The Mandatory Disclosure Rules: Selected Issues, Part 3

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This article supplements our two earlier articles, in the October 2023 and January 2024 issues of this newsletter, on the mandatory disclosure rules ("the MDRs"). In those articles, we specifically focused on the CRA's recent revisions to its online guidance ("the guidance") regarding the MDRs. As a reminder, the MDRs encompass three distinct regimes: the reportable transaction rules (in section 237.3 of the ITA), the notifiable transaction rules (in section 237.4), and the reportable uncertain tax treatment rules (in section 237.5). The guidance was updated again on August 20, 2025, and this article discusses a selection of the changes to the guidance, focusing on items of interest to tax advisers.

Notable Changes: The Reportable Rules

Reporting Transactions in a Series

Paragraph 12 of the guidance now clarifies how to report a series of transactions for the purposes of the reportable transaction rules. It states that

> [t]he filing of a full and accurate information return to the best of a filer's knowledge in respect of the reportable transaction that is part of a series that includes the reportable transaction, and which accurately describes each transaction that is part of the series, will satisfy [a taxpayer's] reporting obligation in respect of each transaction that is part of the series.

The guidance also notes that form RC312 should be completed to the best of a taxpayer's knowledge at the time of filing, but if additional transactions, parties, hallmarks, facts, or information become known after the initial filing, the taxpayer should file an amended form.

Contingent Fee Arrangements

Paragraph 23 of the guidance states in general terms that the fee for the preparation of a tax return (or relevant schedules or forms in respect thereof) that results in a taxpayer obtaining a tax refund—including entitlement to personal tax credits (such as the disability tax credit or other refundable credits) and the Canada workers benefit—would not trigger the contingent fee hallmark. This statement is now subject to a caveat: it applies only where the fee

"does not relate to aggressive tax avoidance transactions (for example, charitable donation schemes)."

Contractual Protection

The guidance states the following:

> The contractual protection hallmark will not apply in a normal commercial or investment context in which parties deal with each other at arm's length and act prudently, knowledgeably and willingly, and does not extend contractual protection for a tax treatment in respect of an avoidance transaction. (paragraph 41)
>
> A reporting obligation would not arise solely in respect of contractual protection in the form of insurance that is integral to an agreement between persons acting at arm's length for the sale of a business where it is reasonable to conclude that the insurance protection is intended to ensure that the purchase price paid under the agreement takes into account any liabilities of the business immediately prior to the sale and the insurance is obtained primarily for purposes other than to obtain a tax benefit from the transaction or series. (paragraph 42)

Paragraph 43 of the guidance previously stated, for greater clarity, that "the contractual protection hallmark would not arise solely where the insurance or indemnity is based on the actions or inactions of a person to achieve a tax result." The revised paragraph now adds the condition that the contractual protection hallmark will also not arise only if "it is reasonable to conclude that the indemnity is intended to ensure that the appropriate purchase price is paid under the agreement."

Paragraph 43 now also provides that

> a reportable transaction and an RC312 filing obligation would not arise solely where a child or the child's purchaser corporation had a legal obligation to indemnify the sellers (for example, parents) for any adverse tax consequences resulting from the failure of the transaction to achieve a tax benefit pursuant to the provisions of the Immediate Intergenerational Business Transfer rules contained in the Act.

We note that an intergenerational transfer typically does not occur between persons "dealing at arm's length," because the parties would be related under the ITA. Therefore, this commentary appears to imply that the phrase "acting at arm's length," contained in the relevant exclusion within the definition of "contractual protection" in subsection 237.3(1), has a distinct meaning. One could infer that the CRA interprets "acting at arm's length" as including parties who are deemed to not deal at arm's length but whose conduct is analogous to parties dealing at arm's length. This change, though welcome, does not clearly disclose the CRA's reasoning for reaching its conclusion and, in our view, should be approached with caution.

Notable Changes: The Notifiable Transaction Reporting Rules

Reporting Transactions in a Series

Paragraph 66 of the guidance now clarifies how to report in respect of a series of transactions in relation to the notifiable transaction rules. This paragraph largely mirrors the guidance in paragraph 12 in respect of reportable transactions as they relate to a "series." Paragraph 66 provides that

> [t]he filing of a full and accurate information return to the best of a filer's knowledge in respect of the notifiable transaction that is part of a series that includes the notifiable transaction, and which accurately describes each transaction that is part of the series, will satisfy [a taxpayer's] reporting obligation in respect of each transaction that is part of the series.

As with the reportable transaction rules, the guidance advises that, as indicated in the RC312 form, a taxpayer should complete the form to the best of the taxpayer's knowledge at the time of filing. However, the taxpayer should file an amended form if additional transactions, parties, hallmarks, facts, or information become known later.

Reasonably Be Expected To Know

Paragraphs 237.4(4)(c) and (d) of the ITA (which form part of the notifiable transaction rules), in general terms, create reporting obligations for advisers and promoters (and for persons not dealing at arm's length with them, provided that such persons are entitled to a fee) in respect of notifiable transactions. However, pursuant to subsection 237.4(7), this reporting obligation does not apply to such a person unless "the person knows or should reasonably be expected to know that the transaction was a notifiable transaction."

Paragraph 68 of the guidance explains that the "test of what a person should '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 person involved." Accordingly, the guidance states that the test would be satisfied where "a reasonable person in the same position would be aware of this information."

NT-2023-02: Avoidance of Deemed Disposal of Trust Property

A transaction becomes a notifiable transaction if (1) the transaction is the same as or substantially similar to a transaction designated by the minister of national revenue with the concurrence of the minister of finance, or (2) the transaction is in a series of transactions that is the same as or substantially similar to the series designated by the minister of national revenue with the concurrence of the minister of finance.

NT-2023-02 designates transactions and series of transactions that are designed to avoid the deemed disposal of trust property. These transactions and series seek to avoid the "21-year deemed realization rule" for a trust, in circumstances designed to circumvent the denial of the rollover under subsection 107(2) to non-residents, or to circumvent subsection 104(5.8), which, in general terms, prevents a trust that has received property from another trust from "resetting" the 21-year rule.

New paragraph 75 of the guidance provides that, where it is reasonable to conclude that the payment of dividends from a trust to a corporation owned by another trust or by a non-resident shareholder "is expected to avoid or defer the 21-year deemed realization rule or to avoid the rules in subsections 107(5) and (2.1)," the transaction or series of

transactions that includes the payment of the dividends would be substantially similar to an NT-2023-02 transaction and would result in a reporting obligation. Subsection 107(5), in general terms, denies a tax-deferred rollout of property under subsection 107(2) to a non-resident.

Paragraph 76 of the guidance expresses the view, in general terms, that estate freeze transactions (including refreeze transactions) would not fall within the scope of NT-2023-02. Specifically, transactions that "limit, in whole or in part, the future growth in the value of shares of Opco (common shares) by having the owner—Old Trust—exchange the common shares for new shares that have a fixed value (preferred shares) that is equal to the fair market value (FMV) of the common shares and where a New Trust subscribes to the growth in the value of shares of Opco" or "where the Old Trust sells the common shares at FMV to the New Trust" would not be considered substantially similar to NT-2023-02. The guidance indicates that this would be the case "insofar as no rights and restrictions are expected to avoid or defer the 21-year deemed realization rule or to avoid the rules in subsections 107(5) and (2.1) through a significant reduction in FMV."

It is worth noting that the 2025 budget proposes to introduce amendments to subsection 104(5.8) that are designed to catch transactions that would otherwise avoid the scope of that provision (and thereby "reset" the 21-year rule) by indirect transfers from one trust to another. This new legislation does not, in our view, clearly exclude the estate freeze (and refreeze) transactions that are excluded from the scope of NT-2023-02, and, accordingly, advisers should be cognizant that such transactions could nonetheless be affected by amended subsection 104(5.8) notwithstanding that they may not be notifiable transactions.

Other Changes

Other noteworthy revisions to the guidance can be identified by searching the online version for the words "new" or "updated." Items that may be worthwhile to review include amendments relating to the following:

1. the interaction between optional GAAR reporting under the reportable transaction rules and the Global Minimum Tax Act (paragraph 16 of the guidance);
2. the application of the MDR regime to clean economy tax credits (paragraphs 22, 34, and 53 of the guidance); and
3. commentary with respect to NT-2023-05, back-to-back arrangements (paragraphs 78 to 80 of the guidance).

Keeping Track of Changes to the MDR Guidance

The CRA has now amended the guidance on several occasions. Taxpayers relying on the guidance when taking filing positions under the MDR regime would be well advised to keep a record of the version in effect at the time those positions were taken. Internet tools such as the Wayback Machine may be helpful in locating prior versions of the guidance if such a record has not been maintained.

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