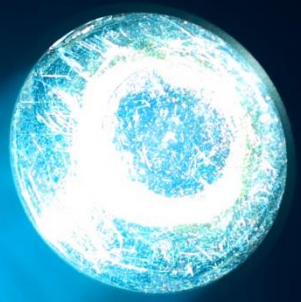

Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures

OECD
BETTER POLICIES FOR BETTER LIVES

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Foreword

On 15 July 2014 the OECD published the Standard for Automatic Exchange of Financial Account Information in Tax Matters, also known as the Common Reporting Standard or CRS. Since then 102 jurisdictions have committed to its implementation in time to commence exchanges in 2017 or 2018. With exchanges under the CRS having now commenced amongst almost 50 jurisdictions there has been a major shift in international tax transparency and the ability of jurisdictions to tackle offshore tax evasion.

At the same time, information from academic studies and media leaks, combined with more recent information collected through compliance activities of a number of tax administrations, as well as the results from the OECD's disclosure initiative demonstrate that professional advisers and other intermediaries 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, including under the CRS.

It is against this background that the Bari Declaration, issued by the G7 Finance Ministers on 13 May 2017, called on the OECD to start "discussing possible ways to address arrangements designed to circumvent reporting under the Common Reporting Standard or aimed at providing beneficial owners with the shelter of non-transparent structures." The Declaration states that these discussions should include consideration of "model mandatory disclosure rules inspired by the approach taken for avoidance arrangements outlined within the BEPS Action 12 Report."

The Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures contained in this report were approved by the Committee of Fiscal Affairs (CFA) on 8 March 2018. This approval does not entail endorsement as a minimum standard. The design of the model rules draws extensively on the best practice recommendations in the BEPS Action 12 Report while being specifically targeted at these types of arrangements and structures.

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Abbreviations and acronyms

AEOI	Automatic Exchange of Information
AML	Anti-Money Laundering
BEPS	Base Erosion Profit Sharing
CFA	Committee on Fiscal Affairs
CRS	Common Reporting Standard
EU	European Union
FATCA	Foreign Account Tax Compliance Act
FATF	Financial Action Task Force
FI	Financial Institution
G7	Group of seven
G20	Group of twenty
IT	Information Technology
KYC	Know Your Customer
MCAA	Multilateral Competent Authority Agreement
MNE	Multinational Enterprise
NFE	Non-Financial Entity
OECD	Organisation for Economic Co-operation and Development
USD	United States Dollars

I. Introduction

1. The purpose of these model mandatory disclosure rules is to provide tax administrations with information on CRS Avoidance Arrangements and Opaque Offshore Structures, including the users of those Arrangements and Structures and those involved with their supply. Information disclosed pursuant to the application of these model rules can be used both for compliance purposes and to inform future tax policy design. These rules should also have a deterrent effect against the design, marketing and use of arrangements covered by the rules.

2. The model rules require an Intermediary or user of a CRS Avoidance Arrangement or Opaque Offshore Structure to disclose certain information to its tax administration. Where such information relates to users that are resident in another jurisdiction it would be exchanged with the tax administration(s) of that jurisdiction in accordance with the terms of the applicable international legal instrument.

3. The mandatory disclosure rules do not affect the substantive provisions of a jurisdiction's CRS Legislation or impact on any reporting outcomes under the CRS. Rather these rules are information gathering tools that seek to bolster the integrity of the CRS by deterring advisors and other intermediaries from promoting certain schemes. The rules seek to accomplish this by providing tax administrations and policy makers with information on schemes, their users and suppliers, for use in compliance activities, exchange with treaty partners and tax policy design.

4. Consistent with the concepts on mandatory disclosure articulated in the BEPS Action 12 Report the model rules are not limited to situations of non-compliance with the tax law (including the rules on CRS reporting). Thus, a disclosure under the rules does not necessarily imply a violation of any tax rule and will not always result in the tax administration taking compliance action in respect of a disclosed Arrangement. Equally, the fact that a tax administration does not respond to a disclosure does not imply any acceptance of the validity or tax treatment of the Arrangement by the tax administration. Jurisdictions implementing these model rules would need to take into account domestic specificities in their own CRS Legislation and the interaction of these model rules with existing anti-avoidance rules.

Key Elements

5. While the BEPS Action 12 Report does not represent a minimum standard, it provides a framework for mandatory disclosure rules that is based on international best practices and presents tax administrations with options to address perceived risks. The framework has five key elements in the design of a mandatory disclosure regime:

(a) A description of the Arrangements that are required to be disclosed (i.e. the hallmarks of a disclosable scheme);

(b) A description of the persons required to disclose such Arrangements (i.e. the Intermediaries that are subject to reporting obligations under the rules);

(c) A trigger for the imposition of a disclosure obligation (i.e. when an obligation to disclose crystallises under the rules and any exceptions from reporting);

(d) A description of what information is required to be reported; and

(e) Appropriate penalties or other mechanisms to address non-compliance.

These elements are reflected in the design of the model mandatory disclosure rules set out in this document. The first two elements (the description of the hallmarks and the definition of Intermediary) set the boundaries of the reporting obligations under these model mandatory disclosure rules so that an Arrangement that is a "CRS Avoidance Arrangement" or an "Opaque Offshore Structure" will be required to be disclosed by any person that is an "Intermediary" in respect of that Arrangement or Structure.

6. The definition of a CRS Avoidance Arrangement and an Opaque Offshore Structure is set out in Rules 1.1 and 1.2. These definitions are given a broad scope in order to capture any type of Arrangement that has the effect of circumventing CRS Legislation or not allowing the accurate identification of the Beneficial Owners under an Opaque Offshore Structure. An Arrangement or Structure that fits within these hallmarks will only be required to be disclosed in the reporting jurisdiction by the persons that are responsible for the design or marketing of that Arrangement or Structure, or persons who can reasonably be expected to know that the Arrangement meets the description set out in those hallmarks (i.e. an "Intermediary" as defined in Rule 1.3). Section 2 of the model rules then sets out the mechanics for disclosure including a description of when, and in what circumstances, an Intermediary is required to file a disclosure (including any exceptions from reporting) and the information required to be reported.

Hallmarks

7. The hallmark for a CRS Avoidance Arrangement captures any Arrangement where it is reasonable to conclude that it has been designed to circumvent, or has been marketed as or has the effect of circumventing CRS Legislation. This generic test is supplemented by specific hallmarks that specifically identify known features of CRS Avoidance Arrangements. These specific hallmarks have

been developed in light of the experiences of a number of tax administrations and in response to schemes that have been disclosed to the OECD under the CRS disclosure facility.

8. The hallmark for Opaque Offshore Structures specifically targets Passive Offshore Vehicles that are held through an Opaque Structure. The purpose of this hallmark is to supplement the disclosure rules for CRS Avoidance Arrangements and to capture Structures that would not ordinarily be subject to CRS reporting (such as holding structures that hold assets other than financial accounts, e.g. real estate).

9. Like the hallmark for CRS Avoidance Arrangements, the definition of Opaque Offshore Structure has a generic element that tests whether the Structure has the effect of not allowing the accurate identification of the Beneficial Owners and it also specifically identifies well-recognised tax planning techniques that can be used to achieve this outcome, such as the use of undisclosed nominees.

Definition of Intermediary and Timing of Disclosure Obligations

10. Rule 1.3 defines who is an Intermediary and Rule 2.1 and 2.2 set out rules governing when that Intermediary is required to make a disclosure under these rules. Intermediaries are defined as those persons responsible for the design or marketing of CRS Avoidance Arrangements and Opaque Offshore Structures ("Promoters") as well as those persons that provide assistance or advice with respect to the design, marketing, implementation or organisation of that Arrangement or Structure ("Service Providers"). By limiting the definition of Intermediary to Promoters and Service Providers, the operation of the model rules is limited to those Intermediaries, Arrangements and Structures that are likely to present the greatest risk from a compliance perspective.

11. The model mandatory disclosure rules only impose disclosure obligations on Intermediaries that have a sufficient nexus with the reporting jurisdiction. This will include an Intermediary operating through a branch located in that jurisdiction as well as an Intermediary that is resident in, managed or controlled, incorporated or established under the laws of that jurisdiction.

12. Under Rule 2.2, an Intermediary is required to file a disclosure in respect of a CRS Avoidance Arrangement or Opaque Offshore Structure at the time the Arrangement is first made available for implementation, or whenever an Intermediary provides services in respect of the Arrangement or Structure. This ensures that the tax administration is provided with early warning about potential compliance risks or the need for policy changes as well as ensuring that it has current information on the actual users of the scheme at the time it is implemented.

Information required to be disclosed

13. The information required to be disclosed in respect of a CRS Avoidance Arrangement or Opaque Offshore Structure is set out in Rule 2.3. The information required to be disclosed includes the details of the Arrangement or Structure, as well as the Clients and actual users of that Arrangement or Structure, and any other Intermediaries involved in the supply of that Arrangement or Structure. The information reporting requirements under the model rules are designed to capture the information that is likely to be most relevant from a risk-assessment perspective and to make it relatively straightforward for a tax administration to determine the jurisdictions with which such information should be exchanged.

14. The rules do not require the Intermediary to disclose information that is subject to obligatory professional secrecy rules. There are also rules that limit the need for the Intermediary to make duplicate disclosures in respect of the same Arrangement or Structure. In the event there is no Intermediary that is within the territorial scope of the disclosure obligations, or the Intermediary is not required to disclose

due to professional secrecy rules, the disclosure obligation falls on the user of that Arrangement or Structure.

Penalties and other mechanisms for dealing with non-compliance

15. In order for mandatory disclosure rules to be effective they must carry appropriate mechanisms for non-compliance. While the penalties to be applied for non-disclosure will be determined by each jurisdiction in light of its particular circumstances, the penalties should be set at a level that encourages compliance and maximises their deterrent effect. The model rules include some commentary on approaches to ensuring compliance with the rules.

II. Model Rules

1. Definitions

Rule 1.1: CRS Avoidance Arrangement

A "CRS Avoidance Arrangement" is any Arrangement for which it is reasonable to conclude that it is designed to circumvent or is marketed as, or has the effect of, circumventing CRS Legislation or exploiting an absence thereof, including through:

(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;

(b) the transfer of 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 or to a jurisdiction that does not exchange CRS information with all jurisdictions of tax residence of a Reportable Taxpayer;

(c) the conversion or transfer of a Financial Account, or the monies and/or Financial Assets held in a Financial Account, to a Financial Account that is not a Reportable Account;

(d) the conversion of a Financial Institution into a Financial Institution that is not a Reporting Financial Institution or into a Financial Institution that is resident in a jurisdiction that does not exchange CRS information with all jurisdictions of tax residence of a Reportable Taxpayer;

(e) undermining or exploiting weaknesses in the due diligence procedures used by Financial Institutions to correctly identify:

  (i) an Account Holder and/or Controlling Person; or

  (ii) all the jurisdictions of tax residence of an Account Holder and/or Controlling Person;

(f) allowing, or purporting to allow:

  (i) an Entity to qualify as an Active NFE;

  (ii) an investment to be made through an Entity without triggering a reporting obligation

under the CRS Legislation; or

(iii) a person to avoid being treated as a Controlling Person; or

(g) classifying a payment made for the benefit of an Account Holder or Controlling Person as a payment that is not reportable under CRS Legislation;

where it is reasonable to conclude that such Arrangement is designed to circumvent or is marketed as, or has the effect of, circumventing CRS Legislation or exploiting an absence thereof.

For the purposes of this Rule 1.1, 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.

Rule 1.2: Opaque Offshore Structure

(a) An Opaque Offshore Structure means a Passive Offshore Vehicle that is held through an Opaque Structure.

(b) Subject to paragraph (c) below, a "Passive Offshore Vehicle" means a Legal Person or Legal 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.

(c) A Passive Offshore Vehicle does not include a Legal Person or Legal Arrangement (i) that is an Institutional Investor or that is wholly-owned by one or more Institutional Investors or (ii) where all Beneficial Owners of that Legal Person or Legal Arrangement are only resident for tax purposes in the jurisdiction of incorporation, residence, management, control and establishment (as applicable) of the Legal Person or Legal Arrangement.

(d) An Opaque Structure is a 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 not allowing the accurate determination of such person's Beneficial Ownership or creating the appearance that such person is not a Beneficial Owner, including through:

(i) the use of nominee shareholders with undisclosed nominators;

(ii) the use of means of indirect control beyond formal ownership;

(iii) the use of Arrangements that provide a Reportable Taxpayer with access to assets held by, or income derived from, the Structure without being identified as a Beneficial Owner of such Structure;

(iv) the use of Legal Persons in a jurisdiction where there is:

- no requirement to keep, or mechanism to obtain, Basic Information and Beneficial Owner information, as defined in the latest Financial Action Task Force Recommendations, on such Legal Persons that is accurate and up to date;
- no obligation on shareholders or members to disclose the names of persons on whose behalf shares are held; or
- no obligation on, or mechanism for, shareholders or members of such Legal Persons to notify the Legal Person of any changes in ownership or control;

(v) the use of Legal Arrangements organised under the laws of a jurisdiction that do not require the trustees (or in case of a Legal Arrangement other than a trust, the persons in equivalent or similar positions as the trustee of a trust) to hold, or be able to obtain, adequate, accurate and current Beneficial Ownership information regarding the Legal Arrangement;

where it is reasonable to conclude that the Structure 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 not allowing the accurate determination of such person's Beneficial Ownership or creating the appearance that such person is not a Beneficial Owner.

Rule 1.3: Intermediary

"Intermediary" means:

(a) any person responsible for the design or marketing of a CRS Avoidance Arrangement or Opaque Offshore Structure ("Promoter"); and

(b) any person that provides Relevant Services in respect 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 a CRS Avoidance Arrangement or an Opaque Offshore Structure ("Service Provider"). The standard of "reasonably be expected to know" must be determined by reference to the Service Provider's actual knowledge based on readily available information and the degree of expertise and understanding required to provide the Relevant Services.

Rule 1.4: Other Definitions

The following capitalised terms shall have the meanings set out below:

(a) "Arrangement" includes an agreement, scheme, plan or understanding, whether or not legally enforceable, and includes all the steps and transactions that bring it into effect.

(b) "Basic Information" on a Legal Person includes, at a minimum, information about the legal ownership and control structure of the Legal Person. This would include information about the status and powers of the Legal Person, its shareholders or members and its directors.

(c) "Beneficial Ownership" or "Beneficial Owner" shall be interpreted in a manner consistent with the latest Financial Action Task Force Recommendations and shall include any natural person who exercises control over a Legal Person or Legal Arrangement. In the case of a trust, such term means any settlor, trustee, protector (if any), beneficiary or class of beneficiaries and any other natural person exercising ultimate effective control over the trust, and in the case of a Legal Arrangement other than a trust, such term means persons in equivalent or similar positions.

(d) "Client", in respect of an Intermediary, means any person who requests an Intermediary to, or on whose behalf, or for whose benefit, the Intermediary:

  (i) make(s) a CRS Avoidance Arrangement or Opaque Offshore Structure available for implementation; or

  (ii) provide(s) Relevant Services in respect of a CRS Avoidance Arrangement or Opaque Offshore Structure.

(e) "CRS Legislation" means the Standard for Automatic Exchange of Financial Account Information in Tax Matters as implemented in the domestic laws of the jurisdiction where the relevant account, product, investment, or Arrangement is maintained and includes any international legal instrument that is in force and effect for that jurisdiction and which provides for the exchange of information collected pursuant to the Common Reporting Standard.

(f) "Institutional Investor" means a Legal Person or Legal Arrangement:

  (i) that is regulated as a bank (including a depositary or custodial institution), insurance company, collective investment vehicle or pension fund;

  (ii) the shares or interests of which are regularly traded on an established securities market;

  (iii) that is a government entity, central bank, international or supranational organisation; or

  (iv) a Legal Person or Legal Arrangement wholly-owned by one or more of the foregoing.

(g) "Legal Arrangement" means an express trust or other similar legal arrangement, such as fiducie, treuhand and fideicomiso.

(h) "Legal Person" means any entity and can include a company, body corporate, foundation, anstalt, partnership, association and other relevantly similar entity, but does not include a natural person.

(i) "Structure" means an Arrangement concerning the direct or indirect ownership or control of a person or asset.

(j) "Partner Jurisdiction" means a jurisdiction:

(i) that has introduced rules that are substantially similar to those set out in this legislation; and

(ii) that, with respect to the particular CRS Avoidance Arrangement or Opaque Offshore Structure, has international exchange of information instruments in effect with all jurisdictions of residence of the Reportable Taxpayer.

(k) "Relevant Services" in respect of a CRS Avoidance Arrangement or Opaque Offshore Structure, means providing assistance or advice with respect to the design, marketing, implementation or organisation of that Arrangement or Structure.

(l) "Reportable Taxpayer" means, in respect of a CRS Avoidance Arrangement, any actual or potential user of that Arrangement and, in respect of an Opaque Offshore Structure, a natural person whose identity as a Beneficial Owner cannot be accurately determined due to the Opaque Offshore Structure.

Capitalised terms that are not otherwise defined shall have the meanings given to them under the relevant CRS Legislation.

2. Requirement to disclose CRS avoidance arrangements and opaque offshore structures

Rule 2.1: Obligation on Intermediary to Disclose

Any person that is an Intermediary with respect to a CRS Avoidance Arrangement or Opaque Offshore Structure must disclose that Arrangement or Structure to the tax authorities in [Jurisdiction Name] if that person:

(a) makes that CRS Avoidance Arrangement or Opaque Offshore Structure available for implementation, or provides Relevant Services in respect of that CRS Avoidance Arrangement or Opaque Offshore Structure through a branch located in [Jurisdiction Name];

(b) is resident or has its place of management in [Jurisdiction Name]; or

(c) is incorporated in, or established under the laws of, [Jurisdiction Name].

Rule 2.2: When information is required to be disclosed

The disclosure required under Rule 2.1 shall be made thirty days after the Intermediary:

(a) makes the CRS Avoidance Arrangement or Opaque Offshore Structure available for implementation; or

(b) supplies Relevant Services in respect of the CRS Avoidance Arrangement or Opaque Offshore Structure.

Rule 2.3: Information required to be disclosed by Intermediary

The information that an Intermediary is required to disclose under Rule 2.1 in respect of a CRS Avoidance Arrangement or Opaque Offshore Structure shall include:

(a) the name, address, jurisdiction(s) and TIN(s) of tax residence of the following persons:

(i) the person making the disclosure;

(ii) any Client of that person in respect of that Arrangement or Structure (separately identifying any Client that is a Reportable Taxpayer, including the date of birth of such persons);

(iii) any actual user of a CRS Avoidance Arrangement or Beneficial Owner of an Opaque Offshore Structure;

(iv) any person that is an Intermediary with respect to that Arrangement or Structure (other than the person making the disclosure).

(b) the details of that CRS Avoidance Arrangement or Opaque Offshore Structure including;

(i) in respect of a CRS Avoidance Arrangement, a factual description of those features of the Arrangement that are designed to have, marketed as having, or have the effect of, circumventing the CRS Legislation; and

(ii) in respect of an Opaque Offshore Structure, a factual description of those features that have the effect of not allowing the accurate determination of the Reportable Taxpayer's Beneficial Ownership or creating the appearance that the Reportable Taxpayer is not a Beneficial Owner of the Passive Offshore Vehicle; and

(c) the jurisdiction or jurisdictions where the CRS Avoidance Arrangement or Opaque Offshore Structure has been made available for implementation;

to the extent such information is within the knowledge, possession or control of the person providing the disclosure.

Rule 2.4: No obligation for the Intermediary to disclose

(a) An Intermediary shall not be required to disclose any information set out under Rule 2.3 where that information is protected from disclosure under professional secrecy rules stipulated in domestic law, but only to the extent the disclosure would reveal confidential information held by an attorney, solicitor or other admitted legal representative with respect to a Client, as defined in the Commentary to Article 26 of the OECD Model Tax Convention.

(b) An Intermediary that is not required to disclose information under this Rule 2.4 shall provide written notice to the Client of the Client's disclosure obligations under these rules by the time specified in Rule 2.2.

Rule 2.5: No obligation on Intermediary to disclose to the extent information has already been disclosed

An Intermediary is not required to disclose any information set out in Rule 2.3, to the extent that the Intermediary holds documentation demonstrating that:

(a) such information was previously disclosed to the [Jurisdiction Name] tax authority;

(b) the information relates to Relevant Services supplied, or a CRS Avoidance Arrangement or Opaque Offshore Structure made available for implementation, through a branch maintained by that Intermediary in a Partner Jurisdiction and such information has been disclosed to the tax authority of that Partner Jurisdiction; or

(c) the Intermediary is required to disclose such information under Rule 2.1(c) and such information has been disclosed to the tax authority of a Partner Jurisdiction where that Intermediary is resident or has its place of management.

Rule 2.6: Reportable Taxpayer required to disclose in certain circumstances

(a) Any Reportable Taxpayer that is resident in [Jurisdiction Name] and that is a user of a CRS Avoidance Arrangement or a Beneficial Owner under an Opaque Offshore Structure must disclose to the [Jurisdiction Name] tax authority any information on the Arrangement or Structure that is not disclosed by an Intermediary because the Intermediary is not subject to any disclosure requirements under Rule 2.1 or is not required to disclose the information pursuant to Rule 2.4.

(b) The Reportable Taxpayer is not required to disclose any information under Rule 2.6(a) to the extent that the Reportable Taxpayer has received documentation from the Intermediary demonstrating that the information has been disclosed by that Intermediary to the tax authority of a Partner Jurisdiction under mandatory disclosure rules that are substantially similar to those set out in this legislation.

(c) The disclosure pursuant to Rule 2.6(a) above shall include all the information required to be disclosed under Rule 2.3 and be made within thirty days after the first step of the CRS Avoidance Arrangement or Opaque Offshore Structure has been implemented.

Rule 2.7: Disclosure of Arrangements entered into after 29 October 2014 and before the effective date of these rules

(a) A Promoter shall disclose a CRS Avoidance Arrangement within 180 days of the effective date of these rules where:

(i) that Arrangement was implemented on or after 29 October 2014 but before the effective date of these rules; and

(ii) that person was a Promoter in respect of that Arrangement;

irrespective of whether that person provides Relevant Services in respect of that Arrangement after the effective date.

(b) No disclosure shall be required under paragraph (a) where the Promoter has documentation to demonstrate that the aggregate balance or value of the Financial Account subject to the CRS Avoidance Arrangement immediately prior to its implementation was less than USD 1,000,000.

(c) Notwithstanding Rule 1.4(e), for the purpose of interpreting defined terms with respect to this Rule 2.7, CRS Legislation means the Standard for Automatic Exchange of Financial Account Information in Tax Matters as published by the OECD on 15 July 2014.

III. Commentary

1. Definitions

1. CRS Avoidance Arrangement

1. Rule 1.1 provides a general description of the core features of CRS Avoidance Arrangements (the generic hallmark) and then provides examples of specific Arrangements that fall within this general description (specific hallmarks). This approach is designed to ensure that the hallmarks capture known CRS Avoidance Arrangements while retaining the flexibility to cover as yet unidentified Arrangements that may pose risks to the integrity of the CRS.

Generic hallmark

2. The generic definition of a "CRS Avoidance Arrangement" is set out in the opening language of Rule 1.1. It describes any Arrangement where it is reasonable to conclude that it has, is designed to have or marketed as having, the effect of circumventing CRS Legislation, which is to be understood as the Arrangement resulting in the avoidance of accurate reporting of CRS information. An Arrangement therefore circumvents CRS Legislation where it avoids the reporting of CRS information to the jurisdiction(s) of residence of a taxpayer in a way that undermines its intended policy, including by:

- exploiting the absence of CRS Legislation or inadequate implementation of such legislation;
- exploiting the absence of a CRS exchange agreement with one or more jurisdiction(s) of tax residence of such taxpayer;
- undermining or exploiting weaknesses in the due diligence procedures applied by a Financial Institution under CRS Legislation; or
- otherwise undermining the intended policy of the CRS.

3. The generic test covers Arrangements with features that take the Arrangement outside the scope of CRS reporting (de jure avoidance Arrangements) as well as Arrangements that while not legally removing a CRS disclosure obligation as a practical matter may avoid CRS reporting or result in the reporting of inaccurate or incomplete CRS information to the jurisdiction of residence of the user of that Arrangement.

…designed to, marketed as or has the effect of..

4. An Arrangement will fall within the scope of the generic hallmark if that Arrangement actually has the effect of circumventing CRS Legislation 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. An Arrangement should be treated as "designed to" circumvent CRS Legislation if it is reasonable to conclude that it has been put in place deliberately to facilitate a non-reporting outcome. An Arrangement should be treated as "marketed" as a CRS Avoidance Arrangement if the benefit of non-reporting under the CRS is used to promote or sell the Arrangement to a potential Client or customer. The term "marketed" does not include providing a legal opinion to a Client on whether an existing or proposed Arrangement is subject to CRS reporting (or on

the way in which an Arrangement should be reported under the CRS). It would, however, include any subsequent use of that opinion to sell an investment or investment structure based on its CRS treatment.

5. The simple fact that an Arrangement has the effect of non-reporting is not sufficient for it to be considered to have the effect of circumventing CRS Legislation. This will only be the case where it is reasonable to conclude that the Arrangement undermines the intended policy of the CRS Legislation. The mandatory disclosure rules are not intended to second guess clear policy choices that were made in the design of the CRS. For instance, real estate is an asset class that is not within the intended scope of the CRS. As a result, an Arrangement to withdraw funds from a reportable Depository Account to purchase an apartment will not constitute a CRS Avoidance Arrangement despite the fact that the Arrangement results in non-reporting of the funds that are used for the purchase. Similarly, the CRS expressly provides for categories of Excluded Accounts and Non-Reporting Financial Institutions that are excluded from reporting to minimise compliance burdens and because, on balance, they do not pose a substantial risk of non-compliance. Accordingly, a transfer of funds from a reportable Depository Account into a pension product that qualifies as an Excluded Account, will, in normal circumstances, not be considered to have the effect of circumventing CRS Legislation. However, the marketing of a scheme that makes use of such an exclusion in ways that undermine the policy rationale for providing that exclusion would be considered a CRS Avoidance Arrangement. An Arrangement does not have the effect of circumventing CRS Legislation if the Financial Account(s) information is exchanged under a FATCA Model 1A Intergovernmental Agreement with the jurisdiction(s) of tax residence of the Reportable Taxpayer. For example, if a Reportable Taxpayer that is tax resident in jurisdiction X transfers a Financial Account to the United States, that transfer would not have the effect of circumventing CRS Legislation, provided the account information is exchanged by the Competent Authority of the United States with jurisdiction X.

Reasonable to conclude

6. The 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.

7. The fact that an Arrangement is a CRS Avoidance Arrangement will not, on its own, make that Arrangement subject to disclosure by the Intermediary under these model rules. For this to be the case, there must also be an Intermediary operating within the reporting jurisdiction that is either responsible for the design or marketing of that Arrangement or that provides Relevant Services and can reasonably be expected to know that the Arrangement is a CRS Avoidance Arrangement. The test of what an Intermediary "can reasonably be expected to know" 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 would be aware of this information. The test for whether a person is an Intermediary is a separate test (see commentary on Rule 1.3).

8. Should there be a need for further guidance, including on the application of the above principles to particular types or categories of investments or transactions or Intermediaries, then jurisdictions implementing these rules are encouraged to engage in a dialogue with relevant stakeholders with a view to providing such guidance. The OECD stands ready to facilitate any such dialogue and assist in the co-ordination of such guidance to ensure consistency in the application of these model rules.

Rule 1.1(a) – Financial investments that are not Financial Accounts

9. The first specific hallmark covers the use of a financial product that provides the investor with the core functionality of a Financial Account but which includes features that take it outside the definition of a "Financial Account" for CRS purposes. This specific hallmark could cover, for instance, the use of certain types of e-money as a substitute for a Depository Account or the issuance of certain types of derivative contracts by Financial Institutions that are out of scope of CRS Legislation but replicate underlying financial assets covered by such legislation. The hallmark refers to the "use" of such a product and would therefore cover the offering of such products as well as Arrangements to transfer funds into such an investment.

Rule 1.1(b) to (d) – Arrangements to transfer funds outside the scope of CRS reporting

10. The second to fourth specific hallmarks in the model rules cover Arrangements that shift money or Financial Assets to Financial Institutions or accounts that are not subject to CRS reporting. Unlike the first hallmark which focuses on the specific features of the product that take it outside the legal scope of the CRS Legislation, these hallmarks look to the jurisdiction where the financial product is offered and the domestic exemptions from reporting within that jurisdiction to identify Arrangements that give rise to CRS avoidance risks. These hallmarks would include moving money to a Financial Institution in a jurisdiction that has not implemented the CRS or that is not exchanging CRS information with the taxpayer's jurisdiction of residence for tax purposes; as well as certain transfers of funds to a non-reportable account of a Financial Institution in a Participating Jurisdiction or strategies such as dividing the amounts held in a Financial Account to remain under the USD 250,000 threshold for CRS reporting.

11. Where the Arrangement fits within one of these hallmarks then any person that is an Intermediary with respect to such an Arrangement would be required to disclose it. Rule 1.3 of the model rules determines whether a person, including a Service Provider, meets this definition. For instance a Financial Institution carrying out routine banking transactions (such as money transfer, custody etc.) could not typically be expected to know the details of a particular jurisdiction's CRS exchange network at a given time but could reasonably be expected to know, with respect to jurisdictions with which the Financial Institution has regular contact, whether that jurisdiction has implemented the CRS (see also the last two sentences of paragraph 20).

12. These specific hallmarks apply to transfers of money or Financial Assets and include those cases where there is a change in the investment structure that has the effect of taking the Financial Account outside the framework of CRS reporting. The hallmarks set a bright-line test that focuses on known risks which can be tested at a single point in time (i.e. the time of transfer or conversion) making it easier for Intermediaries such as investment managers to develop appropriate compliance procedures.

Rule 1.1(e) – Arrangements undermining the effectiveness of and exploiting weaknesses in due diligence procedures

13. The fifth specific hallmark targets Arrangements that undermine or exploit weaknesses in the due diligence procedures used by Financial Institutions to collect CRS information on an Account Holder and the Controlling Persons of a Passive NFE. Arrangements undermining the effectiveness of due diligence procedures are those that frustrate the intended outcomes of those procedures (such as the misuse of residence certificates as described in the Commentary to Rule 1.1(e)(ii) below). Arrangements exploiting weakness in due diligence procedures include those Arrangements that rely on the absence or inadequate implementation of such due diligence procedures, for example by taking advantage of weak

implementation of the latest FATF Recommendations, which are currently those of February 2012. This hallmark would cover the use of Structures that do not allow the accurate determination of the identity of Account Holder and the Controlling Persons and that rely on the creation of indicia or documentary evidence to mislead a financial institution about the actual jurisdiction(s) of residence of an Account Holder in order to facilitate inaccurate or incomplete reporting under the CRS.

Rule 1.1(e)(i) – Arrangements that do not allow the accurate identification of the Account Holder or Controlling Person

14. This sub-paragraph covers those cases where it is reasonable to conclude an Arrangement, such as an asset holding Structure, does not allow the accurate identification of the underlying Beneficial Owners in a way that it has the effect of frustrating the application of the due diligence procedures under the CRS. It should be noted that, in the most simple and commonly used Structures, the due diligence procedures applied by Financial Institutions will generally be sufficient to identify the Account Holders and Controlling Persons. For example:

- a bank that opens an account for a trust with foreign beneficiaries could be expected to request a copy of the trust deed which should identify the beneficiaries (and other beneficial owners of the trust) named in the deed; and

- a share broker that maintains a share trading account for an offshore entity can be expected to require that entity to provide information on its shareholders or other evidence that the entity is a Financial Institution or Active NFE.

15. These types of simple Structures will, on their own, not fall within the specific hallmark in Rule 1.1(e)(i) unless 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. For example, this could include an Arrangement designed to mislead a Financial Institution at account opening about the real discretionary beneficiaries of a trust, by appointing a charity as sole discretionary beneficiary at account opening and replacing the charity by the real intended discretionary beneficiaries after account opening without informing the Financial Institution.

Rule 1.1(e)(ii) – Arrangements that do not allow the accurate determination of the residency of Account Holders and Controlling Persons

16. Sub-paragraph (ii) of this hallmark applies to Arrangements that can be used to avoid accurate and comprehensive reporting of CRS information to the jurisdiction of tax residence of the Account Holder or Controlling Person. This hallmark would, for instance, apply to a person promoting the use of a tax residence certificate as a method of facilitating the avoidance of the CRS.

17. A number of jurisdictions offer tax incentives to individuals to encourage them to take up tax residence in that jurisdiction. These incentives may involve temporary or permanent exemptions from tax on foreign source income and obtaining such tax residency may only require the resident to have a minimal presence in that jurisdiction. A person who is tax resident in more than one jurisdiction may use such a certificate to not declare the fact that he or she is a tax resident in another jurisdiction. Presenting such a certificate to a Financial Institution as proof of residence in order to undermine the Financial Institution's due diligence procedures would fall within the specific hallmark in Rule 1.1(e)(ii) as an Arrangement for which it is reasonable to conclude that it has the effect of undermining or exploiting weaknesses in, the due diligence procedures used by Financial Institutions to correctly identify all the jurisdictions of tax residence of an Account Holder and/or Controlling Person.

18. While procuring a tax residence certificate could be part of an Arrangement to circumvent the CRS, a person who is not a Promoter, but merely provides such services in respect of the obtaining of such a certificate, would not be considered to be an Intermediary in respect of a CRS Avoidance Arrangement unless that person could reasonably be expected to know that the tax residency certificate had been marketed to the Client or customer as way of avoiding CRS reporting.

Rule 1.1(f) – Exploiting Active NFE status or avoiding Controlling Person Status

19. The sixth specific hallmark addresses Arrangements that take advantage of the fact that an Active NFE is not subject to disclosure or reporting obligations with respect to its Controlling Persons under the CRS and targets Arrangements involving the use of a Passive NFE that are designed to circumvent the requirement to disclose Controlling Persons. The model rules in Rule 1.1(f) focus on three areas of known risk:

- the marketing of a company that purports to qualify automatically for Active NFE status in its jurisdiction of incorporation;
- back-to-back investment Arrangements made through an NFE that are intended to prevent an investor from having to reveal their identity under the CRS; and
- investments in a passive NFE that are structured in such a way as to prevent the investor falling within the definition of a Controlling Person under the CRS.

The final element of the hallmark would also cover a plan to switch from a trust to a company as an investment vehicle in order to avoid reporting of the trust's discretionary beneficiaries as Controlling Persons.

20. The hallmark uses the relevant definitions in the CRS Legislation to accurately target these risks without specifying the particular technique used to achieve them. The mere fact, however, that an Entity qualified as an "Active NFE" under the CRS or that a person had a financial investment in an Active or Passive NFE would not bring the Arrangement within the scope of this hallmark unless the transactions contain an element that is designed to qualify the Entity as an Active NFE for CRS purposes or the way the investment in the NFE was structured would lead a reasonable person to believe that the Arrangement had been expected to have the effect of undermining the CRS due diligence procedures.

Rule 1.1(g) – Non-reportable payments to an Account Holder

21. The final specific hallmark relates to Arrangements that classify a payment to an Account Holder or Controlling Person into one that is not reportable under the CRS. The model rules cover Arrangements that purport to "classify" a payment as non-reportable even where that Arrangement has no legal effect, and include the additional precision that the payment must be to or "for the benefit of" an Account Holder or Controlling Person. This hallmark could for instance pick up a trust that pays the bills on behalf of a beneficiary or crediting amounts to a pre-paid debit or credit card.

Other definitions in Rule 1.4

22. Many of the definitions in the hallmark for CRS Avoidance Arrangements take their meaning from the defined term as used in the CRS. However there are a number of capitalised terms that have a specific definition under these rules.

"Arrangement"

23. The term "Arrangement" is used as part of the definition of CRS Avoidance Arrangement. As set out in the BEPS Action 12 Report, this definition is intended to be sufficiently broad and robust to capture any agreement, scheme, plan or understanding (whether enforceable or not) and all the steps and transactions that form part of or give effect to that Arrangement.

"CRS Legislation"

24. The definition of CRS Legislation refers to the Standard for Automatic Exchange of Financial Account Information in Tax Matters, as implemented in the domestic laws of the jurisdiction where the relevant account, product or investment is maintained. It includes agreements in effect to exchange the information collected pursuant to such laws, in particular the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information. Thus an Arrangement will be treated as circumventing the CRS not only where it results in a Financial Institution failing to report (or reporting inaccurate) information to a tax authority but also where it avoids the information being exchanged with the tax authority in the Reportable Taxpayer's jurisdictions of tax residence.

2. Opaque Offshore Structure

25. Rule 1.2 sets out a hallmark for an Opaque Offshore Structure. This hallmark includes specific examples of Opaque Ownership Structures such as the use of nominee shareholders, indirect control Arrangements or Arrangements that provide a person with access to assets held by, or income derived from, the offshore vehicle, without being identified as the Beneficial Owner.

26. The hallmark supplements the specific hallmark for CRS Avoidance Arrangements by specifically identifying those features of offshore Structures that do not allow the accurate determination of the identity of the Beneficial Owner. As this hallmark does not build on the notion of CRS avoidance, it also covers Structures that hold assets other than Financial Accounts, i.e. those not reportable under the CRS (e.g. real estate). In general terms, a Passive Offshore Vehicle will fall within the scope of this hallmark where the ownership of that vehicle has been structured so as to not allow the accurate determination of the identity of natural person(s) with ultimate effective control over that vehicle.

27. The definition of Passive Offshore Vehicle is set out in Rule 1.2(b) and (c) while the definition of Opaque Structure is set out in Rule 1.2(d). Other defined terms are set out in Rule 1.4.

Rule 1.2(b) – Passive Offshore Vehicle

28. Rule 1.2(b) defines when a Legal Person or Legal Arrangement is a Passive Offshore Vehicle. A passive vehicle is one that does not carry on a substantive economic activity that is supported by adequate staff, equipment, assets and premises. A combination of these four elements must be directly connected to the activities of the entity itself and not another party in order for an offshore vehicle to be treated as active (and therefore outside the scope of hallmark) under this test. An offshore entity established in Jurisdiction A that invoices a related company for services supplied by a contractor in Jurisdiction B would be considered "passive" under the definition in Rule 1.2(b). Such an entity would not employ any staff or own any equipment, assets or premises from which the substantive economic activity is carried on. The recruitment of staff, purchase of assets or equipment or the leasing of premises should not be treated as giving rise to a substantive economic activity if this has been done solely for the purposes of avoiding the definition of a Passive Offshore Vehicle.

29. A vehicle is "offshore" if it is incorporated, resident, managed, controlled or established outside the jurisdiction of residence of its Beneficial Owners. The types of entities and arrangements that will be treated as wholly-domestic (and therefore outside the intended scope of this hallmark) would generally include a locally incorporated company held only by resident shareholders and the domestic family trust with resident beneficiaries, where the trustees and others with control over the trust are all resident in the same jurisdiction as the beneficiaries.

30. The definition of "offshore" is drafted in such a way that if any Beneficial Owner is resident in a jurisdiction other than the jurisdiction where the vehicle is incorporated, resident, managed, controlled or established then that vehicle will be treated as offshore with respect to all its beneficial owners. This is to prevent tax planners setting up an offshore entity with one or more local Beneficial Owners, simply in order to circumvent the reporting requirements of the model rules. It also means, however, that an otherwise plain vanilla domestic family trust with a single non-resident beneficiary will fall within the offshore definition. Note however, that the definition of Service Provider in Rule 1.3 applies where the person can reasonably be expected to know that the Structure is an Offshore Structure. This means that a trust that was not a Passive Offshore Vehicle at the time the trust was established would not become reportable simply because the person who set up the trust subsequently learns that one of the beneficiaries of the trust has moved to another country. If that person was, however required to provide

further services in respect of the same trust, then that person would then need to include that change of facts in any assessment of whether the trust was required to be disclosed under these rules.

Carve-Out for Institutional Investors

31. The Opaque Offshore Structure definition only applies to private investment vehicles that are closely-held. Rule 1.2(c) therefore excludes from the definition of "Passive Offshore Vehicle" any Legal Person or Arrangement that is an "Institutional Investor", as defined in Rule 1.4(f), or wholly-owned by one or more "Institutional Investors" as it is unlikely that such Legal Persons or Arrangements would be used to not allow the accurate identification of natural person(s) with ultimate effective control and there is a low-risk of non-compliance. More generally, shareholders of a widely-held vehicle will typically not be captured by this rule, since the definition makes use of the Beneficial Owner definition provided for in the FATF Recommendations and, therefore, they would not be Beneficial Owners, unless they owned more than a specific amount of shares or exercised actual control of that vehicle.

Opaque Structure

32. A Passive Offshore Vehicle will be treated as held through an "Opaque Structure" (and therefore form part of an Opaque Offshore Structure) where the ownership of the vehicle is structured in such a way as to not allow the accurate determination of a person's Beneficial Ownership in that vehicle or to create the appearance that such person is not the Beneficial Owner. This description of an Opaque Offshore Structure, which is the generic element of the hallmark, covers those situations, for instance, where the Structure uses an entity established in a jurisdiction where the lack of transparency regarding ownership with respect to that entity makes it difficult to identify the Beneficial Owner of the Passive Offshore Vehicle. The term also includes Arrangements that provide a person outside the ownership chain with indirect control over the Passive Offshore Vehicle or its assets such as an undisclosed nominee Structure. The paragraphs below provide specific instances of the kinds of Arrangements that can trigger disclosure of the Structure under these rules.

Rule 1.2(d)(i) – Use of Nominee Shareholders with Undisclosed Nominators

33. The FATF Guidance on Transparency and Beneficial Ownership (October 2014) identified (at paragraph 9(e)) that one of the important ways in which offshore Structures can be used to not allow the accurate determination of Beneficial Ownership is through the use of nominee shareholders where the identity of the nominator is undisclosed.

34. A nominee shareholder is any person that holds those shares on behalf of another person (the nominator). A precise legal nature of the nominee relationship will depend on the Arrangements between the nominee and nominator and the circumstances in which the nominee relationship arose. For example, a nominee could be operating as an agent or a bare trustee or could hold the shares on behalf of the purchaser under an uncompleted sale transaction. A nominee Arrangement will only fall within the specific hallmark in Rule 1.2(d)(i), where the Arrangement or the identity of the underlying nominator is undisclosed. While actively traded shares of widely held entities are often held in nominee name by brokers and custodians, such nominee arrangements would typically not be targeted by this hallmark as widely held entities are not within the scope of the Opaque Offshore Structures.

Rule 1.2(d)(ii) – Indirect control beyond formal ownership

35. Another common feature of Opaque Offshore Structures is the ability of natural persons to indirectly control the offshore vehicle under informal Arrangements with persons with direct control over that vehicle. These types of informal control Arrangements do not allow the accurate identification of the Beneficial Owner, either by making it difficult to identify the natural persons with direct or indirect

control over the Passive Offshore Vehicle or creating the appearance that the person with such control is the Beneficial Owner when, in reality, the effective control rests with a third party or parties.

36. For example, this hallmark would capture a trustee of a trust (including a lawyer) who habitually acts under the instructions of another person even though the person is not recognised as a trustee or protector under the trust deed.

37. This hallmark targets those legal or formal Arrangements that have the effect of depriving a legal owner of the economic benefit of the asset or income in favour of a third party such that the third party has the benefit of the asset without being recognised as the Beneficial Owner. This hallmark would apply to an Arrangement whereby a person provided funding to a non-affiliated company in exchange for an option to acquire all or substantially all of the assets of that company for a nominal sum. Such an Arrangement would have the effect of providing the option holder with ultimate effective control over the company or those assets held by that company without being identifiable as their legal owner.

Rule 1.2(d)(iii) – Arrangements that provide a person with access to assets or income without being identified as the Beneficial Owner

38. This specific hallmark targets techniques used to take money or value out of an Opaque Offshore Structure without such payments coming to the attention of the tax administration in the jurisdiction of tax residence as well as Arrangements used to not allow the determination of the source of those funds. This would include the use of prepaid debit and credit cards and interest free loans.

Rule 1.2(d)(iv) and (v)– Use of Legal Persons and Legal Arrangements in jurisdictions with weak anti-money laundering rules

39. These specific hallmarks target the use of Legal Persons or Legal Arrangements in jurisdictions that have not adequately implemented the FATF transparency requirements set out in the hallmarks, but only if one or more of the obligations set out in these hallmarks do not apply with respect to the specific Legal Person or Legal Arrangement that is used in the Structure. The language of the Model Rules refers to the latest version of the FATF Recommendations, which are currently those of February 2012. Jurisdictions may wish to specifically refer to this version in their domestic legislation. That reference would then need to be updated when new or revised FATF Recommendations are issued.

Other definitions in Rule 1.4

40. Most of the definitions in Rule 1.2 are taken from equivalent terms used in the 2012 FATF Recommendations and the guidance that has been developed in the FATF context can be used to interpret those terms. The following terms, however, are specific to the Opaque Offshore Structure hallmarks.

Institutional Investor

41. The definition of Institutional Investor is intended to cover vehicles that are, or that are owned by, Institutional Investors. Institutional investors include: a) regulated entities, b) entities regularly traded on an established exchange, and c) governmental entities, central banks or international or supranational organisations. An international or supranational organisation means any intergovernmental organisation or organisation whose members are primarily governments.

Structure

42. A "Structure" means an Arrangement concerning the direct or indirect ownership or control of a person or asset. The term Arrangement has the same meaning as given to that term in Rule 1.4.

3. Intermediary

43. The definition of "Intermediary" is set out in Rule 1.3. It covers those persons who are responsible for the design or marketing of an Opaque 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 organisation of the Structure or Arrangement (i.e. Service Providers) in circumstances where that Service Provider can reasonably be expected to know that the Arrangement is an Opaque Offshore Structure or CRS Avoidance Arrangement. The knowledge and actions of an Intermediary include those of their employees acting in the course of their employment, as well as contractors working for an employer, and the disclosure obligation and the penalties for a failure to disclose are imposed on that employer.

44. Unlike the definition in the BEPS Action 12 Report, the definition of Intermediary is not limited to persons involved in the "tax aspects" of the Arrangement. While restricting the scope of the disclosure rules to tax advisors can be considered a sensible limitation in the context of rules targeting the Promoters of tax avoidance Arrangements it would be too restrictive for Arrangements that are designed to avoid reporting under the CRS, where 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 a Financial Institution's due diligence procedures. Restricting the definition of Intermediaries to tax advisors would have the effect of excluding a wide range of potential intermediaries (such as investment advisors and lawyers) who do not (and may not be authorised to) provide taxation services.

Promoters

45. A person is "responsible" for the design of a CRS Avoidance Arrangement when that person introduces features into the Arrangement which have or are likely to have the effect of circumventing the CRS. Similarly, a person will be treated as responsible for the design of an Opaque Offshore Structure, where that person includes features in the Structure that result in it being treated as opaque under the test set out in Rule 1.2(d).

46. The "marketing" of an Arrangement or Structure means encouraging others to enter into that Arrangement based on its CRS treatment or the possibility that the Structure will not allow the identification of the Beneficial Owner. A person can be considered to be marketing a CRS Avoidance Arrangement even if such Arrangement was not originally designed as such. For example, a financial advisor that identifies an investment product and markets that product to a customer as a way of avoiding reporting under the CRS would be treated as an Intermediary in respect of CRS Avoidance Arrangement notwithstanding that the issuer may not have designed, marketed or intended the investment product to be used as a way of circumventing the CRS.

Service Providers in respect of CRS Avoidance Arrangements

47. The definition of Intermediary extends beyond Promoters of CRS Avoidance Arrangements to cover persons that provide "Relevant Services" (i.e. advice or assistance in respect of the design, marketing, implementation or organisation of a CRS Avoidance Arrangement) to the extent that such a person can be reasonably expected to know that the Arrangement is subject to disclosure under the model rules.

48. The term "Relevant Services" covers any assistance or advice provided by a Services Provider in respect of the design, marketing, implementation or organisation of an Opaque Offshore Structure or CRS Avoidance Arrangement. The term would apply, for instance, to the advice provided by a lawyer,

accountant or financial advisor as part of a professional services business as well as management or compliance services provided by a corporate services provider to an offshore entity that is used in an Opaque Offshore Structure or CRS Avoidance Arrangement.

49. The intention behind extending the reporting obligations to Service Providers is to ensure that the rules capture de facto promoters (i.e. persons who play a key role in developing, implementing or organising a CRS Avoidance Arrangement without being the person responsible for its marketing or design) and that they cover advisors and service providers that have sufficient knowledge of and involvement in the Arrangement that it is appropriate to impose a disclosure obligation upon them.

50. However a person will not be treated as a Service Provider unless that person can "reasonably be expected to know" that the Arrangement falls within the definition of CRS Avoidance Arrangement. This test requires that the Service Provider both has a sufficient knowledge of the facts of the Arrangement and understanding of its legal treatment to be in a position to determine whether the Arrangement has the effect of circumventing the CRS. As regards the facts of the Arrangement, Service Providers must take into account anything that they actually know about the Arrangement as well as any information that is readily available (including, for instance, in the case of Financial Institutions, information on the customer file or collected in connection with AML/KYC or CRS obligations). These model rules do not impose any additional due diligence or enquiry obligations. As regards the legal treatment of the Arrangement (including under the relevant CRS Legislation) the Service Provider is only required to have the level of expertise that would ordinarily be expected of someone providing the Relevant Services.

51. A person therefore falls within the definition of a Service Provider where their knowledge of the Arrangement combined with the degree of expertise and understanding required to provide the Relevant Services is such that the person can reasonably be expected to know that the Arrangement is a CRS Avoidance Arrangement. The definition of Service Provider would, for example, capture a Service Provider that works closely with the Promoter in designing or marketing the Arrangement. It would also capture a person that does not assist the Promoter, but assists a Reportable Taxpayer to enter into an Arrangement knowing that it is a CRS Avoidance Arrangement. It would also capture a person that provides administration and compliance services in respect of a CRS Avoidance Arrangement where their familiarity with the Arrangement and the degree of expertise required to provide those services means that they can be reasonably expected to know that the Arrangement is a CRS Avoidance Arrangement.

52. The model rules are not intended to impose any additional due diligence rules on a Service Provider beyond those that would ordinarily be undertaken for commercial or regulatory purposes and do not require Service Providers to have or apply a level of expertise beyond that which is reasonably required to provide the Relevant Services. For example, the definition would generally not capture Financial Institutions when carrying out routine banking transactions (e.g. money transfer, custody etc.), because the nature of their involvement and the information readily available to them would typically not meet the "reasonably be expected to know" standard.

53. The definition would also 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 in the same position to conclude that the transfer was a one of the steps in the implementation of a broader Arrangement that fell within the scope of the hallmarks set out under the model rules.

Service Providers in respect of Opaque Offshore Structures

54. As for CRS Avoidance Arrangements, the definition of Service Provider in respect of an Opaque Offshore Structure also covers persons that provide advice or assistance in respect of the design, marketing, implementation or organisation of the Structure, to the extent that such a person can be reasonably expected to know that the Structure has the features which bring it within the definition of an Opaque Offshore Structure in Rule 1.2.

55. Whether a person providing advice or assistance in respect of the design, marketing, implementation or organisation of the Structure can reasonably be expected to know that such Structure is an Opaque Offshore Structure, will depend on the nature of the services provided in respect of the Structure and whether:

(a) the person has actual knowledge of, or readily available information on, the relevant features of the Structure that bring it within the definition of an Opaque Offshore Structure; and

(b) given the type of the services provided, the person can reasonably be expected to have the expertise to understand that this is an Opaque Offshore Structure.

56. This should generally not affect Financial Institutions in their ordinary banking activities. For instance, a Financial Institution that, as part of its ordinary banking activities, opens an account for a non-resident entity, may hold sufficient information to determine whether it is offshore, but would, in ordinary circumstances, be unlikely have access to information that would allow the Financial Institution to determine whether the entity is passive or held through an Opaque Structure. On the other hand, for example, if a company service provider in a jurisdiction which has not adequately implemented the FATF transparency standards sets up companies in its own jurisdiction, which are clearly passive in nature (e.g. they all have the same postal box address), on behalf of a person whom he knows is marketing the use of such entities as Opaque Offshore Structures, the company service provider will be considered a Service Provider in respect of such Structures.

2. Disclosure requirements

Intermediaries required to disclose CRS Avoidance Arrangements and Opaque Offshore Structures

57. Rule 2.1 sets out the basic disclosure obligations imposed on Intermediaries to disclose CRS Avoidance Arrangements and Opaque Offshore Structures. The Intermediary must have a nexus with the reporting jurisdiction for the disclosure obligation to be effective. Rule 2.1 sets out three independent criteria for establishing nexus with the reporting jurisdiction. Disclosure will be required in the reporting jurisdiction where the Intermediary:

(a) makes the CRS Avoidance Arrangement or Opaque Offshore Structure available for implementation or provides services in respect of that Arrangement or Structure through a branch located in the reporting jurisdiction;

(b) is resident or has its place of management in the reporting jurisdiction; or

(c) is incorporated in, or established under the laws of, the reporting jurisdiction.

58. The nexus test is designed to capture any Intermediary with a sufficient connection with the reporting jurisdiction for the tax authorities to be able to require compliance with the disclosure rules. The three criteria for nexus would often also capture those cases where an Intermediary is subject to regulation or required to register as a professional services provider in the reporting jurisdiction, because such regulation and registration requirements typically apply to Intermediaries operating within that jurisdiction. Because the nexus criteria are separate and independent, the model rules contemplate that an Intermediary might be subject to reporting obligations in different jurisdictions in respect of the same scheme. Rule 2.5 includes rules designed to eliminate any unnecessary duplicative reporting.

When information required to be disclosed

59. Because the disclosure obligation applies only to those persons that are Intermediaries in respect of the relevant Opaque Offshore Structure or CRS Avoidance Arrangement, the model mandatory disclosure rules effectively only require a person to disclose that Structure or Arrangement in two situations:

- Where the person has designed the Structure or Arrangement or has begun marketing it (i.e. making it available for implementation) to other potential Intermediaries or Reportable Taxpayers; and

- 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 Arrangement or Structure is a CRS Avoidance Arrangement or an Opaque Offshore Structure.

60. These two situations can arise at different times in respect of the same Structure or Arrangement. The initial disclosure obligations may provide the reporting jurisdiction with early information on the development of Structures designed to not allow the accurate determination of the Beneficial Ownership of assets or income or strategies to circumvent the CRS. The focus of this disclosure obligation is on obtaining timely information on the design of the Structure or Arrangement, and the disclosure may be made before the Intermediary has found any individual users for the Arrangement. Subsequently the disclosure obligations may apply to an Intermediary who provides Relevant Services in respect of an Opaque Offshore Structure or CRS Avoidance Arrangement. At this point the focus of these disclosure obligations is on identifying Clients and actual users of the Opaque Offshore Structure or CRS Avoidance Arrangement and other professionals involved in the supply or implementation of the Structure or Arrangement as well as deterring taxpayers from entering into such Structures or Arrangements.

61. This approach to disclosure follows the approach set out in the BEPS Action 12 Report in that it requires disclosure at different points in the supply chain. Rule 2.5 of the model rules protects the Intermediary from being required to disclose exactly the same information twice in respect of the same Arrangement to the same tax authority.

62. The trigger for when an Intermediary must disclose under Rule 2.2 differs slightly from that set out in the BEPS Action 12 Report. While the BEPS Action 12 Report refers to the point in time when the taxpayer first implements the Arrangement, Rule 2.2 ties the disclosure obligation back to the actual supply of Relevant Services by the Intermediary in respect of that Arrangement. This may result in a later date of disclosure in certain cases. However it also provides the Intermediary with a clearer deadline for complying with its disclosure obligations.

63. A CRS Avoidance Arrangement or Opaque Offshore Structure will be treated as having been "made available" for implementation at the time the material design elements of the Arrangement or Structure had been completed and communicated to a Client or Reportable Taxpayer. It is not necessary for all the material elements of the scheme to be in place before disclosure is required, rather it will be sufficient that the Intermediary has taken initial steps to market the Arrangement.

64. The model text sets a time limit for disclosure that is thirty (30) days after the scheme has been made available or the Relevant Services are provided. The filing date should be as soon as is practicable after the obligation to disclose has been triggered and, for those jurisdictions that already have mandatory disclosure regimes for other types of Arrangements should be consistent with the policy set by the filing requirements under those regimes.

Information required to be disclosed

65. Rule 2.3 sets out the information required to be disclosed by a person in respect of a CRS Avoidance Arrangement or Opaque Offshore Structure. The information required to be disclosed under the model rules includes all the steps and transactions that form part of the Arrangement or Structure including key details of the underlying investment, organisation and persons involved in the Arrangement or Structure and the relevant tax details of the Clients and users of the Arrangement or Structure as well as any other Intermediaries. The liability to disclose attaches automatically to every person that is an Intermediary with respect to the Arrangement or Structure (as well as Reportable Taxpayers pursuant to Rule 2.6) although these persons are only required to disclose information that is within their knowledge, possession or control. 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.

66. The information requirements of the model rules are designed to keep the compliance burden on Intermediaries to a minimum while still capturing the information that is likely to be most relevant. The requirement to separately identify the jurisdictions where the scheme has been made available for implementation and to specify the tax details of all the Intermediaries, Clients and Reportable Taxpayers in connection with that Arrangement is intended to make it relatively straightforward for a tax administration to determine the jurisdictions for whom the disclosed information will be relevant for information exchange purposes.

Tax Details of Clients, Intermediaries and Reportable Taxpayers

67. The persons that are required to be identified under Rule 2.3(a) are:

- the person making the disclosure;
- any person that is a Client of the disclosing Intermediary in respect of the Arrangement or Structure;
- any person that is an actual user of the Arrangement or Beneficial Owner under the Structure; and
- any other person that is an Intermediary in respect of the same Arrangement or Structure.

68. The term "Client" means any person who requests an Intermediary to, or on whose behalf, or for whose benefit, an Intermediary make(s) a CRS Avoidance Arrangement or Opaque Offshore Structure available, or provide(s) Relevant Services in respect of such an Arrangement or Structure. The term Client includes users or potential users and persons acting as a representative or agent of a Reportable Taxpayer. The term Client also includes persons who obtain assistance or advice from an Intermediary on the design, marketing, implementation or organisation of a CRS Avoidance Arrangement or Opaque Offshore Structure with the intention of subsequently promoting that Arrangement or Structure to third parties.

69. The definition of Client is not confined to those persons who are in direct contact with the reporting Intermediary. The reporting Intermediary will also be required to disclose (to the extent such information is within that person's knowledge, possession or control) information on those persons on whose behalf or for whose benefit the Intermediary has made the Arrangement or Structure available or provided the Relevant Services in respect of the Arrangement or Structure.

70. If, for example, an Intermediary that is a lawyer is asked by its Client to prepare the documentation for a trust which is to be used as part of a CRS Avoidance Arrangement, the Intermediary would be required to disclose the identity of the Client (who requested the service) as well as the settlor, trustee and beneficiaries of the trust that are users of the Arrangement if the lawyer provides services on their behalf or for their benefit.

71. An Intermediary is not required to disclose the identity of a Reportable Taxpayer that is a potential user of the Arrangement or Structure unless that person is also a Client of the Intermediary. For example, an Intermediary may make a presentation or provide marketing materials on a CRS Avoidance Arrangement to potential users, while these potential end-users fall within the definition of Reportable Taxpayers, they will not be treated as Clients of the Intermediary (and their identity will not be required to be disclosed) simply because they attend the presentation or receive the marketing materials. However, their identity must be disclosed by that Intermediary, if those persons notify the Intermediary that they

wish to implement the Arrangement or Structure or request the Intermediary to provide them with Relevant Services in respect of that Arrangement or Structure.

72. Under Rule 2.3(a)(iii) an Intermediary is further required to disclose the identity of any Reportable Taxpayer who is an actual user of the CRS Avoidance Arrangement or Opaque Offshore Structure (regardless of whether that Reportable Taxpayer is a Client).

73. An Intermediary is also required to disclose the identity of any other Intermediary in respect of the same Arrangement or Structure. Thus an Intermediary that provides implementation services in respect of a CRS Avoidance Arrangement should also disclose the identity of the person that designed or marketed that Arrangement. The Intermediary is only required, however, to disclose the identity of those persons that are Intermediaries in respect of the same Arrangement. For example, in relation to a lawyer or accountant who is instructed by a bank to design a financial product that falls within the specific hallmark described in Rule 1.1, the lawyer or accountant will be the Intermediary (as the person responsible for the design of a CRS Avoidance Arrangement) and the bank will be a Client of that Intermediary. If the bank subsequently offers the CRS Avoidance Arrangement as a product to its own customers then the bank will become an Intermediary in respect of a separate CRS Avoidance Arrangement with its customer, and that customer would be treated as the Client in respect of that Arrangement. In those cases where a person is both a Client and an Intermediary in respect of the same Arrangement or Structure, the identity of that person only needs to be disclosed once.

74. By requiring an Intermediary to disclose the users and all the Clients and Intermediaries in respect of the same Arrangement or Structure, the mandatory disclosure rules provide the reporting jurisdiction with a complete list of those persons involved in the supply chain for the design, marketing, implementation or operation of the CRS Avoidance Arrangement or Opaque Offshore Structure.

75. In those cases where the Intermediary has incomplete information, and no direct connection with the persons required to be disclosed, the Intermediary would only need to disclose such information that is within the Intermediary's knowledge, possession or control. In this case it may be necessary for the tax administration to undertake further compliance activity to develop a complete picture of the Arrangement.

76. The Intermediary is not required to disclose information in respect of a CRS Avoidance Arrangement or Opaque Offshore Structure unless that Arrangement or Structure is one that is required to be disclosed by that Intermediary under the model rules. If, for example, an Intermediary operates through a branch in the reporting jurisdiction, it should only disclose the identity of those persons that are Clients, Reportable Taxpayers or Intermediaries in respect of Arrangements or Structures that have been made available through the branch or where the branch has supplied Relevant Services in respect of that Arrangement or Structure.

Description of the Arrangement or Structure

77. The description of the CRS Avoidance Arrangement or Opaque Offshore Structure should explain the overall objective of the Arrangement or Structure; identify the persons involved, and their role in, the Arrangement or Structure and provide an explanation of the entities, steps and transactions that make up the Structure or Arrangement including the underlying investment. The description may include references to marketing materials, structure diagrams, presentations and other documents that provide context or explain the Structure or Arrangement in further detail.

Jurisdictions where Arrangement or Structure has been made available

78. Rule 2.3 further requires an Intermediary to disclose those jurisdictions where a CRS Avoidance Arrangement or Opaque Offshore Structure has been made available for implementation. The separate disclosure of these jurisdictions provides early warning of where a CRS Avoidance Arrangement or Opaque Offshore Structure is being marketed and before the Intermediary has provided any Relevant Services in respect of that Arrangement or Structure.

79. As noted above, an Intermediary will be treated as having made available a CRS Avoidance Arrangement or Opaque Offshore Structure to another person for implementation at the time the material details of that Arrangement or Structure have been communicated to that person. Similarly, the jurisdiction where that Arrangement or Structure has been made available should be determined by looking to the where that person was located (i.e. resident, incorporated or managed) at the time the communication was made.

No disclosure required in certain instances

80. Mandatory disclosure rules do not require an attorney, solicitor or other admitted 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 BEPS Action 12 Report, however, the type of confidentiality obligations that exist between legal representatives and their Clients are generally designed to protect a Reportable Taxpayer's or Client's ability to obtain confidential advice. As such, domestic law in the jurisdiction of the Intermediary may have the effect that some or all of the information required to be disclosed under the model rules will be covered by the relevant domestic rules on legal professional privilege. Such information would be excluded from the disclosure requirements, but only to the extent that an information request for the same information could be denied under Article 26 of the OECD Model Tax Convention and Article 21 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

Avoidance of duplicate disclosure

81. In order to avoid duplicate disclosure in respect of the same Arrangement in the same jurisdiction, the model mandatory disclosure rules provide that the Intermediary shall not be required to disclose any information on an Arrangement or Structure that has previously been disclosed to that tax authority by that Intermediary or another Intermediary. This exclusion from disclosure could apply where an Intermediary that is responsible for the design or marketing of a CRS Avoidance Arrangement or Opaque Offshore Structure has previously made a disclosure in respect of that Arrangement or Structure and then subsequently makes the same Arrangement or Structure available for implementation to another Reportable Taxpayer. In such a case the Intermediary would only be required to make an additional disclosure in respect of the identity of the additional Reportable Taxpayer (i.e. the information not previously disclosed). The exclusion could, for instance, also apply where there are multiple intermediaries within the same group of companies and in respect of the same CRS Avoidance Arrangement so that only one disclosure needs be filed in respect of the same Arrangement.

82. In order to minimise the impact of duplicate disclosure by the same Intermediary in different jurisdictions with respect to the same Arrangement or Structure, Rule 2.5(b) and (c) provide an Intermediary with an exemption from disclosure where the Intermediary has a closer nexus with a jurisdiction and where they can demonstrate that information has already been disclosed in that jurisdiction under substantially similar rules, while ensuring that such information may be exchanged with the jurisdiction(s) of tax residence of the Reportable Taxpayer. As such, Partner Jurisdiction is a

jurisdiction that has implemented substantially similar mandatory disclosure rules and that has the appropriate international exchange agreements in place that would allow the tax authorities in that jurisdiction to exchange any foreseeably relevant information on the Arrangement with the jurisdiction(s) of tax residence of the Reportable Taxpayer. It is expected that jurisdiction implementing these model rules will maintain a publicly-available list of Partner Jurisdictions.

Reportable Taxpayer required to disclose in certain circumstances

83. The primary intention of these mandatory disclosure rules is to target Intermediaries that are responsible for the design, promotion or implementation of CRS Avoidance Arrangements and Opaque Offshore Structures. However, consistent with the framework for mandatory disclosure rules set out in the BEPS Action 12 Report, it is also necessary to consider the implications for the user of a CRS Avoidance Arrangement or Opaque Offshore Structure if the Intermediary is not subject to disclosure obligations as well as those cases where the Intermediary is unable to comply with its disclosure obligations under these rules.

84. The model rules impose a direct disclosure obligation on Reportable Taxpayers where the Intermediary is not required to comply with the disclosure obligations in the reporting jurisdiction either because it has no nexus with that jurisdiction under Rule 2.1 or because it is relying on an exemption from disclosure under Rule 2.4.

85. The liability to disclose attaches automatically to the Reportable Taxpayer. The Reportable Taxpayer shall be required to provide all the information set out in Rule 2.3 in respect of that Reportable Taxpayer and the Arrangement or Structure that is within that person's knowledge possession or control. However, no disclosure is required to the extent that the Reportable Taxpayer has written notification that the Intermediary has disclosed the same information to the tax authority of a Partner Jurisdiction under equivalent mandatory disclosure rules. Intermediaries would generally be expected to provide their Clients with a copy of any disclosure that had been made in respect of a reportable Arangement so that the Clients could establish that they had no further disclosure obligations under this section (subject to any regulatory requirements or other restrictions on providing this information to Clients).

86. The reason for imposing a secondary disclosure obligation on the taxpayer in these cases is to support the integrity of the disclosure rules. The disclosure obligation is imposed on the resident taxpayer in order to prevent that taxpayer from insulating itself from the effect of these rules by claiming legal privilege over information or by using the services of an offshore Intermediary that is not subject to equivalent disclosure obligations under foreign law. Disclosure by a taxpayer is not required where disclosure would be limited by domestic protections against self-incrimination. In addition, the adoption of these specific rules to combat CRS avoidance would be without prejudice to a jurisdiction's domestic rules (if any) requiring taxpayers to disclose their offshore assets.

Disclosure of Arrangements entered into after 29 October 2014 but prior to the effective date of the rules

87. The CRS was first published on 15 July 2014. By 29 October 2014, over 90 jurisdictions had publicly committed to adopt the CRS and 51 jurisdictions had signed the CRS MCAA, evidencing almost universal support for the CRS and a desire amongst jurisdictions to implement it in as short a time as possible on a global scale. However, CRS Legislation only started to enter into effect as of 2016 or later. This has provided a window of opportunity to implement CRS Avoidance Arrangements prior to the effective date of CRS Legislation. Rule 2.7 therefore provides for a special rule in respect of CRS Avoidance Arrangements entered into prior to the effective date of the disclosure rules, but after 29 October 2014. A CRS Avoidance Arrangement which was in existence prior to the introduction of the

mandatory disclosure rules will be required to be disclosed after the effective date of the rules only if the Promoter has actual knowledge of the CRS Avoidance Arrangement. The introduction of this rule is of course subject to the constitutional or similar constraints of each jurisdiction.

88. In order to address practical difficulties in identifying the Arrangements covered by this rule, the scope of disclosure is limited to Promoters and do not cover the instances where a Financial Account with an aggregate balance or value, as defined in Section VII of the CRS, of less than USD 1'000'000 is maintained with a Financial Institution. The Promoter is required to disclose the Arrangement to the tax authorities within 6 months (180 days) of the effective date of the model rules.

3. Penalties and other mechanisms for dealing with non-compliance

89. Mandatory disclosure regimes will not be effective unless both Intermediaries and taxpayers have incentives to ensure compliance with the rules. As noted in the BEPS Action 12 Report, mandatory disclosure regimes should include clear sanctions to encourage disclosure and to penalise those who do not fulfil their obligations while, at the same time, providing the flexibility to ensure that the Structure and amount of the penalty can be varied depending on the nature of the CRS Avoidance Arrangement or Opaque Offshore Structure and the Intermediary's role in that Arrangement or Structure.

90. The consequences that attach to non-disclosure will generally be determined by each jurisdiction in light of its particular circumstances. However this commentary includes an illustration of a possible approach to penalties that is designed to balance the need to ensure fairness while incentivising compliant behaviour.

Monetary Penalties on Intermediary

91. In considering an appropriate penalty to be imposed on Intermediaries for a failure to comply with its disclosure obligations, jurisdictions may consider setting the penalty at a fixed rate or (if greater) at a percentage of the fees paid to the Intermediary for the services provided in respect of the CRS Avoidance Arrangement or Opaque Offshore Structure, with the percentage set at rate that removes any economic incentive for the Intermediary to avoid disclosure.

92. Jurisdictions could also consider the use of a daily penalty similar to the one used in the United Kingdom and Ireland under their mandatory disclosure rules. As described in the BEPS Action 12 Report, daily penalties put an emphasis on timely disclosure and they can be used in conjunction with minimum penalties.

Monetary Penalties on Reportable Taxpayer

93. These model rules are primarily targeted at Intermediaries. The model rules also, however, impose disclosure obligations on Reportable Taxpayers in certain limited cases. The reason for imposing disclosure obligations on a Reportable Taxpayer is to ensure that an Arrangement does not cease to be reportable simply because the Reportable Taxpayer claims the benefit of legal privilege or uses the services of an offshore Intermediary. While, in practice, is not expected that a Reportable Taxpayer that was trying to hide an Arrangement from the tax authorities would disclose that Arrangement under these rules, the failure to disclose would be expected to trigger penalties for the Reportable Taxpayer that would be in addition to those imposed for the failure to comply with other filing and payment obligations. The purpose of imposing monetary penalties on Reportable Taxpayers is also to ensure that there is no advantage to be gained from a disclosure perspective by using Intermediaries that are outside the territorial scope of these disclosure rules.

Non-monetary penalties on Intermediary

94. Jurisdictions may also consider non-monetary penalties for Intermediaries and Reportable Taxpayers. Options include taking action to prohibit an Intermediary from providing regulated or professional services in the jurisdiction, publication of names and extension of time limits.

Publication of Names

95. While name publication may not be an appropriate tool in the context of tax avoidance schemes, it is frequently used by tax administrations in the area of tax evasion and fraud. Publication of names of non-compliant Reportable Taxpayers and Intermediaries has the additional benefit of allowing tax administrations to disrupt the promotion of such schemes by high-risk Intermediaries and warn taxpayers of Promoter behaviour that raises a systemic risk for the tax system. Publication may only be appropriate where it was proven in an applicable court or administrative tribunal or where it was admitted that the Reportable Taxpayer or Intermediary used the Arrangement or Structure to intentionally evade taxation and may not be appropriate where the failure to comply was inadvertent, or reasonable steps had been taken by the Reportable Taxpayer or Intermediary to ensure that disclosure was made.

Extension of time limits

96. Another consequence that can attach to a failure to disclose is to extend the time of assessment where any tax is collected in connection with an undisclosed Opaque Offshore Structure or CRS Avoidance Arrangement. The rationale for extending the time limits for assessment is that where the Arrangement is not disclosed the tax authority will need, and should have, more time to identify any non-compliance and correct it.

Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures

This publication contains the Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures. The design of these model rules draws extensively on the best practice recommendations in the BEPS Action 12 Report while being specifically targeted at these types of arrangements and structures.

Part I gives an overview of the model rules. Part II sets out the text of the rules. Part III provides a commentary on those rules.

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