



Potential implications of the mandatory disclosure rules


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Learning objectives / Overview

- Reportable Transactions
- Notifiable Transactions
- Coordination of reporting
- Penalties and Limitation Periods
- Discussion



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Background

- Proposed in the 2021 Federal Budget
- Draft legislation released February 4, 2022 and August 9, 2022
- Will apply to transactions entered into after the legislation receives Royal Assent
- Covers Reportable Transactions, Notifiable Transactions and Uncertain Tax Treatments (we will not be discussing Uncertain Tax Treatments today)
- Consultations on Reportable Transactions and Notifiable Transactions continue



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Reportable Transactions (ITA: s. 237.3) – Amended

• Prior Rules

- Reportable Transaction is an “avoidance transaction” if 2 of 3 “hallmarks” present:
 - Advisor/Promoter entitled to fee based on amount of a tax benefit / contingent on a tax benefit or attributable to the number of persons participating
 - Advisor/Promoter obtains confidentiality
 - A person obtains “contractual protection” (insurance/indemnity/other protection)
- Can be single transaction or one transaction in a series
- Only one person required to file information return for all

• New Rules

- Only 1 of 3 hallmarks is needed to trigger reporting
- “avoidance transaction” threshold lowered: “primary purpose” replaced with “one of main purposes”
- All participants / parties / advisors / promoters must file an information return (except persons providing only clerical or secretarial services in connection with planning)



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Advisors and Promoters – Reportable Transactions

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“Advisor”, in respect of a transaction or series of transactions, **means each person who provides, directly or indirectly in any manner whatever, any contractual protection** in respect of the transaction or series, **or any assistance or advice with respect to creating, developing, planning, organizing or implementing the transaction** or series, to another person (including any person who enters into the transaction for the benefit of another person).

“Promoter”, in respect of a transaction or series of transactions, **means each person who**

- Promotes or sells** (whether as principal or agent and whether directly or indirectly) **an arrangement, plan or scheme** (referred to in this definition as an “arrangement”), **if it may reasonably be considered that the arrangement includes or relates to the transaction** or series;
- Makes a statement** or representation (whether as principal or agent and whether directly or indirectly) **that a tax benefit could result from an arrangement, if it may reasonably be considered that**
 - the **statement** or representation **was made in furtherance of the promoting or selling of the arrangement, and**
 - the arrangement includes or relates to the transaction or series; or
- Accepts** (whether as principal or agent and whether directly or indirectly) **consideration in respect of an arrangement** referred to in paragraph (a) or (b).



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Reportable Transactions – Fee Hallmark

“Reportable transaction”, at any time, means an avoidance transaction and each transaction that is part of a series of transactions that includes the avoidance transaction...if

- a) An advisor or a promoter, or any person who does not deal at arm's length with the advisor or promoter, has or had an entitlement, either immediately or in the future and either absolutely or contingently, to a fee that to any extent...
- i. is based on the amount of the tax benefit
 - ii. is contingent upon obtaining the tax benefit; or
 - iii. is attributable to the number of persons...

“Fee”, in respect of a transaction or series of transactions, means any consideration that is, or could be, received or receivable, directly or indirectly in any manner whatever, by an advisor or a promoter, or any person who does not deal at arm's length with an advisor or promoter, for

- a) Providing advice or an opinion with respect to the transaction or series;
- b) Creating, developing, planning, organizing or implementing the transaction or series;
- c) Promoting or selling an arrangement, plan or scheme that includes, or relates to, the transaction or series;
- d) Preparing documents supporting the transaction or series, including tax returns or any information returns to be filed under the Act; or
- e) Providing contractual protection.



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CRA Commentary – CALU 2022 Roundtable

Q2: Whether fee or commission on a widely available financial / insurance product received by advisor (where the product is purchased, without advisors knowledge, in the context of a series of transactions containing an avoidance transaction) causes the advisor to have a reporting obligation.

CRA response:

- “question of fact” based on a number of factors (including terms of (i) the product and (ii) the compensation received by advisor)
- a fee based “solely on the value of the services ... determined without reference to the tax results of the transaction or series” not caught
- Particular circumstances will be important



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Reportable Transactions – Confidentiality Hallmark

“Reportable transaction”, at any time, means an avoidance transaction and each transaction that is part of a series of transactions that includes the avoidance transaction...if

- b) an advisor or a promoter**, or any person who does not deal at arm's length with the advisor or promoter, **obtains** or obtained **confidential protection** and the prohibition on disclosure provides confidentiality in respect of a **tax treatment** in relation to the avoidance transaction or series

“Confidential protection” means anything that prohibits the disclosure to any person or the Minister of the details or structure of the transaction or series under which a tax benefit results



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Reportable Transactions – Contractual Protection Hallmark

“Reportable transaction”, at any time, means an avoidance transaction and each transaction that is part of a series of transactions that includes the avoidance transaction ... if

- c) the particular person, another person who entered into the avoidance transaction for the benefit of the particular person, advisor or promoter, or any person who does not deal at arm's length with the particular person, the other person, the advisor or promoter, has or had contractual protection** in respect of the avoidance transaction
- o Exception for insurance or other protection that applies in a normal commercial context in which parties deal 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

“Contractual protection” means any form of insurance (except standard professional liability insurance) or other protection (including indemnity, compensation or guarantee) that:

- Protects a person against the failure of a transaction to achieve a tax benefit; or*
- Pays for or reimburses any expense, fee, tax, interest, penalty or similar amount that may be incurred in the course of a dispute in respect of a tax benefit; and*

Any form of undertaking provided by a promoter, or any person who does not deal at arm's length with a promoter, that provides assistance to a person in the course of a tax dispute



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Reportable Transactions

- Who reports?
 - Person(s) receiving a tax benefit
 - Parties to a reportable transaction entered into for benefit of another person
 - Advisors and promoters who earn a fee relating to the reportable transaction or relating to contractual protection
 - Person(s) not at arm's length with advisors and promoters who are entitled either immediately or in the future and either absolutely or contingently, to share in the fee
- When?
 - 45 days after earlier of
 - i. Day on which the person becomes contractually obligated to enter into; or
 - ii. Day of entering into the reportable transaction



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Notifiable Transactions (ITA s. 237.4) – New

- Transactions and series of transactions “designated” by the Minister, and all transactions and series of transactions “substantially similar” to a notifiable transaction will be subject to reporting obligation
- Substantially similar:
 - same or similar expected tax consequences to a notifiable transaction and:
 - factually similar; or
 - based on same or similar tax strategy
 - “is to be interpreted broadly in favour of disclosure”



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Notifiable Transactions (ITA s. 237.4) – New

- Notifiable Transaction includes “*a transaction in a series of transactions that is the same as ... a series of transactions that is designated...*”
- “Series of Transactions” includes pre-ordained transactions and “any related transactions or events completed in contemplation of the series” ITA 248(10)
 - Contemplation may look forward or backward: *Copthorne Holdings* (SCC)
- Unclear whether a Notifiable Transaction may include a transaction outside of the designated series of transactions but within the expanded meaning of series of transactions



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Advisors and Promoters – Notifiable Transactions

“**Advisor**”, in respect of a notifiable transaction, means **each person who provides, directly or indirectly in any manner whatever, any assistance or advice** with respect to creating, developing, planning, organizing or implementing the notifiable transaction, to another person (including any person who enters into the notifiable transaction for the benefit of another person).

“**Promoter**” – same definition as reportable transactions.



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Notifiable Transactions (ITA s. 237.4) – New

- Proposed Designated Transactions:
 - CCPC status manipulation planning
 - Artificial loss generation planning / straddle loss creation
 - Avoidance of 21 year deemed disposition (trusts)
 - Manipulation of bankrupt status to avoid debt forgiveness income inclusion
 - Reliance on s. 256.1 purpose tests to avoid acquisition of control for attribute trading rules
 - Back-to-back arrangements to avoid thin cap rules or Part XIII withholding tax



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Notifiable Transactions (ITA s. 237.4) – New

- Who reports?
 - Person(s) receiving a tax benefit
 - Parties to the notifiable transactions
 - Advisors and Promoters in respect of the notifiable transaction whether earning a fee or not
 - Person(s) not at arm's length with advisors and promoters who are entitled either immediately or in the future and either absolutely or contingently, to a fee in respect of the notifiable transaction
- When?
 - 45 days after earlier of
 - i. Day on which the person becomes contractually obligated to enter into; or
 - ii. Day of entering into the notifiable transaction



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Notifiable Transactions (ITA s. 237.4) – New

- Exception if employer or partnership reports (covers employees and partners but does not cover independent contractors – i.e., most “agents”)
- Exception from reporting for banks, insurance corporations and credit unions unless they know (or but for gross negligence would know) that the transaction is a notifiable transaction.
- Note: CALU has made a submission as this does not appear to exempt employees of such entities from reporting obligations



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Penalties / Limitation Periods

- Taxpayers who fail to file when required:
 - \$500/week to greater of \$25,000 or **25% of tax benefit**
 - For corporations with at least \$50M in assets, increased to \$2,000/week to greater of \$100,000 or **25% of tax benefit**
- Advisors/Promoters who fail to file when required:
 - 100% of fees charged plus \$10,000 plus \$1,000 per day (to a maximum of 100 days)
- **JOINT AND SEVERAL LIABILITY**
- Limitation Periods for reassessment of avoidance transactions suspended until report is filed
- No limitation period applies for a failure to report (i.e., penalties under the reporting rules could be assessed any time)



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Defences

- Due diligence defence for failing to file:
 - degree of care, diligence and skill to prevent the failure to file that a reasonably prudent person would have exercised in comparable circumstances
 - Reasonable and good faith efforts in identifying information required to be provided and take all reasonable steps to make sure that information is provided.
- Solicitor-client privilege exception:
 - A **lawyer** who is an **advisor** in respect of a notifiable transaction is not required to disclose ... any information in respect of which the lawyer, on reasonable grounds, believes that a client of the lawyer has solicitor-client privilege



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Reportable Transaction Analysis



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How to analyse any transaction

- Is there a **tax benefit**?
- Is there an **avoidance transaction** or a transaction that is part of a series of transactions that includes an avoidance transaction? Is **one of the main purposes** is to obtain **the tax benefit**? If so, there is an avoidance transaction.
- Identify the **advisors / promoters / taxpayers** and non-arm's length parties
- Is at least 1 of 3 **hallmarks** present?



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What is a tax benefit?

- Very Broad
 - any reduction, avoidance or deferral of tax
 - any increase in a tax refund
 - includes the preservation or creation of a tax account for use at a later time

If a deduction against taxable income is claimed, the existence of a taxable benefit is clear, since a deduction results in a reduction of tax. In some other instances, it may be that the existence of a tax benefit can only be established by comparison with an alternative arrangement.

The burden is on the taxpayer to refute CRA's assumption of a tax benefit.



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Hallmarks

1. Confidentiality? Non disclosure Agreement?
2. Contractual Protection? Indemnity?
3. Fee: Does an advisor or promoter (or any person who does not deal at arm's length with the advisor or promoter), have an **entitlement**, either immediately or in the future and either absolutely or contingently, to a **fee** that that is either:
 - Based on the amount of a tax benefit?
 - Contingent upon obtaining a tax benefit? or
 - Dependent on the number of persons participating?



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Who needs to report?

- Other than the Corporate Client & Individual Client
- Bank / Lender
- Clients' Lawyer
 - Provides structuring advice and tax opinion
 - Fee is based on time spent
- Clients' Accountant
 - Involved in structuring – compensated by billing time
 - What if accountant received a "referral fee" from insurance advisor
 - Used to be pay clients' accounting fees?
 - Based on size of insurance policy sold or fixed amount?



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Who needs to report? (cont'd)

- Insurance Participants:
 - Insurance Advisor who sells the policy and may suggest the plan
 - Compensation is based on the premiums paid on the policy and portion on override bonus
 - Insurance Company that issues the policy
 - Pays commission to insurance advisor
 - Pays override bonus to insurance advisor and managing general agent (“MGA”)
 - Employees of the Insurance Company
 - Tax and Estate planning consultants (lawyers or accountants in most instances) who may assist in the transaction
 - Compensation is primarily salary but with a bonus (based on targets including sales)
 - Managing General Agent (MGA) of the Insurance Advisor
 - Earns override bonus on policies sold by insurance advisor (based on premiums on policy)
 - Earns trailer fees in future years on policy
 - Employees of the MGA
 - Tax and Estate planning consultants (lawyers or accountants in most instances) who may assist in the transaction
 - Compensation is primarily salary but with a bonus (based on targets including sales)



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Notifiable Transaction Case Study



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Notifiable Transactions: Non-CCPC – Case Facts

- Mr. A was the sole shareholder of a CCPC (“Holdco”) which owned capital property with an unrealized capital gain
- Prior to the sale of Holdco’s capital property, Holdco continued to a non-Treaty foreign jurisdiction but retained its mind and management in Canada – thereby becoming a “non-CCPC”
- Holdco sold its capital property in 2019 realizing a capital gain
- Holdco used a portion of the proceeds of sale to acquire a whole life insurance policy on Mr. A’s life with premiums payable over 10 years
- Holdco has insurance premium payment due on May 1, 2023
 - Assume Notifiable Transaction Rules have received Royal Assent



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Designated Transactions or Series of Transactions

- Is payment by Holdco of insurance premium in 2023 a Notifiable Transaction (“NT”)?
- Finance has proposed that foreign continuance to achieve non-CCPC status would be a designated transaction or series of transactions
- Rules will apply to NTs entered into after Royal Assent
 - The designated transaction(s) occurred prior to Royal Assent
- NT means *“a transaction in a series of transactions that is the same as ... a series of transactions that is designated...”*



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Meaning of Series of Transactions

- The designated series of transactions does not include the premium payment BUT is the premium payment a transaction in a series of transactions that includes the designated series of transactions?
- Must the transaction be:
 - Included within the transactions identified as part of the designated series of transactions?
Or
 - Merely a related transaction to the designated series of transactions?



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Notifiable Transactions: Who must report?

Assuming premium payment is a NT, the following persons must report:

- a) (i) Every person for whom a “tax benefit” results from the NT
- Tax benefit has broad meaning ITA 245(1)
 - Appears to be testing the premium payment, not the continuance
 - Holdco likely receives tax benefit by virtue of insurance
 - Unclear whether Mr. A (Mr. A’s estate/beneficiary?) receives tax benefit
- (ii) Every person for whom a tax benefit results from any other NT that is part of the series; or (iii) from a series that includes the NT
- Appears to test the original continuance series



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Notifiable Transactions: Who must report?

Assuming premium payment is a NT, the following persons must report:

- a) (i) Every person for whom a “tax benefit” results from the NT
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 - Appears to be testing the premium payment, not the continuance
 - Holdco likely receives tax benefit by virtue of insurance
 - Unclear whether Mr. A (Mr. A’s estate/beneficiary?) receives tax benefit
- (ii) Every person for whom a tax benefit results from any other NT that is part of the series; or (iii) from a series that includes the NT
 - Appears to test the original continuance series



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Notifiable Transactions: Who must report?

- b) Every person who has entered into, for the benefit of another person, the NT
 - Appears to be testing the premium payment, not the continuance
 - Would include insurance company
- c) Advisors and Promoters in respect of the NT
 - Appears to be testing the premium payment, not the continuance
 - May include insurance advisors/promoters in respect of the original insurance planning
 - Does not depend on fee being earned
- d) Persons non-arm’s length with advisors/promoters who earn a fee in respect of the NT



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Takeaways

- Scope of Reportable Transactions significantly expanded by requiring only one “hallmark” instead of two
- New Notifiable Transactions regime coming into effect including designated and substantially similar transactions and series of transactions
- Reporting obligations will require multiple reports filed in respect of same transaction by taxpayers/parties and Advisors/Promoters
- Substantial failure to file penalties and expanded reassessment periods



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Questions?

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