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Swiss Insurance Association

OECD
International Co-operation and Tax Administration
Division OECD/DTPA

per email: mandatorydisclosure@oecd.org

Zurich, 13th January 2018

Public Discussion Draft "Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures"

Dear Sir/Madam

The Swiss Insurance Association ("SIA") appreciates the opportunity to comment on the OECD's request for input on new tax rules requiring disclosure of CRS avoidance arrangements and offshore structures (Public Discussion Draft of the Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures "MDR").

The SIA is the umbrella organisation that represents Switzerland's private insurance industry. The Swiss private insurers are major employers, significant taxpayers and among the most important investors both in Switzerland and abroad. The SIA membership consists of some 80 primary insurance companies and reinsurers with over 46,000 employees in Switzerland. The SIA members generate over 90 per cent of the Swiss premium volume in private insurance (https://www.svv.ch/en/members).

The SIA supports the OECD's approach to close potential gaps to the CRS legislation to ensure reporting efficiency on a global level and to identify arrangements designed to circumvent the CRS. The following input is thus to be understood as a supporting measure ensure that the MDR goals are achieved without jeopardizing the efficiency of national CRS implementation measures as developed and gone live to date.

Our comments primarily focus on one general but crucial aspect of the Draft Model Rule 1.1. (from page 36 onwards) that raised concerns among members of the SIA. The SIA is convinced that the input provided will help to increase legal certainty regarding the implementation of the MDR – not only for participating countries but also for potentially affected financial institutions as well as intermediaries and promoters.

Finally, we would like to emphasize that the SIA strongly objects any MDR provision that is not aimed at effectively enforcing the CRS, but is factually overruling and extending the CRS provisions as enacted. Any

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MDR provisions must follow the rule of law as agreed by the Partner Jurisdictions rather than extending the scope of the CRS.

Please note that all references are made to the MDR-Annex “Consolidated Draft Model Rules” from page 36 onwards. References to other sections of the MDR are indicated separately.

1. Comments on Consolidated Draft Model Rules 1.1

The main common concern among the members of the SIA are uncertainties regarding the definition of an arrangement that is to be treated as circumvention of the CRS. The legitimacy of this concept is undisputed and core to the MDR. However, in our opinion there is a considerable risk of misinterpretation of this principle when taking into account the Model Rules according to the Annex of the MDR Public Discussion Draft.

The Model Rules set out in section 1.1 what is to be considered a CRS Avoidance Arrangement. In order to illustrate such harmful arrangements, two basic categories of harmful arrangements are depicted. We expect the wording in 1.1(a) and 1.1(b) to leave some room for varying interpretation.

In order to illustrate, we would like to scrutinize the current MDR wording with regard to specific exemptions as provided by the CRS.

1.1. Model Rules 1.1(a) (Page 36):

“A CRS Avoidance Arrangement is any Arrangement for which it is reasonable to conclude that it is designed to, marketed as or has the effect of, circumventing CRS Legislation or exploiting an absence thereof. <u>In any case a CRS Avoidance Arrangement includes, but is not limited to:</u>

(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;”

Following a text based interpretation, the conclusion could be made that - in addition to e.g. using a specifically developed derivative contract, also a retirement, pension or any another low risk CRS excluded accounts as defined in the CRS Section VIII(C)(17) – might fall under the previously mentioned provision, since the enumerated types of contractual relationships – although having certain elements of a Financial Account - do not qualify as Financial Accounts (see CRS commentary on subparagraph C(17) of Section VIII).

This could trigger the likely unintended result that e.g. any payment to a pension fund, a micro insurance cash value insurance contract or an escrow account would have to be treated as a CRS Avoidance Arrangement. Such outcome would stand in stark contrast to the CRS provisions which govern exemptions from the scope of reporting under the CRS. These exemptions form an integral part of the regulations. It is also explicitly stated, that any exemption must not frustrate the purpose of the CRS (see e.g. Section VIII (C)(17)(g) of the CRS).

Numeral 15 of the MDR states the following: *"An arrangement will fall within the scope of the generic hallmark if that arrangement actually has the effect of circumventing the CRS 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."* The SIA is convinced that the application of exemptions from the reporting duty that are based on the CRS are de jure never means to frustrate or avoid the purpose of the CRS. This is however not reflected in Model Rule 1.1. Accordingly, the wording in its current state must be revised in order to streamline the MDR provisions with the already enacted CRS legislation.

The room for interpretation of 1.1(a) would likely cause inconsistent application of the previously outlined rule by numerous intermediaries as well as promoters. Especially banks acting as intermediaries might come to the conclusion, that they – in line with the requirement of Section 1.1(b) of reasonably understanding the reporting implication of a transfer of funds to a Non-Reporting Financial Institution – might want to report information on any payment to an e.g. exempt micro-insurance cash value contract or to an exempt escrow account in order to mitigate any remote risk of non-compliance with MDR provisions.

Not every course of action (e.g. an acquisition of a term life insurance contract) that effectively results in a change of financial assets' status from reportable to non-reportable is to be qualified as a circumvention. Such Excluded Accounts as well as the implementation in the Participating Jurisdictions are subject to the Peer Review in order to ensure a consistent implementation of the CRS. Hence, a transfer of funds to such accounts must not be undermined by the MDR, resulting in a new level of compliance and reporting duties for Financial Institutions, Promoters and Intermediaries involved – without identifying any of the targeted avoidance arrangements.

To avoid potential misinterpretation the SIA proposes the following:

- Including of clarifying wording (either in Model rules directly or in accompanying documentation) that the use of an account, product or investment that qualifies as an Excluded Account under the CRS is not considered to be a CRS Avoidance Arrangement.

1.2. Model Rules 1.1(b):

"A CRS Avoidance Arrangement is any Arrangement for which it is reasonable to conclude that it is designed to, marketed as or has the effect of, circumventing CRS Legislation or exploiting an absence thereof. <u>In any case a CRS Avoidance Arrangement includes, but is not limited to:</u>

(b) an Arrangement to:

(i) transfer 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"

Following a text based interpretation, the conclusion could be made that - in addition to e.g. a Financial Institution that is not participating in the CRS due to its location in a non-Partner Jurisdiction for a specific account holder / tax residency constellation - every transfer to a Non-Reporting Financial Institution falls into the scope of a CRS Avoidance Arrangement. The term "Non-Reporting Financial Institution" is defined in Section VIII B(1) of the CRS.

This could trigger the likely unintended result that e.g. any payment to a Governmental Entity, an exempt broad retirement fund, a retirement fund of a governmental entity or an exempt collective investment vehicle – basically every Financial Institution that is defined as a Non-Reporting Financial Institution under Section VIII B(1) of the CRS - would have to be treated as a CRS Avoidance Arrangement.

Taking the previously mentioned aspect into consideration, the same conclusion as for the Exempt Accounts must be made. Accordingly, the same conclusion is also to be made for Non-Reporting Financial Institutions:

The current wording of the MDR could trigger the likely unintended result that e.g. any payment to a Pension Fund of an International Organisation or a Governmental Entity, to an Exempt Collective Investment Vehicle or a Central Bank would have to be treated as a CRS Avoidance Arrangement. Such outcome would stand in stark contrast to the CRS provisions which govern exemptions from the scope of reporting under the CRS. These exemptions form an integral part of the regulations. It is also explicitly stated, that any exemption must not frustrate the purpose of the CRS, (see e.g. Section VIII (B)(1)(c) of the CRS).

Numeral 15 of the MDR states the following: *"An arrangement will fall within the scope of the generic hallmark if that arrangement actually has the effect of circumventing the CRS 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."* The SIA is convinced that the application of exemptions from the reporting duty that are based on the CRS are de jure never means to frustrate or avoid the purpose of the CRS. This is however not reflected in Model Rule 1.1. Accordingly, the wording in its current state must be revised to streamline the MDR provisions with the already enacted CRS legislation.

The room for interpretation of 1.1(b) would likely also lead to inconsistent application of the previously-mentioned rule by numerous intermediaries as well as promoters. Especially banks acting as intermediaries might come to the conclusion, that they – in line with the requirement of Section 1.1(b) of reasonably understanding the reporting implication of a transfer of funds to a Non-Reporting Financial Institution – might want to report information on any payment to e.g. an exempt Pension Fund in order to mitigate any remote risk of non-compliance with MDR provisions.

In order to avoid potential misinterpretation the SIA would like to propose the following:

- Including of clarifying wording (either in Model rules directly or in accompanying documentation) that the harmful "not Reporting Financial Institutions" as stipulated in 1.1(b) do not include Non-Reporting Financial Institutions as defined in the CRS.

Since the Non-Reporting Financial Institutions are defined in the CRS directly and the implementation in the Participating Jurisdictions is subject to the Peer Review to assess the low-risk nature of Non-Reporting Financial Institutions, such clarification does not jeopardize the rationale of Model Rules.

In addition to the necessity to provide additional guidance on the term “Financial Institution that is not a Reporting Financial Institution”, we suggest including further guidance on the term “circumventing” as used within the Model Rules. The use of the term “circumvent” in the Model Rules leaves a risk of misinterpretation. The SIA supports the definition of an agreement that circumvents CRS legislation as provided in the first paragraph of numeral 14 of the MDR. We are however of the opinion that the additional explanation as provided in the second paragraph of numeral 14 of the MDR is misleading with regard to the de jure avoidance arrangements.

Not every course of action (such as e.g. additional payments into a broad participating pension fund) that effectively results in a change of financial assets’ status from reportable to non-reportable is to be qualified as a circumvention. There are various local types Non-Reporting Financial Institutions where funds can be transferred to that have been identified to have a low-risk of being used to circumvent the CRS. Such Financial Institutions are subject to the Peer Review to ensure a consistent implementation of the CRS by the Participating Jurisdictions. Hence, a transfer of funds to such Financial Institutions must not be undermined by the MDR, resulting in a new level of compliance and reporting duties for Financial Institutions, Promoters and Intermediaries involved – without identifying any of the targeted avoidance arrangements.

In the same paragraph, the generic circumvention test is partially softened by referencing information exchange under FATCA. The SIA struggles with the interpretation of the respective sentence:

“Therefore an arrangement would not fall within the definition of a CRS Avoidance Arrangement if it results in the exchange of the same Financial Account information, by the United States under a FATCA inter-governmental agreement with the jurisdictions of residence of the taxpayer, that would have been reported and exchanged under the CRS.”

We are of the opinion that this sentence is to be revised carefully in order to provide clearer guidance. The SIA members agree that this sentence originally intended to align FATCA and CRS based reporting of account holder information by examining what Financial Account Information will be provided under FATCA IGAs. However, when referencing information to be delivered by the United States, the following issues are to be considered:

- Not all IGAs are reciprocal, i.e. the United States are not required to deliver data to every IGA Partner Jurisdiction.

- It is generally known that the delivery of account holder information to IGA Partner Jurisdictions under a reciprocal IGA is less sophisticated than the information exchange between CRS partner jurisdictions.

- Most Excluded Accounts and Products as well as most Non-Reporting Financial Institutions as defined in the respective IGAs are based on the IGA Partner Jurisdiction's local law and are therefore not taken into account by the United States.

Following the above, we do not expect that the basically helpful reference to the FATCA IGAs will, under the current wording, effectively help to provide additional clarity.

In order to provide guidance for the parties affected by MDR regulations, the SIA would like to propose the following:

- Rewording of the current FATCA related paragraph to clarify the intention of this paragraph under consideration of the bullet points above.

The application of CRS legislation as intended by the competent legislator must not fall under the definition of circumventing the Model Rules. Hence, payments to a Non-Reporting Financial Institution such as e.g. a Pension Fund of a Governmental Entity must not be considered as circumvention of the CRS legislation, despite such a transfer of funds often resulting in assets being transferred outside of a reportable Financial Account and thus outside the scope of reporting under the applicable CRS legislation.

We are convinced that the above comments will help avoiding unnecessary compliance burdens for the parties involved without any impact on the MDR`s effectiveness.

2. Comments on Consolidated Draft Model Rules 1.3(n)

1.3(n) states that a person is not to be treated as a Reportable Taxpayer if a *"certified or notarised copy of the most recent tax filing of the Reportable Taxpayer filed by the Reportable Taxpayer with the tax administration in all its jurisdictions of tax residence, showing that such Reportable Taxpayer is compliant with its tax obligations with respect to the interest held in, the income derived from, and the assets held through the CRS Avoidance Arrangement or Offshore Structure"* can be provided.

The SIA expects the act of certifying or notarising tax filings will in many countries likely contain limited information, since e.g. a notary public will typically not be in a position to assess the completeness or accuracy of the filed documents. Following this, the SIA expects the certification will merely confirm that a tax filing has presumably been made, without providing any further proof of accuracy or completeness. Thus, the added benefit of a notarization or certification to demonstrate international tax compliance remains opaque at best.

To avoid implementing rules that typically only help demonstrating that a filing has occurred, the SIA would like to propose the following:

- Including the option to reasonably assess based on documentary evidence that an agreement, scheme, plan or the like has been declared with the competent tax authorities.

3. Comments on Consolidated Draft Model Rules 2.1

Regarding 2.1, we would like to add the following comment: The SIA understands that an Intermediary's or Promoter's duty to report in-scope arrangements or in-scope Reportable Taxpayers is limited to reporting to its domestic tax authority. No reporting is to be made to non-domestic tax authorities as such exchange of information will be made between the competent authorities of the Partner Jurisdictions. However, taking into account e.g. N76 2.1 on Page 28 might lead to a misinterpretation as to which jurisdiction(s) reporting(s) shall be made to. A clearer definition of the reporting mechanism seems to be missing from the MDR.

To avoid potential misinterpretation the SIA would like to propose the following:

- Including of clarifying wording (either in Model rules directly or in accompanying documentation) on the reporting mechanism would be helpful in order to assess the impact on Intermediaries and Promoters and to avoid misinterpretations.

4. Comments on Consolidated Draft Model Rules 2.3

The Draft Model Rule 2.3 provides for a special regulation with respect to CRS Avoidance Arrangements implemented on or after 15 July 2014 but prior to the effective date of the MDR. This rule is intended to affect high-value accounts (i.e. financial accounts with an aggregate balance in excess of USD 1'000'000) only.

The SIA rejects any retrospective application of the MDR, including the creation of a special class of pre-existing high-value accounts for MDR-purposes, subject to additional due diligence requirements. This provision would barely be operationalizable and would lead to further considerable administrative efforts and costs.

In order to avoid creating a new MDR-specific sub-category of pre-existing accounts while requiring hardly operationalizable but cost intensive due diligence processes, the SIA would like to propose the following:

- Abolishment of any retrospective effects as provided in draft model rule 2.3.

5. Comments on Consolidated Draft Model Rules 2.4

Numeral 77 of the MDR on the information required to be disclosed states that "information will be treated as within a person's control if it can be obtained by asking for it." It is our opinion that such wording is not helpful to develop an effective yet manageable client identification process for MDR purposes due to its inherent limitlessness of information available to any person. A more precise definition would provide the required guidance for a reasonable transposing of the MDR.

In order to avoid an additional identification process and the redesign of all on-boarding documentation for every contractual party, the SIA would like to propose the following:

- Including of clarifying wording (either in Model rules directly or in accompanying documentation) that the level of information to be considered as to be within a person's control does not have to exceed the information that is to be collected for local AML purposes.

6. Comments on Consolidated Draft Model Rules 2.4(a)

Providing the date of birth should take into account that such information is not necessarily available to a promoter (or to the Financial Institution). We would therefore propose to take this into account by considering the wording as chosen for the CRS in Section I(C) of the standard. Consequently the date of birth would only have to be mandatorily provided to preexisting accounts if available. In case of this information not being available, reasonable efforts have to be made to collect the information. Overruling the CRS via MDR provisions is strictly to be avoided.

To align requirements of the MDR with the already implemented procedures for CRS, the SIA would like to propose the following:

- Including of clarifying wording (either in Model rules directly or in accompanying documentation) that the date of birth is only to be provided if such information is mandatory under the CRS.

The SIA sincerely thanks for the opportunity to outline the views of its members on the core topics related to this discussion draft and would be pleased to elaborate on the issues raised in this submission if required.

Yours sincerely,

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