Public advice and guidance compendium – PCG 2019/6 and LCR 2019/3

This is a compendium of responses to the issues raised by external parties to draft PCG 2018/D9 *OECD hybrid mismatch rules – concept of structured arrangement* and LCR 2018/D9 *OECD hybrid mismatch rules – concept of structured arrangement*

This compendium of comments has been edited to maintain the anonymity of entities that have commented.

Summary of issues raised and responses

Issue No.	Issue raised	ATO response / action taken
1	The interpretation by the ATO of the extent of a 'scheme' for the purposes of determining when a 'structured arrangement' exists is too broad. This is of particular concern in relation to the imported mismatch rules, as this broad interpretation effectively means that the intended deferral of these rules to 1 January 2020 will not apply. The ATO's proposed interpretation would defeat Parliament's objective of legislating the 12 month deferral if this objective is made redundant by the ATO's interpretative view.	We have amended the wording in the final Guideline to make it clear that the Commissioner's view is that there must be a commercial/coordinated nexus between arrangements to form a scheme capable of giving rise to a structured arrangement.
2	It would be helpful if the Guideline provided further guidance in relation to the identification of a scheme including when a taxpayer would be required to test whether the scheme is a structured arrangement, where the scheme was entered into prior to the enactment of the rules. For example, where an Australian taxpayer is not aware of the hybrid mismatch when the scheme was entered into, but subsequently becomes aware, would the hybrid mismatch be a design feature of the scheme?	Paragraph 16 of the final Guideline has been amended to provide further clarification on this issue.

Issue No.	Issue raised	ATO response / action taken
3	It would be useful if the Ruling and Guideline clarified what is meant by 'design feature', in particular, if this test considers the purpose of the scheme.	We have clarified the Commissioner's view in paragraph 28 of the final Guideline and paragraph 32 of the final Ruling. The 'design feature' test is not a purpose test and a finding of a design feature must be supported with contemporaneous demonstrable evidence.
4	It would be useful to provide some general guidance in the Guideline in relation to the form/manner of enquiries that an Australian counterparty is expected to make in relation to the tax treatment of the payment in the foreign counterparty jurisdiction.	Paragraphs 31, 32, 33 and 66 of the final Guideline have been amended to provide further clarification on this issue.
5	It would provide certainty to securitisation vehicles if the Commissioner were to state in the Guideline that, if reasonable steps are taken by the securitisation vehicle to ensure that no interests are acquired by entities which satisfy the requirements in subsection 832-200(4) (a) to (c) of the *Income Tax Assessment Act 1997* (ITAA 1997), the Commissioner will regard the arrangement as 'low risk' in that respect and will not devote resources to investigating it. These steps could be similar to those specified in paragraph 4 of Taxation Determination TD 2001/3 *Income tax: Interest Withholding Tax Exemption – for the purposes of subsection 128F(5) of the Income Tax Assessment Act 1936, when will a company be taken to have the requisite knowledge or suspicion that the debenture or an interest in the debenture was being, or would later be, acquired by an associate?*, such as: • writing to related persons (if known), asking them not to acquire the interests • issuing a statement in the offering circular or other marketing documents advising that related persons (as defined by subsection 832-200(4) of the ITAA 1997) should not acquire the interests, or	The requirements of subsection 832-200(4) of the ITAA 1997 are outside the scope of these products. The ATO is considering if further guidance is necessary to assist taxpayers in this market.

Issue No.	Issue raised	ATO response / action taken
	• instructing any managers, dealers or underwriters not to sell interests to any entities known or reasonably suspected to be related persons of the issuer.	
6	The ATO should consider deferral, in relation to the imported mismatches only, of the application of its current interpretation of a 'structured arrangement' until January 2020 to reduce taxpayers' compliance burdens. Alternatively we submit that the ATO should defer the application of any resources to applying this definition of 'structured arrangement' in relation to imported hybrid mismatches until aft 31 December 2019.	We consider that it would be inappropriate to provide a separate compliance approach that allows deferral of the imported mismatch rule to structured arrangements until 1 January 2020 in the final Guideline and Ruling.
7	It would be helpful for the ATO to provide further guidance on the calculation of penalties under Division 832 of the ITAA 1997 as this potentially creates significant additional compliance work for taxpayers.	The matter raised is outside the scope of these products. The application or remission of penalties will be done in accordance with the legislation and taking due account of ATO policy. Further, the application of penalties in any particular case is dependent on the unique facts and circumstances of each case. For example, whether or not a position is reasonably arguable or whether false and misleading statements are relevant to a particular case. Any guidance on this would need to be consistent with the Commissioner's current views on the administration of the penalties regime as set out in practice statements such as Law Administration Practice Statement PS LA 2012/5 *Administration of the false or misleading statement penalty – where there is a shortfall amount*.
8	It would be worth including in the Guideline an example where a Foreign Co approaches an Australian bank to invest in a 'zero coupon bond'.	The Guideline has not been extended to include a specific discussion of 'zero coupon bonds' on the basis that the principles considered in Example 1 can be applied to the scenario raised. The ATO is considering if further guidance to assist taxpayers in understanding what information required may be expected to satisfy the identification of a deduction/non-inclusion mismatch in this context.

Issue No.	Issue raised	ATO response / action taken
9	We would welcome further guidance on the Commissioner's view on how it will seek to compare the actual financial position of an entity and its financial position where the scheme had not given rise to a hybrid mismatch. This appears to involve some type of counterfactual analysis. We note that little comment is made in either the draft Guideline or draft LCR regarding this issue. A discussion of how the Commissioner will apply paragraph 832-210(3)(c) of the ITAA 1997 in the Guideline or Ruling would provide valuable guidance for taxpayers.	Paragraphs 34 and 35 of the final Guideline have been expanded to assist understanding.
10	We highlight that payments made by third parties that are not party to the arrangement or the scheme giving rise to the hybrid mismatch are arguably not payments made under that scheme. That is, there is a difference between a payment being made under a scheme and a payment being made in relation to a scheme. It is therefore critically important to understand how the ATO will identify a scheme for the purposes of Division 832 of the ITAA 1997.	We have clarified the Commissioner's view in paragraph 28 and Example 3 of the final Guideline. The Commissioner is of the view that a scheme would include both the deduction and non-inclusion of income.
11	Other possible examples would be useful, particularly ones that illustrate when there is not a structured arrangement imported mismatch.	The Guideline cannot address all possible circumstances and there is a need to balance coverage with likelihood. We invite taxpayers to engage with us to discuss their questions and ascertain what products may be available in their circumstances.