The Challenges to Achieve Transparency in 2019

Zac Lucas, Founder and Head of Legal at Centenal, presented a workshop covering a broad array of transparency topics, from the latest developments in the EU's Common Reporting Standard (CRS), the challenges surrounding its implementation, as well as the types of structures that the EU's new mandatory disclosure rules (MDR) seek to identify and eradicate and the impact on compliance operations at wealth management firms.

Link to Content Summary page
Link to Article on website
Link to Presentation
Link to Event Homepage

LUCAS BEGAN BY TELLING the audience at the Hubbis Compliance in Asian Wealth Management Forum that the first step would be to review the OECD Implementation Report from 2018, as it highlights progress and also the areas the OECD will concentrate on in 2019.

"The annual OECD report highlights those noncompliant or recalcitrant countries for CRS purposes" he explained, "for example Israel, Trinidad & Tobago and Vanuatu. Although Israel is moving forward on this, political bickering means they remain non-compliant today. The relevance to you here today of this information is whether you service financial accounts held by entities resident in any of those jurisdictions."

Lucas is a practising lawyer with over 20 years of legal experience

ZAC LUCAS
Centenal

and considerable expertise advising on international regulatory law. He has lectured and written extensively on The Organisation for Economic Cooperation and Development (OECD) and regarding CRS.

As a result, Lucas advises leading private banks, trust companies, asset managers, advisers, wealthy individuals and families as well as governmental authorities on the practical implementation of CRS. This gives him unique insight into the effects the new legislation will have on wealth management in Asia. "It is incumbent upon those involved in the fiduciary or corporate service industries to understand and apply the CRS correctly, and to keep up to date with recent developments" he warned the audience.

Recalcitrant Jurisdiction Blacklist

He added that the head of the OECD had recently been agitating that there will be a blacklist for countries that deliberately drag their heels, and delay full implementation of the CRS.

Lucas then explained that the OECD would in 2019 be looking very carefully at whether financial institutions correctly follows CRS reporting requirements, which at a domestic level lead to spot checks, for example by the Monetary Authority of Singapore, with perhaps local CRS compliance audits. "Essentially," he noted before mining down into far more detail, "that means those in the wealth management industry must ensure correct procedures are in place because they will be assessed on their CRS implementation. Staff, especially client-facing bankers and relationship managers, must be mindful of the need to notify a change circumstance to their clients, which could have a CRS affect on their reportable status, for example."

Change of residency, the pitfalls...

He turned to the OECD residency blacklist, through which the OECD expresses its concerns about the abuse of residency by investment and citizenship by investment schemes for the purpose of circumventing the CRS through misreporting of the residential or the tax status of the relevant taxpayer. He advised the audience to check the list regularly, noting that it currently includes countries such as Qatar, UAE, Malaysia, Vanuatu, Turks & Caicos and others.

"What the OECD is saying, in a roundabout way," Lucas elucidated, "is that if you have account holders or controlling persons connected to these jurisdictions with respect to their residency status, you need to be asking more questions to verify their residency status, where they file their taxes and so forth."

Lucas then explained in some considerable detail about CRS account monitoring, noting that self-certification remains valid until there is a change of circumstances that causes the RFI (the reporting financial institution) to know or have reason to know that the original certificate is incorrect or unreliable.

Where are you filing, or making decisions?

He also highlighted factors around a change of tax residency, which typically focuses on place of effective management and not place of incorporation. "This might," Lucas explained, "challenge you regarding clients that are effectively trying to move their management teams or their directorships. The key here is to determine whether the change is plausible, you all need to make sure that you keep abreast of your clients and that they report changes to you. The same is true for legal arrangements such as partnerships and trusts."

Mandatory Disclosure – major ramifications

Lucas moved on to the new MDR requirements. "The G7 asked the OECD to look into whether it is possible to promulgate rules to combat CRS avoidance arrangements, hence the arrival of the MDRs," he explained. "EU countries must include them in their domestic legislation by end of 2019."

The EU has adopted CRS MDRs since June 2018, bringing countries in Asia such as Singapore and Hong Kong under pressure to implement them, because the rules also cover transactions between any EU country and any non-EU jurisdiction.

"The MDRs work in a similar way to the United Kingdom's Disclosure of Tax Avoidance Schemes (DOTAS)," explained Lucas, "which is an information-sharing mechanism used to gather information about schemes being marketed." However, the prevailing view is that MDRs are more pervasive and far-reaching than the DOTAS scheme.

Watch your advice...

Lucas then gave an overview of how the legislation will effectively work. "If advisers promote (make available) an arrangement that could lead to avoidance of CRS reporting, even if it is not implemented, there must be a disclosure," he elucidated. "Intermediaries have 30 days to inform the authorities about the arrangement, and the information will be shared internationally between reportable jurisdictions," he added. There is a defined set of information that must be disclosed for each transaction and client.

Lucas closed his immensely detailed Workshop with a glance at avoidance and disclosure obligations. "It is important to note that concerning Singapore, if the MDRs are implemented as drafted by the OECD, if you promoted an avoidance arrangement at any time from October 29, 2014, you to have to report, at least for accounts above USD1 million."

Numerous obligations

As to disclosure obligation, Lucas explained that the trigger for the mandatory disclosure is when any party makes available an avoidance arrangement. "MDRs are not outcome-driven" he noted, "as the fact that the client did not implement what you suggested is neither here nor there, the key is that you formally advised on the implementation of an avoidance arrangement, that will trigger the reporting."

He concluded with the strong advice that knowledge of the rules and action taken rapidly and decisively are essential. "You must understand whether you are a "promoter" or a "service provider", a very fine distinction with different reporting outcomes. Finally, educate staff, clients, and your intermediary network about the MDRs, this is important particularly as the Rules contain retroactive elements." ■