do not want to catch and then scope out to ensure legitimate activity is excluded as far as possible.

3.5 Paragraph 14 sets out when an arrangement will be treated as circumventing CRS legislation and includes, among other things, where it exploits inadequate implementation of CRS legislation and/or undermines or exploits weaknesses in the due diligence applied by a financial institution. The question arises how an adviser would be able in practice accurately to identify the existence of such inadequate implementation or weaknesses in due diligence that result in their otherwise legitimate arrangements having the effect of circumventing CRS. We think it is unreasonable to expect an adviser to do this so we would suggest that it will be necessary for HMRC and other tax authorities to risk assess CRS jurisdictions, and make their findings public.

3.6 Paragraph 19 states that the second specific hallmark (arrangements to transfer funds outside the scope of CRS reporting) “would not capture a financial institution that simply transferred money between accounts or to an account at another bank in accordance with the instructions from its customer. Such a transfer would not, by itself, be sufficient evidence of an arrangement between the bank and the customer to circumvent CRS legislation (or to exploit the absence of such legislation)”. It is not clear to use why this act would not be caught by reference to it “having that effect”.

3.7 The same point arises with paragraph 25. “While procuring a tax residence certificate … could be an arrangement that has the effect of allowing taxpayers to circumvent the CRS, a person who provides such services would not be considered to be an Intermediary in respect of a CRS Avoidance Arrangement ….” Why not? Similarly with paragraph 27.

3.8 There is special provision for CRS avoidance arrangements for high value accounts (more than $1m) entered into after 15 July 2014 but before the effective date of the rules. These are to be reported within 180 days of the effective date of the Mandatory Disclosure Rules. Assuming it is possible to legislate in the UK for what appears to be retrospective legislation, this proposal is, in our opinion, unreasonable. It is likely to be extremely difficult and impractical for an intermediary to comply with, as they would have to trawl back over several years’ worth of data / files which undoubtedly will not have been kept in a way that makes identification of disclosable arrangements easy. It will be less difficult to comply going forward once appropriate systems and processes have been set up.
4 Offshore structures

4.1 The offshore structures hallmark supplements the specific hallmark for CRS Avoidance Arrangements by specifically identifying those features of offshore structures that are commonly used to hide the identity of the beneficial owner. The focus of this hallmark is on structures that hold assets other than Financial Accounts, i.e. those not reportable under the CRS (e.g. real estate).

4.2 The definition of an opaque ownership structure is an “ownership Structure for which it is reasonable to conclude that it is designed to have, marketed as having, or has the effect of [our underlining] allowing a natural person to be a Beneficial Owner of a Passive Offshore Vehicle while obscuring such person’s Beneficial Ownership or creating the appearance that such person is not a Beneficial Owner”. Our comments above on the broad meaning of the words “has the effect of” apply equally here.

4.3 We can foresee that the issue for intermediaries will be having enough information to know whether a structure falls within the hallmark or not.

5 Intermediaries

5.1 The rules require Intermediaries that are resident, incorporated or managed in the reporting jurisdiction to disclose a CRS Avoidance Arrangement within 15 working days of making the arrangement available for implementation or supplying relevant services in respect of arrangement.

5.2 We would suggest that separate requirements will be needed: 15 days to disclose the idea and periodical dates for disclosing names of users. This reflects the two separate policy objectives of hearing about the ideas quickly and finding out who has used them in time to open enquiries.

6 Acknowledgement of submission

6.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the CIOT is included in the List of Respondents when any outcome of the consultation is published.

7 The Chartered Institute of Taxation

7.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and
explan how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 18,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

The Chartered Institute of Taxation
23 January 2018
CCBE response to the OECD consultation on “Mandatory disclosure rules for addressing CRS avoidance arrangements and offshore structures”

January 2018

Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE is recognised as the voice of the European legal profession, representing European bars and law societies in their common interests before European and other international institutions.

The CCBE would like to make the following comments in response to the OECD Consultation on “Mandatory disclosure rules for addressing CRS avoidance arrangements and offshore structures”.

I: Chapter 3 – Disclosure Requirements on Intermediaries

1. Definition of Intermediary

“Intermediary” means a Promotor or a Service Provider.

Service Providers in respect of CRS Avoidance Arrangements

59. A person that is not responsible for the design or marketing of the CRS Avoidance Arrangement should not be treated as an Intermediary in respect of that arrangement unless that person’s knowledge of, and the nature and extent of their involvement with, the arrangement, means that they could reasonably be expected to know that the arrangement was subject to disclosure under the Model Rules. The definition of “Service Provider” is, therefore, not intended to capture those persons who provide only limited assistance in the implementation or organisation of the arrangement and who could not reasonably be expected to be aware of those elements of the arrangement that have the effect of circumventing the CRS. The definition would not, for example, capture a lawyer or corporate services provider who completed the necessary filing formalities for transferring shares in a foreign company unless that person had other information that would lead a reasonable person to conclude that the transfer was one of the steps in the implementation of a broader arrangement that fell within the scope of the hallmarks in Chapter 1.

60. The definition of Intermediary would not capture a professional advisor who provides advice on whether an existing arrangement is subject to CRS reporting, unless that advice is in respect of the design, marketing, implementation or organisation of a CRS Avoidance Arrangement and, the advice is provided in the circumstances where the professional advisor can reasonably conclude that the arrangement has been designed or marketed as a CRS Avoidance Arrangement or that the circumvention of the CRS was one of the effects of that arrangement.
61. For example, a lawyer may advise a bank on the tax and regulatory treatment of a proposed offering of a retail product that is intended to help clients manage their exchange and interest rate exposure and the opinion may conclude that the product is properly considered a type of derivative contract that is outside the scope of the bank’s CRS reporting obligations. There is nothing on these facts to indicate to the lawyer that the arrangement has the effect of circumventing CRS reporting and accordingly the lawyer will not be treated as an intermediary even if that product comes within the description of the CRS Avoidance Arrangement hallmark in Section 1.1(a). The lawyer is not responsible for the design or marketing of the product (so will not fall within the first limb of the Intermediary definition) and although the lawyer can be considered to have provided advice on the design or implementation of the arrangement there is nothing on these base facts to indicate to the lawyer that the arrangement is to be used to circumvent CRS reporting. In this example, the lawyer’s written opinion on the CRS treatment of the product would not, in isolation, be considered to be a statement marketing the CRS benefits of the arrangement. If the bank, however, used that opinion to sell the CRS benefits of the scheme to its customers, then the bank could be treated as having “marketed” a CRS Avoidance Arrangement to its own customers thus triggering a disclosure obligation.

CCBE Comments:

The CCBE acknowledges the discussion regarding the scope and extent of what a lawyer does leading him to qualify as intermediary or not according to proposed regulations. However, this has no practical consideration since professional secrecy applies whatever the role is of the lawyer.

II: Point 86 of Chapter 4 “Information Reporting” and Rule 2.5 of the Annex – Consolidated Draft Model Rules

Extract – Point 86.

86. Mandatory disclosure rules do not generally require an attorney, solicitor or other legal representative to disclose any information that is protected by legal professional privilege or equivalent professional secrecy obligations. The same approach is reflected in Article 26 of the OECD Model Tax Convention and Article 21 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. As noted in the Action 12 Report, however, the type of confidentiality obligations that exist between legal representative and their clients are generally designed to protect a Reportable Taxpayer’s or Client’s ability to obtain confidential advice. The obligation to protect a Reportable Taxpayer’s or Client’s secrets would not typically be expected to include the information that is required to be disclosed under Section 2 to the extent it relates to actual or proposed transactions and the identity of the parties involved. Nevertheless it is possible that some of the information required to be disclosed under the model rules will be caught by the rules of legal professional privilege and it should therefore be excluded from the disclosure requirements to the extent that an information request for the same information could be denied. An Intermediary that is not required to disclose information on a CRS Avoidance Arrangement or Offshore Structure due to the obligations of legal professional privilege is required, however, to notify the tax administration of that fact and notify any Reportable Taxpayer of its disclosure obligations described further in Section 4 below.
Extract – Rule 2.5 of the Annex – Consolidated Draft Model Rules

2.5 No obligation to disclose to the extent information is covered by professional secrecy

(a) The Intermediary shall not be required to disclose any information set out under Section 2.4 above to the extent that the disclosure would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are produced for the purposes of seeking or providing legal advice or used in existing or contemplated legal proceedings and protected from disclosure under domestic law.

(b) An Intermediary that is not required to disclose information under this Section 2.5 shall provide written notice to:
   (i) the [Country Name] tax authority that the Intermediary has information on a CRS Avoidance Arrangement or Offshore Structure that is not required to be disclosed under this Section 2.5;
   (ii) any Reportable Taxpayer of its disclosure obligations under Section 2.7.

CCBE Comments:

The right to consult a lawyer privately serves the important public interest of enabling individuals to seek advice on their legal position without be constrained by the fear that the information they provide will subsequently be revealed. Professional secrecy of lawyers is a fundamental principle imperative for the rule of law and the proper administration of justice, without it there would be no proper protection of the clients’ fundamental rights.

- In para 86 it is noted that mandatory disclosure rules do not generally require an attorney, solicitor or other legal representative to disclose any information that is protected by legal professional privilege or equivalent professional secrecy obligations.

We deem that this notation should be an integral part and a main rule under the disclosure rules (MDR). In several countries’ legislation and in the praxis of e.g. the Human Rights Tribunal and the European Court of Justice, a tax subject’s right to acquire confidential legal advice has been protected in accordance with human rights conventions.

It should be made clear in the next versions of the MDR that nothing in these rules is intended to deteriorate the widely accepted principles of attorney-client privilege that protect one’s access to fair trial. Also, it should be made clear that the principle of attorney-client privilege will continue to be judged based on domestic rules in force in each jurisdiction and for example any differences of its applicability to different types of service providers (e.g. members of the bar, certified tax advisors) will continue to be respected to full extent in order for the MDR to be compliant with human rights conventions and local laws protecting human rights.

- In para 86 it is further stated that: “The obligation to protect a Reportable Taxpayer’s or Client’s secrets would not typically be expected to include the information that is required to be disclosed under Section 2 to the extent it relates to actual or proposed transactions and the identity of the parties involved.”

We deem that this statement is unnecessary and could be seen as an infringement of the above mentioned international and domestic rules of attorney-client privilege. The purpose of the attorney-client privilege is to safeguard one’s possibility to acquire legal advice in an
intention to arrange one’s legal affairs in a compliant way. Any infringements of the confidentiality of this attorney-client relationship could endanger one’s access to fair trial. Therefore, as stated above, it should be made clear in the next MDR versions that the international and local principles regarding attorney-client privilege that are currently in force will supersede the MDR and will not be altered in any way and also, that whether or not information required to be disclosed under the MDR will fall under the attorney-client principle will be determined independently of MDR on the basis of these attorney-client privilege rules in force in each jurisdiction and in international human rights conventions separately (and acknowledging differences in these rules applicable to different professions such as members of the bar, certified tax advisors etc.).

• In para 86 it is also stated that: “An Intermediary that is not required to disclose information on a CRS Avoidance Arrangement or Offshore Structure due to the obligations of legal professional privilege is required, however, to notify the tax administration of that fact and notify any Reportable Taxpayer of its disclosure obligations described further in Section 4 below.” This is also expressed in the Section 2.5(b)(i-ii) of the Annex.

We deem that this statement and the obligation under Section 2.5.(b)(i) could often in practice make void the attorney-client privilege. If an intermediary whose advice is protected by the legal privilege would need to disclose to the tax authorities any information at all – even the mere fact that this intermediary is in the possession of information which could be reportable under the MDR -, this would in practice lead to an infringement of the privilege and be in contradiction to one’s access to fair trial in accordance with the human rights conventions. It is reasonable to assume that if there would be a fear of breach of confidentiality as suggested under Section 2.5(b)(i), this could work as a deterrent for an individual seeking confidential legal advice to arrange one’s tax matters in a compliant way. Therefore – in order to be compliant with human rights conventions and the principle of fair trial – Section 2.5(b)(i) should be removed from the MDR and when legal advice falls under the privilege, this kind of a confidentiality breach from the intermediary should not be required.

In addition, including an obligation of notification by a lawyer seems to implicitly permit third parties to enquire into whether a lawyer has complied with the provision. This presumably would involve an examination of the correspondence between the client and the intermediary, thereby effectively overriding legal privilege/professional secrecy.

It should be noted that elementally the attorney-client privilege is based on the sanctioned ethical supervision of attorneys (typically members of the bar) in accordance with the local rules in force in each jurisdiction. This sanctioned supervision has safeguarded and should continue to safeguard that attorneys act ethically when providing tax advice. Advice given by service providers that are not subject to sanctioned ethical supervision does not fall under the attorney-client privilege, and for the purposes of the MDR it should be sufficient that only these intermediaries, that are not subject to sanctioned supervision, will disclose the required information.

• Regarding paragraph 2.5. (a) the CCBE suggests to add the word "information " to the following sentence “The Intermediary shall not be required to disclose any information set out under Section 2.4 above to the extent that the disclosure would reveal confidential information or communications between a client and an attorney, solicitor or other admitted legal representative where such communications are produced for the purposes of seeking or providing legal advice or used in existing or contemplated legal proceedings and protected from disclosure under domestic law.” This is requested as the term “communication” may not take into account that a lawyer is bound by professional secrecy regarding all matters, which
have been entrusted to him/her or have otherwise become known to him/her in his/her professional capacity as a lawyer, whose confidentiality is in the interest of his/her party.

**Conclusion**

In conclusion, the CCBE is of the opinion that the present wording of the proposed MDR infringes upon rules of professional secrecy in force in most jurisdictions.

We refer to draft amended Directive 2011/16/EU concerning mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, where it was provided that when the intermediary is subject to professional secrecy, any disclosure requirement must fall solely on the taxpayer to the exclusion of any reporting obligation on the lawyer subject to professional secrecy.
This is a submission on the OECD paper on CRS-avoidance arrangements.

I have been an administrator and designer of pension funds in several OECD jurisdictions for more than 30 years. It is clear enough that because pension funds operating for example, under the IOPS model or the OECD commentaries, have tax-favourable treatment internationally, it is inevitable that some persons will attempt to abuse a pension fund legal framework to avoid tax or tax-reporting. This is unremarkable and should come as no surprise. HMRC’s experiences in battling “pension-busting” is extensive, for example. So is their experience of “QROPS-busting” and the resulting money-laundering consequences. Their tax law on “disguised remuneration” is broad and deep, as another example.

What is worth, in my submission, noting though is that the OECD proposals on CRS-avoidance arrangements and also the current legislation (with its origins in the 1988 Mutual Administrative Assistance Agreement template) are in fact duplicating existing anti-avoidance rules. In some cases they will overlap. For instance, most Revenue authorities have power to requisition information and documents irrespective of suspicion of avoidance. Indeed, most Revenue authorities have power to issue their own search and seizure warrants. The law Courts internationally have developed a significant experience of adjudication of exercise of these powers, for decades.

The difficulty I foresee with the OECD proposals is that they are not synchronized with existing powers of requisition and GAAR. Instead, they focus on criminalizing failure to meet mandatory reporting, to a great extent. Take for example a Revenue authority issuing a requisition, not a search warrant to an institution it is believed holds information about pension fund members tax-resident outside the jurisdiction. On the one hand, the institution might face criminal prosecution or committal of its directors, for failure to comply. On the other, because none of the pension fund members is tax-resident and therefore none is a taxpayer, in the Revenue’s jurisdiction, the institution might very well have been legally advised that the Revenue requisition is ultra vires. Either way, the domestic requisition obtains information which cannot be channeled under the CRS regime but could be under a DTA.

Take another example, some pension funds are unvested: this is the position for USA tax-law classified “Non-Qualifying Deferred Compensation Plans”. It is also the position for all ORSO plans in Hong Kong. In other words, none of the plan assets is available to answer creditors or claimant spouses of plan members. It follows that a Revenue requisition on a pension administrator of such plans is facing a fundamental inconsistency between the CRS assumption that plan members participate on a current basis, in plan assets (potentially reportable under CRS unless clearly Excluded Accounts) and the law which requires that the members may not and cannot, do so. It also follows that there is no account that is CRS reportable, as such in the case of a Hong Kong administered NQDC plan or an ORSO scheme which itself is a NQDC plan.

For this reason, I recommend that extending criminality to failure to report a CRS-avoidance arrangement needs to be synchronized with GAAR and that the position of unvested pension funds be specifically incorporated under the Excluded Accounts regime. This would still leave the Revenue with GAAR and warrants and requisition powers anywhere where abuse is suspected. In other words, the OECD proposals are adopting an anti-avoidance stance with overarching criminality and therefore potential for charges of money-laundering which is the lowest common denominator. There should be an assumption that jurisdictions such as Hong Kong which have long had tax-recognition of pension funds and long had anti-avoidance rules, are already able to deal with abuse both criminally and civilly.

I submit that the CRS proposals need refining to themselves answer assumptions in the paper which are not reflected in actual pension administration law and practice.

I also submit that the rules on tax-recognition of international transfers of pension fund assets be themselves recognized under the CRS proposals, because at present they appear to have the potential to be classified as a CRS-avoidance arrangement.
OECD Public Discussion Draft: Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

We have set out below our comments on the above Discussion Draft which was issued on 11 December 2017. The Discussion Draft covers one possible response, mandatory disclosure, to achieve the objectives of addressing arrangements which:

- Circumvent reporting under the Common Reporting Standard (‘CRS’), or
- Conceal actual beneficial ownership using non-transparent offshore structures.

We support a multinational approach to mandatory disclosure rules rather than individual countries taking their own positions. However, for this approach to be truly effective it is important that all major countries sign-up to it.

We have commented on some specific aspects of the proposal below.

Common Reporting Standard

At a high-level, our advice on CRS would fall into one of the following categories:

- Advising whether an arrangement would be subject to CRS reporting. Per paragraph 60 of the Discussion Draft, we would not be an Intermediary in respect of this advice.

- Providing advice to taxpayers who do not wish to avoid CRS, but would prefer the information to be reported to a tax authority in a country that has strict controls over the data it receives. This could involve, for example, an individual moving tax residence so that the information is provided to the tax authorities in their new country of residency. Based on the draft definition of a CRS Avoidance Scheme, this would not seem to be in scope as there is no CRS avoidance, which we believe is the correct approach.

- Advising institutions regarding their CRS systems. This work would not involve advising our clients.
Based on our experience, circumventing reporting under CRS is not widespread. However, we can understand the concern and hence the proposed hallmark. This said, we do not believe that this hallmark should apply with retrospective effect, subject to some exceptions, from 15 July 2014. We would suggest that any new reporting regime only applies to future events and allows time for Intermediaries to put in place systems to capture the relevant information.

In addition, we do not believe that the hallmark should extend to arrangements entered into before CRS is agreed to be adopted in a jurisdiction. This is on the basis that we would not see anything done before the introduction of CRS in a country as CRS avoidance, as at the time of the arrangement there was nothing to avoid. For this purpose the effective date should be when the jurisdiction agrees to adopt CRS – not the future date when reporting is due.

**Offshore structures: the approach**

This hallmark would seem to be a substitute for increasing the reporting by taxpayers regarding offshore structures. A potential benefit of this approach could be in respect of tax evasion. A taxpayer intent on evading tax is unlikely to comply within any regime and the benefit of the rules, as proposed, is that the reporting obligation would be placed on the Intermediary. However, for those truly looking to evade tax, the rules could be side-stepped by using an Intermediary that is not subject to disclosure requirements under these rules. This would require the taxpayer to disclose under 2.7 (page 44 of the Discussion Draft) but a tax-evader is unlikely to comply with this requirement. There could be a penalty for not complying, but this may not act as an effective deterrent.

Rather than place the reporting obligation on Intermediaries, we wonder if a more appropriate approach would be to increase the disclosure requirements on taxpayers. The same information requirements as set out in the Discussion Draft could be placed on the taxpayer – we comment on the draft hallmark below – but this would ensure that there are not multiple disclosures by different Intermediaries. Additional tax return reporting would also remove the stigma of compliant taxpayers believing that they are being branded as evaders and their activities are being independently disclosed by their advisers. We also believe that this approach would create a more level-playing field between taxpayers using onshore and offshore advisers. Again, for those wishing to evade tax, this is unlikely to assist but we do not believe this is any different to an approach that puts the primary responsibility to disclose on the Intermediary.

**Offshore structure: the hallmark**

The hallmark, as drafted, is extremely broad and we would suggest that it needs to include a filter. From a UK perspective, if the filter were to be that one of the main benefits of the arrangement is the expectation of a UK tax advantage, we would suggest that it may be better to include this hallmark with the existing domestic Disclosure of Tax Avoidance Scheme rules. The use of a ‘one of the main benefits’ test would ensure that only taxpayers using the arrangement for tax purposes would be within the scope of the rules and taxpayers using an offshore company for other purposes (for example, to protect their privacy) would be unaffected. Consideration would need to be given to how any tax benefit test should be applied to non-domiciled individuals in the UK whose affairs regularly include offshore structures to take advantage of the UK remittance rules. This is a matter which the UK Government could consider as part of any implementation process.

We do not believe a single filter based on obtaining a certified or notarised copy of the taxpayer’s most recent tax return would be effective. This would filter out arrangements that are already in place and which have tax consequence which have already been included in the relevant tax return(s). It would not cover the circumstances.

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1 The rules provide a mechanism for avoiding multiple disclosures, but it is questionable whether it could be applied in practice due to the short reporting timescale and the information available to the different Intermediaries. Many offshore structures are used for privacy purposes and not tax avoidance and, as such, an Intermediary may only have the information about the particular part of the structure on which they are advising.
arrangements where the taxpayer will have a future tax return reporting requirement, with which they will comply at that time, or where the offshore arrangement has no effect on the taxpayer’s tax position and there is nothing to include in a tax return.

Without a filter, and as set out above, we would suggest that the reporting requirement should be on the taxpayer rather than the Intermediary. If the reporting obligation remains on the Intermediary, we would suggest that there is a longer timeframe for reporting. 15 days is insufficient time for an Intermediary to assess whether any of the features of the Offshore Structure hallmark could apply. We would suggest a minimum reporting period of 30 days.

**Information Reporting**

It is proposed that the information that an Intermediary needs to disclose includes any Reportable Taxpayer with respect to that Arrangement or structure. This approach may be appropriate for generic mass-marketed arrangements but not for bespoke advice, which we would expect to be the norm for Offshore Structures. It is not clear to us how this information reporting requirement would work in practice. For example, an offshore structure is established in Country X for client A and one of the features is that there is indirect control beyond formal ownership. An offshore structure is established in Country Y for client B and, again, one of the features is that there is indirect control beyond formal ownership. Under the information reporting requirement, would this be the same arrangement? If the advice is provided to client B a number of years after the advice was provided to client A, would there would need to be a new disclosure, or would this be a supplemental disclosure – the details of client B and the country/ countries involved – in respect of the original disclosure for client A? Whatever the approach, it would seem that there is the potential for a large number of disclosures to be required under the proposed rules and therefore, as set out above, it may be more appropriate to place the disclosure obligation on individual taxpayers rather than Intermediaries.

We agree that the rules should only apply to natural persons and not corporate entities for which information is more readily available (for example, audited financial statements).

Yours faithfully

**W J I Dodwell**
Deloitte LLP

cc: HM Revenue & Customs (mandatorydisclosure.rules@hmrc.gsi.gov.uk)
Mr Achim PROSS
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Centre for Tax Policy and Administration
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Submitted by e-mail: mandatorydisclosure@oecd.org

SUBJECT: EBF response to the OECD Discussion draft on Mandatory Disclosure Rules for addressing CRS avoidance arrangements and offshore structures

Dear Mr Pross,

The European Banking Federation (EBF), which is the voice of European banks, welcomes the opportunity that is provided to comment on the Discussion draft on Mandatory Disclosures.

European banks are fully committed to comply with the Common Reporting Standard (CRS). If loopholes were identified, these should be properly addressed in order to ensure a global level playing field in the CRS implementation.

The practical implementation of the CRS has been one of the biggest and most complex tax projects to date, both financially and organizationally, for tax administrations and financial institutions alike. IT systems had to be substantially expanded, extensive data collection processes were implemented, reporting systems were set up, compliance processes had to be redefined and employees comprehensively trained. Comprehensive reviews of all financial accounts have been and are still being carried out by financial institutions in 2016, 2017 and 2018 (non-early adopters) in order to determine the tax residency of their clients and to eventually identify reportable accounts. With its very broad scope, the CRS has resulted in the setting-up of a comprehensive and unprecedented system for the automatic exchange of financial account information.

At this stage, it is important to stress that the CRS implementation is still in its initial phase with only early adopters having exchanged information for the first time in September 2017, while the other participating jurisdictions – more than 50 - have not yet exchanged any information and the network of exchange relationships is still in the process of being expanded. A fully-fledged reporting including entities and their controlling persons will only take place at the end of the two years review phase of preexisting accounts. Under such circumstances, the Global Forum has not yet launched its peer review process. The proposed Mandatory Disclosure Rules (MDR) scheme that forms the purpose of the consultation at hand hence appears to be premature.
We strongly believe that jurisdictions should first take the time to seriously analyse the data exchanged in 2017 and 2018 before envisaging additional measures, which should be based on a reasoned and holistic assessment of the CRS. The implementation of the proposed disclosure rules would certainly require additional due diligence at the level of financial institutions, irrespective of whether or not they are involved in reportable arrangements. Such developments would be only justified, if details about the alleged loopholes were clearly identified. At this early stage of implementation, we believe that any loopholes in the CRS are necessarily based on preliminary observations.

Considering that a comprehensive system for data collection and annual data exchange had to be set up according to a specific approach (the CRS approach is notoriously only operationalizable with a great deal of effort), it is appropriate to address potential CRS deficiencies within the existing system for systematic and administrative reasons. Potential circumvention of the CRS should give reason to adapt the CRS standard accordingly and should not be tackled with additional reporting obligations which are not compatible with the CRS rules, especially from an implementation perspective. Therefore, CRS avoidance, should it be proven that there is indeed a confirmed and widespread risk, should be dealt with by amending the CRS, although we believe, as outlined above, that the further progress of implementation and data exchange should be awaited in order to adequately assess the efficiency and effectiveness of the CRS.

In view of this background, we respectfully call for a reconsideration of the MDR project. For the reasons outlined above, we consider that the time is not mature for new rules and that the approach to new rules is systematically and administratively questionable. We believe that the primary and continuing focus should be on developing and creating a true level playing field within the implementation of the CRS. Accordingly, we deem it appropriate, at least in a first step, to shelve the MDR project for the time being. In our opinion, the key factors for achieving the CRS’s goals are, on one hand, that the global standard is implemented on a broad scale and, on the other hand, that the CRS rules are consistently implemented (level playing field). We understand that the planned MDR contemplates to address, among other things, the CRS avoidance via non-CRS jurisdictions. This means that the gaps in global implementation will be closed by the fact that jurisdictions already implementing the CRS will assume additional reporting obligations. In our opinion, such an approach harbors the great risk that the development of a level playing field in the implementation of the CRS will be severely hampered, as potential deficiencies would be addressed by means of a new standard, instead of improving the existing one. As a consequence, incentives for a proper implementation of the CRS would be weakened.

In anticipation to a substantial increase of the flow of personal data exchanged in 2018, the security and the integrity of the data so exchanged should presently constitute the first priority of the OECD and participating jurisdictions alike. The EBF has notably expressed its concerns in this respect in the context of the development of the CRS technical infrastructure, the Common Transmission System (CTS). To our knowledge, no definitive assurances have been provided as to whether one or more jurisdictions, irrespective of their participation to the CRS, would be able to access the personal data stored on the CTS under circumstances not expressly foreseen under the CRS. In fact, we believe that this question takes on importance in the light of the Microsoft Ireland case currently under examination by the U.S. Supreme Court1.

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Finally, we understand that the clawback period until 15 July 2014 is retrospective. Retrospective application of legislation is impossible for intermediaries. In practice, the retrospective identification of behaviours or arrangements cannot be achieved.

We attach herewith specific comments on the OECD Discussion draft of 11 December 2017. These technical comments are without prejudice to the general observations set out above. In view of the significant investments made by financial institutions globally in order to implement the CRS, we submit that any additional disclosure obligation, as currently contemplated, should apply to Reporting Financial Institutions on a subsidiary basis.

Yours sincerely,

Wim MIJS
Chief Executive Officer

Enclosure: 1

cc: John Peterson; Philip Kerfs
APPENDIX: SPECIFIC COMMENTS

1. **Chapter 1 – Definition of CRS Avoidance Arrangement:**
   - Sec. 1.1(a) – Financial investments that are not Financial Accounts:
     - “Financial Account” is a general term and covers depository accounts, custodial accounts, certain equity and debt interests, cash value insurance contracts and annuity contracts.
     - These terms are defined in greater detail in the CRS and its Commentary, including descriptions regarding the main features and characteristics of the different types of financial accounts (i.e. depository account, custodial account, etc.).
     - In order to avoid uncertainty, the Commentary (No. 17) should not refer to “core functionality of a financial account” but should refer to the core features and characteristics of the different types of financial accounts as defined in domestic CRS guidance.
     - Furthermore, it seems that the phrase “offering of such products” is not in line with the overall definition of “CRS Avoidance Arrangement” (offerings are not mentioned in the description of the term “Arrangement”).
   - Sec. 1.1(b) – Arrangements to transfer funds outside the scope of CRS reporting:
     - The CRS has defined certain accounts as excluded from the definition of “Financial Accounts” (see Sec. VIII.C.17 CRS “Excluded Accounts”), which effectively makes them “non-reportable accounts”.
     - Excluding these accounts from the definition of “Financial Accounts” was agreed upon by the OECD and its member states.
     - It seems contradictory to consider an arrangement to transfer funds into such an “Excluded Account” as circumventing the CRS legislation.
     - Even more so, if the advice from a bank to invest in e.g. a retirement or pension account (as defined in Sec. VIII.C.17.a CRS), which would require the transfer of funds from a CRS-reportable depository account into a non-reportable “Excluded Account”, would qualify as a CRS Avoidance Arrangement.
     - Therefore, Sec. 1.1(b)(ii) should be not applicable with respect to “Excluded Accounts” (as defined in Sec. VIII.C.17 CRS).
   - Sec. 1.2(a) – Arrangement:
     - According to Sec. 1.2(a) the term “Arrangement” means an agreement, scheme, plan or understanding.
     - No. 37 of the Commentary does not include significantly more information.
     - No. 17 of the Commentary (last sentence) states that also the “offering” of certain products could qualify as a CRS Avoidance Arrangement (see remarks to Sec. 1.1(a)).
     - To facilitate a higher level of legal certainty, the Commentary should include a more detailed description of the term “Arrangement”.


2. **Chapter 2 – Definition of an offshore structure:**

- **Sec. 1.2 – Passive Offshore Vehicle:**
  - The proposed identification of potential CRS avoidance arrangements / opaque offshore structures requires a granular case-by-case review and judgment by qualified specialists (“reasonable to conclude” test) which will be very burdensome.
  - It seems, that the meaning of “Passive Offshore Vehicle” (or “passive entity”, see No. 37 Commentary) is not aligned with the CRS-definition of “Passive NFE”.
  - As set out in Sec. 1.2, a “Passive Offshore Vehicle” does not carry on a substantive economic activity that is supported by staff, equipment, assets and premises.
  - It is unlikely, that every entity that qualifies for an Active NFE-Status (as described in the CRS) is going to meet these requirements (e.g. a NFE liquidating its assets might not carry on a substantive economic activity that is supported by staff or equipment).
  - The CRS stipulates that only Controlling Persons of a Passive NFE (as defined in the CRS) qualify as Reportable Person; thus Controlling Persons of an Active NFE are not subject to CRS-reporting.
  - Regarding a potential risk of avoiding CRS-Reporting, the disclosure of an Active NFE (as defined in the CRS) as an Offshore Structure under the MDR would not mitigate such risk, since CRS-reporting is not required (and technically not possible) with respect to Controlling Persons of an Active NFE (as defined in the CRS).
  - Therefore, an entity that qualifies for an Active NFE-Status under the CRS should not be considered as an Offshore Structure, irrespective of its ownership structure.

3. **Chapter 3 – Disclosure requirements on intermediaries**

- **Intermediary**
  - The model rules require an Intermediary (or taxpayer) to disclose certain relevant information to its tax administration regarding CRS Avoidance Arrangements and Opaque Offshore Structures.
  - The definition of Intermediary covers those persons who are responsible for the design or marketing of an Offshore Structure or a CRS Avoidance Arrangement (i.e. Promoters) as well as those that provide services in respect of the design, marketing, implementation or organization of the structure or arrangement (i.e. Service Provider) in circumstances where that service provider can reasonably be expected to know that the arrangement was an Offshore Structure or CRS Avoidance Arrangement.
  - Because subjective tests cannot efficiently be operationalized by financial institutions, the EBF recommends, at least for Reporting Financial Institutions that have implemented CRS reporting and done the required CRS due diligence:
    - An actual knowledge standard (akin to knowledge of relationship manager);
    - A dominant purpose test.

- **Service Provider**
  - In the case of Service Providers, it would be logical if this actual knowledge standard is only applicable in situations where there is “relationship manager” in CRS. If there
is no relationship manager, the Reporting Financial Institution is deemed not to set up the scheme (i.e. design, marketing, implementing or managing).

- In all cases we would urge the OECD to provide greater clarity that a bank providing of routine banking services without greater involvement or knowledge of the planning, will not cause the bank to be considered a Service Provider.
Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures (Public Discussion Draft)

EY welcomes the opportunity to comment on the public discussion draft on the Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures (“the discussion draft”) and to contribute further to the development of the OECD’s work of building a modern framework for international tax. In responding to the discussion draft, we have drawn on our own insights from the perspective of an intermediary, as well as reflecting the experience of our clients.

Our primary area of concern is in relation to the compliance burden which could be imposed on those within scope of the proposals and, accordingly, we consider that it will be important that the OECD works to ensure that the burden on Intermediaries and tax authorities is proportionate. On this basis, we have highlighted a number of areas where we have specific concerns and provided recommendations, where appropriate, as to how these might be addressed.

Improving clarity

At this stage in the consultation process, we consider that it would be particularly valuable to provide greater clarity on certain aspects of the proposals, including:

- Defining where the Intermediary’s requirement to report rests. Under the current draft, we consider that there is a lack of clarity as to where the dividing line between “Promoters” and “Service Providers” lies. For example, where both have a role in marketing, where does the obligation rest, and how is multiple reporting to be avoided? Further use of examples would be particularly helpful here.

- The operation of the USD 1 million exemption on reporting (section 4.2 (a)). It is not clear what the position would be if the Intermediary was not aware of the value of the Financial Account (as could be the case in layered structures) and, again, further guidance on this would be useful.

- The issue of client-attorney-privilege. Under the current draft, it is proposed that attorney intermediaries are required to notify their home country’s tax office of their knowledge that certain arrangements or structures are in place which may not be disclosed under the privilege. The end user or beneficial owner is then required to self-report to their home country’s tax office. In that scenario, the attorney would have to inform the end user or the beneficial owner of their duty to self-report. It is not clear how this approach reconciles with the nemo tenetur principle.

Development

In addition to providing greater clarity on certain aspects of the proposals, we would also recognise the need to:
- **Develop objective tests to underpin the reporting requirement.** The discussion draft proposes applying the definition of Service Provider to those persons who could “reasonably be expected to know” that the arrangement in question is an avoidance arrangement or an offshore structure that requires reporting. We consider that this relies on a high degree of subjectivity and could give rise to blurring of the dividing line between legitimately describing and interpreting the law and provide commensurate consulting services, on the one hand, and enticing a person to enter into an avoidance agreement or an offshore structure, on the other.

- **Define better the dividing line between reporting requirements and wider obligations under the CRS framework.** For example, paragraph 24 on page 12 sets out the example of a country that offers tax incentives to natural persons in order to entice them to take up tax residence in such country without having to fulfil even minimal physical presence requirements. Such incentives could also be coupled with investment requirements such as the acquisition of real estate. In essence, this could lead to an “artificial” residence certificate being issued that does not reflect the economic reality. If the CRS regulations were implemented properly by partner countries and the Global Forum established that the country was compliant or largely compliant we would assume that no such reporting by Intermediaries should be necessary.

- **Ensure that retroactive aspects of the new requirements are both practicable and proportionate.** We consider that the focus of the current draft on linking requirements back to the effective date of the OECD CRS rules could raise potential difficulties, for example where local ratification post-dates the general launch of CRS.

- **Test the rationale behind the carve out to the “Reportable Taxpayer” rule set out in section 5.3.** The discussion draft suggests that an Intermediary should not treat a person as a Reportable Taxpayer where the Intermediary is in possession of a “certified or notarized” copy of the most recent tax filing filed by the Reportable Taxpayer with the tax administration which demonstrates tax compliance in respect of all income derived from an Arrangement or Offshore Structure. Given that a tax filing represents the taxpayer’s position but not necessarily the tax office’s assessment, it is not clear that this offers a robust approach.

- **Maintain an alignment between the information held for CRS purposes and the information required for reporting.** The discussion draft suggests that information is reported which is not held for CRS purposes, such as contact details.

**Next steps**

We trust these observations are of assistance to you identifying areas which can be usefully addressed in the next rounds of consultations and discussion on the framework for mandatory disclosures. EY would welcome the opportunity to participate further in this process and stands ready to contribute further to the development of your thinking in this important area.

Yours faithfully

Christopher Sanger  
Global Head of Tax Policy  
Ernst & Young LLP
FBF/RESPONSE TO PUBLIC DISCUSSION DRAFT: MANDATORY DISCLOSURE RULES FOR ADDRESSING CRS AVOIDANCE ARRANGEMENTS AND OFFSHORE STRUCTURES

Dear Sir,

The FBF, as the voice of the French banking sector representing the interests of over 400 banks operating in France, encompassing large and small, wholesale and retail, local and cross-border financial institutions, is pleased to provide comments on the public discussion draft regarding mandatory disclosure rules for addressing CRS avoidance arrangements and offshore structures. We thank the OECD for the consultative process underway and call for a continued interaction with the private sector so that the voice of business is duly taken into account.

As preliminary remark, please note that the French financial institutions (FIs) has always strongly supported the Standard for Automatic Exchange of Financial Account Information in Tax Matters (Common Reporting Standard or CRS).

However, as far as the contemplated mandatory disclosures rules are concerned, the French banking industry is of the view that:

- The proposed rules are strongly premature since the first exchanges of financial information only occurred in September 2017. In this regard, at this stage, it should be preferable to focus the efforts on the improvement of the existing legal framework by determining and closing the potential loopholes rather than implementing immediately disclosures rules likely to place, on intermediaries, the consequences of the existing shortcoming of the legislation in force. In this context, our recommendation would be to define and to monitor, upstream, the actual discrepancies which may give rise to harmful tax practices.

- They are redundant with other legislations in force or under development. At the European level, the new transparency rules for tax planning intermediaries aim at implementing similar disclosure obligations with same generic hallmarks. Disclosures obligations are also provided with by the European Union Fourth Anti-Money Laundering Directive enacted, on June 25, 2015. From a French perspective, according to the new finance bill for 2018, FIs are now compelled to provide the French Tax Authority with a list of client refusing to provide information about their residency ("recalcitrant clients").

- They provide for a generic definition of a CRS avoidance arrangements excessively general generating thus the risk for tax administrations to be overwhelmed with information, while only some of which will be useful. FIs could, for example, consider that any arrangement under FATCA should be reported indeed the USA are a non-CRS country. A significant
volume of useless information would inhibit enforcement efforts by making it harder to find abusive behaviour. In addition, in France, such an inclusive definition could be ruled as unconstitutional since it has been the case in precedent-setting judicial decision.

- They also provide for a broad definition of the notion of intermediary who provide relevant services. In this respect, it should be noted that FIs never act as promoter or marketer of tax arrangements of any kind since, from a French legal point of view, banks are not authorized to act as tax advisor. FIs should not be viewed as acting as intermediary accordingly.

- The clawback period until 15 July 2014 is retrospective. Retrospective application of legislation is impossible for intermediaries. In practice, the retrospective identification of behaviours or arrangements cannot be achieved.

– The “reasonably expected to know” standard will be extremely difficult to implement since FIs are deemed to have the full knowledge of arrangements designed and achieved by their clients which is, in practice, impossible. In this respect, our recommendation would be to limit the disclosure obligations to the promoter or the beneficiary of the said tax arrangement.

- The carve out for reportable taxpayers should be extremely difficult to implement since the clients must provide a certified or notarised copy of a tax return proving that they have paid tax in all their jurisdictions of tax residence in respect to the income and assets subject to the arrangement. This requires a high evidential burden. In any case, practically it is likely to be very difficult for any person to demonstrate that they have met all their tax obligations.

As a conclusion, please note that French FIs are fully committed to implement CRS in an effective way and in compliance with its objectives. However, their role must be limited to the effective exchange of information on the basis of objective criteria and not on generic and inaccurate definitions. It is important that the disclosure rules do not imply for French FIs to disclose any arrangement structured by clients and peers on the basis of mere suspicions. Placing excessive burden on FI in terms of identification of tax arrangements designed and implemented by their clients would be counterproductive and should inevitably weaken the process of exchange of financial information.

Best regards,
To whom it may concern,

Thank you for the opportunity to provide input to the draft discussion draft “Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures”.

The Financial Transparency Coalition is a global civil society network\(^1\). We work to curtail illicit financial flows through the promotion of a transparent, accountable, and sustainable financial system that works for everyone.

Please find below our main recommendations with regard to this consultation:

**Active NFEs**: Countries should require Active NFEs to be looked-through and identify/report their beneficial owners (BO), unless they were incorporated in a jurisdiction with (public) registries of beneficial ownership. The definition of BO should use lower thresholds than 25% (e.g. 5%).

**Disguising residency of account holders and controlling persons**: Sub-paragraph 1.1 (c) (ii) refers to arrangements that disguise the residency of account holders and controlling persons, and notes that a number of countries offer tax incentives to individuals to encourage them to take up residence in that jurisdiction.

Countries should be required to refer to a common, independent source to identify those jurisdictions offering schemes that may be used to disguise residency. For instance, the Tax Justice Network’s Financial Secrecy Index 2018 (forthcoming) will include a list of jurisdictions with lax residency/citizenship certificates. Countries under the MCAA’s Annex A (sending, but not receiving information) should also be included under this list.

The list should be considered a (non)-binding recommendation to establish enhanced CDD for any account holder or BO with a residence/passport from those jurisdictions. This enhanced CDD should include requiring all past residencies and citizenships, require birth-certificate and check actual presence in the alleged jurisdiction of residency/citizenship (e.g. by looking at passport stamps).

**Definition of Account Holder**: Consider anyone with a power of attorney or any right to manage, transfer, or withdraw money as an account holder to be reported.

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\(^1\) The members of the FTC coordinating committee are Centre for Budget and Governance Accountability, Christian Aid, Eurodad, Fundacion SES, Global Financial Integrity, Global Witness, Latindadd, PALU, Tax Justice Network – Africa, Tax Justice Network, and Transparency International.
Sanctions and penalties: In addition to the penalties proposed in the draft rules, countries should put in place measures allowing for the possibility to freeze or revoke the license of any corporate service provider, lawyer, etc. offering CRS avoidance schemes at a personal level. This should apply for example for repeated non-compliance in the stipulated time-frame.

Countries should also seek forms of ‘restorative’ justice, where the focus is on the harm done to victims, including extraterritorial responsibility for victims abroad, and seek measures that would both offer access to effective remedy, including compensation for harms caused.

If the person is not subject to license requirement, it should be possible disqualify him/her from operating in the financial sector and also the directors or officials from the company offering the CRS avoidance schemes.

In addition, country authorities should be required to publish aggregate yearly data on the penalties and sanctions imposed for failing to comply with disclosure rules. These should include the number and monetary values of penalties imposed, and the number and types of administrative sanctions such as license freezing.

Whistle-blowers: Jurisdictions should ensure comprehensive whistle-blower legislation is in place that extends to whistle-blowers reporting CRS avoidance schemes. They should also offer incentives to whistle-blowers reporting these schemes, such as compensation, or a % of the expected or resulting monies obtained as penalties/fines while having a strong emphasis of using recovered funds for preventive activities by various stakeholders.

Reporting of client requests on CRS avoidance: Require all law firms, corporate service providers, accounting firms, etc. to report (tip off authorities) on all requests from clients to implement schemes to avoid or go against the spirit of the CRS, similar to AML’s STRs.

Threshold for Disclosure of Arrangements entered into after 15 July 2014 and before the effective date of these rules: eliminate the threshold of USD 1.000.000 (point 4.2) for arrangements or reduce to at the most USD 10.000.

Public disclosure of arrangements. Disclosure of arrangements should not be sent to authorities only, but should be publicly available.

We are happy to provide further detail and background to these recommendations. Please feel free to contact Andres Knobel of the Tax Justice Network at andres@taxjustice.net or Sargon Nissan, Director, Financial Transparency Coalition, at snissan@financialtransparency.org.

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Position Paper of the German Association of Tax Advisers (DStV) regarding the proposed OECD Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

In the preceding months, multiple leaks such as the Panama Papers and Paradise Papers have shown that cross-border tax planning models enabled global undertakings to channel billions of euros in tax revenues away from the European Union and its Member States. In doing so, law firms specializing in international tax planning fed into a market where specially designed “products” are offered to undertakings with the aim of reducing their overall tax burden. In developing their products, law firms search for loopholes in the international tax system, on which basis turnovers and profits can be shifted until almost no tax must be paid.

The OECD Model Rules giving rise to this public consultation focus on arrangements that are designed to avoid reporting under the OECD Common Reporting Standards (CRS). Thus, the defining feature of the arrangement is unlikely to be its tax consequences per se, but rather the way the arrangement can be used to circumvent CRS reporting obligations and undermine financial institutions due diligence procedures. It therefore, nevertheless, has an indirect impact on taxation and tax advisers qua intermediaries.
Preliminary remarks

The CRS, the BEPS 12 Action Plan Report and the Model Rules giving rise to this consultation rightfully acknowledge that the true reasons for aggressive tax planning, the design of opaque offshore structures or CRS avoidance arrangements are the diversities between national regulations. For example, states use their tax systems to compete against each other by raising attractiveness for the economy, thereby motivating profit shifting resulting in undue distortions of competition. The construction of taxation schemes or reporting avoidance arrangements only exists because national laws are not coordinated. The EU Commission and the OECD have recognized this and seek for global solutions to this problem within the BEPS project.

The DStV firmly supports all reasonable national and international efforts to curb tax evasion and comparable practices if they progressively reduce the differences in tax systems or between reporting obligations between States. For this reason, we welcome the OECD, G20 and G7 initiative which led to the creation of the Common Reporting Standard (CRS) for the automatic exchange of financial account information.

The discussion draft for model “Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures” is therefore in our view a necessary and welcome addition to increase the robustness of the CRS regime. The insights about tax arrangements, employed by individuals and international corporations, are capable of undermining trust and fairness in our societies in general, and threaten the integrity of our tax systems. The OECD Model Rules can provide tax administrations with intelligence on the design and supply of CRS avoidance arrangements and offshore structures. At the same time, we need to keep in mind that mandatory disclosure obligations need to be justified and proportionate, since they are facie in breach of the principles of privacy and confidentiality, for example guaranteed by Article 8 of the European Convention of Human Rights.

It should be noted that over 99.9% of tax accountants and taxpayers are not involved in CRS avoidance arrangements or the design of opaque offshore structures. This is demonstrated, for example, by the results of a study prepared by the Greens in the European Parliament. In the study "Usual Suspects? - Co-conspirators in the business of tax dodging" the largest tax data leaks in recent years, the offshore leaks, the Panama Papers and the Bahamas Leaks, are evaluated (see study commissioned by The Greens/EFA in the European Parliament: "Usual Suspects? - Co-conspirators in the business of tax dodging"). This evaluation has shown that intermediaries designing critical tax arrangements or offshore structures are barely active in
Germany. Germany does not rank among the world or European TOP 10 countries (see the aforementioned study, Figure 2, page 8, and Figure 5, page 10). Rather, the German share accounts for only 2.99% of the intermediaries involved in such models in the EU. Furthermore, the study reveals that German small and medium-sized law firms are not listed as relevant intermediaries within the scope of the study.

It is thus important that any kind of international regulation on disclosure requirements affecting the profession of tax advisers is carried out with great caution and carefulness in order to not overburden small and medium sized firms.

The DStV therefore emphatically notes that the expedient idea of drafting a model regulation for mandatory disclosure rules needs to keep the important societal functions of tax advisers in mind. Only a negligible minority of tax advisors engage in harmful practices, and burdening the vast majority of upright professionals with excessive red tape or treating them as suspects would undermine the effectiveness, sustainability and acceptability of the measure at hand.

*In this regard, the DStV emphasizes that:*

Disclosure requirements cannot affect either the core of the professional ethics of tax advisers (i.e. confidentiality), the nature and substance of the professional regulation of tax advisers within their national context (i.e. alter the socio-economic role of a profession) or the capacity of the profession to deliver high quality services to its clients (i.e. by an increase of workload as a consequence of an unbridled disclosure obligation). For this reason,

1. the subject matter of the disclosure obligation must be clearly determined and precisely formulated. In this regard, specific hallmarks should be preferred over generic hallmarks. By this, unnecessary disclosing of information is prevented. Intermediaries or other reporting entities are not overly burdened by the uncertainty of what needs to be disclosed.

2. The subject matter of the CRS Avoidance Arrangements and Opaque Offshore Structures as well as the persons required to disclose (and under what circumstances) must be specified clearly and with legal certainty. This
also includes the point of time when disclosure has to be made (i.e. feasible). Differences in the implementation in national law will automatically lead to legal uncertainty and undermine transparency.

3. The OECD Model Rules must give sufficient margin to the national legislator to align the specificities of the national professional regulations with the OECD disclosure requirements. Only this can guarantee that the OECD Model Rules have no negative impact on the exercise of the liberal professions that characterize intermediaries.

Comments on selected provisions

Section 3(1) in conj. with 3(5) pt. 1, 2 and 4 – The definition of intermediary

Intermediary is defined as “promoter” - persons who are responsible for the design or marketing of an Offshore Structure or a CRS Avoidance Arrangement – or as a “Service Provider” – a person that is responsible for the design, marketing, implementation or organization of the structure or arrangement.

The fact that the definition of intermediary goes beyond tax adviser and focusses of the nature of the activity instead is favorable to the DStV. Especially since the disclosure obligation relates to structures or organizations that are preferably designed, marketed, implemented or organized by financial advisors or investment advisers or lawyers (see. Para 64).

It is however unclear, if the intermediary must be member of a profession in the state in which it is active. Tax advisor is a regulated profession and comes with a protected title. It should be clarified that the trigger for the disclosure obligation is the activity pursued. Acting under a title (regulated profession) only shall not be a decisive criterion.

Moreover, there is need to clarify if the personal scope covers companies or undertakings acting as intermediaries. At the current stage the reference is made to “persons”. Does this refer
to natural persons only or does it include legal persons as well. This must be further clarified for the sake of legal certainty.

At para. 64 the explanation defines the intermediary as a “local intermediary” providing its services through a “branch”. In the light of the current era of digitalisation this criterion of “physical presence” seems outdated. Services, such as consulting or advisory services, do not per se require physical presence in the country where the service is delivered. Where must disclosure be made if the service provider does not offer the service via a branch but online? Thus, the definition of “branch” should be more specific or deleted.

Section 3(3) – The determination of the start of and the period for disclosure

Under the Model Rules, States are required to have a very short notification deadline for intermediaries. The information should be provided to the tax authority within 15 working days. The moment of time for this notification period is triggered in two situations:

- Where the person has designed the structure or arrangement and/or has begun marketing it (i.e. making it available for implementation) to other potential intermediaries or Reportable Taxpayers.

- Where the intermediary provides relevant services in respect of the structure or arrangement to a client or Reportable Taxpayer in circumstances where the Intermediary can reasonably be expected to know that the structure is an Offshore Structure and one of the benefits of the arrangement is the circumvention of CRS reporting.

These two situations can arise at different times in respect of the same structure or arrangement. Although “the filing date should be as soon as is practicable after the obligation to disclose has been triggered”, it is clear from the wording of the Model rules that the period for disclosure remains 15 working days. Irrespective of the point of time the disclosure obligation is triggered. While the DStV acknowledges the necessity to trigger the notification period in different points of time, depending on the activity pursued or service offered, inevitably, this will cause more workload for intermediaries and service providers.

For this reason, the DStV is of the opinion that a deadline of 15 days is unreasonably short. It is true that the necessary information is already available to the intermediary and the reportable
taxpayer when arrangements or structures are made available or implemented. Nevertheless, the necessary information to be submitted by intermediaries or reportable taxpayers must be prepared, collected and reviewed before transmission to the tax authorities. The pure mass of information to be checked and reviewed can require more time than 15 working days to guarantee a full and complete disclosure of information under the Model Rules. This is due to, for example, the anonymization of information involving third parties, checking against self-incrimination or to ensure timely correspondence with other promoters or intermediaries involved in the same arrangements or structures (i.e. Chapter 4 exempts intermediaries from being required to disclose exactly the same information twice in respect of the same arrangement to the same tax authority).

The DSTV therefore proposes to extend the deadline to one month.

Additional remark:
Currently it is unclear from the Model Rules how “having been made available” must be interpreted.

From our understanding a CRS Avoidance Arrangement or Offshore Structure will be treated as having been “made available” for implementation at the time the material design elements of the arrangement or structure have been completed and communicated to a client or Reportable Taxpayer. While the DSTV welcomes the fact that the rules on disclosure have no retrospective effect, i.e. are only triggered after the service is provided to the client or Reportable Taxpayer or comes to the knowledge of the intermediary. It remains unclear if this includes cases where an CRS Avoidance Arrangement or Offshore Structure is communicated but not applied and turned into practice? Here, the DSTV emphasizes that further clarification is highly demanded to provide appropriate safeguards for intermediaries or promoters.

Section 4(1) pt. 1 - Information to be disclosed to the public authorities

The last sentence of Chapter 4(1) determines that the intermediary must disclose the information “to the extent such information is within the Intermediary’s knowledge, possession or control”.

“Intermediaries knowledge, possession or control” are broad notions and must be further clarified, regarding, for example, the point of time the information comes to the intermediary’s
knowledge, possession or control. The definition of “their knowledge” is unclear. What is the scope? When does an intermediary have knowledge? Is suspicion sufficient? Likewise, the terms “possession or control” needs clarification. Does possession or control only exist where the possession or control is exercised materially over the information (i.e. hardcopy or digital copy)?

The Model Rules propose that the information will be treated as within a person's control if it “can be obtained by asking for it”. The threshold of “being obtainable by asking for it” leaves a wide margin of interpretation and creates unnecessary uncertainty for intermediaries and Reportable Taxpayers. For example, how should an intermediary proceed if the information is not communicated upon asking for it?

An intermediary cannot be expected to go beyond the requirements of the applicable professional standards and existing know-your-customer rules when collecting and reporting information under the Model Rules. Thus, the DStV strongly reminds the OECD to ensure a high level of legal certainty by avoiding generic and broad requirements being imposed on intermediaries.

Section 1 and 2 - Hallmarks

The description of the arrangements that are required to be disclosed is an essential aspect of the proposed Model Rules. To that end, the OECD draft contains the so called “hallmarks” set out in Chapter I and II. Hallmarks act as filters which specify the features of arrangements of interest for the tax administration under the Model Rules at hand. They can be divided in two categories: “generic hallmarks” and “specific hallmarks”. Bearing in mind that hallmarks define what constitutes a reportable arrangement, these essential features must be well-defined, clear and concise so as to maximize the legal certainty within which intermediaries and Reportable Taxpayers exercise their disclosure duties.

Generic Hallmark - Avoidance Arrangements

Chapter I sets out the “generic hallmarks”, which are intended to capture concomitant circumstances of arrangements which are designed to circumvent, marketed as, or have the effect of bypassing the CRS. They do not define specific legal characteristics of the
arrangements in question. Innovative arrangements with legal features unknown to the administration would not be identifiable through a list of such features. By capturing arrangements due to the concomitant circumstances, the “generic hallmarks” therefore act as the primary tool of the Model Rules to provide tax administrations with intelligence about innovative avoidance arrangements. Invertedly, by providing tax administrations with input about the avoidance strategies employed, the information gathered from arrangements to be disclosed under the “generic hallmarks” can be expected to inform legislative change. The “generic hallmarks” therefore act as a catalyst for legal policy.

Unlike comparable proposed regimes for tax matters, such as the OECD BEPS Action 12: Final Report Mandatory Disclosure Rules, or the European Commission’s proposal for the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (COM(2017) 335 final and its Annex 1), the “generic hallmarks” in the discussion draft are not mediated by any filter.

However, filters ensure that a regulation does not include unnecessary or irrelevant cases. Overinclusion can lead to excessive compliance costs, particularly for smaller entities, undermine the willingness of obliged parties to comply with an otherwise sensible regulation and can cause preventive overreporting, which strains the resources of authorities and hinders them from identifying relevant cases for preventive regulation. Thus, the DStV strongly advises the OECD Model Rules to include a main benefit test.

In the case of the BEPS Action 12 Final Report and COM(2017) 335 a main benefit test acts as such a filter. It ensures that business decisions which reduce the tax rate as a side effect do not fall under the scope of the reporting requirement. In the case at hand, an implicit main benefit test can be included in the definition of CRS Avoidance Arrangement (p.8) as follows:

…is any Arrangement for which it is reasonable to conclude that it is designed to, or marketed as circumventing CRS Legislation or exploiting an absence thereof.

For example, this would remove business decisions which are not primarily targeted at, or marketed as CRS avoidance arrangements, but which as a secondary effect remove a transaction from the scope of CRS reporting.

Alternatively, the BEPS Action 12 Final Report contemplates a de-minimis filter (p. 38-39) to prevent overdisclosure, ensure the usefulness of the information attained and reduce the
compliance cost for both the private sector and tax administrations. The de-minimis filter is discarded in the BEPS Action 12 Final Report, because of the pre-condition based on a main benefit test. However, since no main benefit test is included in the Model Rules, a de-minimis can be implemented to mediate the broad scope of the “generic hallmarks” and thereby reduce the risk of overinclusion. To ensure that the de-minimis filter would not be used to circumvent CRS obligations systematically, it would suffice to suspend its application for “specific hallmarks”.

**Specific Hallmark – Offshore structures**

The “specific hallmarks” in Chapter II on the other hand list legal features, such as offshore structures, for which it is reasonable to conclude that they undermine or exploit weaknesses in the due diligence procedures under the CRS. These structures must be disclosed.

The specific hallmarks under the Model Rules allow tax authorities to target arrangements which are known to be used for CRS avoidance. Unlike the “general hallmarks”, the specific hallmarks therefore do not target innovative arrangements, but arrangements which have already been identified by the tax administration, at least in their relevant characteristics.

Since the “specific hallmarks” build on the prior information available to the respective tax administration, the DSTV suggests to heed the OECD BEPS 12 2015 Final Report principles, whereby the States define country specific hallmarks together with a list of excluded tax regimes and outcomes that are not required to be disclosed. This would prevent the overinclusion of arrangements and build on the intelligence available to the respective tax administration. Additionally, this ensures the usefulness of the information attained and simultaneously reduces the compliance cost for both the private sector and tax administrations.

**Section 4(3) – Avoidance of double disclosure**

In order to avoid duplicate disclosure in respect of the same arrangement in the same jurisdiction, Chapter 4(3) of the Model Rules provides that the intermediary “shall not be required to disclose any information on an arrangement that has previously been disclosed to that tax authority by that intermediary or another intermediary”.

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The obligation to report certain information either on intermediaries or tax payers includes additional work. The adoption of a potentially broad information obligation must be prevented. While the DStV – in principle – welcomes the effort to minimize additional workload for intermediaries, the road taken under Chapter 4(3) seems to be flawed and not sufficient in attaining this goal.

For example, under the Model Rules two unrelated entities can be obliged to disclose information to the tax authorities. These intermediaries can be established in two countries and have no relation whatsoever. How does the 3.1(b) exception be applied in practice and ensure no additional workload for intermediaries? How is control ensured? How does this affect liability, where, for example, one intermediary communicates that the information has been disclosed, but in fact has not been? This uncertainty gives room for abuse and thus needs further clarification.

It should be noted that many firms that are considered as intermediaries under the proposal consist of only one professional and a few employees. The proposal is studded with such vague legal concepts. Here, more legal certainty must be ensured to minimize the practical workload of intermediaries and to avoid disputes with the tax authorities and the risk of being penalised for a failure to report. The Model Rules should give due account to this fact.

Section 4(2) – Protection of professional secrecy

The DStV welcomes the fact that the proposal recognises and seeks to protect the information exchanged between legal counsel and client, if the national regulations of a certain profession cover the information by professional secrecy (confidentiality). We emphasis, that in the light of transparency – the objective the Model Rules seek to attain - it is not relevant who provides the information to the tax authorities, but only that the relevant information is disclosed. The DStV strongly emphasises that the relationship between the intermediary and his client should not unnecessarily been intervened with, so as to infringe the rule of law at national level or disproportionately burden the intermediary.

The tax consultant is an independent body within tax law. Advice given on tax matters is a legal advice and the associated professional tasks serve the tax law, an important common good. The tax adviser has a prominent societal function in certain societies. The purpose of the
professional confidentiality principle is to ensure an open and trustful relationship and communication between the client and his legal adviser.

The exemption to the disclosure obligation granted to intermediaries under Chapter 4(2) does not touch upon this specific feature of the legal relationship. By exempting the intermediary from the disclosure obligation if national law protects the principle of professional secrecy ensures that the core of the professional ethics and the trust between the adviser and client is maintained. In Germany, for example, this is the case for lawyers, accountants and tax advisers.

However, the DStV is of the opinion that the wording of Section 4(2)(2) point 1 can be misleading by covering information under the professional secrecy principle that emerges from “communications [which] are produced for the purpose of seeking or providing legal advice or used in existing or contemplated legal proceedings and protected from disclosure under domestic law”. This can be misleading if, for example, other information that is not produced for purposes referred to before is not covered by professional secrecy. This is problematical under German law, where the principle of confidentiality covers all communication between adviser and client. A breach of which can be sanctioned by criminal law. Thus, the DStV strongly advises that the principle of professional secrecy should be subject to its definition by law. Moreover, it must cover all communication and information exchanged by adviser and client (confidentiality).

In the light of the foregoing, the DStV supports that the disclosure obligation shifts to the reportable taxpayer where the intermediary is covered by a principle of professional secrecy and, hence, is legally prevented from making a disclosure of information to third parties.

However, in this light, the DStV is strongly against an anonymous notification which is required by Section 4(2)(2) pt. (a), whereunder the intermediary is required to file a written notification to the responsible tax authority that he holds “information on a CRS Avoidance Arrangement or Offshore Structure that is not required to be disclosed” due to the exemption thereunder. An anonymous notification, although it does not disclose the personal information of the taxpayer involved, clearly violates the confidentiality principle entrusted to the intermediary (i.e. Parteiverrat). By making a notification to the relevant tax authority, irrespective of being anonymous or not, the confidentiality principle is negated.
Moreover, since the disclosure obligation shifts to the Reportable Taxpayer under Section 4(2)(2) pt. (b) where the waiver is triggered, there is no practical need for an additional notification by the intermediary. Rather, the DStV emphasis the disproportionality of this requirement, i.e. by overburdening intermediaries. The DStV wants to emphasise that the objective of the Model Rules is transparency. Transparency is attained either, by disclosure through the intermediary or by disclosure of the Reportable taxpayer. Any additional disclosure requirement or notification obligation is superfluous, violates the professional secrecy between adviser and client and clearly goes beyond what is strictly necessary to attain the objective of transparency. In the light of the foregoing, the DStV strongly advises to delete the notification requirement under Section 4(2)(2) pt.(a).

Instead the OECD should further elaborate on the information obligation of the intermediary vis-à-vis the Reportable Taxpayer. It is important that the Model Rules clearly define to what extent the information obligation shifts from the intermediary to the Reportable Taxpayer. Currently, it remains unclear from the Model Rules when the intermediary has fulfilled its information obligation under Chapter 4(4) vis-à-vis the Reportable Taxpayer regarding the shift of the disclosure obligation. Is a formal information sufficient or must the intermediary accompany his client? Here, the Model Rules must provide further clarification of the scope of the information obligation of the intermediary towards the Reportable Taxpayer.

Also, questions of liability must be clarified. How and to what extent does the intermediary incur liability, if the information obligation is not pursued, pursued incorrectly, incomplete, late or false?

Coherence with the EU Commission Proposal (COM(2017) 335 final)

On a final note, the DStV wants to stress the importance of coherence among international and European initiatives when it comes to disclosure obligations that have an impact on the tax adviser profession.

Although the OECD Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures and the EU Commissions proposal on the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (COM(2017) 335 final) are not identical, they overlap on multiple aspects. Amongst others, for example, both legal instruments seek to impose disclosure or notification obligations on
intermediaries and in particular tax advisers. The legislator wishes to enhance the transparency concerning cross-border tax planning or, in the case of the Model Rules, concerning the use of avoidance arrangements or offshore structures through which private entities avert reporting obligations vis-à-vis national tax authorities.

The DStV wishes to bring to the OECD’s attention that coherence of the procedural aspects affecting tax advisers under both instruments cannot be ignored or dealt with in isolation. Coherence of the two instruments must a central objective towards their finalisation. The OECD and the EU Commission must work closely to align and adjust their rules to the largest degree possible. The aversion of unnecessary workload imputed to tax advisers or intermediaries must be ensured at all stages.

Without asking, we will be happy to provide further information or explanation if needed.

Kind regards,

RA FASTR Prof. Dr. Axel Pestke  
(Secretary General)  
Dr. Jan Trommer, LL.M.  
(European and Professional Law Expert)
Opinion Statement PAC 1/2018 on the OECD Consultation regarding Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

(Prepared by CFE on behalf of the Global Tax Advisers’ Cooperation Forum)

Submitted to the OECD on 15 January 2018

We will be pleased to answer any questions that you may have concerning the GTACF comments. For further information, please contact the Chair of CFE Professional Affairs Committee Wim Gohres at wim.gohres@nl.pwc.com or the CFE Brussels Office at brusselsoffice@cf-eutax.org +32 2 761 00 91, Avenue de Tervuren 188A, B - 1150 Brussels.
1. Introduction

On 11 December 2017, the OECD released a “consultation document”¹ under cover of a media release² which invited submissions by 15 January 2018. The public discussion draft is 44 pages in length and contains mandatory disclosure rules for two loosely connected subjects, the avoidance of reporting under the Common Reporting Standard (“CRS”) and the use of ‘opaque’ offshore structures.

2. Consultation period and stakeholders’ involvement

The first exchanges on the CRS rules date from 2017 and a lot of countries have not begun the exchange³. The CRS rules are primarily aimed at financial institutions and are quite complicated themselves. The disclosure rules regarding opaque offshore structures are complicated as we will see hereafter. The GTACF therefore wants to emphasize that the consultation period is too short for the complicated subjects at hand and that as a result it is difficult to see the true value of this consultation. In view of the call for penalties on non-complying intermediaries and reportable taxpayers, the short consultation period running over public holidays in most countries runs the risk of underestimating the impact that the proposal may have for those involved and the uncertainty which may stem therefrom. In light of these considerations, GTACF recommends an additional consultation period. Such an extension would allow professional associations such as GTACF to gather comprehensive internal feedback from our member organisations, therefore more meaningful consultation input and technical refinement of the proposed course of action. We will endeavour to partake in any subsequent consultations on this very important subject.

Having said this, GTACF will comment on some of the most salient aspects of the proposal, but cannot claim to be exhaustive or even thorough in its comments. Nonetheless, GTACF hopes that its comments may contribute to the discussion of the proposal.

3. Position of the GTACF

GTACF’s main concern is that the scope for an obligation to report is too broad and the test to decide whether a report is necessary is quite challenging. We fear that this creates uncertainty for intermediaries and taxpayers involved and could result authorities receiving large quantities of information about quite innocent arrangements sent to reduce the risk of failing to comply. This would ultimately present those authorities with large quantities of meaningless data from which it is difficult to identify activities that are the target of the proposals. Although the OECD definition of intermediaries includes tax advisers as ‘service providers’, this definition remains somewhat vague. It

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involves persons who are involved in the implementation of the structures, but it remains unclear how much diligence is appropriate to expect before giving tax advice. Tax advisers assist their clients in complying with the complicated tax laws and rules on national and international level and advise their clients on these rules and how to organize their affairs in order to be compliant with such laws and rules. As such, tax advisers stand beside their clients and do not and should not have a commercial interest other than serving their clients while remaining professionally independent from all parties, including their clients.

The present proposal is aimed at a wide group of consultants and true intermediaries, regulated or not, amongst which there may be tax advisers. It is therefore good to remember that only a small part of the tax advisers are actually involved in the area the proposal seeks to regulate and that these tax advisers will provide their services within the boundaries of the relevant laws and jurisprudence.

In this respect it is important to notice once again that the proposal asks for reporting on what are, in itself, legitimate arrangements and structures. If the purpose of any activity directed to avoiding reporting is to evade taxes (or any other illegal purpose) the conduct is for that reason illegal, and usually subject to the heavy penalties associated with tax evasion or other financial crime.

GTACF and its member organisations fully support the combat against tax evasion and expect their members not to be part of any form of tax evasion. GTACF notes that in the end the taxpayer is the one primarily responsible for his affairs and feels that the proposal puts a disproportionate responsibility on the ‘intermediaries’ especially in view of the call for sanctions. Making such intermediaries the addressees of the proposed rules, sends out the message that taxpayers themselves bear no or little responsibility for their affairs and that they are more or less subject to what intermediaries propose to them.

GTACF also notes that the description “CRS avoidance arrangement” in itself suggests that there is an obligation to use only financial instruments that would be subject to CRS exchange. Similarly, the word ‘avoidance’ can be seen as suggestive of complicity. CRS obliges financial institutions to exchange information of their clients for tax purposes, but in no way obliges taxpayers to use only financial instruments provided by financial institutions, nor is there an obligation to have their dealings signed off by a tax adviser. GTACF feels it would be more appropriate to extend the scope of the CRS to other entities. This would better serve the purpose of establishing clarity in the reporting obligation, as opposed to putting the reporting onus on the intermediaries. In doing so, the reporting would become much more factual and aimed at situations that, at this stage, are not subject to CRS reporting.

GTACF is concerned that tax advisers would have an obligation to disclose steps taken by their clients, when they, acting as advisers may not know whether or when the steps have been taken, and the steps themselves (choosing one type of investment rather than another) might intrinsically be very commonplace and not motivated by tax evasion or any other illicit purpose. It seems to us that the approach adopted internationally in respect of Anti Money Laundering legislation should be adopted and the disclosure obligation focussed on where there are doubts of illegality. Indeed, where AML legislation already applies there should not be a requirement to disclose the same transaction to multiple authorities.

Also, any requirements imposed on advisers (who are ‘intermediaries’ within the OECD definitions but, in acting as advisers, are not in reality parties to any of the transactions undertaken ), should reflect their position as owing duties of confidentiality to their clients and not necessarily knowing

\[4\] Cotorceanu, Peter: Hiding in plain sight,(2015) 21 Trusts & Trustees 1050 (Oxford)
what their clients have implemented. In many countries, there is no precedent for imposing obligations in such circumstances (other than AML legislation). Where, as for example in the UK’s DOTAS legislation, advice that is given can become reportable, this is in the first instance the generic nature of the advice that is believed to produce a tax advantage. The scope of the obligation is tightly defined to try to ensure that appropriate confidentiality obligations are respected, that the regime is not disproportionately onerous to operate, and that the disclosures made are focussed on matters likely to be of interest to the authorities, who if confronted with routine disclosure of even legitimate transactions, would encounter difficulty in ‘seeing the wood for the trees’. Any requirements going further than AML rules should follow the same approach.

4. Definition of CRS Avoidance Arrangements

GTACF believes that a technical refinement of the definitions used by the OECD would result in better clarity and compliance with any relevant obligations subsequently. Similarly, GTACF believes that clarity of legislation and rules in general is essential element in preserving taxpayers’ rights and enforcing existing legal obligations.

Conversely, asking intermediaries to report on insufficiently precise or vaguely drafted rules would result in uncertainty. Focusing on clarity of the CRS or other legislation will better ensure that such weaknesses are subsequently eliminated.

A CRS ‘Avoidance’ Arrangement is any Arrangement for which it is reasonable to conclude that it is designed to, marketed as or has the effect of circumventing CRS legislation or exploiting the absence thereof.

If an arrangement has the effect of ‘circumventing’ CRS legislation, it is of little interest that it may or may not be designed or marketed as such. In fact, once it is established that CRS legislation is not ‘applicable’ (instead of ‘circumvented’), that should suffice. It is therefore not easy to see the added value of the elements ‘designed’ and ‘marketed’. The question is therefore what the proposal is really aiming at, all arrangements which have the effect of ‘circumventing CRS’ or the reporting on arrangements which are actually intended to do this. There would be some logic in aiming at those arrangements which were actually intending to avoid CRS, however in GTACF’s opinion only if the intention was actually aimed at tax evasion.

GTACF is of the opinion that the exploitation of the absence of CRS legislation cannot and should not be part of the definition. As indicated above there is no ethical or legal requirement to be subject to CRS legislation. If there is no CRS legislation this cannot be a reason for reporting. If this is felt as a shortcoming, the CRS legislation should be expanded. On a more technical level GTACF feels that this makes the definition so broad that it will become unclear when it is actually applicable and thus creates uncertainty for taxpayers and intermediaries alike. In view of the fact that it is proposed that involved persons should be sanctioned, this shall result in legal uncertainty.

Definition 1.1.(c) is aimed at reporting in cases where the due diligence procedures used by Financial Institutions show weaknesses. GTACF feels that logically the CRS or other legislation should be amended to ensure that such weaknesses are eliminated instead of asking intermediaries to report on them. The proposal indicates that these hallmarks are developed in the light of experience of a number of tax administrations. GTACF therefore advocates to focus on the more principled issues, such as clarity of the rules.

In the OECD Consultation commentary under 16) it is explained that ‘reasonable to conclude’ is to be determined from an objective standpoint without reference to the subjective intention of the
persons responsible for the design, marketing or using the scheme. This approach seems somewhat confusing. The test will be satisfied where a reasonable person in the position of a professional adviser with a full understanding of the terms and consequences of the arrangement and the circumstances in which it is designed, marketed and used would come to this conclusion. GTACF points out that in view of the broad hallmarks such a professional adviser will have problems concluding this. The question is therefore how intermediaries and other people involved should be able to make such a distinction, when no professional adviser is involved.

5. Definition of Offshore Structures

GTACF believes that these definitions are quite complicated to understand and therefore implement in practice, under threat of sanctions.

GTACF points out that the definitions set out in Chapter 2 are complex as they refer to each other which results in circular referrals e.g. 1.1 Offshore structure and 1.4 Opaque Ownership structure. This actually reads as: “An Offshore Structure is a Passive Offshore Vehicle held through an Opaque Ownership Structure which is a Ownership Structure allowing a natural person to be Beneficial Owner of a Passive Offshore Vehicle.”

Definition 1.3 regarding Passive Offshore Vehicle excludes Institutional Investors, but that seems counterintuitive. In fact, such legal person/arrangement is still passive, the ownership in itself does not change that. It would make more sense to exclude this situation from Opaque Ownership Structures.

The definition of Beneficial Owner refers to the FATF recommendations but then expands this which leads to a partial repetition. It would be better to adhere to the FATF glossary by repeating that definition without embellishments.

GTACF therefore feels that this part of the proposal will be very difficult to implement and/or understand by those persons actually responsible under the threat of sanctions, to report on this. Once again it is pointed out that the mere fact that there is an offshore structure does not say anything about the legitimacy of the structure. There can be many good reasons for this. The definitions do not seem to make an exception for Offshore Structures in situations where relevant authorities are informed about ownership details.

6. Disclosure requirements

The definition of an Intermediary incorporates Promoters and Service Providers. A Promoter means any person who is responsible for the design or marketing of a CRS ‘Avoidance’ Arrangement or Offshore Structure. A Service Provider means any person who provides Relevant Services in circumstances where the person could reasonably be expected to know that the Arrangement is a CRS ‘Avoidance’ Arrangement or Offshore Structure.

The group of people that become subject to the reporting obligation can and will be therefore very broad. For a disclosure on what is in effect a legitimate arrangement GTACF feels this is not balanced. GTACF points out that if the arrangement is not legitimate those involved will be subject to criminal law and can be punished but will in all probability not be active in making disclosures. This proposal for practical purposes is thus not aimed at the latter group and therefore the reporting obligations should be reasonable and clear.

This also means that GTACF feels that the reporting obligations if any should be limited to situations where the arrangement is actually implemented. GTACF points out that ‘making available’ is one of
the few key elements which are not defined. For example, the United Kingdom’s Disclosure of Tax Avoidance Schemes (DOTAS) has a clear guidance on this subject.

The proposed disclosure of CRS arrangements entered into after 15 July 2014 is in fact retrospective if not retroactive. For reporting on arrangements which are not illegal GTACF feels this will be disproportionate specifically in view of the uncertainty in respect of ‘what’ to report and ‘who’ should report.

7. Information reporting

The reporting should enclose names, address, contact details, jurisdictions of tax residence and tax identification number (TIN) of the person making the disclosure, any Reportable Taxpayer (in which case also the birth date should be reported) and any Client or Intermediary and furthermore the details of the arrangement.

GTACF is concerned that part of this proposal actually entails reporting on other people such as the taxpayer, the actual client, potential users and other intermediaries involved. Non-compliance to this would be sanctioned. GTACF feels that the proposal in this respect goes beyond what one may expect of the citizens of democratic states and points out this reporting on other people is actually required where per se no illegitimate arrangements are in order.

For CRS one should also report those features for which it is reasonable to conclude that they are designed to, marketed as, or have the effect of, ‘circumventing’ CRS. For the Offshore Structures similar language applies. GTACF feels that this borders on self-incrimination and at least will breach the equality of arms. Especially for tax advisers this will be very awkward. For taxpayers this reporting as soon as such an arrangement is made available, may actually endanger their free access to tax advice.

8. Penalties

The commentary states that the regime needs penalties for both intermediaries and taxpayers to ensure compliance. However, GTACF reiterates that it would be disproportionate to impose penalties for not reporting legitimate arrangements in a situation where it is unclear whether these are covered by the proposal or not. GTACF clearly stands against tax evasion, however imposing a penalty for non-cooperation with self-incrimination is in fact at odds with the principles of the rule of law.

9. In conclusion

GTACF therefore concludes that the proposal as such puts an unfair obligation on intermediaries and especially on tax advisers and their clients that could ultimately prove ineffective because compliant intermediaries (as defined) could seek to protect their position by reporting matters that are in reality of no interest to the authorities.

The broad definitions of the proposal combined with the penalties make for a situation where those involved could be penalized for what may be a legitimate arrangement. GTACF feels that better clarity of CRS legislation will supersede the need for mandatory disclosure rules. Finally, GTACF is of the opinion that the part of the OECD proposal related to Offshore Structures will be very difficult to implement in practice.
About the Global Tax Advisers’ Cooperation Forum

The Global Tax Advisers’ Cooperation Forum (GTACF) was established in 2014 by CFE Tax Advisers Europe, the Asia-Oceania Tax Consultants Association (AOTCA) and the West African Union of Tax Institutes (WAUTI). The GTACF is a platform for tax advisers to provide a global response to international tax initiatives and to strengthen tax technical and policy cooperation.

CFE Tax Advisers Europe is the umbrella organisation of the European tax advisers. Our members are 30 professional organisations from 24 European countries with more than 200,000 individual members. GTACF aims to safeguard the professional interests of tax advisers, to exchange information about international and national tax laws and policy, professional law, and to contribute to the coordination of tax law and policy in Europe. CFE is registered in the EU Transparency Register (no. 3543183647-05).

AOTCA is the umbrella organisation of the Asia and Oceania tax advisers. Our members are 20 professional organisations from 17 Asian and Oceania countries with more than 400,000 individual members. Like CFE, AOTCA aims to safeguard the professional interests of tax advisers, to exchange information about international and national tax laws and policy, professional law, and to contribute to the coordination of tax law and policy in its region.

WAUTI aims to harmonize taxation practice in West Africa, and to promote the highest professional standards of competence and integrity among practitioners in member states. In order to have a forum for technical and educational development, information sharing and enhancement of Tax Practice and Administration, The Chartered Institute of Taxation of Nigeria (CITN) and The Chartered Institute of Taxation of Ghana (CITG) in collaboration with Revenue agencies in the West African Region have formed The West African Union of Tax Institutes (WAUTI).
January 15, 2018

Submitted via email to: mandatorydisclosure@oecd.org

Dr. Achim Pross  
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Re: Investment Industry Association of Canada’s response to the Draft OECD Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

Dear Sirs and Mesdames:

The Investment Industry Association of Canada (the IIAC) represents 130 IIROC-regulated investment dealer member firms in the Canadian securities industry.¹ We appreciate the opportunity to provide comments on the Draft OECD Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures (the Disclosure Rules). The IIAC and its Members have been very supportive of and involved in the development of the Standard for Automatic Exchange of Financial Account Information in Tax Matters (CRS). We further support the policy goals of the Disclosure Rules as we recognize the importance of preventing tax evasion and money laundering.

Our comments are intended to further the goals of the Disclosure Rules by reducing the uncertainty in the draft rules as to how financial institutions can ensure compliance. While we are unable to provide in-

¹ The IIAC is the national association representing the investment industry’s position on securities regulation, public policy and industry issues on behalf of our 130 IIROC-regulated investment dealer members in the Canadian securities industry. These dealer firms are the key intermediaries in the Canadian capital markets, accounting for the vast majority of financial advisory services, securities trading and underwriting in the public and private markets for government and corporations. For more information visit, http://www.iiac.ca
depth commentary on the Disclosure Rules due to the limited time period available to comment, we would like to highlight certain high-level issues.

The IIAC supports the recommendations outlined by the Business and Industry Advisory Committee to the OECD (BIAC) and AFME/UK Finance in their January 15, 2018 submissions. In particular, we want to emphasize the importance of their recommendations that:

- an actual knowledge standard be applied; and
- a main purpose test be applied;

**Actual Knowledge Standard Should be Applied:**

- The proposed standard of “reasonable to conclude” in the CRS Avoidance Arrangements definition should be amended and replaced with an objective standard of actual knowledge. This would align with the standard required in the existing CRS ‘Relationship Manager Inquiry’.

- More importantly, given the serious nature of a determination that an arrangement qualifies as a CRS Avoidance Arrangement it should be based on actual facts of which the Financial Institution (FI) has knowledge. We support BIAC’s proposed restatement of the standard as “whether it is reasonable to conclude, based upon what the FI knows, whether the arrangement is an attempt to specifically avoid reporting under the CRS”.

**Main Purpose Test Should be Applied:**

- The threshold “has the effect of” in the CRS Avoidance Arrangement definition is overly broad. The IIAC supports the adoption of a “main purpose” or “dominant purpose” test to avoid capturing arrangements that were designed for valid (non-CRS avoidance) purposes. BIAC notes that the definition also includes the term “designed” which indicates a level of intent, however, “has the effect of” captures arrangements where there may not be intent to avoid CRS Reporting.

- We are concerned that normal course transfers of money from non-registered brokerage accounts (CRS Reportable) to registered retirement or savings accounts such as RSPs, RESPs, TFSAs (Canadian plans that are CRS Non-Reportable) could be captured as one of the Disclosure Rules hallmarks as a result of the “has the effect” threshold. The Commentary in the Disclosure Rules at paragraph 19 states that it would not capture a transfer in accordance with instructions from the client, but it would apply “if the bank, in its role as an investment manager, advised the...”}

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customer to move the funds to another ... account in order to escape CRS reporting”. Without
the main purpose test, an investment manager assisting with retirement preparedness who
advises a client to transfer money from their non-registered brokerage account into their
registered retirement account could potentially be included in the definition of a CRS Avoidance
Arrangement as the transfer would “have the effect of” avoiding CRS reporting, even though
that is not the intent or purpose of the advice.

- The Commentary at paragraph 14 states that an arrangement that results in the same financial
account information being exchanged by the US under a FATCA IGA would not fall within the
definition of a CRS Avoidance Arrangement. It is unclear how a FI would be able to determine
that the same financial account information would be have been reported and exchanged after
a transfer to the US occurred. For Canadian FIs this could be particularly problematic as many
Canadian clients may have residences in the US and have reasons unrelated to CRS avoidance to
transfer money to US accounts or other US FIs. The Disclosure Rules Commentary needs to be
clarified to ensure that the transfer of money or assets from an IGA jurisdiction to the US would
not be a CRS Avoidance Arrangement between a FI and its client, unless the main purpose was
to avoid CRS reporting.

The IIAC further supports BIAC’s recommendations that:

- penalty protection be provided for reporting FIs (not acting as product developers/promoters)
  when they make a good faith effort to develop and implement effective policies and
  procedures; and
- protection from legal actions initiated by clients whose transactions have been reported under
  the Disclosure Rules be provided for reporting FIs and other tax intermediaries acting in good
  faith.

We would also like to raise an additional concern regarding the reporting timeline requirements.
Reporting is required within 15 working days of the CRS Avoidance Arrangement or Offshore Structure
being made available for implementation or of the supply of the Relevant Services. Given the
subjectivity of the requirements, the short reporting period imposes significant difficulties on FIs.

We appreciate the opportunity to provide you with these comments and would be pleased to discuss
the Disclosure Rules further. If you have any questions with respect to the foregoing, we kindly ask that
you contact the undersigned at awalrath@iiac.ca or 416-687-5472. Thank you.

Yours sincerely,

“Adrian Walrath”

Assistant Director
Investment Industry Association of Canada
Dear Achim,

KPMG International1 is pleased to have the opportunity to provide comments on the Public Discussion Draft regarding Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures (the “Discussion Draft”). We support a targeted and efficient mechanism for tackling CRS Avoidance Arrangements and Offshore Structures, and we consider that a mandatory disclosure regime (“MDR” or “the Rules”) is an important initiative in helping to ensure the proper working of the Common Reporting Standard (“CRS”) and in the fight against tax evasion.

The purpose of our response is to try to assist in making the proposed Rules clear, robust, and enforceable while reducing the administrative burden on compliant intermediaries. It is important for the efficient working of the rules that they do not result in over-reporting, which could mean that tax authorities would have too much information to actually identify abusive schemes. We also believe that the proposed Rules in the Discussion Draft include uncertainties and difficulties of interpretation and application that need to be addressed.

We have set out our comments as follows:

- Enhancing Effectiveness - in particular helping ensure the tests are objective and apply appropriately to various intermediaries;
- Scope Clarifications - in particular to confirm the intended scope of the Rules and that they apply as intended;

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1 KPMG is a global network of professional services firms providing Audit, Tax and Advisory services. We operate in 154 countries and territories and have 200,000 people working in member firms around the world. The independent member firms of the KPMG network are affiliated with KPMG International Cooperative (“KPMG International”), a Swiss entity. Each KPMG firm is a legally distinct and separate entity and describes itself as such.
• Penalties – helping ensure the Rules are effective;
• Select Operational Challenges; and, in an appendix,
• Drafting Points.

It is also worth making two overarching points. The first is that the main aim of the Rules is, correctly in our view, to stop those intermediaries and taxpayers who deliberately wish to avoid obligations under CRS. If those parties are prepared to disregard existing law, it cannot be guaranteed that they will adhere to their obligations to report under any new legislation. Nevertheless we consider that the proposals will act as a deterrent; further more they should be easier to enforce than trying to prove facilitation or carrying out of tax evasion.

The second point is that the proposals will inevitably place a compliance burden on compliant intermediaries who come across schemes proposed by others which may be used to circumvent the Rules.

The proposed Rules, as currently drafted, does not distinguish between such Service Providers who find or suspect that their services may be being abused and those who deliberately facilitate CRS avoidance. We believe the new Rules should recognise this distinction, both in providing (i) a more objective test or tests to define when a person should reasonably have known that a CRS Avoidance Arrangement or Offshore Structure is being facilitated and (ii) for differential penalties.

Section A - Enhancing Effectiveness

A Primary and a Secondary Rule

The OECD will be familiar with a Primary/Secondary rule approach from the work on Action 2 (Hybrids). We suggest that this approach should be taken for the MDR as well. In brief:

— the Primary Rule would impose mandatory reporting (as set out in the discussion draft, subject to our further submissions on the rule) on Promoters;
— the Secondary Rule would impose mandatory reporting on Service Providers that are not also Promoters. Reporting would be based on a series of objective fact patterns for transfers or transactions that meet one of the hallmarks of a CRS Avoidance Arrangement or Offshore Structure.

In further support of this approach, we note that some jurisdictions, e.g., New Zealand, have different CRS rules for an Account Holder and for an Information Provider. The latter being someone who may have some information regarding an account without being the account holder. This segregation of intermediaries allows appropriate knowledge standards and exclusions to be applied.

Promoters – Primary Rule

We see the core of the proposed rule as requiring a Promoter of a CRS Avoidance Arrangement, including the use of an Offshore Structure, to report the relevant
arrangement to their Revenue Authority. We understand and acknowledge the requirement for this rule as providing an early indicator of CRS Avoidance Arrangements being marketed. Our view is that the definitions largely and effectively implement this formulation of the primary rule.

**Service Providers – Secondary Rule**

It is also appropriate, in our view, to extend reporting obligation to Service Providers, so giving an additional mechanism to identify a CRS Avoidance Arrangement. Service Providers who do not have full knowledge of the CRS Avoidance Arrangement or Offshore Structure, however, will struggle to identify those arrangements that have “the effect of, circumventing CRS Legislation,” and will feel compelled to report based on incomplete information.

We appreciate that reporting by Service Providers may provide the only clues to the existence of certain CRS Avoidance Arrangements and Offshore Structures. But where Service Providers are not also Promoters, we believe that specific rules about what to report, rather than asking the Servicer Provider to determine (using the general and specific hallmarks) which arrangements could reasonably have the effect of a CRS Avoidance Arrangement, will benefit both governments and CRS compliant financial institutions.

We suggest simple, objective rules for each hallmark regarding what types of transactions, accounts, or account holders should be reported by Service Providers – the definition of Relevant Services is too broad for this purpose. For example, while we agree with the Commentary in paragraph 19 in that simple money transfers at the request of customers should be excluded from reporting, we do not see a basis in the draft Rules to conclude that the financial institution is not required to report in this circumstance. If the transfer “has the effect” of circumventing the CRS, e.g., a transfer to a non-reportable retirement account, and if the financial institution provides services to implement the arrangement by transferring the funds, then the financial institution appears to be required to report even where there are no grounds to believe the taxpayer will then fail to properly fulfil their tax obligations.

**Section B - Scope Clarifications**

**Movement of funds to the United States of America (U.S.)**

The Commentary suggests that transfers to the U.S. would not constitute CRS Avoidance Arrangements or Offshore Structures, notwithstanding its non-participation in the CRS, if the Reportable Person of the transferring Intermediary would still be reported to the account holder’s residence jurisdiction under an Intergovernmental Agreement (IGA) in effect under FATCA. Because the “same Financial Account information” is not transferred by the U.S. under the IGAs, e.g., account balance information is not shared, we would recommend that the word “similar” be used instead of “the same” if we are correct in understanding the intent. More importantly, we recommend adding some reference to this modification to the rule itself.
CRS Legislation

The definition of CRS Legislation refers to the domestic laws of the jurisdiction where the relevant account is maintained. Because the Discussion Draft is aimed at accounts or transactions other than Financial Accounts, we suggest using instead “the domestic laws of the jurisdiction where the Intermediary is tax resident, organized, incorporated, managed and controlled, or otherwise operating (e.g., as a branch).” We acknowledge that Intermediaries in non-CRS jurisdictions will not be subject to these Rules, but believe that the requirement for Reportable Taxpayers using CRS Avoidance Arrangements to report in their residence jurisdiction if the Intermediary does not otherwise report will uncover CRS Avoidance Arrangements in such cases.

Definition of a Reportable Taxpayer

There are significant administration challenges with the use of notarized or certified tax filings by potential end users of a CRS Avoidance Arrangement to avoid reporting. For example, who would be certifying the returns? Governments or attorneys/accounts for the potential end user? Does the Intermediary accept them at face value? Presumably Intermediaries would need to maintain them, but do they also need to refresh them on a periodic basis? We suggest that the definition of Reportable Taxpayer after the word “however” be stricken. Otherwise, it is possible that the same individuals and entities promoting the CRS Avoidance Arrangements will be drafting certifications regarding the sufficiency of the end user’s tax filings.

Section C – Penalties

We note that penalty regimes vary significantly between participating jurisdictions, both in terms of size of penalty but also in terms of the liable party. For example:

- The UK will impose a penalty on the Financial Institution for inaccurate reporting, generally not exceeding £3,000;
- Luxembourg can impose a penalty on reporting failures of 0.5% of the amount that was required to be reported;
- France imposes a penalty on the account holder where they fail to provide their tax residency and TIN (after 30 days following the second request) of EUR 1,500.

We recognise that many of the approaches to penalties have been aligned with existing local tax regulations and related penalty regimes already in place. However we raise these variances as we believe this could encourage some organisations to take advantage of regimes with lighter penalties. We believe it would be helpful for the CRS MDR to provide some guidance or best practice to participating jurisdictions on the application, approach and level of penalties.

Section D – Operational Challenges

Below we identify two examples of operational challenges with the reporting mechanisms in the Discussion Draft. We have other examples, which we would be happy to share with you at your request.
Partner Jurisdictions

Because each jurisdiction will have its own unique list of Partner Jurisdictions based on their exchange networks, it is unclear who would have the obligation to file which pieces of information under chapter 3 of the Discussion Draft.

Assume a CRS Avoidance Arrangement or Offshore Structure is made available for implementation by an Intermediary and its branch, whose respective jurisdictions have some Partner Jurisdictions in common, but some that are unique:

- Under the Rules, the details of the arrangement are filed only once in the Intermediary’s country of residence, incorporation, or place of management (“Intermediary’s Country”) but not the branch jurisdiction.

- Then, assuming the branch is located in a Partner Jurisdiction, the branch jurisdiction will receive the arrangement details under an exchange mechanism, so the branch of the Intermediary reports only those taxpayers for whom it implements a CRS Avoidance Arrangement or Offshore Structure (assuming that is not reported in Intermediary’s Country). So the branch jurisdiction Tax Authority will need to match the arrangement details with the Reportable Taxpayer details it gets from the Intermediary’s country.

- If the branch country Tax Authority receives reporting from the branch about Reportable Taxpayers in a Partner Jurisdiction (rather than in the branch jurisdiction), it will exchange that information with that Partner Jurisdiction.

What is unclear to us, in this scenario, is what happens if that Partner Jurisdiction of the branch jurisdiction is not also partners with the Intermediary’s Country. How does the Partner Jurisdiction get the details of the arrangement? Is it through the branch country Tax Authority matching before passing on the Reportable Taxpayer information?

**Suggestion:** Unless it is intended that there is a global database of CRS Avoidance Arrangements with unique identifiers, for the example above, we would suggest the branch file details of the arrangement but only those Reportable Taxpayers of the branch. The Intermediary would file details of the arrangement and any Reportable Taxpayers that it has. To help ensure completeness (and prevent arguments that a Reportable Taxpayer belongs to no part of the Intermediary), it would be necessary to assign Reportable Taxpayers not reported by a branch to the Intermediary Country's Reporting. This would be consistent with the approach to determining the reporting obligations of a Financial Institution under the CRS.

We assume that further filings would be required as additional Reportable Taxpayers implement the CRS Avoidance Arrangement or Offshore Structure. This should be confirmed.
Multiple Disclosure Limitations

In chapter 4, section 3 of the Discussion Draft, the Rules helpfully limit multiple disclosures if another Intermediary has already disclosed the arrangement or the Reportable Taxpayer in connection with that arrangement. In practice, would there be a global database of CRS Avoidance Arrangements that Intermediaries would review and identify one that matches what they are offering and print the screen as evidence or put a unique reference number of the arrangement into their reporting? If not, how would the other Intermediary know the arrangement had been disclosed previously? If they did find out another Intermediary had disclosed the arrangement, what proof do they need to obtain from the Intermediary that did the disclosing? A copy of the original filing could contain personally identifiable information (PII).

**Suggestion:** We suggest that the rule to limit multiple disclosures be only those disclosures within related party or control groups. This would allow for recordkeeping without disclosing PII to others or requiring a central database.

An alternative to this approach may be to allow agreement by the Intermediaries involved for one of them to take responsibility for the reporting. If that was available, an Intermediary which would otherwise have to report, would only require a copy of the designated Intermediary's disclosure.

**In Closing**

We would be pleased to discuss these comments at your convenience.

Yours sincerely,

Christopher Morgan, Head of Global Tax Policy

KPMG International
Appendix – Drafting Points

We consider that consistent use of terminology and interpretations within the Discussion Draft and the CRS itself is key to helping ensure a robust framework to tackle CRS avoidance. We note that this is the intention (paragraph 29 on page 14) however, we are concerned that this may not have been achieved. To assist in this aim we include examples we have identified of potential inconsistencies in the use of terms between the consultation document and the Common Reporting Standard and an example of ambiguity.

These include:

**Chapter 1**

- Page 6 paragraph 5: real estate holding structures are not ordinarily subject to CRS reporting. We consider this an ambiguous statement as although real estate is not a Financial Asset (as defined in Section VIII.A.7 of the CRS) an investment in the company that holds the property is (as stated in the CRS FAQ No 5 on Section VIII.A of the CRS) is a Financial Asset. Consequently a real estate holding company may be a Financial Institution or an NFE. A company holding a direct investment in real estate will be an NFE. As an NFE the company may be reported on along with its Controlling Persons (if required).

- Page 10 paragraph 15: professional advice on the tax consequences of an arrangement is not limited to that prepared by a legal advisor. Some jurisdictions expand rights of non-disclosure (with appropriate safeguards) beyond legally privileged advice. Is “legal opinion” intended to be limited to legal advisors? Consideration should be given to applying the same non-disclosure rights as would be available under domestic law with the same constraints and requirements.

- Page 11 paragraph 18 and paragraph 20: “money or other financial assets”. Money is not defined as a Financial Asset (Section VIII.A.7 of the CRS) and hence to avoid additional confusion we would suggest that what was meant was “money, or Financial Asset(s)”. We fully appreciate the concern that money may be moved from a Depository Account within the scope of CRS to a Depository Account outside the CRS. However, we do not believe the Draft meant to suggest that money is a Financial Asset.

- Page 11 paragraph 18: We suggest clarifying that cross border transfers from Reportable Accounts under the CRS need to be reviewed to determine if the country to which the funds are transferred, including the U.S., would not report them. We have commented in our submission that the Rules should indicate that the U.S. is not considered as a non-CRS participant jurisdictions for these purposes. We also note with respect to the fragmentation example that new entity accounts do not benefit from the $250,000 threshold, and would be reportable under the CRS even if opened with a lower amount.

- Page 13 paragraph 25: If providers of tax residence certificates were required to ask and document whether the requestor was procuring the certificate to avoid reporting under the CRS, we believe that would add to the pressure on potential end users of CRS Avoidance Arrangements to either reconsider or self-report.
Page 13 paragraph 26: It seems the change in entity structure from a trust to a company will always be considered a CRS Avoidance Arrangement. We suggest there should be an exclusion for pension and other widely held funds that might merge or migrate to another entity form.

Page 13 paragraph 28: In some instances, the unbanked are paid by their employers using debit cards where the workers do not otherwise have a bank account. Are these intended to be captured here? Or is the hallmark here only intended to apply to someone that has a Reportable Account already?

Chapter 2

Page 15 Rule 1.2: The definition of Offshore Structure does not seem consistent with paragraph 39; in section 1.2, “offshore” is an entity set up in a jurisdiction “other than” the jurisdiction of one or more of the beneficial owners. Said another way, if the entity is set up in a jurisdiction of any of the beneficial owners, it will not be offshore. Clearly, paragraph 39 shows that is not what is intended for CRS Avoidance Arrangements and Offshore Structures. That raises another point, however. What if the arrangement is offshore with respect to some beneficial owners and not to others? Is it only necessary to report those with respect to whom the arrangement is considered offshore?

Page 15 Rule 1.4(a): It is typical that brokers will invest in shares on behalf of their clients “in street name” and not disclose the nominator to the fund or company that issues the shares. Under the CRS, the brokers would be disclosing these custodial accounts if maintained for non-residents. It would be helpful to have an example that excludes such Reporting Financial Institution brokers from the scope of this definition where they maintain financial accounts for the beneficial owners.

Page 16 Rule 1.4(d): We would recommend the creation of a list of jurisdictions, or the use of an existing list (e.g., the FATF high-risk and non-cooperative jurisdictions list), that meet one or more of the three criteria maintained by the OECD and agreed by all participating countries. To leave the decision to each FI would very likely result in each FI taking separate counsel and using different lists of jurisdictions that they believe meet one of the three criteria.

Page 16 Rule 1.4(e): The definition of what is “adequate” in terms of information collected and maintained by trusts is subjective. (We acknowledge that FATF recommendations and Anti-Money Laundering rules may provide a base to help ensure compliance with those rules. However, those rules may not apply to all persons affected by the MDR). Is a name and address adequate without more? Is it adequate to use a risk based approach and only collect and maintain information on beneficial owners of more than 20% of the trust? We recommend, as above, that the OECD maintain a list agreed to by all Partner Jurisdictions. Consideration could also be given to applying the due diligence requirements for a Financial Institution with respect to a Financial Account to information requirements for a Relevant Person under the MDR.

Page 17 paragraph 37: There appears to be a new definition for “passive entity” that is not consistent with the CRS definition of a passive NFE. A Promoter or Service
Provider may know whether an entity has “staff, equipment, assets, and premises,” but other potential Intermediaries would not have enough information or actual knowledge of such operations as they will not have been required to ask as part of the CRS due diligence.

- Page 18 paragraph 39: The definition of “offshore” in this paragraph should inform the revisions to rule 1.2 to reflect the intentions in paragraph 39.

- Page 18 paragraph 41: In the penultimate sentence, should the “undisclosed nominee” actually be an “undisclosed nominator” structure to be consistent with section 1.4(a)? Same question in paragraph 43, should the phrase be changed to “where the nominator is undisclosed?” Alternatively, “undisclosed beneficiary” could be used to be consistent with FATF.

- Page 19 paragraph 46: We would recommend the review of options to be limited to those options that are not publicly traded, and those options written involving at least one publicly traded group affiliate. To do otherwise would likely result in a significant volume of reporting, which would make identifying abusive behavior more difficult and also may raise privacy considerations.

- Page 19 paragraph 47: We would recommend making clear that the prepaid debit cards are not those of a particular merchant or those tied to a Financial Account at a Reporting FI. It may also be helpful to tie this rule into the overpayments on credit cards rules to eliminate those other prepaid debit cards with less than a certain balance. Please note that the review of all prepaid debit cards may cut against the access to banking goals for developing countries. The reference to interest free loans is confusing as those are not financial accounts in the first instance.

- Page 19 paragraph 49: We would suggest that “entities regularly traded on an established exchange” be used in lieu of “publicly traded entities.”

Chapter 3

- Page 21 rule 5.2: We would recommend adding the word “knowingly” before “providing assistance…” in the definition of Relevant Services. Adding the word knowingly will tie the definition of Relevant Services back to the definition of a CRS Avoidance Arrangement, which requires a full understanding of the terms and consequences of such an arrangement in order to make it reasonable to conclude one exists. See paragraph 16.

- Page 22 rule 5.4: We believe it would make the Service Provider definition clearer and more consistent to use the phrase “reasonably to conclude” in lieu of “reasonably be expected to know” and refer back to paragraph 16.

- Page 24 paragraph 62: We believe the subjective aspect of the requirement, i.e., which jurisdictions lack the globally accepted AML/KYC rules that could lead to obscuration of natural persons, could result in inconsistent application, so restate our recommendation above to have a globally agreed list of these countries available.
Chapter 4

■ Page 27 rule 1: We would expect potentially several gaps in the information provided. For example, information provided by the Promoter would not include Reportable Taxpayers until a sale has been made; for Service Providers who have reason to know there is a CRS Avoidance Arrangement or Offshore Structure, they would not have the details in 1.2; the information in section 1.3 could be every jurisdiction if the marketing is done via the internet. There would need to be a process for multiple filings of the same information and tracking.

■ Page 28 rule 3.1: When relying on another Intermediary’s disclosure, they will need to collect and maintain some sort of proof. A copy of the filing would contain PII of the Reportable Taxpayers, so how would this work in practice?

■ Page 29 paragraph 77: We believe that the sentence that states that information is within a person’s control if it can be obtained by asking for it creates a duty to investigate every non-reportable Financial Account and even transactions (e.g., options) that are not Financial Accounts. While the last sentence of the paragraph seems to suggest that information that Intermediaries would not otherwise have under KYC rules is not expected, that would still require some ability to do targeted searching of KYC data for each non-Reportable Taxpayer. We also note that KYC/AML rules may not apply to all Intermediaries. As you know, the Reporting FI’s experience with account holder responses to self-certification is quite poor. Is outreach something contemplated here?

■ Page 30 paragraph 79: If Intermediaries are intended to use the definition of “control” from paragraph 77, then is a web search for similar CRS Avoidance Arrangements or a review of government databases (if made available) also required? If so, what are the key terms or other data elements that should be searched for?

■ Page 31 paragraph 87: If a second Intermediary relies upon the disclosure of the first Intermediary in a Partner Jurisdiction, how do the tax authorities identify the CRS Avoidance Arrangement when the second Intermediary only reports the Reportable Taxpayers and nothing else because it would be duplicative?

■ Page 31 paragraph 88: We would strongly recommend a central database of Partner Jurisdiction relationships for Intermediaries to draw from.
To the International Co-operation and Tax Administration Division, OECD/CTPA.

Dear Sir/Madam

The Law Society of England and Wales (‘the Society’) is the professional body for the solicitors’ profession in England and Wales, representing over 170,000 registered practitioners. The Society represents the profession to parliament, government and national and international regulatory bodies, and has a public interest in the reform of the law.

The Society is a named supervisory body under anti-money laundering legislation, and our Money Laundering Task Force is widely-respected for its role in developing guidance and in assisting with the development of AML legislation; the same is true of our Tax Law Committee’s expertise in relation to national and international tax law. The UK government and other agencies make extensive calls upon both these committees’ expertise, and we are pleased that they do so.

Regrettably, OECD’s decision to publish a consultation document on 11 December 2017 with a deadline for comments of 15 January 2018 has given no time for those committees or for any other Law Society expert groups to consider the proposals. Many practitioners will have been on holiday for two weeks or more over the Christmas and New Year period, leaving just days to consider proposals which are complex and far-reaching. It is difficult to see how anyone could regard such a short consultation period at that time of year as adequate or acceptable.

There has been insufficient time for us to consider the proposals, but I am grateful to colleagues at the Society of Trust and Estate Practitioners for sharing with us their response to the consultation and I can say that we would certainly echo their views about:

- the undesirability of imposing on citizens a legally enforceable duty to inform on one another
- the challenge to the rule of law posed by retrospective legislation: and
- the entitlement of citizens to obtain confidential independent professional advice about the application of the law to their particular circumstances.

We would also endorse many of the substantive comments and concerns about the draft rules that are set out in the response, and would urge the OECD to consider them very carefully. We do hope that respondents’ views are afforded greater respect than might be suggested by the imposition of such a short consultation period.

The Society would also urge OECD to issue a further consultation, one which could take account of the responses received and which would give a more realistic period for further responses to be made.

Yours faithfully

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http://www.lawsociety.org.uk
To the International Co-operation and Tax Administration Division
OECD/CTPA

By email: mandatorydisclosure@oecd.org

15 January 2018

Dear Sir / Madam

Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

Maples and Calder is an international law firm representing financial, institutional and business clients.

We appreciate the opportunity to submit for your consideration our comments regarding the OECD's Public Discussion Draft on Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures (the "MDR"). Having reviewed the MDR, we make the following comments:

1. The definition of "CRS Avoidance Arrangement"

We note that, as set out in paragraph 14 of the commentary to the MDR, an arrangement will be treated as circumventing CRS Legislation where it "avoids the reporting of CRS information to the jurisdiction of residence(s) of a taxpayer." Although paragraph 14 continues to provide four bullet point examples of arrangements that would be regarded as circumventing CRS Legislation, all such examples imply some form of intention to either exploit or undermine the CRS and they are listed as being inclusive rather than exhaustive. On a literal reading of the wording to paragraph 14 it would appear therefore that any arrangement that "has the effect of" avoiding the reporting of CRS information would be a CRS Avoidance Arrangement even absent any intention to exploit or undermine the CRS.

We would welcome additional clarity on how the wording to paragraph 14 applies to advice that may be given by an Intermediary regarding the potential application of the Non-Reporting exemptions contained within the CRS where there is no intention to exploit or undermine the CRS. For example, if as part of establishing an investment fund structure for a client an Intermediary advises that the investment vehicle should be regulated to assist with attracting additional investor capital would that be regarded as an arrangement that "has the effect of" circumventing CRS Legislation if, by virtue of being regulated, the vehicle can then avail itself of the Exempt Collective Investment Vehicle exemption?

Although Intermediaries may be able to identify arrangements where there is an element of "design" or "marketing" there would appear to be a risk that any advice provided by an Intermediary that in some way involves a Non-Reporting FI could be viewed as having the "effect of" avoiding the reporting of CRS information and therefore constitute a CRS Avoidance Arrangement.

The use of the term "effect of" has the potential, on a literal reading, to capture a significant number of arrangements even where this is no intention, whether principal or incidental, to exploit or undermine the CRS. It would also place a significant onus on Intermediaries as they may not always be aware of the overall "effect of" an arrangement that is put in place especially if
that Intermediary is a non-CRS specialist advisor subject to the general objective standard referred to in paragraph 16 of the commentary. We would welcome additional clarity, including through the use of practical examples, on the types of arrangements that are intended to be caught by the "effect of" wording.

2. The definition of Promoter

We note that section 1.3(l) of the Consolidated Draft Model Rules contained in the Annex to the MDR (the "Rules") define "Promoter" as meaning "any person who is responsible for the design or marketing of a CRS Avoidance Arrangement or Offshore Structure". We would appreciate additional clarity on who the OECD would regard as the Promoter where the person that purportedly designs or markets the CRS Avoidance Arrangement is doing so in his/her capacity as an employee. For example, if, as part of presentation to a potential client, an employee of a corporation markets a CRS Avoidance Arrangement would it be the corporation or the individual employee that would be regarded as the promoter or would it be both? Does the position change if instead of being an employee the individual is a partner of a partnership?

We note that paragraph 98 to the commentary to the MDR dealing with penalties considers linking the amount of the penalty to the amount of the fees paid to the Intermediary. This would appear to suggest that in the context of an employee that purportedly designed or markets a CRS Avoidance Arrangement it would be the employer that ought to be regarded as the Promoter. Additional clarification on this point would be welcomed.

3. Requirement to notify Reportable Taxpayer of disclosure obligations

Section 2.5(b)(ii) of the Rules requires an Intermediary that is not required to disclose any information under Section 2.4 of the Rules as a result of professional secrecy to instead notify the Reportable Taxpayer that the Reportable Taxpayer may have an obligation to disclose the information. At a practical level, in the majority of instances, there should be no issue with the Intermediary notifying the Reportable Taxpayer. However, as the definition of Reportable Taxpayer contained in Section 1.3(n) of the Rules includes any "actual or potential end user" of the CRS Avoidance Arrangement it is reasonable to assume that there will be instances where the Intermediary cannot identify all Reportable Taxpayers. We would welcome additional commentary to confirm that Intermediaries are only required to provide notice to those Reportable Taxpayers that they have knowledge of. We note that paragraphs 77 and 80 of the commentary contain a similar standard with respect to the type of information that an Intermediary is required to disclose (i.e. only information that is within their knowledge, possession or control).

4. The definition of Offshore Structure

The definition for a disclosable "Offshore Structure" is critical to the MDR. We note that pursuant to Section 1.2(b) of the Rules that a person or arrangement is "offshore" if they are located in a different jurisdiction to the jurisdiction of residence of the beneficial owner. This broad definition recognises, quite rightly, that the person or arrangement could be located in any jurisdiction in the world.

In this regard, we would note that the expression "offshore" (and "onshore") is frequently used by commentators and stakeholders in a colloquial fashion, and in fact it does not have any consistent application or meaning. For example, in the context currently of global transparency initiatives promoted by governments and international organisations, a higher level of
international disclosure requirements may in fact exist in certain jurisdictions (traditionally labelled by some commentators as “offshore”) than in some large economies.

We suggest that the nomenclature "offshore" used in the MDR is confusing and in fact inconsistent with the technical provisions which simply refer to a different jurisdiction to the beneficial owner.

In our view, the finalisation of the MDR with reference to an "Offshore Structure" as a central definition could lead some commentators and stakeholders to inadvertently conclude that these measures are of narrow application and are not relevant to any jurisdiction outside those jurisdictions who may historically and colloquially have been termed "offshore" jurisdictions.

This could lead to an ineffective and incomplete application of these new measures globally, whereas they should of course be of general and have international application as is clear from the detail of the commentary and indeed the overall objectives of the Bari Declaration and the G7 Ministers as cited in the commentary of addressing arrangements, wherever established, which provide the "shelter of non-transparent structures".

Accordingly, we suggest that it would help achieve these objectives that rather than refer to "Offshore Structures" that definition (and associated references) instead refers to "Non-Domestic Structures". Indeed, this description is itself consistent in terminology with the alternative of a "wholly-domestic" structure described in paragraph 38 of the commentary which falls outside the scope of the arrangements.

We have not had an opportunity to review the MDR in significant detail especially as it relates to Offshore Structures. If there is an additional second consultation round on the MDR we would gladly welcome the opportunity to provide further feedback.

We welcome the efforts of the OECD in the Base Erosion and Profit Shifting (BEPS) project and we have previously provided commentary to the OECD in respect of BEPS. We would be happy to clarify or elaborate on any of points raised in this letter at your convenience.

Yours sincerely,

Maples and Calder
PricewaterhouseCoopers International Limited, on behalf of the Network Member Firms of PwC (PwC), thanks the OECD for the opportunity to provide comments on the Public Discussion Draft on Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures (the “Discussion Draft”). The consultation period for this initial Discussion Draft (five weeks, including the Christmas and New Year break) has been too short to consider fully the range of complex issues which could potentially affect many service providers and taxpayers. Therefore, please treat the comments that follow as only high level preliminary thoughts which do not pretend to be exhaustive.

**Commitment to preventing and identifying evasion**

PwC strongly supports the purpose of the Standard for Automatic Exchange of Information in Tax matters, or Common Reporting Standard (“CRS”), as a significant step in tackling opportunities for tax evasion through the hiding of taxable funds from tax authorities.

Anti-Money Laundering Laws and Regulations in many jurisdictions require professional services firms, such as PwC, to disclose to the relevant authorities any case where there is a reasonable suspicion of money laundering, including tax evasion. In addition, in many jurisdictions there are consequences under criminal and civil laws for tax advisers who assist clients in committing tax evasion. We are careful to avoid situations where we know, or suspect, that a client is or has been involved in tax evasion. Based on our experience, we believe other reputable professional services firms conduct themselves in similar fashion. In addition to statutes and regulations proscribing conduct that might facilitate tax evasion, PwC’s own Global Code of Conduct requires all our people to act with integrity at all times. Transparency is one of the core principles in PwC’s Global Tax Code of Conduct, and PwC firmly supports the principle of transparency with tax authorities that underpins the Discussion Draft.

It follows that we would be in favour of efficient, targeted and proportionate mechanisms to disclose CRS avoidance arrangements and offshore structures that are designed to conceal taxable funds or flows from relevant tax authorities, whether through deliberate circumvention of CRS or through other
means. Such mechanisms could play an effective role in contributing to a fair and transparent financial system.

As specified in the Discussion Draft, mandatory disclosure rules should be designed in such a way that they deter high risk structures and arrangements, and limit the compliance burden placed on low-risk taxpayers and compliant intermediaries. However, we currently have concerns that - without a number of things in the content being clarified - the proposal may impose a significant and possibly disproportionate burden on the vast majority of taxpayers, who are fully compliant with their tax obligations, and on tax authorities. Additionally, over-disclosure (reporting of arrangements that are not the target of the proposals) could itself obscure tax authorities’ ability to identify those arrangements that need to be countered.

Disclosure regimes are an effective deterrent when they can be appropriately targeted against identifiable behaviour; however there is a real risk that if drafted too broadly, the proposals would have the unhelpful consequence of deterring legitimate behaviour (for example establishing a business in a developing country which is not within the CRS). Depending on how the regime operates and is perceived, taxpayers and professional firms may be unwilling to accept the reputational risks of entering into a disclosable arrangement, and this will have the effect of deterring individuals and their professional advisers from undertaking legitimate activity.

We note that the CRS is primarily aimed at financial institutions and we are not in a position to speak for them, though we are aware that many have incurred considerable expense to comply with various reporting and disclosure regimes. We will comment on the effects the proposal may have for tax advisers and taxpayers.

**Intention and effect of the proposals**

The introduction to the Discussion Document refers to the Action 12 report on Mandatory Disclosure Regimes, and specifically to this intention:

“The report sets out the key elements of mandatory disclosure rules that are designed to target the most high risk structures and promoters, while limiting the compliance burdens on low-risk taxpayers.”

The introduction also refers to information sources suggesting that:

“certain professional advisers continue to design, market or assist in the implementation of offshore structures and arrangements that can be used by non-compliant taxpayers to circumvent the correct reporting of relevant information to the tax administration of their jurisdiction of residence.”

The OECD is said to be looking at a range of options (including this proposal) that could be taken to address:

“arrangements designed to circumvent or attempt to circumvent the CRS (“CRS Avoidance Arrangements”) and the use of non-transparent offshore structures to conceal actual beneficial ownership (“Offshore Structures”).”

However, the way the hallmarks have been drafted in the Discussion Draft is much wider than these quotes suggest, such that disclosure would not be limited to arrangements which are actually used to
circumvent the CRS or to conceal beneficial ownership from tax authorities. For example, almost any commercial or personal transactions with a country which has not implemented the CRS would appear to be reportable. These could simply arise because individuals whose family originate in a non-CRS country have decided to move (possibly long before the CRS was envisaged) to a CRS country, and have commercial and family links in both territories.

Unless suitable hallmarks and filters can be found to narrow the requirements, we envisage a level of reporting and investigation (both leading up to that reporting and in reviewing it) which will create significant and disproportionate burdens on tax authorities and taxpayers, as well as tax advisers and other intermediaries as defined in the proposal. Tax authorities run the risk of large numbers of disclosures of innocuous arrangements which will not help in identifying the arrangements that they rightly seek to investigate.

We would be more than willing to contribute to a broad stakeholder group with the aim of assisting with the development of suitable hallmarks and filters. This presumably could also be informed by the types of arrangements that you/tax authorities have become aware of through the OECD’s CRS public disclosure facility and/or the other sources referred to in the Discussion Draft that have given rise to the concerns.

It is clearly a judgement call for Governments how widely they cast the net (through design of the hallmarks) to balance the desire to capture all arrangements that they might want to investigate with a desire not to have a multitude of superfluous reporting that creates an unmanageable burden for tax authorities and hinders identification of genuine “high risk” situations. Too broad a net risks achieving little more than added paperwork for the compliant with opportunities for footfaults that generate disrespect for the law rather than enhanced compliance.

**Retrospection**

The proposal to require retrospection back to July 2014 will create a huge burden on professional advisers trying to identify past events that might be considered to fall within the scope of the hallmarks. In the case of tax advice it might be necessary to review individual files going back a number of years to consider whether the hallmarks apply. This will be very difficult to implement, particularly when the relevant people involved at the time have left an organisation.

Retrospection over such a long period brings its own difficulties. The CRS was adopted by different countries at various times over the period since July 2014, and ascertaining whether arrangements involved countries which had not implemented the CRS at that point in time would require a knowledge of this timetable on the part of all advisers and intermediaries.

We also see a practical difficulty for Governments given that in some countries retrospective legislation is not allowed, or is strictly limited, under domestic law or human rights provisions.

**Definition of “Offshore Structures”**

The definition of an “Opaque Ownership Structure”, which includes a generic element that incorporates the situation in which “it is reasonable to conclude that it is designed to have, marketed as having, or has the effect of allowing a natural person to be a Beneficial Owner of a Passive Offshore Vehicle while obscuring such person’s Beneficial Ownership or creating the appearance that such person is not a Beneficial Owner” seems very unclear when envisaging how to interpret it in practice.
We acknowledge the reference to evidence of arrangements being set up to hide beneficial ownership for tax or other regulatory reasons, and understand the rationale for wanting to identify these. We note though that entities such as trusts are used for many purposes - to protect the interests of young or vulnerable beneficiaries, protect wealth intended for future generations - and in many cases were established a long time ago by previous generations. The critical thing is to find a way of identifying those where proper reporting of taxable funds to relevant tax authorities is not taking place, amongst the multitude of those where that is not the case.

With this in mind the proposals could be amended so that only situations where an intermediary is aware that a structure is being used to obscure beneficial ownership for tax or money laundering purposes are within the scope of the proposals. The most straightforward way to do this might be to remove the reference to something which merely “has the effect of” allowing a natural person to be an “obscured beneficial owner”, or alternatively to make it clear that it is “obscuring” from relevant tax authorities that is the concern, together with adjusting the specific hallmark examples.

Multiple intermediaries

It is suggested in the Discussion Draft that duplicate disclosure in respect of the same arrangement should be avoided in the same jurisdiction (or a Partner Jurisdiction). This applies whether the information on an arrangement has previously been disclosed to the tax authority by that intermediary or another intermediary.

There is a considerable practical difficulty where a large number of independent intermediaries are all involved in a particular arrangement, particularly given that the definition of arrangement in the proposal is so wide. They may not be known to each other and otherwise any one intermediary may not be aware of whether another intermediary has made a report. The final proposals could address this by identifying in objective terms which intermediary ought to be primarily responsible.

Further, with the exception of a Partner Jurisdiction in relation to various head office/branch arrangements, the limitation described in the Discussion Draft applies only in relation to reporting within one particular jurisdiction. Multiple reporting to multiple jurisdictions seems to be an entirely feasible occurrence, but one that equally would benefit from being constrained.

Limiting reporting to actual transactions/implemented arrangements

The trigger for reporting by an intermediary is 15 working days from an arrangement being made available to a taxpayer, and it is proposed that the report will include details concerning that taxpayer. This may well give rise to situations in which taxpayers’ details are reported even though they immediately reject any approach by someone promoting an arrangement. This was surely not intended and would be an undesirable and inequitable outcome - no taxpayer should be identified in connection with an arrangement which they decided not to put in place.

We would recommend consideration of a similar approach to the UK DOTAS rules, whereby a promoter is only required to report personal details of a taxpayer when the promoter first becomes aware of a transaction implementing the disclosable arrangements. That is separate to the requirement to disclose the arrangement itself to HMRC at the point it is first made available.
Next steps

We would recommend, and are keen to participate in, further discussions involving business and wider stakeholder groups on the issues involved in this consultation. We suspect that the number of responses to the Discussion Draft may not be as large as might otherwise have been the case because it appears at the outset to be predominantly about avoidance of CRS reporting, rather than the wider scope that the currently proposed hallmarks cover.

If you would like to discuss in more detail some of the points to which we refer above please contact me or any of the people whose contact details are provided below.

Yours faithfully,

Stef van Weeghel, Global Tax Policy Leader
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T: +31 (0) 887 926 763

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<th>PwC Contact</th>
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## Comments on the OECD’s Draft for Public Consultation on Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

**Date Submitted:** 15 January 2018

**Name of entity providing comments:** Standard Chartered Bank

**Contact Details:**
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**To:** The International Co-operation and Tax Administration Division, OECD/CTPA

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<th>S/N</th>
<th>Section</th>
<th>Description</th>
<th>Comments</th>
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<tr>
<td>1.</td>
<td>Chapter 1, Section 1.1, Paragraph 16</td>
<td>Test of “reasonable to conclude”</td>
<td>The Consultation Paper provides that the test is to be determined from an objective standpoint without reference to the subjective intention of the persons responsible for the design, marketing, or using the scheme. The Paper provides further that the test will be satisfied where “a reasonable person in the position of a professional adviser with a full understanding of the terms and consequences of the arrangement and the circumstances in which it is designed, marketed, and used, would come to this conclusion.”</td>
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The test may be read to require a financial intermediary to determine how a “reasonable person in the position of a financial adviser” would view an arrangement or structure to determine whether the structure is “designed to, marketed as or has the effect of circumventing CRS Legislation or exploiting an absence thereof.”

To what extent will the OECD or tax authorities interpret this language to require financial institutions to determine how a financial adviser would objectively view a transaction, e.g., by engaging a third-party adviser to review the transaction to determine whether disclosure is required, or will reasonable suspicion be sufficient to require disclosure to the tax authorities? If it is
| 2. | Chapter 1, Section 1.1(a), Paragraph 17 | Financial investments that are not Financial Accounts | The Consultation Paper refers to e-money or the issuance of certain types of derivative contracts by financial institutions as examples of financial investments that could have the core functionality of a financial account but which include features that are designed to take it outside the definition of a Financial Account for CRS purposes.

The OECD may wish to clarify whether other types of investments may fall under this section, including investment properties and other, similar types of investments. |

| 3. | Chapter 1, Section 1.1(c)(i), Paragraph 22 | Test for arrangements that disguise the identity of the Account Holder | Paragraph 22 of the Consultation Paper refers to examples of arrangements and structures that will not be expected to fall within the specific hallmark in Section 1.1(c)(i) “unless they were designed or marketed as, part of a CRS Avoidance Arrangement or they contained features that would lead a reasonable person to conclude that the arrangement, as a whole, would have the effect of undermining the due diligence procedures applied by financial institutions under the applicable CRS legislation.”

The test here refers only to the “reasonable person” and not a “reasonable person in the position of a financial adviser” referred to in Section 1.1.

We seek clarification on the applicable test with respect to Section 1.1(c)(i). |

| 4. | Chapter 1, Section 1.1(c)(ii), paragraph 24 | Test for arrangements that disguise the residency of account holders and controlling persons | The Consultation Paper provides that presenting a tax residence certificate to a financial institution as proof of residence to undermine due diligence procedures would fall within the hallmark in Section 1.1(c)(ii) as an arrangement for which “it is reasonable to conclude” that it has the effect of undermining or exploiting weaknesses in due diligence procedures.

We seek clarification on the applicable test, and... |
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<td>5.</td>
<td>Chapter 1, Section 1.1(d), paragraph 27</td>
<td>Test for arrangements that exploit Active NFE status or avoid Controlling Person status</td>
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<td>The Consultation Paper refers to the standpoint of a “reasonable person” in assessing whether an arrangement falls within the scope of this hallmark.</td>
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<td>We seek clarification on the applicable test, and whether this is to be assessed from the standpoint of a reasonable person or a “reasonable person in the position of a financial adviser.”</td>
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<td>6.</td>
<td>Chapter 1, Section 1.1(d), paragraph 28</td>
<td>Non-reportable payments to an Account Holder</td>
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<td>The Consultation Paper clarifies that arrangements that disguise or convert a payment to an Account Holder or Controlling Person into one that is not reportable under the CRS constitute CRS Avoidance Arrangements.</td>
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<td>We seek clarification on whether the OECD will require Intermediaries to assess the reasonability of payments, and if so, whether an Intermediary, such as a Financial Institution, is required to consolidate information and knowledge about the account with that contained in different parts or branches of the Intermediary.</td>
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<td>7.</td>
<td>Chapter 2, Section 1.2, paragraph 36 and other parts as stated in the most right hand box of this row</td>
<td>Other sections being mentioned</td>
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<td>The labelling of the other sections being mentioned is inconsistent, as it should be Section 1.2 rather than Section 1(2). This is also noted in the other parts of the document listed below:</td>
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<td></td>
<td>• Reference of 1(4)(a) in Chapter 2, Section 1.4(a), paragraph 43</td>
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<td>• Reference of 2(4)(a) in Chapter 4, Section 1.1, paragraph 79</td>
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<td>• Reference of 1(c) in Chapter 4, Section 1.3, paragraph 83</td>
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<td>• Reference of 1(a)(iii) in Chapter 4, Section 5, paragraph 92</td>
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<td>8.</td>
<td>Chapter 2, Section 1.2, paragraph 37</td>
<td>Elements to treat an entity as active</td>
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| 9. | Chapter 2, Section 1.4(a), paragraph 43 | Undisclosed nominators | The last two sentences of this paragraph provide that “A nominee will only fall within the specific hallmark in Section 1(4)(a), however, where the nominee is undisclosed. A nominee shareholder whose status as a nominee has been declared to the company on a timely basis and is included in the relevant register should not be treated as an undeclared nominee for the purposes of this paragraph.”

The OECD may wish to clarify if the word “nominee” as marked in underlined in the first sentence above should instead be referred to as “nominator”. The OECD may also wish to clarify if the second sentence is intended to refer to the nominator rather than the nominee. |
| 10. | Chapter 2, Section 1.4(b), paragraph 44 | Typographical error | “Another common feature.....obscure the identity of the beneficial owner, either by making it difficult to identify the natural persons...” |
| 11. | Chapter 3, Section 1.1, paragraph 53 | Definition of “intermediary” | The definition of “Intermediary” covers Promoters and Service Providers in circumstances where that Promoter or Service Provider can “reasonably be expected to know that the arrangement was an Offshore Structure or CRS Avoidance Arrangement.”

We seek clarification on whether the test of reasonableness is from the objective standpoint of a financial adviser or a reasonable person. |
| 12. | Chapter 3, Section 1.1, paragraph 52 | Requirement to disclose a CRS Avoidance Arrangement within 15 working days | The model text sets a time limit for disclosure that is 15 working days after the scheme has been made available or the relevant services are provided.

We seek clarification on the obligations of an Intermediary who acquires knowledge about the Arrangement that results in the Intermediary... |
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<th>being reasonably expected to know that the Arrangement is a CRS Avoidance Arrangement, if such knowledge is acquired after 15 working days from the time that the Arrangement was made available or the relevant services provided.</th>
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<td>13.</td>
<td>Chapter 3, Section 4, paragraph 72</td>
<td>Special rule for disclosure of Arrangements entered into after 15 July 2014 but prior to the effective date of the rules</td>
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<td>With respect to high-value accounts, “Promoters” must disclose a CRS Avoidance Arrangement where that Arrangement is entered into after 15 July 2014 but before the effective date of the rules, irrespective of whether that person provides Relevant Services in respect of that Arrangement after the effective date.</td>
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<td>This rule applies retrospectively and is in effect, an ex post facto rule. This retroactively changes the legal consequences of activities conducted or committed before the enactment of the rule. Laws with an ex post facto effect may be inconsistent with or expressly prohibited by the local regulations in certain jurisdictions, particularly if criminal consequences are to apply. Certain common law jurisdictions may expressly prohibit retroactive criminal legislation.</td>
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<td>Retroactive laws that have a criminal effect are also inconsistent with international treaties. For example, the Universal Declaration of Human Rights provides in Article 11, paragraph 2, that no person shall be held guilty of any criminal law that did not exist at the time of offence nor suffer any penalty heavier than what existed at the time of the offence.</td>
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<td>14.</td>
<td>Chapter 4, Section 1</td>
<td>Information that is required to be disclosed</td>
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<td>The Consultation Paper provides that the information that an Intermediary is required to disclose under paragraph (1) must be in the form as set out in Schedule 2. However, there is no Schedule 2 provided to the model rule or Consultation Paper.</td>
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<td>The OECD should include a template Schedule 2 that provides the format of reportable information as mentioned, for completeness.</td>
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<td>15.</td>
<td>Chapter 4, Section 1.2, paragraph 82</td>
<td>The obligation to report information – description of Arrangement</td>
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<td>The description of the CRS Avoidance Arrangement or Offshore Structure should, according to the Consultation Paper, explain the “overall objective of the arrangement or structure, identify the persons involved, and their role in the...”</td>
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arrangement or structure and provide an explanation of the entities, steps and transactions that make up the structure or arrangement including the underlying investment.”

Whilst the rules provide that the details of the Arrangement or Structure should be reported to the extent such information is within the Intermediary’s “knowledge, possession or control”, we propose the rules or commentary should further clarify that the obligation to provide a description should be to the best of knowledge, information, and belief of the Intermediary.

The knowledge of an Intermediary about a structure or arrangement will differ greatly depending on its role and involvement. The obligation to provide a description of the arrangement or structure should be to the best of the Intermediary’s knowledge, information, and belief.

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<td>16.</td>
<td>Chapter 4, Section 1.2, paragraph 82</td>
<td>The obligation to report information – description of Arrangement</td>
</tr>
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</table>
| 17. | Chapter 4, Section 2, paragraphs 85 to 86 | No disclosure required where contrary to obligations of Professional Secrecy | The attorney-Intermediary is required to notify the home country’s tax authority of the fact that he or she has information on an Avoidance Arrangement or Offshore Structure that he or she is not required to disclose due to legal professional privilege.

The OECD may wish to clarify the rationale for this requirement, given that the attorney-Intermediary will not be able to provide any detail on the arrangement or structure. Nonetheless, as the objective of the model rules is to keep the compliance burden on Intermediaries to a minimum whilst still capturing the information that is likely to be most relevant from a risk assessment perspective, the OECD may wish to clarify the extent of information that is required to be provided by attorney-Intermediary during the notification process to the home country’s tax authority, as the attorney-Intermediary may otherwise disclose information that is protected under the legal professional privilege. The attorney-Intermediary could be determined to have contravened either of the laws, i.e., this Mandatory Disclosure Rules or the Professional
|   | Chapter 4, Section 3, paragraph 87 | Avoidance of duplicate disclosure | The model rules provide that an Intermediary shall not be required to disclose any information on an Arrangement that has previously been disclosed to that tax authority by that Intermediary or another Intermediary. The OECD may wish to clarify whether an Intermediary is required to undertake any action to verify or evidence that the other Intermediary has indeed made the disclosure to the tax authority. In addition, the OECD may wish to clarify if the tax authority of each CRS participating jurisdictions is expected to maintain a list of such disclosures made by all Intermediaries. The concern is how one Intermediary will have knowledge of what one or more other Intermediaries have (or have not) disclosed.

The model rules also provide that where there are multiple intermediaries in respect of the same CRS Avoidance Arrangement, exclusion could also apply so that only one disclosure needs to be filed in respect of the same Arrangement. The OECD may wish to clarify that, where there are multiple intermediaries but the disclosure has not been made by any of the intermediaries, which Intermediary should have the requirement to disclose, e.g., whether it is the Intermediary that is closest to the client, that is maintaining the financial account or that is the Promoter. |
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<td>19.</td>
<td>Chapter 4, Section 4, paragraph 90</td>
<td>Reportable Taxpayer required to disclose in certain circumstances</td>
<td>The Consultation Paper proposes a direct disclosure obligation on Reportable Taxpayers in two cases. Because of the way these points are drafted, it should be clarified that these two cases are not to be read in conjunction but are two separate cases where a Reportable Taxpayer will be obliged to make a direct disclosure.</td>
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<td>20.</td>
<td>Chapter 4, Section 4, paragraph 91</td>
<td>Reportable Taxpayer required to disclose in certain circumstances</td>
<td>The Consultation Paper provides that “Intermediaries would generally be expected to provide their clients with a copy of any disclosure that had been made in respect of a reportable arrangement so that the clients could establish that they had no further disclosure obligations under this section.” The OECD may wish to clarify whether the obligation to provide “clients” with a copy of the disclosure applies in all scenarios where an Intermediary makes a disclosure, and the content</td>
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of the disclosure to the “client”.

Further, we seek clarification on whether the obligation to provide “clients” with a copy of the disclosure may have implications on tipping off restrictions under Anti-Money Laundering regulations, and, to the extent that there are any such implications, we seek clarity on the OECD’s expectations on resolving conflicts between the two.

| 21. | Chapter 4, Section 5.2, paragraph 95 | Partner Jurisdiction limitation | The Consultation Paper provide that a Partner Jurisdiction is limited to those jurisdictions that have introduced mandatory disclosure rules with similar hallmarks and disclosure requirements, as well as those that have agreed to exchange of information. The OECD may wish to clarify if it will make public and maintain a list of these jurisdictions in its portal. |
| 22. | Chapter 5 | Penalties | The OECD may wish to clarify what its recommendation is with respect to the enforcement of the model rules and the penalties, that is, how will breaches of the rules be detected, if Intermediaries fail to disclose CRS Avoidance Arrangements or Offshore Structures. |
| 23. | Chapter 5 | Penalties | The OECD may wish to make recommendations on the appeal process for Intermediaries and Reportable Taxpayers who are dissatisfied with the tax administration’s decision or penalty. |
STEP Response to OECD consultation on Mandatory Disclosure Rules for addressing CRS avoidance arrangements and offshore structures

1. STEP is the worldwide professional association for those advising families across generations. We help people understand the issues families face in this area and promote best practice, professional integrity and education to our members.

2. STEP takes this opportunity to comment on the Consultation on Mandatory Disclosure Rules for addressing CRS avoidance arrangements and offshore structures given the importance of the issue to its members and their clients.

3. This issue has been under consideration by the OECD since at least 5 May 2017. The consultation document was released on 11 December 2017 which invited submissions by 15 January 2018. The public discussion draft contains elements of retrospectivity, proposes the creation of numerous criminal offences and significantly limits the capacity of persons to receive confidential independent advice about their legal position, irrespective of whether or not their intention is the evasion of tax or another financial crime.

4. These are far reaching changes and raise important issues of principle which should not be overlooked. In addition the current proposals themselves do not appear to have taken into account possible consequences.

5. In the circumstances the consultation period allowed is inadequate. In the time available it has not been possible to fully analyse the proposals and before matters proceed further the OECD should provide for a longer period of consultation and give consideration to how the proposals impinge upon fundamental human rights some of which are constitutionally protected in many of its member jurisdictions, including:
   a) The undesirability of imposing on citizens a legally enforceable duty to inform on one another
   b) The challenge to the rule of law posed by retrospective legislation: and
   c) The entitlement of citizens to obtain confidential independent professional advice about the application of the law to their particular circumstances.

Executive Summary

6. STEP members encourage and enable clients to pay the right amount of tax at the right time. Tax compliance is a collective objective our members share with the OECD and its member jurisdictions. How to achieve it has to be well thought through and kept simple and prospective.
7. The responsibility of legislatures is to enact intelligible laws which achieve the purpose of the legislature. The responsibility of citizens is to comply with those laws and within those constraints to conduct economically viable enterprises or activities. Enacting a law which criminalizes conduct such as failing to report a scheme “otherwise undermining the intended policy of the CRS” (or indeed requires citizens to know what that is, to the extent it is not expressed in the legislation) does not satisfy that requirement.

8. It is not as if the various national laws which implement CRS are simple and clear, and the obligations they create have many undesirable consequences unconnected with the fight against tax crimes.

9. We accordingly have considerable concerns with the draft rules as they stand. For example, in the absence of specific or implied recognition of legal professional privilege the assertion that “Mandatory disclosure rules do not generally require an attorney, solicitor or other legal representative to disclose any information that is protected by legal professional privilege or equivalent professional secrecy obligations” is incorrect. It is vital for confidence in the legal system that no further regulatory creep affects this fundamental aspect and we are therefore concerned with the meaning of the word “generally” in this context. We look forward to the overriding principles of legal professional privilege and professional confidentiality being strongly re-asserted in the OECD’s final recommendations.

10. We also have a number of concerns over areas such as the scope of the hallmarks; the alignment of the hallmarks with existing or proposed models that will come into being in the EU; the impact on legal professional privilege and professional confidentiality generally; and the definition of ‘opaque offshore structure’, particularly the pejorative use of the term offshore.

11. More generally, to work, any rules have to be objective.

12. We note the hallmark approach as a possible framework for targeting the most high risk structures and promoters, while limiting the compliance burdens on low-risk taxpayers. We are deeply concerned however that the hallmarks as they stand are defined much too widely and will apply to arrangements which are not intended to be covered by these rules but will not apply to arrangements which should be covered by these rules.

13. Given the nature and extent of these concerns, we consider the very short length of the consultation period over the holiday season does not allow for adequate discussion and investigation of the consequences of such changes. We believe that further consultation is needed both with the larger financial institutions (such as the banks) and the smaller reporting financial institutions (such as trustees represented by STEP) to ensure that the hallmarks are appropriately
targeted to address all high risk structures and promoters and at the same time to exclude arrangements which are not intended to be caught by these rules.

14. We ask that the new MDR be aligned/conform with other models, such as the EU’s DAC 6 legislation. For example, we note that there are currently a number of differences between the DAC 6 and the OECD proposals in particular.

15. We do not believe it is necessary to have a definition of opaque offshore structures in addition to the general hallmark relating to CRS avoidance arrangements. Instead we would propose that it may be simpler to have a single category of CRS avoidance arrangements and to incorporate any of the specific hallmarks currently contained within the section dealing with opaque ownership structures where relevant.

16. In revising far-reaching guidance, it is important to ensure that international initiatives to improve tax transparency and combat evasion are proportionate and evidence based. Such a short period of consultation cannot possibly allow for the collection of such evidence especially given the short period of a few months that has elapsed since the first wave adopters reported on calendar year 2016 in the summer of 2017. As such, we would strongly request a further period of reflection and consultation before final guidance is issued to allow for more considered responses and greater scenario planning.
MODEL MANDATORY DISCLOSURE RULES AND COMMENTARY

Definition of a CRS Avoidance Arrangement

17. The discussion draft emphasises that the intention is to target the most high risk structures and promoters. We support this intention.

18. The rules should apply in circumstances where the dominant purpose of the arrangements is to avoid CRS reporting and/or to obscure beneficial ownership. They should not apply in circumstances where the arrangements in question represent a legitimate commercial choice (such as investing or using other financial services in the United States).

19. The intermediary to whom the rules should apply should be the person involved in designing or implementing the arrangements with that purpose in mind or, if that person does not have a reporting obligation under these rules (e.g. because they are based in a non-participating jurisdiction), another person materially involved in the arrangement who has actual knowledge that the arrangement has been designed or implemented with that purpose in mind and that the person who would otherwise be primarily responsible is not under a reporting obligation should be applicable.

20. CRS sets out rules for Financial Institutions to follow in obtaining information for the purpose of satisfying their reporting obligations. CRS sets out objective indicia to help the Financial Institutions obtain and report the correct information. A “reasonableness” test applies under which Financial Institutions are entitled to rely on the information they have unless they “know or have reason to know” that the information is incorrect or unreliable. A relationship manager inquiry is required only where the individual concerned has “actual knowledge that the Account Holder is a Reportable Person”. In comparison as currently drafted the MDR applies no “reasonableness test” and requires no actual knowledge or clear information on the part of the Financial Institution involved in the arrangement as it will be obliged to make a report where it is “reasonable to conclude” that the arrangement was designed or marketed so as to circumvent CRS. This is to be determined from an objective standpoint without reference to the subjective intention of the persons responsible for the design, marketing or using the scheme (i.e. the test will be satisfied where a reasonable person in the position of a professional adviser with a full understanding of the terms and consequences of the arrangement and the circumstances in which it is designed, marketed and used, would come to this conclusion). In order to be compliant this would appear to require a level of expertise in relation to CRS on the part of those involved which is unlikely to be there in most cases. This will only lead to over-reporting or under-reporting. There also appears to be no defence. By way of comparison the UK’s Criminal Finances Act 2017 provides...
a defence where the relevant entity has arrangements in place to prevent the
types of behavior the legislation is aimed at.

21. The hallmarks are currently broadly drafted, likely to lead to catching many
more than the high risk structures the MDR are intended to catch. This could
lead to large volumes of unnecessary reporting and onerous administrative
burdens, the consequence being that the logistics of monitoring structures
becomes unmanageable in practice. In particular, bringing arrangements within
the definition simply because they have the effect of avoiding CRS or obscuring
beneficial ownership will make the regime unworkable from a practical
perspective. Furthermore, at a micro-level, it may perversely result in no CRS
reporting of a structure that is caught by the MDR, because obscuring the
beneficial ownership of such structures was never considered by any of those
involved in the arrangements, even though this may be one of the effects of the
arrangements.

22. The hallmarks are also not appropriately targeted and arguably would not catch
all arrangements which have been designed to circumvent CRS reporting
(although we note that the hallmarks are not intended to be exhaustive).

23. We believe that the reporting obligation and the hallmarks should be reviewed in
detail and amended so that they are appropriately targeted both to identify the
offensive arrangements but also to ensure that the right information is being
reported by the right people and that those who are not knowingly involved in
any such arrangement are not penalized due to a lack of expert knowledge.

24. There is insufficient time to do this properly in the timetable set for responses to
be submitted. We believe that a more detailed dialogue should be held with
Financial Institutions and other interested parties to identify how these rules can
best be implemented.

Definition of an offshore structure

25. We are not convinced there is any evidence at present to support the need for a
separate rule relating to "opaque offshore structures" as well as the more general
hallmark relating to CRS avoidance arrangements. This is especially the case
because of the widespread regulation of trust and corporate service providers in
many so-called 'offshore' jurisdictions who have their own obligations to
ascertain beneficial ownership of structures which they help to establish or
administer.

26. This is to some extent acknowledged in paragraph 5 which explains that the
purpose of the hallmark relating to opaque ownership structures is to
"supplement the disclosure rules for CRS avoidance arrangements".
27. We believe it would be simpler to have a single category of CRS avoidance arrangements and to incorporate any of the specific hallmarks currently contained within the section dealing with opaque ownership structures where relevant. This approach would have the added advantage of removing the onshore/offshore distinction and focus instead on whether the arrangement is intended to circumvent or frustrate CRS. The belief is widely that much (indeed, by volume perhaps most) financial crime occurs not in offshore centres but onshore and a focus on offshore arrangements is likely to divert enforcement activity from the areas of greatest significance.

28. The definition of "offshore" for the purposes of determining whether a structure is an opaque offshore structure is currently much too broad as it only requires one beneficial owner to be resident in a jurisdiction which is different to that in which the structure is established.

29. There will be many situations where what most people would think of as a wholly domestic structure becomes an "offshore" structure for the purposes of the proposed rules because a single beneficial owner lives in a different jurisdiction. Given the breadth of the definition of "beneficial owner" (particularly in a trust context), the individual who renders the structure "offshore" may have an insignificant interest.

30. If the individual is a beneficial owner for CRS purposes, they should still be reported under CRS even if their beneficial ownership is obscured. If the result of the arrangements is that the Relevant Financial Institution is not told that the individual is a beneficial owner, surely this would already fall within the definition of a "CRS avoidance arrangement" which reinforces the point that there is no need for a separate hallmark relating to offshore structures (which in turn would resolve the debate about the circumstances in which a structure should be treated as being "offshore").

Disclosure requirements on intermediaries

31. The hallmarks in paragraphs 1.4(d) and (e) in Chapter 2 (Offshore Structures) are suitable if the rules are amended so that there is only a duty to report where the intermediary intends to avoid CRS (or has actual knowledge that there is such an intention) but are impractical where there is no intention to avoid CRS. It is highly likely that the intermediary will have little awareness whether these hallmarks apply (having not turned their minds to disclosure/record-keeping requirements). This could also provide an incentive for those with real avoidance intentions to seek out less knowledgeable advisers so as to minimise the risk of being reported.
32. This illustrates why the disclosure obligations should be limited to circumstances where advisers specifically seek out such jurisdictions (i.e. where there is an intention to avoid CRS) rather than including intermediaries who happen to be involved with structures established in such jurisdictions and where there is no CRS avoidance intention.

33. It is not clear whether an intermediary has to make a disclosure if they are satisfied that any relevant individual is fully tax compliant in their home jurisdiction. The draft rules appear to say that there still needs to be a disclosure of the arrangements, even though there is no "reportable taxpayer" who needs to be referred to. However, the commentary (paragraph 75) suggests that there is no need to make a report at all.

34. If the ultimate intention is (as we understand it to be) to detect tax evasion/non-compliance, this would suggest that there should be no need to make a report at all if the intermediary is satisfied that the taxpayer is fully compliant.

35. In this context, seeing a copy of an individual's tax return may not be the correct way of verifying this as, if there is no tax to pay, there may be nothing about the structure on the tax return. Instead, an acceptable alternative might perhaps be a suitable confirmation from any professional in the relevant jurisdiction who is responsible for filing the individual's tax return or otherwise providing tax advice in circumstances where the individual, whilst tax resident, is not obliged to file a return for the year in question or has no taxation obligations with respect to the structure.

36. The requirement to report any arrangement entered into after 15 July 2014 will impose a significant burden on intermediaries if the hallmarks remain unchanged. If they were amended so that they only apply where the intention to avoid CRS was a dominant purpose of the arrangement, the position would be materially improved but could still pose a significant compliance burden depending on how the rules are interpreted. For example, it would seem that advice that the consequences of a protector resigning or a trust distribution being made before (rather than after) 31 December 2015 in a first wave jurisdiction which results in no CRS reporting might be caught if an intention to avoid CRS reporting could be inferred. For example, in the case of a Protector with standard powers, the Protector will not be liable to pay tax with respect to the trust simply because he is a Protector. There is no risk of tax evasion or obscuring beneficial ownership of the trust by an individual resigning as Protector before 31 December 2015. As the effect of him resigning means that he is not reported as a “Controlling Person” it might however be inferred that the purpose of him resigning was to avoid him being reported under CRS.
37. We have very grave concerns about the principle that retrospective reporting should be considered appropriate especially in the absence of any objectively published evidence. Retrospective tax reporting is not unlawful in the UK although some jurisdictions will have retrospective legislation forbidden by their constitutions. We believe that for fairness and accuracy the arrangements should have a common application which applies consistently across every jurisdiction and that in any event retrospective legislation is fundamentally inconsistent with the rule of law.

38. We also note that in a substantial number of jurisdictions, including many of the traditional ‘offshore’ jurisdictions, any intermediary who knowingly facilitated tax evasion would already have committed an offence in their jurisdiction. Instead, we would ask that a prospective-only application with sufficient lead time to develop effective systems be put in place.

39. The 15 day time limit for disclosure is extremely onerous. Such a time limit may be appropriate for a promoter where they are marketing their scheme which is intended to circumvent CRS. However, if there is no requirement for intention or if the intermediary is a service provider (rather than a promoter), 60 days (or possibly longer) seems more appropriate.

Information reporting

36. Although the current draft states that “Mandatory disclosure rules do not generally require an attorney, solicitor or other legal representative to disclose any information that is protected by legal professional privilege or equivalent professional secrecy obligations” it is essential that legal professional privilege be correctly understood and strongly and robustly defended in the final version.

37. By providing that in such circumstances the client will have the obligation to make the report, legal professional privilege is destroyed in any event. The purpose of legal professional privilege is to enable the client to have confidential legal advice.

38. Generally the position is clear that communications and associated documents are not legally professionally privileged if they are part of the furtherance of a crime or fraud. Many governments recognise that legal professional privilege is a vital part of the legal system. We ask therefore that the MDR adopt the same stance.

39. In a taxation context, the advice will frequently be given by a tax professional who is not a lawyer (or, even if he or she is, may not hold a practicing certificate.) This needs to be recognized in the proposals.

Penalties
40. It is a logical conclusion if there is to be a reporting requirement that there should be penalties and sanctions for high risk structures and promoters who design and implement arrangements with the dominant intention of circumventing CRS and obscuring beneficial ownership, those that the MDR are targeting. As it currently stands, the MDR is likely to catch a large number of legitimate arrangements and intermediaries that the guidance does not intend to cover. The appropriate setting of penalties therefore depends on ensuring that the final draft of the MDR is proportionate.

41. A material point to be borne in mind here is the inconsistent application of CRS rules in different jurisdictions. This has been apparent to us in our discussions with our Members and in our participation in the BIAC group. Where such inconsistency results in confusion as it can easily do, the approach taken to applying penalties on an automatic basis should be mitigated with a reasonable excuse principle.

42. Also consideration should be given to ensuring that Financial Institutions who have policies in place to ensure (as far as possible) that employees and agents with whom they work do not knowingly enter into CRS avoidance arrangements which are not reported under the MDR have a defence to the application of these rules where they inadvertently fail to report.

Conclusion

43. The proposed method of the hallmark approach is a logical way to proceed but we have significant concerns that the hallmarks as currently drafted are too broad and fail to target all types of arrangement to be fully fit for purpose.

44. We would also welcome clarification and tighter drafting around a number of definitions.

45. In addressing the potential changes that the guidance contained in this consultation will cause, we believe that a considered analysis of the effect that the MDR has on the competitiveness of TCSPs be undertaken in conjunction with the cumulative effect of the regulatory changes on the sector before any final proposals are implemented. This will include more detailed scenario planning than has occurred to date.

46. STEP will participate in future consultations and discussions on the MDR where we hope to discuss these points in further detail.
By E-Mail only
The Organisation for Economic Co-operation and Development (OECD)
International Co-operation and Tax Administration Division, OECD/CTPA
MandatoryDisclosure@oecd.org

Zurich, 15 January 2018

Public Consultation: Mandatory Disclosure rules for CRS Avoidance Arrangements and Offshore Structures

Dear Madam, dear Sir

We have taken notice that on December 11, 2017, the OECD has published a discussion draft for public consultation of mandatory disclosure rules for CRS Avoidance Arrangements and Offshore Structures (the “Disclosure Rules”).

The Swiss Association of Asset Managers (SAAM) takes the opportunity to comment on this draft for public consultation as follows:

I. The Swiss Association of Asset Manager (SAAM)

The Swiss Association of Asset Managers (SAAM) is the leading industry association of independent asset managers in Switzerland and has about 1'000 members. It was established in 1986 with the objective of creating a seal of approval for independent asset managers through self-regulation. As the leading Swiss trade association in the industry and the recognised centre of competence and service provider for independent asset managers the association is deeply involved in all political and regulatory activities concerning its members and the entire profession. SAAM also actively promotes training and continued education of investment professionals in Switzerland.
SAAM from an early stage had been involved on a national and international level in many activities around the development of the CRS and its deployment in Switzerland. The association has been and is involved in the industry consultation group established by the Swiss Federal Tax Administration with the goal supporting the administration in the implementation of the CRS in this country.

The Director of the OECD Centre for Tax Policy and Administration, Mr. Pascal Saint-Amans, has honoured SAAM’s activities with his participation at the association’s annual general meeting in May 2013 in Montreux. Mr. Saint-Amans participated at round table discussions with members of the Swiss parliament and national experts in international taxation. His clear and unambiguous statements regarding the importance of safeguarding fundamental rights of the individuals concerned, in particular data protection and basic human rights, when implementing the CRS then still being in a relatively early project status.

Our members have not forgotten Mr. Saint-Amans open mindedness and his dedicated participation in the spontaneous discussions with our members after the round table event.

II. General Comments on the Disclosure Rules

The Disclosure Rules purport to provide better intelligence on design and supply of schemes which may lead to the avoidance of reporting under the CRS. Further, the Disclosure Rules shall “act as a deterrent against the marketing and implementation” of such schemes.

The Disclosure Rules contain a large number of definitions of what the OECD would want to see as avoidance arrangements and sets forth disclosure and information obligations for legal entities and individuals towards their national tax authority.

The objects of the reporting to be made are extremely broad. Not only any arrangement that aims at circumventing any CRS Legislation is to be reported, but also any arrangement that may have such (side or even undesired) effect shall be reportable. The simple arrangements which results in an entity qualifying as Active NFE (e.g. the establishment of an operating business with money that previously has been held in a Financial Account) shall become a reportable arrangement.

Such broad reporting would encompass any normal business transaction which converts financial investments into assets of an operating business. Such reporting duties are simply not manageable by institutions and individuals subject to such obligations. In particular, small investment advisors that not only manage client’s bankable assets but advise clients on a holistic and broad basis with respect to the financial, taxation, retirement and domiciliation aspects and needs may not cope with such broad duties. In such a context every advisory situation that may involve two jurisdictions (everything that is not home country is off shore..) would automatically generate a related reporting – except when not reportable financial assets would become such.
But the Disclosure Rules do not stop there. The definition of CRS Avoidance shall also encompass the choice of residence of individuals. Giving individuals advice related to the election of their domicile, thus, becomes an activity apparently to be deterred. Individual civil liberties do not seem to anything of value to OECD. Mobility, also on an international level, is an important element of cooperation and sound and sustainable economic development. The draft Disclosure Rules directly attack the fundamental principles of the OECD as laid down in the founding charter, where preservation of individual liberty as an important pillar of an international community is recognized.

SAAM objects to such irresponsible regulation of everything that is wealth related advice to clients. The burden of new reporting obligations would be unbearable for small businesses in the field of investment advice. The outrageous number of useless reports would clog resources in the administration that should and could otherwise be used for useful purposes.

SAAM requests the OECD to abandon the project Mandatory Disclosure rules for CRS Avoidance Arrangements and Offshore Structures.

III. Specific Comments on selected Rules

The below comments on selected rules formulates specific criticism on some of the rules developed in the Disclosure Rules.

These comments are not exhaustive but illustrate with all clarity that the Disclosure Rules are unsound from their basis, are in conflict with other recommendations and rules of the OECD as well as in flagrant contradiction with fundamental goals and intentions of the OECD.

A. CRS Avoidance Arrangement

It is unsound policy to extend the definition of avoidance arrangement to any scheme, advice or conduct that – while pursuing legitimate goals – has the side effect of resulting in no reporting under CRS.

It is against the concept of freedom of speech to impose reporting duties on simple notion of communicating information on countries that have no CRS Legislation and the consequences of such absence. Implicitly, also criticism on such countries will no longer be possible without reporting that such communication would become a reportable situation. In the end, even criticism on non-implementation or sub-standard-implementation of the CRS would be in scope of the Disclosure Rules.

Proper and honest investment advice will be jeopardized with the inclusion of the transfer of funds from within the scope of CRS to outside. Objective investment advice should be subject to reporting duties even if the result of its implementation would be less reporting under CRS. The CRS covers
financial accounts and financial assets and no other asset classes. Investment professionals should not be hindered from investing in non-reportable assets and from giving respective advice to clients.

B. Offshore Structure

The definition of “offshore” is a flagrant attack on cross border-holdings which are inevitable in smaller countries with strong economic ties to other (including neighbouring) countries. The extremely broad definition is in strict contradiction to the OECD’s goals of strengthening international economic cooperation and collaboration in the private sector. It builds up undue pressure to create and maintain national structures instead of encouraging international cooperation and collaboration.

The definition of Passive Offshore Vehicle is largely inconsistent with definitions in the CRS, in particular regarding active and passive NFE. Namely, the definition contradicts classifications in the CRS regarding holding companies, companies holding real property and/or other non-financial assets.

The carve-out for institutional investors unduly privileges regulated financial business over other economic activities.

The concept of opaque ownership structure is largely in contradiction to the concept of beneficial ownership as it is a key element of the Recommendations of the FATF. The concept of beneficial ownership as defined in the Recommendations of the FATF is a key element incorporated by reference into the CRS.

C. Disclosure Requirements on Intermediaries

The definition of Intermediary is too broad. It encompasses service providers that from their professional background are not familiar and do have to be familiar with the concepts and mechanics of the CRS. The CRS is an extremely technical set of in many parts extremely detailed rules and regulations. The number of experts in this field is limited and largely concentrated in financial institutions that are directly targeted by CRS Legislation. The know-how required to make a sound judgement on whether a scheme does or does not qualify as an Avoidance Arrangement is not available to all businesses and individuals that fall into the scope of the term “Intermediary”. The required know-how is also not accessible – in particular to small businesses – under affordable commercial conditions. The unduly broad definition of Avoidance Arrangement requires that every accountant, every wealth advisor or wealth manager would be required to have every advice given reviewed by appropriate and (often unaffordable) expensive external legal expert counsel.

In particular, in small countries with economies that are largely interwoven with other countries’ economies small businesses would extremely suffer under the Disclosure Rules. Privileging big companies
over small enterprises by way of extensive and expensive reporting duties, is inconsistent with the OECD's general policies of strengthening economies through a healthy distribution of economic activities among big and small players.

The retroactive effect of the reporting obligations for specific arrangements back to July 15, 2014 will not be manageable. In particular for small business it will be literally impossible to scrutinize every advice given to clients within an international (and, thus, CRS relevant) context.

D. Information Reporting

The reporting duties, the concepts and scope of information to be reported are clearly too broad and too complex to be managed by small business in the field of investment advice.

The privilege for the legal professions enjoying professional secrecy gives these businesses an unfair competitive advantage. As they have no information duties, they simply do not have to care whether an arrangement which is implanted or on which advice is given is a CRS Avoidance Arrangement or not. Thus, they can largely economise on the required business processes and routines other businesses have to establish in order to identify, classify and report such arrangements. This rule goes strictly against the OECD's principle that competition shall be fair and undistorted.

The privileges against self-incrimination are not consistently covered. Such privilege does not only apply to the Reportable Tax Payer but to any other entity and individual helping and abiding such Reportable Tax Payer and exposing itself to potential criminal prosecution. The privilege leads to the awkward situation where avoidance schemes with a potentially criminal notion are not reportable but schemes with no such undesired notion (and thus much less harmful to the interests of a fair and proper taxation) would be reportable.

E. Penalties

The Penalties suggested for Intermediaries and Reportable Tax Payers would lead to an extensive potential criminalisation of entities and individuals engaged in investment advice. This criminalisation would impede the service providers' ability to give to his/her/its clients proper and full advice on all available options and possibilities. The quality of investment advice would suffer when failing to report that investment advice had been given on concepts and structures that may have (usually as a side effect) CRS avoidance. This is neither in the interest of the service provider nor in the interest of the client. Moreover, such incentive is in contradiction with the goals of the OECD.
In herewith closing our comments, we would like to thank the OECD for having given us the possibly to comment on the discussion draft for public consultation of mandatory disclosure rules for CRS Avoidance Arrangements and Offshore Structures.

Yours sincerely,

Verband Schweizerischer Vermögensverwalter | VSV

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Submitted by e-mail: mandatorydisclosure@oecd.org

Basel, 15 January 2018  
St. 001/ISP

Public Discussion Draft: Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures

Dear Mr Pross,

This letter provides comments of the Swiss Bankers Association (SBA) regarding the planned introduction of Mandatory Disclosure Rules (MDR) for addressing CRS avoidance agreements and offshore structures. We appreciate the opportunity to present you with our comments on the OECD's discussion draft on the MDR.

Firstly, please note that Swiss banks are fully committed to comply with the CRS rules and therefore support all efforts to ensure proper implementation of the CRS. Furthermore, it is in our interest in view of ensuring a level playing field to address possible ways to prevent circumvention of the CRS.

The CRS has now been implemented in many parts of the world with numerous countries having created the local legal bases for implementation. The network of exchange relations is, as intended, constantly being expanded. From the financial industry's point of view, it can be said that the practical implementation of the CRS was one of the biggest and most complex tax projects that had to be tackled, both financially and organizationally. The IT systems had to be substantially expanded, extensive data collection processes were implemented, reporting systems were set up, compliance processes had to be redefined and employees comprehensively trained. All in all, jurisdictions and the financial industry have made great efforts to implement the CRS properly. With its very broad scope, the CRS has resulted in the setting-up of a comprehensive and unprecedented system for the automatic exchange of financial account information on an annual basis.

However, the CRS effective application is just in its starting phase with early adopters having exchanged data for the first time in September last year. More data will be exchanged in the upcoming years once further committed jurisdictions undertake their first exchanges and the reporting is extended to pre-existing accounts held by individu-
als as well as by entities and their controlling persons at the end of the two year review phase. Therefore, before new compliance and reporting obligations are imposed, it is essential to give time to implementing jurisdictions and the reporting financial institutions to properly implement the CRS, and effectively exchange data. At the same time, the receiving tax authorities must be given the opportunity to process and analyze the enormous amount of data received, not mentioning the additional data received through the country-by-country reporting and exchange of tax rulings.

Creating a new data exchange mechanism, that goes beyond data exchange requested by CRS, would be at this point in time decidedly premature and unnecessarily burdensome for all parties involved including tax authorities. We strongly believe that jurisdictions should first be given the time to seriously analyze the data exchanged in the upcoming years before envisaging additional measures, which should be based on a reasoned and holistic assessment of the CRS.

Considering that a comprehensive system for data collection and annual data exchange had to be set up according to a specific approach (the CRS approach is notoriously only operationalizable with a great deal of effort), for systematic and administrative reasons it is absolutely appropriate to address potential CRS deficiencies within the existing system. Potential circumvention of the CRS should not be tackled by imposing additional reporting obligations which are not compatible with the CRS rules, especially from an implementation perspective.

We strongly believe that the key factors for achieving the CRS’s goals are, on one hand, that the global standard is implemented on a broad scale, i.e. by encouraging not yet participating countries particularly with significant financial service industries to implement the CRS, and, on the other hand, that the CRS rules are consistently implemented (level playing field). As mentioned above, new jurisdictions have recently committed to the standard, and the network of exchange relations is constantly being expanded. The planned peer reviews of the Global Forum are also pending. We understand, further, that the planned MDR contemplates to address, among other things, the CRS avoidance via non-CRS jurisdictions. This means that the gaps in global implementation will be closed by the fact that jurisdictions already implementing the CRS will bear a higher compliance burden due to additional reporting obligations. In our view, such an approach harbors the great risk that the development of a level playing field in the implementation of the CRS will be severely hampered, as potential deficiencies would be addressed by means of a new standard, instead of improving the existing one. As a consequence, incentives for a proper implementation of the CRS would be unnecessarily weakened.

Against the backdrop of the above, we respectfully call for a reconsideration of the MDR project. For the reasons outlined above, we consider that there is no immediate need for new regulations and that apart from that the chosen approach is systematically and administratively questionable. Accordingly, we cannot support the planned introduction of the MDR and consider it therefore paramount to halt the MDR project or at least suspend it until the CRS is properly implemented by all participating jurisdictions and the relevant experience regarding avoidance arrangements is available, which proves the introduction of new regulations to be necessary. Jurisdictions should first take the time to seriously analyze the data exchanged in the upcoming years before
envisaging additional measures, which should be based on a reasoned and holistic assessment of the CRS. Finally, we are convinced that the prime and continuing focus of all efforts has to be on the creation of a true global level playing field and that this has to be achieved within the framework of the further development of the CRS.

Further considerations of our association, also partly concerning the technical design of the MDR, can be found in the appendix. These technical comments are without prejudice to the general observations set out above. In view of the significant due diligence and reporting obligations under the CRS we submit, amongst others, that Reporting Financial Institutions that are already subject to CRS rules (including audits by their local authorities) and already report their account holders and controlling persons of passive entities should not assume any additional duties under the MDR.

Thank you for considering our comments. Please do not hesitate to contact us if you have additional questions about this letter.

Yours sincerely,
Swiss Bankers Association

August Benz  Petrit Ismajli
Appendix: Further considerations

1. The planned introduction of MDR for all financial institutions, irrespective of how they have implemented the CRS, would not reward the correct implementation of the CRS, but would instead punish the financial institutions despite their continuous efforts. Therefore, we call for the provisions to be adapted accordingly, so that financial institutions in countries that have fully implemented the CRS should not be subject to additional disclosure requirements in order to compensate for the potential lack of reporting resulting from the fact that the standard has not been fully implemented globally.

The model rules cover for instance primarily arrangements that shift assets to a non-CRS jurisdiction, such as the US. A potentially significant CRS avoidance strategy may be the use of legal structures holding assets deposited with financial institutions domiciled in the US. Since the current FATCA regime does not include disclosure reciprocity for legal structures either incorporated in the US or in a jurisdiction different to the FATCA partner jurisdiction, US financial institutions are not required to disclose any financial data of such accounts to their counterparty FATCA jurisdictions. Hence, when it comes to further strengthening the CRS regime and to implement additional reporting requirements, it is essential to expand the type of information and account relationships reported by the US (by implementing the CRS or under the reciprocal FATCA IGAs).

2. Clarifying the ownership of offshore structures is not the primary scope of the CRS and as a matter of principle has to be achieved by making sure (e.g. through the peer review mechanism) that jurisdictions apply effectively the 2012 FATF recommendations. Of course, as far as CRS is concerned, it is paramount to ensure that the participating jurisdictions have properly implemented the rules relating to the identification of controlling persons of entities. Therefore, we believe that prior to the introduction of new reporting requirements, every possible means should be used to enforce the implementation of the FATF recommendations and the CRS rules in the participating jurisdictions. The focus of the OECD’s activities should therefore be primarily on the enforcement of existing provisions rather than on the introduction of new reporting mechanisms.

3. The identification of potential CRS avoidance arrangements and opaque offshore structures, as suggested by the MDR, requires a case-by-case review and judgment by qualified specialists ("reasonable to conclude" test). The broad rules may have a deterrent effect on advisors and promoters designing and marketing CRS avoiding schemes. However, the identification of transactions with any of the proposed hallmarks is much more difficult for large financial institutions with a global client base to administer efficiently. The proposed new rules are impossible to operationalize (e.g. on the basis of electronically searchable indicia) and therefore cannot be applied to a large base of clients. It is unrealistic to expect large financial institutions to have "professional advisors" (see para. 16 of chapter 1) review all aspects of an arrangement to determine if the "reasonable to conclude" requirement is met. This level of review is impossible in relation to large numbers of cross border transactions processed by financial institutions that are unaware of the motives or intention of clients undertaking those transactions. Furthermore, the proposed hallmarks are capable of too wide range of interpretations to be consistently applied. The applica-
tion (and the resulting disclosure) may vary significantly from one intermediary to the other, and across jurisdictions, resulting in an uneven playing field and a risk of “arbitrage” by affected clients.

In addition, many intermediaries may adopt a risk-averse position and report every operation that bears one of the hallmarks, without further checks (i.e. report any fund transfer to a non-CRS jurisdiction such as the US or any transfer from a reportable account to an excluded account such as regular transfers from a personal account to a pension account for example, report any active NFE, etc.). The broad definition of “intermediary” could also result in the same transaction being reported multiple times by cautious institutions that are unable to confirm if the reporting has been done by another entity.

Due to the fact that subjective tests (including the reason to know standard) cannot effectively be operationalized, we recommend that Reporting Financial Institutions should be excluded from the “intermediary” definition. Said another way, a Reporting Financial Institution that has applied the FATCA and CRS due diligence procedures and has policies and procedures in place to prevent the advising on avoidance of FATCA and CRS reporting should in our view not be subject to further obligations to report under the MDR.

The current proposal can be unambiguously interpreted as being aimed at advisers and promoters of CRS avoiding agreements and offshore structures that hold other assets than Financial Accounts. It is therefore justified that Reporting Financial Institutions that are already subject to CRS rules (including strict audits by their local authorities) and already report their account holders and controlling persons of passive NFEs should not be subject to the MDR.

4. Due to the timing of the comment period and the limited time for an in-depth analysis of the discussion draft on the MDR, it is not possible for us to fully develop all our concerns (i.e. Chapter 1, Para. 17 derivative transactions; Para 18 transfer of funds outside the scope of CRS reporting; Chapter 2, Para. 39 definition of “offshore”; Chapter 3, Para. 53 Definition of “reasonably expected to know” standards; Para. 73 Definition of “relevant services” in respect of a scheme; Chapter 4, Para 77 how are details to be reported).

We would therefore be pleased if you would give us the opportunity to discuss the draft in more detail at a separate meeting.
Dear Sir/Madam

The Swiss Insurance Association ("SIA") appreciates the opportunity to comment on the OECD’s request for input on new tax rules requiring disclosure of CRS avoidance arrangements and offshore structures (Public Discussion Draft of the Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures “MDR”).

The SIA is the umbrella organisation that represents Switzerland’s private insurance industry. The Swiss private insurers are major employers, significant taxpayers and among the most important investors both in Switzerland and abroad. The SIA membership consists of some 80 primary insurance companies and reinsurers with over 46,000 employees in Switzerland. The SIA members generate over 90 per cent of the Swiss premium volume in private insurance (https://www.svv.ch/en/members).

The SIA supports the OECD’s approach to close potential gaps to the CRS legislation to ensure reporting efficiency on a global level and to identify arrangements designed to circumvent the CRS. The following input is thus to be understood as a supporting measure to ensure that the MDR goals are achieved without jeopardizing the efficiency of national CRS implementation measures as developed and gone live to date.

Our comments primarily focus on one general but crucial aspect of the Draft Model Rule 1.1. (from page 36 onwards) that raised concerns among members of the SIA. The SIA is convinced that the input provided will help to increase legal certainty regarding the implementation of the MDR – not only for participating countries but also for potentially affected financial institutions as well as intermediaries and promoters.
Finally, we would like to emphasize that the SIA strongly objects any MDR provision that is not aimed at effectively enforcing the CRS, but is factually overrules and extending the CRS provisions as enacted. Any MDR provisions must follow the rule of law as agreed by the Partner Jurisdictions rather than extending the scope of the CRS.

Please note that all references are made to the MDR-Annex "Consolidated Draft Model Rules" from page 36 onwards. References to other sections of the MDR are indicated separately.

1. Comments on Consolidated Draft Model Rules 1.1

The main common concern among the members of the SIA are uncertainties regarding the definition of an arrangement that is to be treated as circumvention of the CRS. The legitimacy of this concept is undisputed and core to the MDR. However, in our opinion there is a considerable risk of misinterpretation of this principle when taking into account the Model Rules according to the Annex of the MDR Public Discussion Draft.

The Model Rules set out in section 1.1 what is to be considered a CRS Avoidance Arrangement. In order to illustrate such harmful arrangements, two basic categories of harmful arrangements are depicted. We expect the wording in 1.1(a) and 1.1(b) to leave some room for varying interpretation.

In order to illustrate, we would like to scrutinize the current MDR wording with regard to specific exemptions as provided by the CRS.

1.1. Model Rules 1.1(a) (Page 36):

“A CRS Avoidance Arrangement is any Arrangement for which it is reasonable to conclude that it is designed to, marketed as or has the effect of, circumventing CRS Legislation or exploiting an absence thereof. In any case a CRS Avoidance Arrangement includes, but is not limited to:

(a) the use of an account, product or investment that is not, or purports not to be, a Financial Account, but has features that are substantially similar to those of a Financial Account;”

Following a text based interpretation, the conclusion could be made that - in addition to e.g. using a specifically developed derivative contract, also a retirement, pension or any another
low risk CRS excluded accounts as defined in the CRS Section VIII(C)(17) – might fall under the previously mentioned provision, since the enumerated types of contractual relationships - although having certain elements of a Financial Account - do not qualify as Financial Accounts (see CRS commentary on subparagraph C(17) of Section VIII).

This could trigger the likely unintended result that e.g. any payment to a pension fund, a micro insurance cash value insurance contract or an escrow account would have to be treated as a CRS Avoidance Arrangement. Such outcome would stand in stark contrast to the CRS provisions which govern exemptions from the scope of reporting under the CRS. These exemptions form an integral part of the regulations. It is also explicitly stated, that any exemption must not frustrate the purpose of the CRS (see e.g. Section VIII (C)(17)(g) of the CRS).

Numeral 15 of the MDR states the following: “An arrangement will fall within the scope of the generic hallmark if that arrangement actually has the effect of circumventing the CRS or if it is designed to have, or is marketed as having, that effect. This means that the generic hallmark covers both schemes that are or can be used to avoid or frustrate the legal requirements of the applicable CRS legislation as well as those based on a misinterpretation or misapplication of that legislation.” The SIA is convinced that the application of exemptions from the reporting duty that are based on the CRS are de jure never means to frustrate or avoid the purpose of the CRS. This is however not reflected in Model Rule 1.1. Accordingly, the wording in its current state must be revised in order to streamline the MDR provisions with the already enacted CRS legislation.

The room for interpretation of 1.1(a) would likely cause inconsistent application of the previously outlined rule by numerous intermediaries as well as promoters. Especially banks acting as intermediaries might come to the conclusion, that they - in line with the requirement of Section 1.1(b) of reasonably understanding the reporting implication of a transfer of funds to a Non-Reporting Financial Institution – might want to report information on any payment to an e.g. exempt micro-insurance cash value contract or to an exempt escrow account in order to mitigate any remote risk of non-compliance with MDR provisions.

Not every course of action (e.g. an acquisition of a term life insurance contract) that effectively results in a change of financial assets’ status from reportable to non-reportable is to be qualified as a circumvention. Such Excluded Accounts as well as the implementation in the Participating Jurisdictions are subject to the Peer Review in order to ensure a consistent implementation of the CRS. Hence, a transfer of funds to such accounts must not be undermined by the MDR, resulting in a new level of compliance and reporting duties for Financial Institutions, Promoters and Intermediaries involved – without identifying any of the targeted avoidance arrangements.
To avoid potential misinterpretation the SIA proposes the following:

- Including of clarifying wording (either in Model rules directly or in accompanying documentation) that the use of an account, product or investment that qualifies as an Excluded Account under the CRS is not considered to be a CRS Avoidance Arrangement.

1.2. Model Rules 1.1(b):

“A CRS Avoidance Arrangement is any Arrangement for which it is reasonable to conclude that it is designed to, marketed as or has the effect of, circumventing CRS Legislation or exploiting an absence thereof. In any case a CRS Avoidance Arrangement includes, but is not limited to:

(b) an Arrangement to:

(i) transfer a Financial Account, or the monies and/or Financial Assets held in a Financial Account to a Financial Institution that is not a Reporting Financial Institution”

Following a text based interpretation, the conclusion could be made that - in addition to e.g. a Financial Institution that is not participating in the CRS due to its location in a non-Partner Jurisdiction for a specific account holder / tax residency constellation - every transfer to a Non-Reporting Financial Institution falls into the scope of a CRS Avoidance Arrangement. The term “Non-Reporting Financial Institution” is defined in Section VIII B(1) of the CRS.

This could trigger the likely unintended result that e.g. any payment to a Governmental Entity, an exempt broad retirement fund, a retirement fund of a governmental entity or an exempt collective investment vehicle – basically every Financial Institution that is defined as a Non-Reporting Financial Institution under Section VIII B(1) of the CRS - would have to be treated as a CRS Avoidance Arrangement.

Taking the previously mentioned aspect into consideration, the same conclusion as for the Exempt Accounts must be made. Accordingly, the same conclusion is also to be made for Non-Reporting Financial Institutions:

The current wording of the MDR could trigger the likely unintended result that e.g. any payment to a Pension Fund of an International Organisation or a Governmental Entity, to an Exempt Collective Investment Vehicle or a Central Bank would have to be treated as a CRS Avoidance Arrangement. Such outcome would stand in stark contrast to the CRS provisions which govern exemptions from the scope of reporting under the CRS. These exemptions form
an integral part of the regulations. It is also explicitly stated, that any exemption must not frustrate the purpose of the CRS, (see e.g. Section VIII (B)(1)(c) of the CRS).

Numeral 15 of the MDR states the following: “An arrangement will fall within the scope of the generic hallmark if that arrangement actually has the effect of circumventing the CRS or if it is designed to have, or is marketed as having, that effect. This means that the generic hallmark covers both schemes that are or can be used to avoid or frustrate the legal requirements of the applicable CRS legislation as well as those based on a misinterpretation or misapplication of that legislation.” The SIA is convinced that the application of exemptions from the reporting duty that are based on the CRS are de jure never means to frustrate or avoid the purpose of the CRS. This is however not reflected in Model Rule 1.1. Accordingly, the wording in its current state must be revised to streamline the MDR provisions with the already enacted CRS legislation.

The room for interpretation of 1.1(b) would likely also lead to inconsistent application of the previously-mentioned rule by numerous intermediaries as well as promoters. Especially banks acting as intermediaries might come to the conclusion, that they - in line with the requirement of Section 1.1(b) of reasonably understanding the reporting implication of a transfer of funds to a Non-Reporting Financial Institution - might want to report information on any payment to e.g. an exempt Pension Fund in order to mitigate any remote risk of non-compliance with MDR provisions.

In order to avoid potential misinterpretation the SIA would like to propose the following:

- Including of clarifying wording (either in Model rules directly or in accompanying documentation) that the harmful “not Reporting Financial Institutions” as stipulated in 1.1(b) do not include Non-Reporting Financial Institutions as defined in the CRS.

Since the Non-Reporting Financial Institutions are defined in the CRS directly and the implementation in the Participating Jurisdictions is subject to the Peer Review to assess the low-risk nature of Non-Reporting Financial Institutions, such clarification does not jeopardize the rationale of Model Rules.

In addition to the necessity to provide additional guidance on the term “Financial Institution that is not a Reporting Financial Institution”, we suggest including further guidance on the term “circumventing” as used within the Model Rules. The use of the term “circumvent” in the Model Rules leaves a risk of misinterpretation. The SIA supports the definition of an agreement that circumvents CRS legislation as provided in the first paragraph of numeral 14 of the MDR. We are however of the opinion that the additional explanation as provided in the second paragraph of numeral 14 of the MDR is misleading with regard to the de jure avoidance arrangements.
Not every course of action (such as e.g. additional payments into a broad participating pension fund) that effectively results in a change of financial assets’ status from reportable to non-reportable is to be qualified as a circumvention. There are various local types Non-Reporting Financial Institutions where funds can be transferred to that have been identified to have a low-risk of being used to circumvent the CRS. Such Financial Institutions are subject to the Peer Review to ensure a consistent implementation of the CRS by the Participating Jurisdictions. Hence, a transfer of funds to such Financial Institutions must not be undermined by the MDR, resulting in a new level of compliance and reporting duties for Financial Institutions, Promoters and Intermediaries involved – without identifying any of the targeted avoidance arrangements.

In the same paragraph, the generic circumvention test is partially softened by referencing information exchange under FATCA. The SIA struggles with the interpretation of the respective sentence:

“Therefore an arrangement would not fall within the definition of a CRS Avoidance Arrangement if it results in the exchange of the same Financial Account information, by the United States under a FATCA inter-governmental agreement with the jurisdictions of residence of the taxpayer, that would have been reported and exchanged under the CRS.”

We are of the opinion that this sentence is to be revised carefully in order to provide clearer guidance. The SIA members agree that this sentence originally intended to align FATCA and CRS based reporting of account holder information by examining what Financial Account Information will be provided under FATCA IGAs. However, when referencing information to be delivered by the United States, the following issues are to be considered:

• Not all IGAs are reciprocal, i.e. the United States are not required to deliver data to every IGA Partner Jurisdiction.

• It is generally known that the delivery of account holder information to IGA Partner Jurisdictions under a reciprocal IGA is less sophisticated than the information exchange between CRS partner jurisdictions.

• Most Excluded Accounts and Products as well as most Non-Reporting Financial Institutions as defined in the respective IGAs are based on the IGA Partner Jurisdiction’s local law and are therefore not taken into account by the United States.

Following the above, we do not expect that the basically helpful reference to the FATCA IGAs will, under the current wording, effectively help to provide additional clarity.
In order to provide guidance for the parties affected by MDR regulations, the SIA would like to propose the following:

- Rewording of the current FATCA related paragraph to clarify the intention of this paragraph under consideration of the bullet points above.

The application of CRS legislation as intended by the competent legislator must not fall under the definition of circumventing the Model Rules. Hence, payments to a Non-Reporting Financial Institution such as e.g. a Pension Fund of a Governmental Entity must not be considered as circumvention of the CRS legislation, despite such a transfer of funds often resulting in assets being transferred outside of a reportable Financial Account and thus outside the scope of reporting under the applicable CRS legislation.

We are convinced that the above comments will help avoiding unnecessary compliance burdens for the parties involved without any impact on the MDR’s effectiveness.

2. Comments on Consolidated Draft Model Rules 1.3(n)

1.3(n) states that a person is not to be treated as a Reportable Taxpayer if a “certified or notarised copy of the most recent tax filing of the Reportable Taxpayer filed by the Reportable Taxpayer with the tax administration in all its jurisdictions of tax residence, showing that such Reportable Taxpayer is compliant with its tax obligations with respect to the interest held in, the income derived from, and the assets held through the CRS Avoidance Arrangement or Offshore Structure” can be provided.

The SIA expects the act of certifying or notarising tax filings will in many countries likely contain limited information, since e.g. a notary public will typically not be in a position to assess the completeness or accuracy of the filed documents. Following this, the SIA expects the certification will merely confirm that a tax filing has presumably been made, without providing any further proof of accuracy or completeness. Thus, the added benefit of a notarization or certification to demonstrate international tax compliance remains opaque at best.

To avoid implementing rules that typically only help demonstrating that a filing has occurred, the SIA would like to propose the following:

- Including the option to reasonably assess based on documentary evidence that an agreement, scheme, plan or the like has been declared with the competent tax authorities.
3. **Comments on Consolidated Draft Model Rules 2.1**

Regarding 2.1, we would like to add the following comment: The SIA understands that an Intermediary’s or Promoter’s duty to report in-scope arrangements or in-scope Reportable Taxpayers is limited to reporting to its domestic tax authority. No reporting is to be made to non-domestic tax authorities as such exchange of information will be made between the competent authorities of the Partner Jurisdictions. However, taking into account e.g. N76 2.1 on Page 28 might lead to a misinterpretation as to which jurisdiction(s) reporting(s) shall be made to. A clearer definition of the reporting mechanism seems to be missing from the MDR.

To avoid potential misinterpretation the SIA would like to propose the following:

- Including of clarifying wording (either in Model rules directly or in accompanying documentation) on the reporting mechanism would be helpful in order to assess the impact on Intermediaries and Promoters and to avoid misinterpretations.

4. **Comments on Consolidated Draft Model Rules 2.3**

The Draft Model Rule 2.3 provides for a special regulation with respect to CRS Avoidance Arrangements implemented on or after 15 July 2014 but prior to the effective date of the MDR. This rule is intended to affect high-value accounts (i.e. financial accounts with an aggregate balance in excess of USD 1’000’000) only.

The SIA rejects any retrospective application of the MDR, including the creation of a special class of pre-existing high-value accounts for MDR-purposes, subject to additional due diligence requirements. This provision would barely be operationalizable and would lead to further considerable administrative efforts and costs.

In order to avoid creating a new MDR-specific sub-category of pre-existing accounts while requiring hardly operationalizable but cost intensive due diligence processes, the SIA would like to propose the following:

- Abolishment of any retrospective effects as provided in draft model rule 2.3.

5. **Comments on Consolidated Draft Model Rules 2.4**

Numeral 77 of the MDR on the information required to be disclosed states that “information will be treated as within a person’s control if it can be obtained by asking for it.” It is our
opinion that such wording is not helpful to develop an effective yet manageable client identification process for MDR purposes due to its inherent limitlessness of information available to any person. A more precise definition would provide the required guidance for a reasonable transposing of the MDR.

In order to avoid an additional identification process and the redesign of all on-boarding documentation for every contractual party, the SIA would like to propose the following:

- Including of clarifying wording (either in Model rules directly or in accompanying documentation) that the level of information to be considered as to be within a person's control does not have to exceed the information that is to be collected for local AML purposes.

6. Comments on Consolidated Draft Model Rules 2.4(a)

Providing the date of birth should take into account that such information is not necessarily available to a promoter (or to the Financial Institution). We would therefore propose to take this into account by considering the wording as chosen for the CRS in Section I(C) of the standard. Consequently the date of birth would only have to be mandatorily provided to preexisting accounts if available. In case of this information not being available, reasonable efforts have to be made to collect the information. Overruling the CRS via MDR provisions is strictly to be avoided.

To align requirements of the MDR with the already implemented procedures for CRS, the SIA would like to propose the following:

- Including of clarifying wording (either in Model rules directly or in accompanying documentation) that the date of birth is only to be provided if such information is mandatory under the CRS.

The SIA sincerely thanks for the opportunity to outline the views of its members on the core topics related to this discussion draft and would be pleased to elaborate on the issues raised in this submission if required.

Yours sincerely,

Swiss Insurance Association SIA
Thomas Helbling
CEO

Marc Chuard
Head of Finance & Regulation
Statement of the Wirtschaftsprüferkammer

corresponding the Public Discussion Draft

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

Berlin, January 15, 2018
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The Wirtschaftsprüferkammer (Chamber of Public Accountants) is a corporation under public law, whose members are all Wirtschaftsprüfer (Professional Accountants in Public Practice), vereidigte Buchprüfer (Sworn Auditors), Wirtschaftsprüfungsgesellschaften (audit firms) and Buchprüfungsgesellschaften (firms of sworn auditors) in Germany. The Wirtschaftsprüferkammer is headquartered in Berlin and is competent throughout Germany for its more than 21,000 members. Its legally defined tasks are described in detail at www.wpk.de. The Wirtschaftsprüferkammer is entered in the Transparency Register of the European Commission with the number 025461722574-14.

1. Content of the proposal

The draft proposes a disclosure requirement for intermediaries in the context of “CRS Avoidance Arrangements” and “Offshore Structures”. CRS Avoidance Arrangements are identified by generic and specific hallmarks covering arrangements that have features which take the arrangement outside the scope of CRS reporting as well as arrangements that may result in no reporting or the reporting of inaccurate or incomplete CRS information. Its aim is to strengthen the CRS-System and thus the tax compliance in cross-border cases. In its very core, so-called “intermediaries” shall be obliged to disclose information about the arrangement or structure and certain persons involved.

2. Relevance for the profession of Professional Accountants in Public Practice and Sworn Auditors

In the current state of the proposal Professional Accountants in Public Practice and Sworn Auditors would be obliged to file information as intermediaries as well.

According to the proposed definition, “intermediary” means a person who is responsible for the design or marketing of a CRS Avoidance Arrangement or Offshore Structure (so-called “Promoter” – Chapter 3, No. 5.1 of the Model Rule) or any person who provides Relevant Services in respect of a CRS Avoidance Arrangement or Offshore Structure in circumstances where the person providing such services could reasonably be expected to know that the Arrangement is a CRS Avoidance Arrangement or an Offshore Structure (so-called “Service Provider” – Chapter 3, No. 5.4 of the Model Rule).

Professional Accountants in Public Practice and Sworn Auditors are authorised to advise and represent their clients in tax issues (§ 2 Sec. 2 of the Public Accountant Act – Wirtschaftsprüferordnung – WPO). Thus the unlimited authorization to provide commercial assistance in tax issues (§ 3 No. 1 of the Tax Advisors Act – Steuerberatungsgesetz – StBerG) is one of the forma-
tive tasks for the profession of the Professional Accountants in Public Practice and Sworn Auditors.

3. Criticism and demand

The proposal conflicts with fundamental professional duties of the profession of Professional Accountants in Public Practice and Sworn Auditors.

Professional Accountants in Public Practice and Sworn Auditors are subject to an extensive professional secrecy. According to German professional law they have to practice their profession with independence, conscientiousness, confidentiality and on their own responsibility (§ 43 Sec. 1 WPO). The confidentiality is elementary for the profession and serves to keep the trust of the clients and the public into the profession. In terms of the professional law the meaning of legal secrecy is shown in the fact that Professional Accountants in Public Practice and Sworn Auditors besides the – passive – confidentiality – actively – have to take care for secret facts and circumstances not to become known to unauthorized parties (§ 10 of the Professional Charter for Professional Accountants in Public Practice/Sworn Auditors – Berufssatzung für Wirtschaftsprüfer/vereidigte Buchprüfer – BS WP/vBP).

Breaches of the professional secrecy can be sanctioned by criminal laws. The unauthorised disclosure of information gained in the professional context by a Professional Accountant in Public Practice or a Sworn Auditor is a criminal offense that could lead to a fine or even imprisonment (§ 203 Sec. 1 of the German Criminal Code – Strafgesetzbuch – StGB; § 333 HGB). Plus, Professional Accountants in Public Practice and Sworn Auditors must not breach their obligation to observe confidentiality even in case of public prosecution and before court. Therefore they are allowed to refuse to bear witness over circumstances gained during their professional practice which is an important exception from the obligation to testify before court (§ 53 Sec. 1 No. 3 of the German Code of Criminal Procedure – Strafprozessordnung - StPO).

According to the current proposal there is no obligation to disclose to the extent the information is covered by professional secrecy (Chapter 4, No. 2 of the Model Rule). This does affect communications between an attorney, solicitor or another admitted legal representative and his client. Professional Accountant in Public Practice or a Sworn Auditor should not be obliged as well.

Therefore we propose to form Chapter 4, No. 2.1 of the Model Rule as follows:

„The Intermediary shall not be required to disclose any information set out under Section 1 above to the extent that the disclosure would reveal confidential communications […] where such communications are […] protected from disclosure under domestic law."

Statement of the Wirtschaftsprüferkammer concerning the Public Discussion Draft on Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures
We would appreciate it if our suggestion is taken into account during the course of further proceedings. We have limited the contents of our statement to questions which affect the professional position and character of our members.
An:
OECD/CTPA, International Co-operation and Tax Administration Division

Zur Kenntnisnahme:
Bundesministerium für Wirtschaft und Energie – Referat Freie Berufe (VII B 3)
Bundesanstalt für Finanzdienstleistungsaufsicht
Deutsche Prüfstelle für Rechnungslegung e. V.
Bundesrechtsanwaltskammer
Bundessteuerberaterkammer
Bundesnotarkammer
Patentanwaltskammer
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Deutscher Genossenschafts- und Raiffeisenverband e. V.
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GDW Bundesverband deutscher Wohnungs- und Immobilienunternehmen e. V.
Deutscher Steuerberaterverband e. V.
Deutscher Anwaltverein e. V.
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Gesamtverband der Deutschen Versicherungswirtschaft e. V.
Bundesverband Deutscher Banken e. V.
Schutzgemeinschaft der Kapitalanleger e. V.
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Bundesverband Öffentlicher Banken Deutschlands (VÖB) e. V.
European Federation of Accountants and Auditors for SMEs