

UPDATE

Guernsey's Mandatory Disclosure Rules

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The Income Tax (Approved International Agreements) (Implementation) (Mandatory Disclosure Rules) Regulations, 2020 (**Guernsey MDR**) were made on 11 March 2020. The Rules are not yet in force, and no intended date has been published, but we understand it will not be before joint guidance is issued by the Crown Dependencies and that is not expected until Q4 2020.

Guernsey MDR implements the commitment made by Guernsey to the EU Code of Conduct Group to introduce a mandatory disclosure regime. It closely follows the OECD's 'Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures', which is the international standard for mandatory disclosure rules and is based on Action 12 of the OECD's Action Plan on Base Erosion and Profit Shifting (BEPS).

What is it that has to be reported?

The Guernsey MDR will create reporting obligations in respect of two types of arrangements ('Reportable Arrangements'):

- 'CRS Avoidance Arrangements'; and
- 'Opaque Offshore Structures'.

These can be summarised as follows:

CRS Avoidance Arrangements are arrangements which it is 'reasonable to conclude' are designed to circumvent, or are marketed as, or have the effect of, circumventing the Common Reporting Standard ('CRS') under Guernsey law, or exploiting an absence of or any omission or deficiency within an enactment implementing the CRS.

An arrangement circumvents the CRS where it avoids the reporting of CRS information to all jurisdictions of tax residence of the taxpayers in a way that undermines the policy intent of the CRS.

Opaque Offshore Structures has a two stage test, meaning a 'passive offshore vehicle' that is held through an 'opaque structure'.

- A 'passive offshore vehicle' is 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.

There are two specific exceptions to this definition. Firstly, it doesn't apply to vehicles that are, or are wholly owned by, one or more institutional investors.

It also doesn't apply if all beneficial owners are resident for tax purposes in the same jurisdiction as the passive offshore vehicle.

- An 'opaque structure' is one which it is 'reasonable to conclude' is designed to have, is marketed as having, or has the effect of disguising the identity of the beneficial owner(s).

Guernsey MDR specifies that this may include:

1. the use of nominee shareholders,
2. the exercise of indirect control over entities beyond formal ownership,
3. 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,
4. the use of legal persons in a jurisdiction where there is –
 - (a) 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,
 - (b) no obligation on shareholders or members to disclose the names of persons on whose behalf shares are held, or
 - (c) 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;
5. the use of legal arrangements organised under the laws of a jurisdiction that do not require trustees to hold, or be able to obtain, adequate, accurate and current beneficial ownership information.

Guidance is to be provided on the meaning of the expression 'reasonable to conclude' in each of the above definitions. The States of Guernsey Briefing Note dated 1 October 2019 suggests that, in relation to Opaque Offshore Structures, the guidance will include the following examples:

- That it is 'reasonable to conclude' that a company that meets the Guernsey economic substance legislation will not be a 'passive offshore vehicle'.
- That it is 'reasonable to conclude' that an entity registered or administered in Guernsey is not an 'opaque structure' on the basis that all of the AML/CFT KYC information is available in Guernsey.

Who will have to make mandatory reports?

In general, only intermediaries have to make reports in relation to Reportable Arrangements (although a Guernsey resident taxpayer may have to make a report if an intermediary is not required to do so).

Guernsey MDR creates two different categories of intermediary for these purposes – *promoters* and *service providers* – and in most respects they are treated in the same way, but there are of course some differences.

Promoters are intermediaries who are responsible for the design or marketing of a Reportable Arrangement.

Service Providers are intermediaries who provide assistance or advice in respect of the design, marketing, implementation or organisation of a Reportable Arrangement and 'could reasonably be expected to know' that the arrangement or structure is one of the two types of Reportable Arrangement described above. It seems that this will include lawyers, accountants and financial advisors, as well as management or compliance services provided by a corporate services provider.

What is the threshold to trigger reporting in Guernsey?

Intermediaries are required to report Reportable Arrangements within 30 days if:

1. they make Reportable Arrangements available from or provide services in respect of them, through an office or branch in Guernsey; or
2. they are resident or have their place of management in Guernsey; or
3. they are incorporated or established under Guernsey law.

A limited reporting exception applies where information is contained in a communication or item that is covered by legal professional privilege, although a Guernsey resident taxpayer may then have to make a report.

An intermediary is not required to make a report if it holds documentation demonstrating that a report has already been made in Guernsey or a partner jurisdiction.

Does the reporting requirement have retrospective effect?

The reporting requirement only applies to Reportable Arrangements serviced by a *service provider* who meet the trigger threshold described above when the legislation comes into force, so in that scenario, there is no retrospective reporting.

However, *promoters* of *CRS Avoidance Arrangements* that were implemented on or after 29 October 2014, must make a report within 180 days of Guernsey MDR coming into force (unless the promoter can demonstrate that it related to assets of less than US\$1,000,00).

What should you do next?

1. Carry out due diligence to establish whether:
 - (a) you are an intermediary and if so, are you a *promoter* or a *service provider*;
 - (b) you *promote* or *service* Reportable Arrangements and, if so, whether they are *CRS Avoidance Arrangements* or *Opaque Offshore Structures*; and
 - (c) you do so from an office or branch in Guernsey, you are resident or managed in Guernsey or you are incorporated/established under Guernsey law.
2. Carry out due diligence to establish whether you have previously *promoted CRS Avoidance Arrangements* at any time since 29 October 2014.
3. Develop training and policies and procedures to identify Reportable Arrangements.
4. Develop procedures for collecting required information and reporting Reportable Arrangements to the States of Guernsey Revenue Service.
5. Check client terms and conditions and/or privacy statements to ensure there is no restriction on reporting required information. There should be no difficulty in meeting these statutory reporting requirements if the client relationship is governed by Guernsey law, but you may need to update any information provided about your reporting obligations.
6. Look out for the announcement of the commencement date of the legislation and publication of the guidance.

Contacts



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