MINISTRY FOR
FINANCIAL SERVICES
CAYMAN ISLANDS GOVERNMENT

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2nd Round Consultation Response

Introduction of Mandatory Disclosure Rules ("MDR") for CRS Avoidance Arrangements and Opaque Offshore Structures

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1. About this consultation

In April 2023, the Ministry of Financial Services and Commerce ("the Ministry") shared for consultation with industry associations the draft Tax information Authority (Mandatory Disclosure) Regulations, 2023 (the "**Regulations**").

The Cayman Islands made a commitment to the Chair of the EU Code of Conduct Group (Business Taxation), ("**CoCG**") to consult on the implementation of OECD-style Model Rules with legislative amendments expected to follow.

The consultation was held from 27 April 2023 to 25 May 2023 (4 weeks). Respondents were: Cayman International Reinsurance Companies Association (CIRCA), Maples Group, Alternative Investment Managers Association (AIMA), Insurance Managers Association Cayman (IMAC) and the Cayman Islands Monetary Authority (CIMA).

This report summarises the responses into themes and provides the Ministry's replies and feedback on the consultation. In the Ministry's replies, 'we' refers to the Ministry.

2. Consultation Themes & Responses

2.1 Definitions

2.1.1 Industry Comments

A respondent stated they would welcome clarity from the Ministry as to whether we propose to include in the guidelines, examples of the different categories of an intermediary.

Further, a respondent noted that the definition of "client" is a person who requests an intermediary to either make available for implementation or provide relevant services in respect of a CRS avoidance arrangement or an opaque offshore structure. Accordingly, the meaning of "requests" on a literal interpretation may extend the definition of client to persons that are not actual clients of the service provider, for example would it extend to a person that simply contacts a service provider and requests assistance before they have any terms of engagement and before the service provider agrees to on-board the client.

Other respondents noted that the term "reasonably be expected to know" is not defined in the draft Regulations and asked if there is the intention the Tax Information Authority's ("**TIA**") guidelines would address its meaning with examples covering situations where a service provider is responsible for making a disclosure.

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2.1 2 Ministry Reply

The Ministry recognizes the need for guidance and the TIA will publish guidelines under its power at Regulation 5(1) to its website to coincide with the commencement of the Regulations.

2.1.2.1 Intermediaries

There are two category of intermediary; Promoter and Service Provider. A promoter will almost always have a full understanding of the material aspects of the arrangement, because in order to effectively carry on the activities of a promoter, the intermediary will need to fully understand the material aspects of the arrangement. It follows that a person involved in a CRS Avoidance Arrangement or Opaque Offshore Structure but without knowledge of those material aspects is unlikely to be a promoter and will normally be a service provider instead. However, if a person is willfully ignorant of certain aspects of the arrangement, in order to try to avoid being a 'promoter', the TIA would still consider such a person was a promoter.

A service provider is a person who provides assistance or advice with respect to the design, marketing, implementation or organization of a CRS avoidance arrangement or opaque offshore structure. This assistance or advice could include providing finance, expertise, or knowledge, sharing experience, or offering accounting advice. A person will not be a service provider, if they did not know, and could not reasonably be expected to know, that they were providing assistance or advice. A person who provides certain routine services for a client would not normally be caught by the definition of an intermediary.

The TIA will include further guidance and examples on these categories within the guidelines.

2.1.2.2 Clients

Regarding the definition of "clients", guidance on the meanings of "make available" and "assistance or advice" and "when assistance or advice is given" will be included in the guidelines.

An arrangement could be made available in different ways. A client could approach a promoter seeking advice or ideas, and the promoter could make the arrangement available in response to that request. Equally, an arrangement could be made available in the course of other work between an intermediary and a client or an arrangement could be proactively made available to prospective clients through a marketing campaign.

The design of an arrangement would need to be final before the arrangement can be said to be made available for implementation. Providing high level solutions or options, the details of which are unknown and would depend on the clients particular circumstances, where there could still be material changes to the proposed arrangements cannot be considered as being made available for implementation to the client. From the TIA's perspective a person will not be treated as having had an arrangement made available to them if they have not expressed any interest or engagement with the arrangement being

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offered. They could not reasonably be expected to implement the arrangement. Similarly, if a client has not expressed interest in or engagement with an arrangement that is final (that there is unlikely to be any material changes to the arrangement), the promoter of such an arrangement would not have to report details of person.

2.1.2.3 Reasonably expected to know

The TIA would not expect service providers to do additional external due diligence to establish whether there is a reportable arrangement. A service provider would perform its normal due diligence for the type of transaction and client in question. If a service provider fails to do its normal due diligence or is willfully ignorant, then they may still meet the test of reasonably expected to know.

In the ordinary course of business and in order to do their job effectively, an intermediary may have access to information that would not need to be read or examined. There is no obligation to read all information or documentation in case there is information that suggests the arrangement is reportable. However, it would not be acceptable for an intermediary to deliberately avoid or not read information which they otherwise would have read, to try and avoid becoming aware that an arrangement was reportable.

Particularly in large organization, knowledge may be fragmented. Attempting to artificially fragment knowledge so that no person has the full picture of the arrangement and therefore no one is in a position to conclude that the arrangement should be reported would not be acceptable. Where there is no attempt to deliberately fragment knowledge or otherwise circumvent the rules, we would not expect that all knowledge held in the organization would be treated as known to one person.

2.2 Data Protection

2.2.1 Industry Comments

A respondents noted that from a data protection perspective, the draft regulations are silent as to whether clients of an intermediary should be notified if client-specific personal data is being disclosed to the TIA.

In addition, another respondent requested clarity as to whether the TIA guidelines will address potential data protection concerns, in particular as their reading of regulation 8(b)(ii) is that the date of birth of the client of an intermediary is required to be reported to the TIA.

2.2.2 Ministry Reply

Similar to FATCA and CRS, the MDR do not require reporting intermediaries to notify clients of any reporting executed on them.

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The information required to be disclosed would meet the definition of personal data under the Data Protection Act (2021 Revision), however it would be subject to the exemption under Part 4 of that Act on the basis the disclosure is required by or under the enactment by any law..

2.3 CRS Avoidance Arrangements

2.31 Industry Comments

A respondents commented that it is ambiguous to the extent it is unclear who will decide or reasonably conclude that an arrangement is designed to circumvent the CRS Regulations. The necessary clarity should be provided to avoid conflicts in the interpretation of whether a scheme qualifies as designed to circumvent the regulations.

2.3.2 Ministry Reply

The OECD commentary in section III of the Model Rules (page 23) explains that this test of 'reasonable to conclude', "…is to be determined from an objective standpoint by reference to all the facts and circumstances and without reference to the subjective intention of the persons involved. Thus, 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".

The test is an objective one, but in determining whether an arrangement has the effect of undermining the CRS the intent of those involved will be relevant as it will offer a good indication as to whether the arrangement may have the relevant effect. In considering whether an arrangement may have the effect of undermining reporting obligations (or taking advantage of the absence of these) an intermediary will need to consider the effect of the arrangement as a whole. Where an intermediary only has knowledge of a particular step and has no reason to consider that that step forms part of an arrangement that will undermine or circumvent CRS, there is no obligation on that intermediary to report.

An arrangement does not have the effect of circumventing CRS, simply because, as a consequence of the arrangement, no report under CRS is made. The OECD commentary makes clear that "an Arrangement is not considered to have the effect of circumventing CRS Legislation solely because it results in non-reporting under the relevant CRS Legislation, provided that it is reasonable to conclude that such non-reporting does not undermine the policy intent of such CRS Legislation."

In applying the objective test of whether an arrangement has the effect of undermining or circumventing CRS reporting, the presence of certain features would suggest a CRS avoidance arrangement has been made. For example:

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- A transaction that is highly structured in such a way that the avoidance of CRS reporting is the logical explanation for that structure;
- A transaction that is otherwise uncommercial, but for the benefit of avoiding CRS reporting;
- Ownership structures which result in beneficial owners holding assets just below the threshold of reporting (e.g. beneficial owners holding 24% of an interest where local rules apply a 25% threshold), or
- The refusal by a financial account holder to provide an explanation for a transaction or structure in circumstances in which that has been requested.

Where a scheme has been designed as a CRS avoidance arrangement it is reportable by the intermediary, even if the eventual user does not seek to avoid CRS reporting. It is the fact that the scheme was designed to circumvent legislation that is important. Similarly, an arrangement that was not designed to circumvent the CRS but is used to achieve that effect, is reportable because it has the effect of circumventing the CRS. However, the intermediary may not have knowledge of this, and so would not necessarily have to report, in which case the reportable person would.

CRS reporting requirements often fall away when moving assets into a jurisdiction that does not require CRS reporting. This does not necessarily mean that this is a CRS avoidance arrangement. However, if moving of assets to non-reporting jurisdictions is part of the design, or is marketed as, or has the effect of, circumventing the CRS legislation then it will be a reportable as a CRS avoidance arrangement.

3. Next Steps

The Regulations closely follow the OECD model rules which are available here: https://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf. The primary reason for this is to maintain consistency in the application of the rules between implementing jurisdictions. The benefits of a consistent approach are likely to increase as and when more countries adopt MDR. This is intended to reduce the reporting burden faced by businesses operating across multiple jurisdictions.

The OECD model rules include commentary which provides guidance on ensuring compliance with the rules. The commentary gives examples of the type of arrangements and structures that might be expected to be caught by the rules, as well as clarifying situations where no report would be due.

The Ministry considers that the commentary is a helpful source of interpretation, and in general it is anticipated that there will be broad alignment between the Commentary and the interpretation set out in the guidelines to be issued.

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The consultation provided relevant and constructive comments and the Regulations have been updated in accordance with the feedback received.

Cabinet approval may now be sought to publish the Regulations and will done so in conjunction with those jurisdictions that have made similar commitments to implement MDR.