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AN ALERT FROM THE BDO TRANSFER PRICING PRACTICE

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SUBJECT

OECD MODEL MANDATORY DISCLOSURE RULES FOR CRS AVOIDANCE ARRANGEMENTS AND OPAQUE OFFSHORE STRUCTURES

SUMMARY

On March 8, 2018, the Organisation for Economic Co-Operation and Development (OECD) issued model disclosure rules to address Common Reporting Standard (CRS) Avoidance Arrangements and Opaque Offshore Structures (Arrangements/Structures), entitled "Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures."[1] The new guidance would require an intermediary of an arrangement that resembles an Arrangement/Structure to disclose factual descriptions of the Arrangement/Structure; identify those involved in the Arrangement/Structure, including other intermediaries; and to identify the jurisdiction in which the Arrangement/Structure is available to implement. The model rules would require intermediaries to make the disclosure 30 days after the intermediary makes the Arrangement/Structure available to implement or after the intermediary provides what are considered "Relevant Services."[2]

Similar to when the OECD published guidance in its Base Erosion and Profit Shifting project (BEPS Action Plan) in October 2015, tax jurisdictions will likely adopt the model disclosure rules unevenly, based on their specific circumstances. Also similar to the BEPS Action Plan, the OECD emphasizes the need for inter-jurisdictional exchange of reported information to effectively deter Arrangements/Structures. Uneven implementation and jurisdictional exchange will likely present specific challenges as intermediaries navigate the reporting landscape.

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1 For a definition of such Arrangements/Structures, see pages 14-16 of the "Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures."

2 "Relevant Services" are defined as providing assistance or advice with respect to the design, marketing, implementation, or organization of that arrangement or structure.

DETAILS

Background

The OECD's 47-page publication of the model rules provides guidance related to covered arrangements, compliance rules, individuals and services providers who would generally be impacted, and the institution of penalties. The model rules target regulated service providers who are involved in the supply chain to make such Arrangements/Structures available. BDO professionals who deal with these Arrangements/Structures should monitor the implementation of the model rules, particularly as the guidance calls for disclosures related to CRS Avoidance Arrangements entered into after October 29, 2014, and before the effective date of these rules.

Intermediaries are generally defined as (1) persons responsible for the design or marketing of an Arrangement/Structure, and (2) persons that provide assistance or advice with respect to the design, marketing, implementation, or organization of such Arrangements/Structure and can reasonably be expected to know it is an Arrangement/Structure. Intermediaries are not obliged to disclose information to the extent the information was previously disclosed to the relevant tax authority by the intermediary or another intermediary. Intermediaries must also have nexus with the reporting jurisdiction for the model disclosure obligation to be effective. The model disclosure rules set out three criteria for establishing nexus. Intermediaries would be required to disclose in the jurisdiction where (1) the intermediary makes an Arrangement/Structure available for implementation or provides services with respect to that Arrangement/Structure through a branch located in the reporting jurisdiction; (2) the intermediary is a resident or has a place of management; or (3) the intermediary is incorporated in, or established under the laws of said jurisdiction. The OECD includes model rules to eliminate duplicative reporting. These criteria will likely establish nexus for intermediaries in multiple tax jurisdictions, and as evidenced by the implementation of the BEPS Action Plan, countries may implement exchange agreements more slowly than reporting requirements are established.

Information required to be disclosed by an intermediary, to the extent it is within the knowledge, possession, or control of the person providing the disclosure, includes:

1. The name, address, jurisdiction(s) and TIN(s) of tax residence of the person making the disclosure; any client of that person related to an Arrangement/Structure; any actual user of an Arrangement or beneficial owner of a Structure; and any intermediary other than the person making the disclosure.
2. The details of an Arrangement/Structure, including:
    a. A factual description of the features of an Arrangement that are designed to have, marketed as having, or have the effect of circumventing the CRS Legislation; and
    b. A factual description of the features that have the effect of not allowing the accurate determination of a reportable taxpayer's beneficial ownership or creating the appearance that the reportable taxpayer is not a beneficial owner of the passive offshore vehicle.
3. The jurisdiction(s) where the Arrangement/Structure has been made available for implementation.

Penalties and other mechanisms for non-compliance are recommended in the model rules. As with the other requirements and obligations in the model rules, individual jurisdictions will have to choose the nature and extent to which penalties should apply for non-compliance. Additional details regarding recommendations for disclosure requirements, instances where there would be no obligation for an intermediary to disclose, taxpayer disclosure requirements, and details about the Arrangements/Structures that these model rules are intended to address are available, in English, **here**.

BDO INSIGHTS

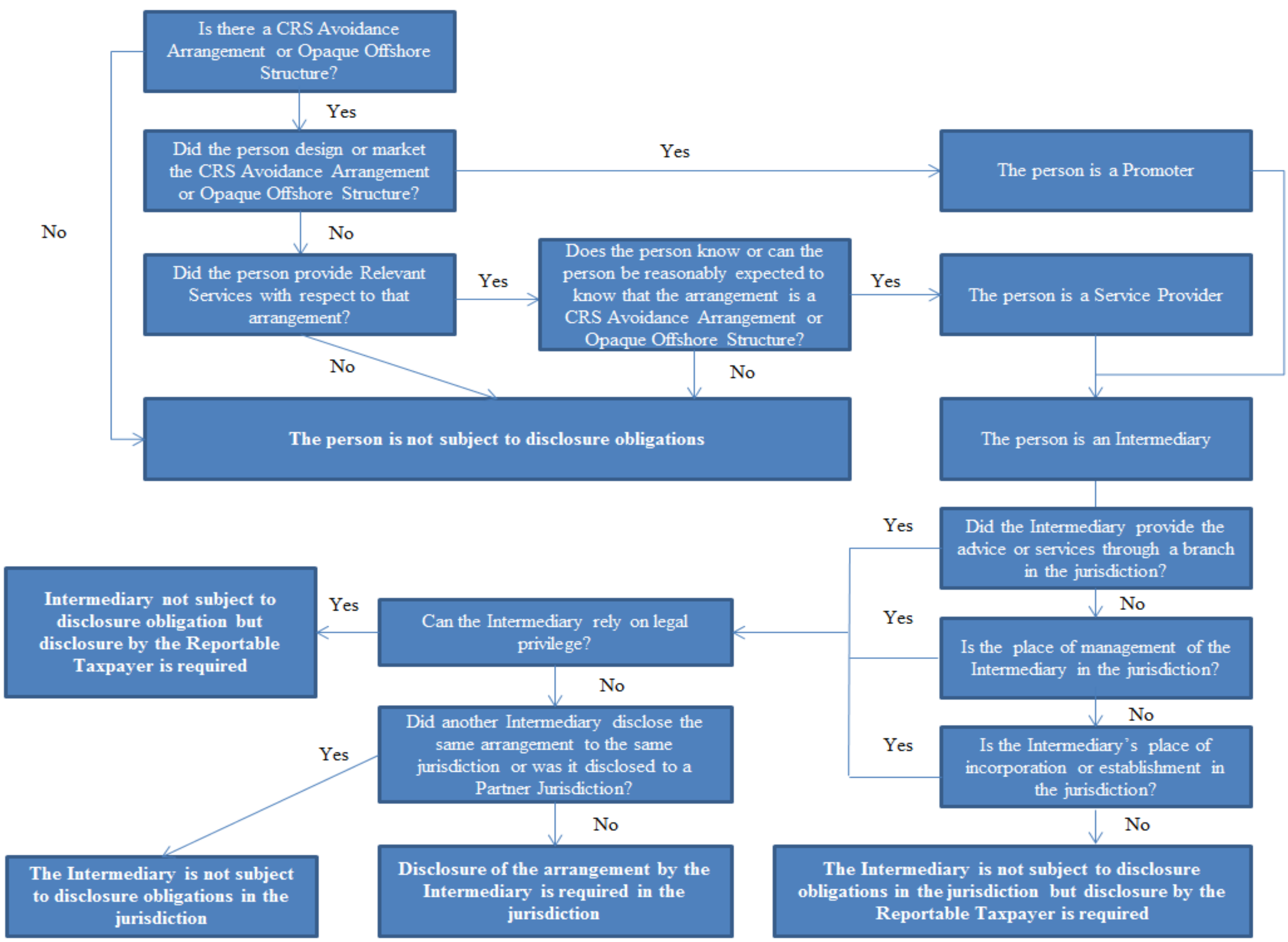
The model rules call for jurisdictions to exchange the disclosed information with tax administrations where the information is relevant, but using the OECD BEPS Action Plan as an analogy, intermediaries may face challenges in ensuring the information is provided to each jurisdiction as is required. Using the uneven adoption of global country-by-country (CbC) reporting rules could prove useful in predicting such challenges. Since January 2016, 112 countries have become members of the OECD's BEPS Inclusive Framework, meaning they have committed to the BEPS package, at a minimum. Members of the Inclusive Framework have implemented measures from the BEPS Action Plan based on their specific needs and circumstances, thus the rules for a BEPS measure such as CbC reporting, vary by jurisdiction. Such implementation creates obstacles for taxpayers to be compliant globally, particularly for multinational enterprises. Taxpayers must understand which countries have agreements in place to exchange CbC reports with each other, and which do not, to help them determine where they should file their CbC report, and whether they must file in more than one country so that they are not penalized by a jurisdiction in which they have operations for not making the report available to said jurisdiction's authorities. Intermediaries who are impacted by implementation of the model rules may expect similar challenges in ensuring that the information is reported to all the necessary jurisdictions.

Should countries begin adopting their versions of the model disclosure rules, those who would be intermediaries to an Arrangement/Structure, such as international tax and transfer pricing practitioners, should become familiar and understand the nature of any new legislation and how it differs in each of the countries as it relates to their clients and services.

Figure 1, from the OECD's "Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures Questions and Answers" article, illustrates the decision-making process at a high-level of how the mandatory disclosure rules would function within a particular jurisdiction.

Figure 1

High Level Overview of the Operation of the Mandatory Disclosure Rules for a Particular Jurisdiction



http://www.oecd.org/tax/exchange-of-tax-information/mandatory-disclosure-rules-questions-and-answers.pdf