Guernsey's new Mandatory Disclosure Rules Regulations

Service area / Corporate, Trusts and Private Wealth

Location / Guernsey

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The Income Tax (Approved International Agreements) (Implementation) (Mandatory Disclosure Rules) Regulations, 2020 (the "**Regulations**") were passed by Guernsey on 11 March 2020 with a commencement date yet to be announced. The Regulations introduce new duties to disclose information in respect of certain structures. This note briefly sets out the background and effect of these Regulations, and will be of interest to accountants, lawyers, fiduciaries, fund promoters and administrators operating in Guernsey.

MDR

Following public consultation in 2018, Guernsey committed to introducing Mandatory Disclosure Rules on CRS Avoidance Arrangements and Opaque Offshore Structures ("**MDR**") in response to the EU Code of Conduct Group's investigation of the tax policies of third countries to the European Union. Similar commitments were given by other Crown Dependencies with which Guernsey is currently cooperating to develop a common approach. Technically, the Regulations implement the OECD model MDR, the Multilateral Competent Authority Agreement on the Automatic Exchange regarding CRS Avoidance Arrangements and Opaque Offshore Structures (the "**MCAA**"), and certain bilateral agreements between the competent authorities of Guernsey and other Common Reporting Standard ("**CRS**") participating jurisdictions.

The MDR framework is an OECD best practice initiative based on the principles of the Base Erosion and Profit Shifting initiative ("**BEPS**") Action 12 Report and is designed to bolster the CRS which Guernsey has already implemented. Whereas the CRS achieves greater cooperation between tax authorities to enhance transparency and prevent tax evasion, the MDR aims to deter promoters and service providers involved with CRS Avoidance Arrangements or Opaque Offshore Structures.

The Regulations will require a person or "intermediary" who is involved in the promotion, design, marketing, implementation or management of a "CRS Avoidance Arrangement" or "Opaque Offshore Structure" in Guernsey, to report the existence of the arrangement or structure and the users of it to Guernsey's Revenue Service. The Revenue Service will then exchange the relevant information with those jurisdictions in which the users are resident, subject to the relevant exchange agreements being in place. Various offences may be committed and penalties incurred for failure to comply with the duties to disclose to the Revenue Service in Guernsey required information pursuant to the Regulations.

Who is caught? Intermediaries

An **Intermediary** can be either a "Promoter" or a "Service Provider".

- A **Promoter** is any person responsible for the design or marketing of a CRS Avoidance Arrangement or Opaque Offshore Structure.
- A **Service Provider** is any person that provides assistance or advice in respect of the design, marketing, implementation or organisation of a CRS Avoidance Arrangement or Opaque Offshore Structure in circumstances where the person providing such services could "reasonably be expected to know" that the arrangement or structure is one caught by the Regulations. The standard of "reasonably be expected to know" is determined by the Service Provider's actual knowledge based on readily available information and the degree of expertise and understanding required to provide these relevant services.

The higher burden of proof for the Service Provider reflects the fact that a Service Provider may be unwittingly involved whereas a Promoter will likely know that an arrangement or structure is intended to circumvent reporting obligations which would otherwise be applicable.

What are the arrangements or structures?

- A "**CRS Avoidance Arrangement**" is generally any "arrangement for which it is reasonable to conclude that it has, is designed to have or marketed as having the effect of circumventing CRS Regulations" in Guernsey. A subset of more detailed rules on arrangements and structures are provided. Further, we expect more Revenue Service guidance in relation to the "reasonable to conclude" test.
- An "**Opaque Offshore Structure**" is a "Passive Offshore Vehicle" held through an "Opaque Structure". A Passive Offshore Vehicle is a "legal person or arrangement that does not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises in the jurisdiction where it is established or is tax resident", subject to certain exceptions. An Opaque Structure is one which it is "reasonable to conclude is designed to have, is marketed as having, or has the effect of allowing a natural person to be a beneficial owner of a passive offshore vehicle while adopting certain behaviours or methods" essentially to disguise the beneficial owners. The opaque structure must only be reported if it is reasonable to conclude that the intention of the structure is to obscure beneficial ownership. Again, we expect more guidance on this test.

Revenue Guidance

To some extent one target of the EU and OECD's initiatives – the Opaque Offshore Structure – is less likely to arise in Guernsey as a result of the introduction with effect from 2019 of Guernsey's economic substance regime (see our briefing). Additionally, Guernsey's finance industry already screens structures under stringent AML/CFT legislation, which are designed to identify the beneficial owner behind such structures in accordance with the internationally recognised standards of FATF Recommendations. For these reasons, the Revenue's latest guidance suggests that certain registered structures may not be regarded as Passive Offshore Vehicles although this will be subject to further consultation. Together the Regulations and the Revenue's guidance regarding their interpretation and application represent important new additions to Guernsey's reporting regime.

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