ICAEW
REPRESENTATION 10/22

MANDATORY DISCLOSURE RULES

Issued 8 February 2022

ICAEW welcomes the opportunity to comment on the Mandatory Disclosure Rules Consultation report published by the government in November 2021, a copy of which is available from this link.

This response of 8 February 2022 has been prepared by the ICAEW Tax Faculty.

Internationally recognised as a source of expertise, the ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 157,800 chartered accountant members in over 147 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

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KEY POINTS

1. Following the narrowing of scope in relation to DAC6 announced on 31 December 2020, members consulted expected that they would not need to make a disclosure under the DAC6 rules as they simply did not advise on arrangements within the scope of Hallmark D. While the transition to the OECD Mandatory Disclosure Rules (MDR) does not represent a significant change in scope to DAC 6, members did recognise the need to continue to implement training to educate staff on the rules.
2. There appears to be a general consensus that these rules are focused on arrangements that might allow or facilitate tax evasion and therefore it is important that HMRC's interpretation is on all fours with this. Many members felt that further guidance around Hallmark D would have been useful and reiterated this point in relation to MDR.
3. ICAEW welcomes the removal of the criteria regarding membership with a professional body in the definition of an intermediary. This is because it would have been very complex for members to implement and oversee systems to manage this criterion. The increased territorial scope of MDR would have exacerbated this.
4. We have not provided individual responses to the questions in the consultation as it is our understanding that the MDR rules will follow the rules and guidance provided in respect of the DAC 6 provisions and therefore we have not had any significant new concerns raised by members in relation to scope. We have instead focused on the consistent messages from members associated with a small number of key concerns.
5. The biggest concern by far was regarding the requirement to report historic CRS avoidance arrangements as far back as 2014 which we discuss in more detail below.

REPORTING OF PRE-EXISTING ARRANGEMENTS

6. There was unanimous feedback that the reporting requirements regarding historic arrangements were unreasonable, despite the limitations proposed in the consultation.
7. One of the biggest challenges raised was that existing statutory time limits around record keeping don't require records to be retained as far back as 2014.Some members were concerned that, given the GDPR legislation which came into force in 2018, they may have been forced to destroy some of these records since they would not legally be able to retain the relevant information without the client's permission to do so. The document retention policies of individual members would also mean that much information has been destroyed. In addition, staff turnover since 2014 will have been significant and so there will be a limit on the number of staff who would recall work done between 2014 and 2018.
8. While we understand the desire to closely align with the OECD MDR recommendations there were questions as to why it was necessary to include this look back period when the EU rules only required reporting of arrangements under Hallmark D (which was designed to align with OECD MDR) to 2018. Members were keen to understand why the government considers this extra compliance burden is justified.
9. Members are keen that this part of the proposals is reconsidered. If the government wishes to proceed with backdating to 2014 then it is important that guidance is provided so that members understand what procedures HMRC would consider adequate to ensure that there was no risk of penalties.
10. To be clear, while members do not expect to need to make any disclosures in relation to this look back period, their concern is that they wish to be compliant and to be able to

demonstrate that compliance to HMRC, but the information limitations may make this almost impossible to do in practice.

11. Given all the challenges around information availability we would also ask that HMRC provides guidance in relation to how penalties would be applied to this look back period. Members indicated that it might be difficult to raise penalties for errors in backdated reporting because it would likely be problematic to evidence that an error had occurred. It is therefore hard to envisage the provisions around backdating to have any significant impact given the difficulties in imposing any sanctions for non- compliance.

SOFTWARE MATTERS

12. Members thought that, given the scope of the rules had narrowed considerably, an online form would be a more appropriate way to report as opposed to an xml file upload.
13. This is because it was considered that a report under these rules would be a very rare event and therefore advisers were concerned at having to incur significant expense in relation to buying in or building the relevant technology to make a disclosure which might never be needed. Despite the low likelihood of needing to make a disclosure there was acknowledgement that the technology would have to be there ‘just in case’. Leaving buying or building the technology until a disclosure obligation was identified would be too late due to the 30-day disclosure window.

OTHER MATTERS

14. While not essential, members thought it might be helpful to understand how and when the information is going to be shared under MDR. Under DAC 6 we had more detail around this. This extra information would help in articulating the purpose and importance of the rules to clients and staff.
15. Members noted that the draft regulations did not include any clauses regarding HMRC issuing arrangement reference numbers, or the need to report such reference numbers on tax returns. They were looking for clarification that it was the case that there would be no arrangement reference number system.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see https://goo.gl/x6UjJ5).