

BEPS AND COUNTRY-BY-COUNTRY REPORTING



TEI San Diego Chapter
International Tax Day
9 February 2016

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 - Status of BEPS and future agenda
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- US Country-by-Country Update
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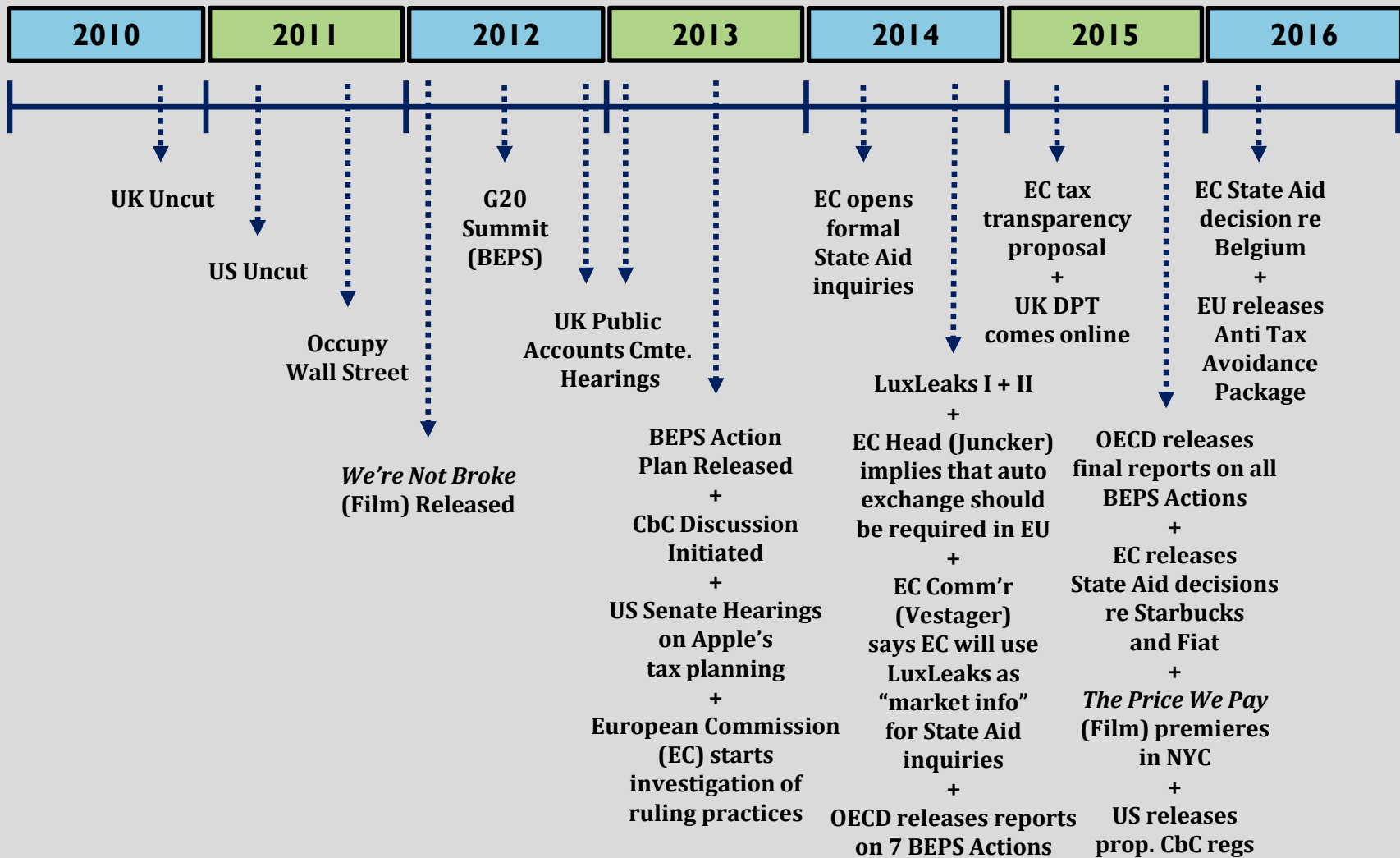




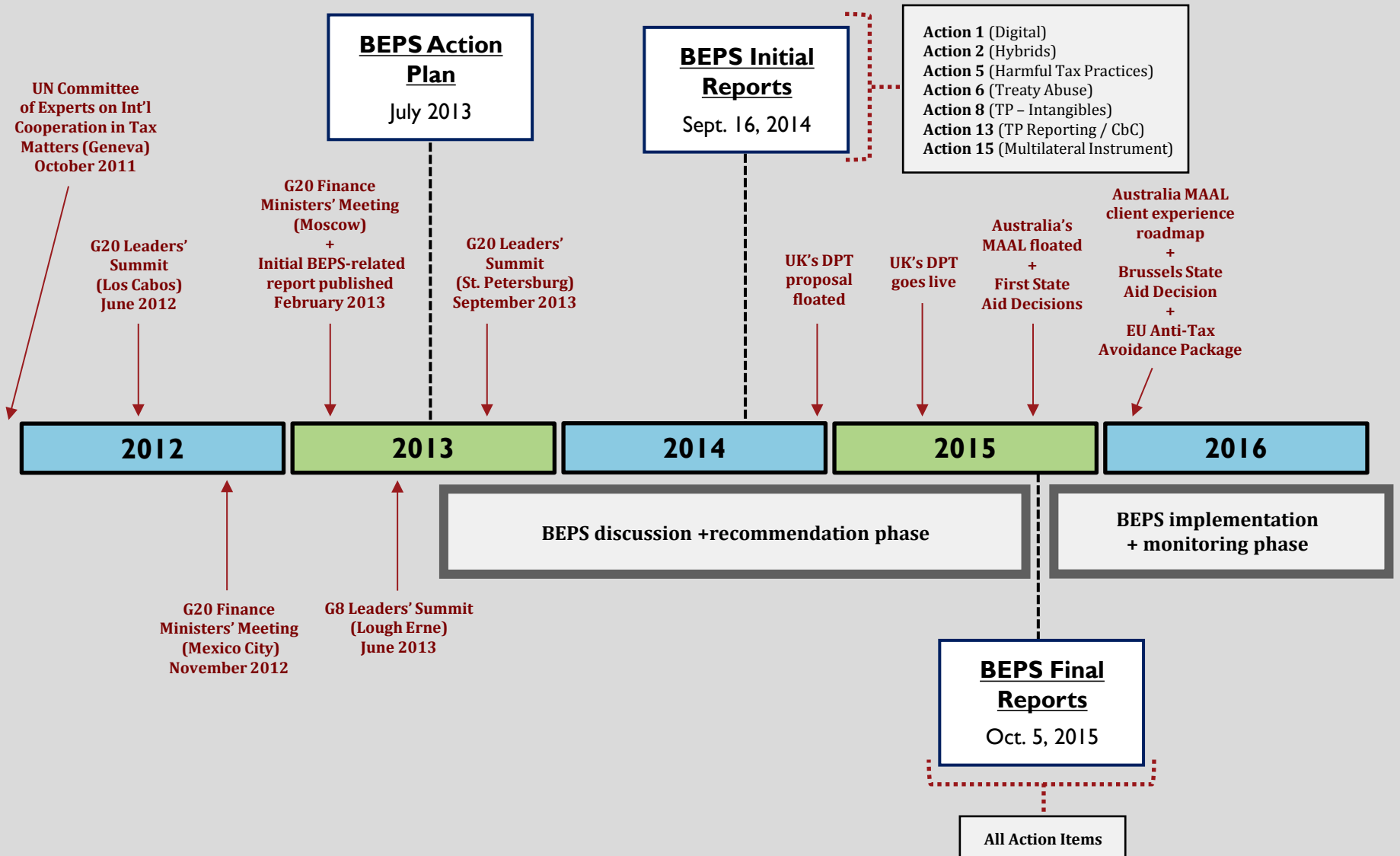
BEPS UPDATE



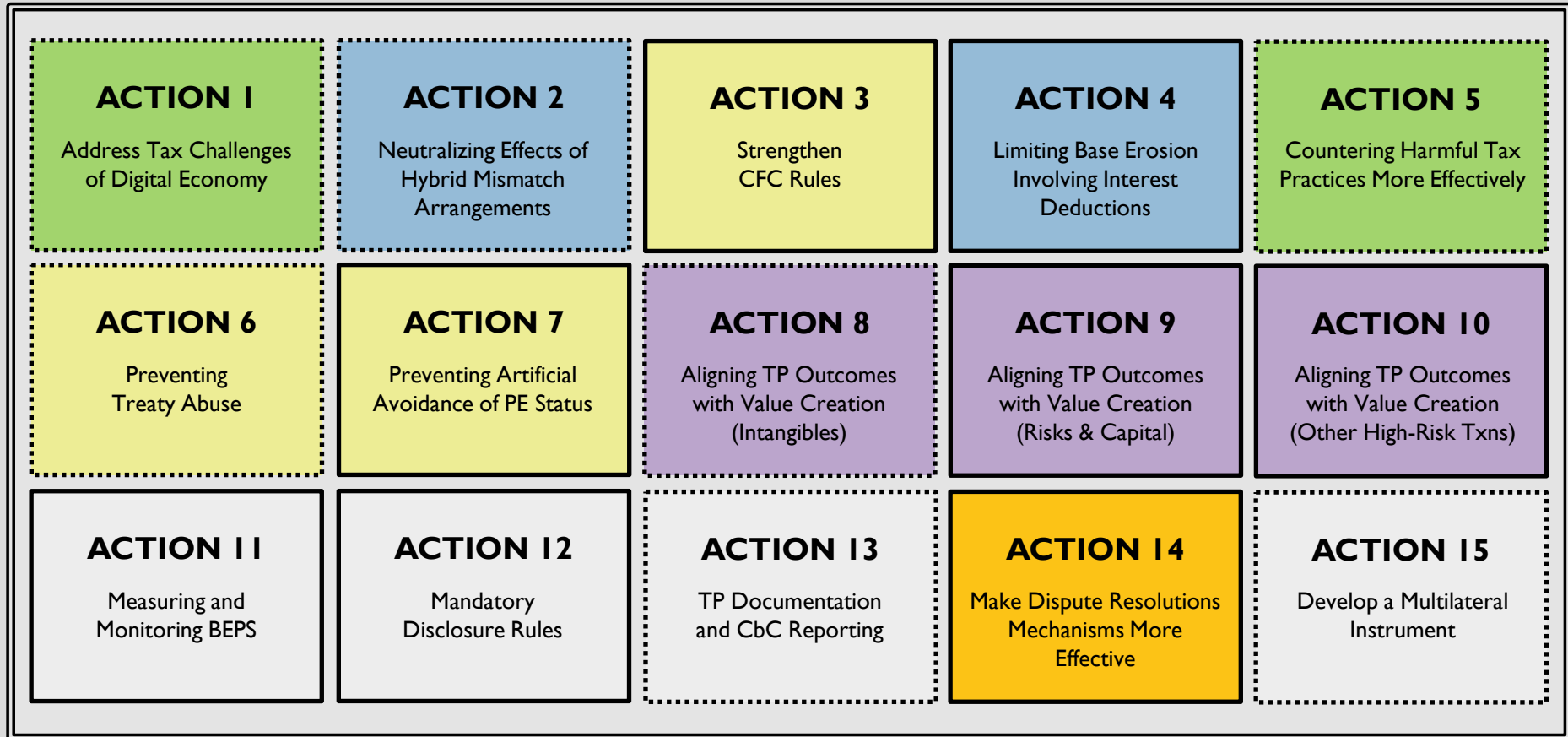
OVERALL ANTI-PLANNING TIMELINE



BEPS TIMELINE



BEPS ACTION PLAN – OVERVIEW



Value / Supply Chain

Intangibles

Transfer Pricing *

Financing

Dispute Resolution

Administrative

Initial Reports – released 2014

Final Reports (for all) – released 2015



BEPS – WHERE ARE WE NOW?

October 2015 Reports

- **Historic point for international tax**
- **Consensus** – final reports categorize actions based on roughly four levels of endorsement:

Minimum Standards	Fixed floor for certain tax rules (Ex: A5 and A6)
Common Approaches	Generally agreed approaches for certain tax rules (Ex: A2 and A4)
Best Practices	Approaches to tax rules that merit consideration (Ex: A3 and A12)
Other	Outcome has other impact (e.g., administrative) (Ex: A1 and A15)

“Post-BEPS” Era

- **Implementation and monitoring**
 - Is next heavy lift – monitoring will be particularly important for “minimum standards”
 - Be wary of unilateral actions – particularly in digital space
 - EU seems set to implement across all 28 member states



BEPS – WHERE ARE WE NOW? (CONT.)

“Post-BEPS” Era (cont.)

- **Some continuing work on substantive matters into 2016 / 2017**
 - Finalizing certain TP guidance
 - Attribution of profits to PE due to changes in PE definition
 - Finalizing model treaty provisions / commentary relating to LOB
 - Treaty entitlement for pension funds, REITs, other non-CIVs
 - Finalizing interest deductibility matters – group ratio carve-out, banking / insurance
 - Consideration of work in related areas that have emerged in course of BEPS project
- **Design of an “inclusive framework”** – continued developing country participation
- **US-specific considerations**
 - Hill / Administration interplay
 - FTC issues will percolate



ACTION 1 – DIGITAL

ACTION 1

Address Tax Challenges
of Digital Economy

ACTION OBJECTIVES

- ID key difficulties digital economy presents to application of current international tax rules
- Develop options to address the foregoing
- Key areas of concern:
 - *Nexus* – significant digital presence w/o liability to local tax
 - *New Business Models* – generating marketable location-relevant data via use of digital products/services; characterization of income; application of related source rules
 - *Indirect Taxes* – ensuring effective collection

FINAL REPORT

- Digital economy cannot be ring-fenced (but it does exacerbate BEPS issues)
- Other areas of BEPS package effectively deal with BEPS concerns in digital economy, e.g.
 - *Action 7 (PE)* – anti-fragmentation and prep/aux rules; tightening dependent agent
 - *Actions 8-10 (TP)* – updating TP Guidelines
 - *Action 3 (CFC)* – update to address challenges of the digital economy
- Does not adopt certain Sept. 2014 proposals (e.g., “significant economic presence” test)
- Indirect tax (e.g., VAT) work – recommends collecting tax in jurisdiction of consumption
- Essentially invites unilateral action by countries

KEY NOTES

- Initial report released 2014
- Task Force (Digital Economy)
- Implementation is monitoring of developments (process to be developed in 2016)
- Will monitor developments in info/comm. technologies; will also review impact of unilateral actions
- Characterization of payments under new business models (e.g., cloud computing) is of continuing interest
- New report issued by 2020
- *US View* – largely reflected in report; B. Stack (Task Force)
- *Other Countries* – UK’s DPT (“Google Tax”), Australia’s MAAL; Italy’s 25% virtual PE

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FURTHER WORK:

Further work required; continuous review with new report in 2020

ACTION 2 – HYBRIDS

ACTION 2

Neutralizing Effects of Hybrid Mismatch Arrangements

ACTION OBJECTIVES

- Develop model treaty provisions and design recommendations for domestic law rules to neutralize effects (e.g., double non-taxation, double deduction, long-term deferral) related to hybrid entities/instruments
- Key areas of concern:
 - *Treaty* – changes to ensure hybrid instrument or entity (incl. dual-resident entity) not used to obtain treaty benefits “unduly”
 - *Domestic Laws* – to (1) prevent exemption or non-recog’n for payments deductible by the payor, (2) deny deductions for payment not includible in recipient’s income (nor taxed under CFC rules), and (3) deny deductions for payment also deductible elsewhere
 - *Coordination* – for applying foregoing rules
- To be coordinated with Actions 3, 4 and 6

FINAL REPORT

- Rules should either (a) deny a deduction, or (b) require inclusion...w/r/t hybrid scenarios
- Hybrid mismatch rules proposed using *primary* rule (denying deduction) and a *defensive* rule (to kick in if the other country does not have or apply primary rule)
- Key *linking* rules target following mismatches
 - *Double Deduction* outcomes (DD)
 - *Deduction / No Inclusion* outcomes (D/NI)
 - *Indirect Deduction / No Inclusion* outcomes (indirect D/NI)
- If paid to CFC, generally should not view as D/NI situation if full inclusion at full rate
- Payment on financial instrument should not create D/NI outcome if mere timing difference and income included within 12 months

KEY NOTES

- Initial report released 2014
- Significant developments in 2015 report; ~ 80 examples
- Domestic rule (and possibly treaty) proposals likely to be widely adopted; MNEs with existing intragroup financing need to consider impact if a relevant country adopts rec’d rules; the imported mismatch rules are extremely complex
- *US View* – see new US model; domestic rules need legis.
- *Other Countries* – EU amends EU parent-sub directive; a December 2015 Germany and Japan protocol adopts items from Actions 2/6/14; UK introduced anti-hybrid rules effective Jan. 1, 2017. But some countries see their existing anti-hybrid rules as adequate (e.g., Holland)

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FURTHER WORK:

Will be done on interaction of CFC and hybrid rules



ACTION 3 – CFC

ACTION 3

Strengthen
CFC Rules

ACTION OBJECTIVES

- Develop recommendations regarding the design of CFC rules
- Likely to be coordinated with Actions 2 and 4

FINAL REPORT

- Identifies six “building blocks” for design of effective CFC rules
 - *Definition of CFC – and “control”*
 - CFC exemptions and threshold requirements
 - *Definition of CFC income*
 - *Computation of CFC income*
 - *Attribution of income*
 - *Prevention / elimination of double taxation*
- Recognizes that flexibility required (tax policy)
- Continued work on interaction b/t CFC rules and hybrids even though basic rec. in hybrid rules that subpart F inclusion be treated as if included in “ordinary income”

KEY NOTES

- Discussion draft April 2015
- Final report merely lays out building blocks for effective CFC rules; recognizes that policy objectives of some countries are variable (e.g., territorial vs. worldwide)
- Not a minimum standard; no serious add'l work likely
- Does identify challenges to existing CFC rules posed by digital/mobile income
- *US View* – would have liked greater focus in this area, but not expecting more here; see Greenbook proposals
- *Other Countries* – countries in many cases have relaxed CFC rules (e.g., UK); appears that the EU is interested in seeing robust CFC rules in Europe (see EU Anti-Tax Avoid. Pkg)

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FURTHER WORK:

May be done on interaction of CFC and hybrid rules



ACTION 4 – DEDUCTIONS

ACTION 4

Limiting Base Erosion
Involving Interest
Deductions

ACTION OBJECTIVES

- Develop best practices recommendations for design of rules re deductibility of related- and third-party interest expense
- Consider same for expenses used to produce exempt or deferred income
- Assess the effectiveness of different types of limitations
- Develop TP guidance regarding pricing of related party financial transactions (such as financial or performance guarantees), captive insurance and derivatives
- To be coordinated with Actions 2 and 3

FINAL REPORT

- Recommends common approach for domestic rules re interest deductibility (link net interest deduction to TI generated by econ. activities)
 - *Fixed Ratio Rule* (FRR) – deduction permitted for net interest (incl. to 3rd party) based on fixed ratio of 10-30% of entity’s EBITDA
 - *Group Ratio Rule* (GRR) – for groups that are more highly-leveraged with 3rd party debt, may supplement FRR by applying worldwide concepts rather than those set out in FRR
- Considerations for applying rules, including for (a) carrying unused deductions / capacity, and (b) averaging EBITDA to limit volatility
- WHT still should apply to disallowed interest
- Further work in queue for (a) highly-leveraged industries (banking), and (b) financial txns TP

KEY NOTES

- Discussion draft Dec. 2014
- Broad agreement on 10-30% outlined in 2015 report
- Countries that already have restrictions on deductibility may be slow or reluctant to implement (assessing whether to replace/modify own rules)
- No timetable for adoption, but suggests giving taxpayers ample time to restructure
- Work on rule nuances and issues for highly-leveraged industries into 2016; TP for financial transactions through 2017; review action in 2020
- *US View* – largely on-board; domestic rules need legis.; Stack asks whether a problem with highly-leveraged industry before all set out to fix it?

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FURTHER WORK:

Clarify items for application of GRR; TP for financial transactions (work runs into 2017); overall review in 2020



ACTION 5 – HARMFUL

ACTION 5

Countering Harmful Tax Practices More Effectively

ACTION OBJECTIVES

- Restart work on harmful tax practices, taking holistic approach
- Focus on *preferential regimes* and seek to require substance for application thereof
- Examples of preferential regimes
 - *IP*
 - *Headquarters / holding company*
 - *Distribution and service centers*
 - *Financing or leasing*
 - *Fund management*
 - *Banking and insurance*
 - *Shipping*
- Improve transparency, including compulsory spontaneous exchange on rulings (including those relating to preferential regimes)

FINAL REPORT

- For preferential regimes (e.g., patent box), the minimum standard for assessing whether there is “substantial activity” is the *nexus* approach
 - *Core production activities* – used as proxy for substance; when applying preferential regimes need to show line b/t qualifying income and core (financial/service) activities necessary to earn the income; for IP regimes, must have conxn b/t IP profits and claimant’s R&D effort
 - *Covered intangibles* – patents, copyrighted software and certain similar intangibles
 - *Transitioning* – all regimes must become compliant; no new entrants to existing non-compliant regimes after July 30, 2016; participants in existing non-compliant regimes can benefit until June 30, 2021
- Mandatory spontaneous EOI for tax rulings re preferential regimes, unilateral APAs, rulings re downward profit adjustment (e.g., informal capital), PE rulings, related-party conduits, etc.

KEY NOTES

- Initial report released 2014
- IP regimes – 16 regimes were reviewed and found deficient; grandfathering for 5 years w/ certain restrictions
- All preferential regimes must adopt nexus standard
- EOI starts April 1, 2016 and applies to (a) future rulings, and (b) rulings issued on/after January 1, 2010 (if in effect as of January 1, 2014)
- Ongoing peer monitoring and review mechanisms to ensure countries remain compliant
- *US View* – did A5’s support of substance approach incentivize US to consider innovation box (to preserve R&D jobs)?
- *Other Countries* – new Ireland KDB is BEPS-compliant; Lux has taken steps to change box

- MINIMUM STANDARD** **BEST PRACTICES**
 COMMON APPROACH **OTHER:** _____

FURTHER WORK:

Further work on allowing other IP; other forms of tax relief/incentives



ACTION 6 – TREATY

ACTION 6

Preventing
Treaty Abuse

ACTION OBJECTIVES

- Develop model provisions treaty to prevent granting of treaty benefits in “inappropriate circumstances”
- Develop recommendations regarding design of domestic law to prevent treaty abuse
- Clarify that tax treaties are not intended to be used to generate double non-taxation
- Identify tax policy considerations that should normally be taken into account before a country decides to enter into a tax treaty with another country
- To be coordinated with Actions 2 and 15

FINAL REPORT

- Minimum standard for preventing treaty abuse, but flexible in how implemented. Pick one –
 - *Principal purpose test* (PPT)
 - *Limitation on Benefits* (LOB) test and *domestic anti-conduit rules*
 - *PPT and LOB*
- “Clarifies” that tax treaties not intended to generate double non-taxation
- OECD model – changes to reflect that treaty not to inadvertently limit domestic GAAR
- Some SAARs also suggested (e.g., dealing with low-taxed PEs, dual resident companies, etc.)
- Proposal intended be incorporated in Action 15 workstream (multilateral instrument)

KEY NOTES

- Initial report released 2014
- Because of menu approach, much will depend on whether multilateral instrument (A15) will be viable; otherwise, will be laborious b/c countries will need to open negotiations w/ existing treaty partners in effort to do a protocol
- References two US model provisions (a) deny WHT rate if income subject to special regime, and (b) void favorable provisions if treaty partner’s laws change post-signing
- *US View* – previously voiced strong opposition to PPT (said would reserve), likely leading to “menu” result (to achieve consensus); final work awaits US model
- *Other Countries* – Dec. 2015 Germany/Japan protocol incl. items from Actions 2/6/14

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FURTHER WORK:

LOB to be updated with US model, and non-CIV funds work (in 2016)



ACTION 7 – PE

ACTION 7

Preventing Artificial
Avoidance of PE Status

ACTION OBJECTIVES

- Develop changes to the definition of PE to prevent the “artificial avoidance” of PE status
- Target commissioner arrangements
- Target advantages arising via the “specific activity” exemptions of Article 5(4)
- Work on PE profit attribution issues

FINAL REPORT

- Targets techniques that “inappropriately” avoid tax nexus (e.g., replacing distributors with commissionaires)
- Art. 5(4) present (bright-line) exceptions will be subject to over-riding (subjective) provision that activity be non-core (i.e., prep/aux)
- Expand types of sales agent activity that can give rise to a PE, by changing agent language
 - *Dependent agent* – wording “habitually plays the *principal* role leading to the conclusion of contracts that are *routinely* concluded *without material modification by the enterprise*”
 - *Independent agent* – may not be independent if works almost exclusively for enterprise that is *closely related* (>50% direct/indirect)
- Anti-fragmentation (breaking up contracts or complementary functions amongst group)

KEY NOTES

- Discussion draft Oct. 2014
- Although some carve-back from discussion draft, 2015 report still makes big changes
- Anticipation is that will be widespread adoption of A7, possibly with local changes; significant A1 intersection
- Some tax authorities may act as though A7 already adopted
- On agent activity, countries really targeting marketing functions that walk up to line without concluding contracts
- *US View* – B. Stack has stated that US will not agree to A7 aspects of A15 until see how attribution to PE plays out; sees more PEs within boxes?
- *Other Countries* – DPT, MAAL, Italy virtual PE, Nov. 2015 Australia/Germany protocol

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FURTHER WORK:

Limited work on profit attribution (esp. to commissionaires), minor changes to commentary, in 2016



ACTIONS 8-10 – TP

ACTION OBJECTIVES

- Develop rules to prevent BEPS by
 - *Moving intangibles among group members (Action 8)*
 - Define intangibles broadly
 - Ensure intangible profits connected (not divorced) from value creation
 - Develop rules / “special measures” for hard-to-value intangibles
 - Update guidance on cost-sharing (CCAs)
 - *Transferring risks among, or allocating excessive capital to, group members (Action 9)*
 - Develop rules / “special measures” so returns don’t inappropriately accrue solely b/c risk contractually assumed or capital provided
 - Require alignment of returns & value creation
 - Coordinate with Action 4
 - *Engaging in transactions which would not, or would only very rarely, occur between 3rd parties (Action 10)*
 - Develop rules / “special measures” to (a) clarify when txns may be recharacterized, (b) clarify the application of TP methods in context of global value chains, and (c) deal with management / Hdqtr fees

FINAL REPORT

- Guidelines are to be revised
- Reduced incentives for MNEs to shift income to “cash boxes” – if a capital-rich member does not control financial risk associated with funding then it gets no more than risk-free return (or less if txn not commercially rational)
- Returns accrue to entities that do DEMPE fxns (development, enhancement, maintenance, protection and exploitation) in relation to that intangible
- CCAs – should be operationally realistic, not provide a TP result that differs from result that does not based on a CCA
- Recommends safe harbor for low-value added intragroup services
- Continued work on hard-to-value intangibles

ACTION 8

Aligning TP Outcomes with Value Creation (Intangibles)

ACTION 9

Aligning TP Outcomes with Value Creation (Risks & Capital)

ACTION 10

Aligning TP Outcomes with Value Creation (Other High-Risk Txns)

KEY NOTES

- Initial report released 2014 (Action 8 only)
- Chpt 1 and Chpt 6 of TP Guidelines were updated
- US view – B. Stack believes no real remaining work on profit split; not opening door to profit split in future

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FURTHER WORK:

Incorporate items into Guidelines; ongoing work into 2016 (hard-to-value intangibles, etc.)



ACTION 11 – MEASURING

ACTION 11

Measuring and
Monitoring BEPS

ACTION OBJECTIVES

- Develop recommendations regarding items that indicate scale/economic impact of BEPS
- Ensure tools are available to monitor and evaluate both (a) effectiveness, and (b) impact of actions taken to address BEPS
- Assess range of existing data sources, and identify new types of data that should be collected (taking into consideration need for taxpayer confidentiality and administrative costs for tax administrations and businesses)

FINAL REPORT

- Measuring BEPS is challenging, but thinks that “global CIT revenue losses due to BEPS could be significant”; cites 4-10% of global CIT revenue (or roughly US \$100m-240m) in play
- New data and methodologies required
- Dashboard of six BEPS indicators:
 - *Concentration of FDI in low-tax countries*
 - *Profits rates of MNE affiliates in low-tax countries compared to those in high-tax countries*
 - *Profit rates of MNE affiliates in low-tax countries compared with profit rates of own global groups*
 - *ETR of MNEs compared to domestic-only entities*
 - *Separation of intangible assets from location of their production*
 - *Concentration of debt in MNE affiliates located in high-tax countries*

KEY NOTES

- Discussion draft April 2015
- Parallel work is underway to help low-income countries with BEPS-related challenges, including (a) availability of TP comparables (esp. in the area of commodities), and (b) in the area of indirect transfers; work will continue into 2017
- Work with low-income countries is part of larger work in BEPS to help bring along developing countries
- Additional measures of BEPS may be possible using data collected in A5, A12 and A13
- Measuring and monitoring will be ongoing endeavor

- MINIMUM STANDARD** **BEST PRACTICES**
 COMMON APPROACH **OTHER:** Analytical report

FURTHER WORK:

Ongoing work, including developing toolkits to help developing countries



ACTION 12 – DISCLOSURE

ACTION 12

Mandatory
Disclosure Rules

ACTION OBJECTIVES

- Develop recommendations regarding design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, structures
 - Will take into consideration administrative costs for tax authorities and businesses
 - Will draw on experiences of increasing number of countries with such rules
 - Will use modular design to allow for maximum consistency but still permit country-specific needs and risks
- A key focus will be international tax schemes
 - Will use wide definition of “tax benefit” to capture as many transactions as possible
 - Will involve designing and implementing enhanced models of information sharing between tax administrations

FINAL REPORT

- Modular framework of guidance drawn from best practices, for use by countries without mandatory disclosure rules that are seeking to design a regime to fit the countries’ needs to obtain *early* information on aggressive or abusive tax planning schemes and their users

KEY NOTES

- Countries free to choose whether or not to introduce mandatory disclosure regimes
- Recommendations seem to be similar to certain UK rules

- MIMIMUM STANDARD BEST PRACTICES
 COMMON APPROACH OTHER: _____

FURTHER WORK:

ACTION 13 – CBC

ACTION 13

TP Documentation
and CbCR Reporting

ACTION OBJECTIVES

- Develop rules for TP documentation to enhance transparency for tax administrations
 - Will take into consideration administrative costs for tax authorities and businesses
 - Rules will include a requirement that MNEs provide all relevant governments with “needed information” on their global (a) allocation of income, (b) economic activities, and (c) taxes paid among countries...all according to a common template

FINAL REPORT

- Three-part reporting mechanism
 - *Master file* – describes high-level information of global business operations and TP policies; to be delivered to all relevant countries via local law
 - *Local file* – detailed txn'l TP documentation, identifies material related-party transactions, amounts involved and the company's analysis of TP determinations thereof; to be delivered to relevant countries via local law
 - *Country-by-country report (CbCR)* – annual report made via template, reporting by jurisdiction the amount of revenue, profit before income tax, income tax paid/accrued to jurisdictions and other economic activity indicators; filed with group parent's tax authority (in first instance) and then shared with other gov't via G2G exchange; in “limited circumstances” a secondary mechanism (e.g., local/direct filing) can be used as backup
- Model implementation legislation and Competent Authority agreements developed
- CbCR to be used for audit risk-assessment

KEY NOTES

- Initial report released 2014
- Chpt. 5 of TP Guidelines will be replaced with this guidance
- Recommends that first CbCR filed for MNE's fiscal years starting Jan. 1, 2016, due 12 months after close of year; realizes may need grace
- CbCR for MNEs with annual consolidated group revenue of € 750m or more
- Will be widely-adopted; MNEs must develop process
- *US View* – predicted to impact 1600 US-based MNEs; T/IRS issued prop. regs. Dec. 2015; Hill may be taking issue with CbCR (bill to delay regs; no gathering for pre 2017 years?)
- *Other Countries* – many have adopted or are in process of adopting (e.g., China, UK, etc.)

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CbCR | <input type="checkbox"/> BEST PRACTICES |
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FURTHER WORK:

Revisit TP doc. standards and CbCR by 2020 w/ view towards improving



ACTION 14 – DISPUTES

ACTION 14

Make Dispute Resolutions
Mechanisms More
Effective

ACTION OBJECTIVES

- Develop solutions to address obstacles the prevent countries from solving treaty-related disputes under MAP
- Consider absence of arbitration provisions
- Consider fact that access to MAP and arbitration may be denied in certain cases

FINAL REPORT

- Strong political commitment to effective and timely resolution of disputes through MAP
- General agreement on taxpayer access, timely resolution and peer review w/r/t MAP; note 17 specific measures that are intended to compromise minimum standards
- 20 countries have agreed to adopt mandatory binding arbitration in their bilateral treaties
 - *Countries* – Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the UK and the US
 - *Inventory* – these countries represent 90%+ of MAP inventory in 2013

KEY NOTES

- Discussion draft Dec. 2014
- Minimum standard, and big commitment to establishing an effective monitoring mech. to ensure min. std. met and countries make add'l progress re rapidly-resolving disputes; Forum on Tax Admin (FTA) will operate here through the recently-estab. MAP Forum
- 20 major countries agree to adopt mandatory binding arbitration for MAP
- A goal is 24 mos. resolution
- Will be critical to see level of commitment by Brazil, China and India; they are in most need of improvement
- *US View* – central importance
- *Other Countries* – Dec. 2015 Germany/Japan protocol incl. items from Actions 2/6/14

- MIMIMUM STANDARD** **BEST PRACTICES**
 COMMON APPROACH **OTHER:** _____

FURTHER WORK:

Ongoing work expected



ACTION 15 - MULTILATERAL

ACTION 15

Develop a Multilateral Instrument

ACTION OBJECTIVES

- Study the feasibility of using a multilateral instrument to enable jurisdictions to implement BEPS into treaties
- Develop multilateral instrument that will be available for use to quickly adapt international tax instruments to account for the rapidly evolving nature of the global economy

FINAL REPORT

- No real deliverable, since final report merely attaches 2014 report
- Continues to express desirability and feasibility of a multilateral instrument
- Scope of instrument should only include treaty-based measures from BEPS (e.g., MAP, dual residence structures, hybrid mismatches, PE issues, treaty abuse)
- Mandate for *ad hoc* group to develop it
 - About 90 countries participating, including (apparently) the US
 - Ad hoc group originated in May 2015; first meeting (apparently) was early Nov. 2015
 - Participation does not require country commit to signing the document

KEY NOTES

- Initial report released 2014
- Very much work in progress
- Would simultaneously update 3000+ bilateral treaties
- Intent is to limit its scope to treaty-based BEPS measures
- There is precedent for such an instrument, but not with such complex and potentially variable application
- End of 2016 signing targeted
- *US View* – skepticism; a heavy lift, and US will not sign onto PE standards (A7) until sees how profit attribution works
- *Other Countries* – 90 countries participating in ad hoc group

- MINIMUM STANDARD** **BEST PRACTICES**
 COMMON APPROACH **OTHER:** Implementation tool

FURTHER WORK:

Ongoing work, but goal is to have instrument signed Dec. 31, 2016



EUROPEAN (TAX) STATE AID

EC's State Aid investigations

- **Background** – In mid-2014, EC opened “state aid” investigations relating to tax rulings granted to several high profile MNEs by European jurisdictions. The essential challenge is that member states gave companies a preferential, selective advantage compared to other stand-alone competitors. If EC is successful in its challenges, the companies that are found to have benefitted will be required to disgorge those benefits to the granting member state. The inquiry has a look-back period of 10 years.

- **Inquiries and status**
 - **Netherlands** (Starbucks) – adverse decision Oct. 2015
 - **Luxembourg** (Fiat, Amazon, McDonalds) – adverse Fiat decision Oct. 2015; others await decision
 - **Ireland** (Apple) – awaiting decision
 - **Belgium** (“Excess Profits” regime) – adverse decision Jan. 2016

- **US perspective**
 - **US Treasury in Europe** – EC appears to be “disproportionately targeting US companies”
 - **§ 891 Letter** – Hill asks whether US companies subjected to discriminatory / extraterritorial tax
 - **§ 901 and § 905(c)**



UNILATERAL BEPS

UK's Diverted Profits Tax (DPT)

- **Introduction and application** – DPT was floated in Dec. 2014, formally approved in March 2015 and went into effect from April 1, 2015. Although complex, the DPT essentially applies if (1) any person (P) carries on activity in the UK in connection with the supply of goods or services to UK customers by a non-UK company, (2) it is reasonable to assume that this was done to ensure that the non-UK company did not have a UK PE because of P, and (3) the structure has a main purpose of avoiding UK tax or the parties are related
- **General DPT impact** – levies UK tax at 25% rate on an amount of profits that are deemed to have been *artificially diverted* from the UK (vs. normal UK corp. tax rate of 20%)

Australia's Multinational Anti-Avoidance Law (MAAL)

- **Introduction and application** – MAAL was floated May 2015, and introduced in Sept. 2015 with an effective date of Jan. 1, 2016. It is very similar in the application to the UK's DPT, although the MAAL is couched as an addition to the GAAR and may thus enjoy greater protections from treaty claims as Action 6-like item. ATO released MAAL roadmap Jan. 2016
- **General MAAL impact** – if applicable, will apportion profits to a notional Australian PE, subject the PE to tax (and possibly 100% penalty on that tax), and WHT applied to payments of interest or royalties deemed paid by the PE



EU BEPS-ADOPTION PLAN

EU Anti-Tax Avoidance Package – January 28, 2016

Chapeau Communication

Anti-Tax Avoidance Directive (ATAD)

- Draft directive
- 6-legally binding anti-abuse measures proposed; sees them as *minimum standards*
- Interest Deductibility. See generally BEPS Action 4
- Rules for Exit Taxation. Move to/of PE out of state is taxed
- “Switch-Over” Clause. Allow to tax dividends or KG rec'd from “low-taxed” (40%) co/PE
- GAAR. Arrangements can be ignored if not genuine
- CFC Rules. CFC inclusions if more than 50% passive and “low-taxed” (40% of parent)
- Hybrid Mismatches.

Recommendation on Tax Treaties

- BEPS Action 6. EC urges member states to adopt BEPS Action 6 (treaty abuse)
- If member state includes a PPT, EC recommends that rule be modified to comply with EU case law such that genuine economic activity is not affected
- BEPS Action 7. Member states urged to adopt BEPS Action 7 (avoiding PE) to amend treaty PE definitions
- Reporting. Member states are required to inform the EC of measures taken to comply with the recommendation, and EC will publish a report on the recommendation's application within 3 years of its adoption

Revised Admin. Cooperation Directive

- BEPS Action 13. EC proposes coordinated implementation of Action 13's CbCR by extending the scope of other work on mandatory exchange to this workstream
- Since most member states are OECD participants, this could happen fast
- EC will come forward with more info in Spring 2016

Communication on External Strategy

- General. Ideas for promoting stronger and more coherent EU approach to working with non-EU countries on tax governance matters – e.g., use of special clauses in trade agreements, developing country assistance, etc.
- Common EU Screening. EC wants common EU system for assessing, screening and listing non-EU countries for tax purposes

Staff Working Document

Study on Aggressive Tax Planning





COUNTRY-BY-COUNTRY US UPDATE



PROPOSED TREAS. REG. § 1.6038-4

- Provides a new requirement for certain U.S. persons that are the *ultimate parent entity* of a U.S. multinational enterprise group (U.S. MNE group) earning substantial annual revenue to file an annual report (U.S. CbC report) containing information on a country-by-country basis related to the MNE group's income and taxes paid, together with certain indicators of the location of economic activity within the MNE group.
- The categories of information required to be reported on the U.S. CbC report were developed in coordination with other member countries of the Group of Twenty (G20) and the Organisation for Economic Cooperation and Development (OECD) (proposed regulations conform to OECD model template).



PROPOSED TREAS. REG. § 1.6038-4

- A U.S. CbC report filed with the IRS may be exchanged with other tax jurisdictions in which the U.S. MNE group operates that have agreed to provide the IRS with foreign CbC reports filed in their jurisdiction by foreign MNE groups that have operations in the United States.
- Foreign CbC reports will provide the IRS with information that will assist the IRS in performing risk assessment of foreign MNE groups operating in the United States.
- CbC reports filed by both U.S. MNE groups and foreign MNE groups will help the IRS perform high-level transfer pricing risk identification and assessment.
- CbC report will not be used as a substitute for an appropriate transfer pricing determination based on the arm's length standard under section 482.



PROPOSED TREAS. REG. § 1.6038-4

- U.S. Persons Required to File CbC Report
 - U.S. business entity that is the ultimate parent entity of a U.S. MNE group that had annual revenue \geq \$850,000,000
 - U.S. MNE group – group of business entities including a U.S. business entity that is the ultimate parent entity
 - Ultimate parent entity of U.S. MNE group is a U.S. business entity that controls a group of business entities, at least one of which is organized or is a tax resident outside of the United States.
 - Group must be required to consolidate accounts for financial reporting purposes under U.S. GAAP (or would be if publicly traded).
 - Business entity means a person as defined in IRC § 7701(a) that is not an individual as well as a PE that prepares separate financial statements. Includes DREs.
 - Possible reporting exception based on national security reasons.



PROPOSED TREAS. REG. § 1.6038-4(D)(1)

- Key Definitions and Concepts
 - Tax residence – liable to tax based on place of management or organization
 - Treaty tie breaker rules apply if resident in more than one jurisdiction (if no treaty, then Art. 4 of 2014 OECD Model Tax Treaty applies).
 - Constituent entity – any separate business entity or PE of U.S. MNE group except foreign corporations or foreign partnerships for which parent is not required to report under IRC § 6038(a) (control of business entity).
 - IRS requesting comments regarding rules for defining which business entities are considered constituent entities and definition of U.S. MNE group.



PROPOSED TREAS. REG. § 1.6038-4(D)(1)

- Information Required for Each Constituent Entity
 - Tax jurisdiction in which entity is resident
 - Tax jurisdiction in which entity is organized (if different)
 - Tax residence jurisdiction tax ID number
 - Main business activity or activities of constituent entity



PROPOSED TREAS. REG. § 1.6038-4(D)(1)

Name of the MNE group: Fiscal year concerned:														
Tax Jurisdiction	Constituent Entities resident in the Tax Jurisdiction	Tax Jurisdiction of organization or incorporation if different from Tax Jurisdiction of Residence	Main business activity(ies)											
			Research and Development	Holding or Managing intellectual property	Purchasing or Procurement	Manufacturing or Production	Sales, Marketing, or Distribution	Administrative, Management or Support Services	Provision of Services to unrelated parties	Internal Group Finance	Regulated Financial Services	Insurance	Holding shares or other equity instruments	Dormant
	1.													
	2.													
	3.													
	1.													
	2.													
	3.													

*Please specify the nature of the activity of the constituent entity in the "Additional Information" section.



PROPOSED TREAS. REG. § 1.6038-4(D)(2)

- Information Required With Respect to Each Tax Residence Jurisdiction
 - Revenues from transactions with other constituent entities
 - Revenues other than from transactions with other constituent entities
 - Profit or loss before tax
 - Total income tax paid on a cash basis to all jurisdictions
 - Total accrued tax expense recorded on taxable profits or losses (excluding deferred taxes or uncertain tax liabilities)
 - Stated capital of all constituent entities (except that stated capital of PE reported by legal entity of which it is a PE)
 - Total accumulated earnings (except that accumulated earnings of PE reported by legal entity of which it is a PE)
 - Total number of employees (FTE basis) in the jurisdiction
 - Net book value of tangible assets other than cash
 - “Stateless” income aggregated and reported



PROPOSED TREAS. REG. § 1.6038-4(D)(2)

Name of the MNE group: Fiscal year concerned: Currency used:										
Tax Jurisdiction	Revenues			Profit (Loss) Before Income Tax	Income Tax Paid (on cash basis)	Income Tax Accrued - Current Year	Stated Capital	Accumulated Earnings	Number of Employees	Tangible Assets other than Cash and Cash Equivalents
	Unrelated Party	Related Party	Total							

Name of the MNE group: Fiscal year concerned:
Additional Information. <i>Please include any further brief information or explanation you consider necessary or that would facilitate the understanding of the compulsory information provided in the Country-by-Country Report.</i>



PROPOSED TREAS. REG. § 1.6038-4

- Time and Manner of Filing Return:
 - Due with the ultimate parent entity's U.S. income tax returns for the taxable year (on or before the due date)
- Requirement to Maintain Records
 - Ultimate parent entity must maintain records to support the information provided on CbC form.
 - No requirement to maintain records that reconcile the amounts on CbC report with tax returns of any jurisdiction or applicable financial statement.
- Effective Date of CbC Reporting Regulations
 - Rules apply to taxable years of ultimate parent entities of U.S. MNE groups that begin on or after the date of publication of final regulations.
 - Thus, if on a calendar year basis, earliest reporting would be with respect to 2017 (due in 2018).





CBC REPORTING – OUTSTANDING ISSUES AND CHALLENGES



CBC REPORTING ISSUES AND CHALLENGES

- Concerns Regarding Confidentiality of Information in CbC Report
 - “Return information” per IRC § 6103
 - Information can be exchanged only pursuant to information exchange agreements
 - Anticipate U.S. will enter into separate bilateral competent authority agreements for CbC EOI
 - Generally, exchanged information can’t be used or disclosed for any non-tax purpose
 - Competent authority agreements may further limit uses to “assessing high-level transfer pricing and other tax risks and, where appropriate, for economic and statistical analysis.”



CBC REPORTING ISSUES AND CHALLENGES

- International Responses
 - European Commission proposal to expand a prior directive to require “mandatory automatic exchange of country-by-country reports between Member states.”
 - OECD announced 31 countries recently signed Multilateral Competent Authority Agreement on CbC Reporting
 - Automatic exchange of CbC report information on an annual basis
 - Australia has agreed to adopt CbC reporting as of Jan. 1, 2016 for MNEs with group revenues over AU\$1 billion (≈ €650,000)
 - France has adopted CbC reporting for accounting periods beginning on or after January 1, 2016
 - Netherlands, Ireland, Spain and UK have implementing legislation either complete or nearly so with 2016 reporting



CBC REPORTING ISSUES AND CHALLENGES

■ International Responses

- Germany announced that they intend to incorporate CbC reporting into German tax law but no new amendments to the German Tax Code have yet been released
- China – CbC state tax authority issued CbC discussion draft
- U.S. intends to enter into bilateral agreements “with appropriate countries” that adopt CbC reporting and that have “appropriate safeguards and infrastructure in place”

Bob Stack, U.S. Deputy Assistant Treasury Secretary for International Tax Affairs



CBC REPORTING ISSUES AND CHALLENGES

- **Effective Date Considerations**
 - Differences between effective dates for CbC reporting for U.S. and other jurisdictions may create timing mismatch problems.
 - Earliest effective date for U.S. regulations is for calendar year 2017
 - About a dozen countries (France, Netherlands, U.K., Ireland, Mexico) have adopted or plan to adopt enabling measures to implement CbC reporting as of Jan. 1, 2016 with first CbC reporting due Dec. 31, 2017 (for automatic exchange in 2018)
 - Thus foreign members of U.S. MNE groups may have local filing requirements prior to effective date of U.S. CbC regulations
- **Filing Date Differences**
 - Proposed regulations require an earlier filing deadline (Sept. 15) than that proposed by OECD Action 13 (Dec. 31) for calendar year taxpayers.



CBC REPORTING ISSUES AND CHALLENGES

- Criticisms of CbC Reporting

- Business groups have expressed concerns with increased uncertainty, compliance costs and risks of disclosure of confidential information.
- Treasury's authority to implement enabling regulations has been questioned by House Ways and Means Committee Chair Kevin Brady, R-Texas, Sen. Orrin Hatch, R-Utah, and Rep. Paul D. Ryan, R-Wis.

“New country-by-country reporting requirements on U.S. companies must be limited and should not make it even harder for our companies to compete.... Congress will not allow Treasury to move forward with BEPS policies that enable foreign governments to misuse information reporting and exploit American companies.”

House Ways and Means Committee Chair Kevin Brady, R-Texas

- BEPS Act (H.R. 4297)



CBC REPORTING ISSUES AND CHALLENGES

- Open Issues
 - Whether IRC § 6038 penalties apply for failure to file
 - While reconciliations of CbC report information to financial records or tax returns is not required under the proposed regulations, such reconciliations may be the subject of examination.
 - Unclear precisely how CbC reporting information will be used to assess transfer pricing risk.
 - Must assess whether internal systems are able to assemble and reconcile CbC report information.
 - Language in bilateral competent authority agreements limiting uses of CbC report information and confidentiality safeguards.
 - What are acceptable sources of information for CbC reporting (consolidated reporting packages, financial statements, internal books and records).



CBC REPORTING ISSUES AND CHALLENGES

- Open Issues
 - Whether foreign jurisdictions will require secondary reporting for U.S. MNE group constituent entities beginning for 2016.
 - CbC reporting may lead to increase in transfer pricing audits and disputes, however current mutual agreement procedures (MAP) not equipped to handle additional controversies.
 - Adoption of an efficient dispute resolution system needed (BEPS Action 14)
 - Important that U.S. MNE groups prepare transfer pricing documentation in a way that supports allocation of profits in CbC reporting.
 - Possible requests for CbC reports as part of business acquisition due diligence.



CBC REPORTING ISSUES AND CHALLENGES

- Compliance Concerns
 - Systems required to compile the data for CbC report – challenging for IT systems
 - May be real barriers to transmission of data between constituent entities. CbC reporting may result in increased transparency and greater visibility into transfer pricing within business entities.
 - Disclosure of CbC report information may trigger inquiries into other tax compliance areas (e.g., VAT)



PROPOSED TREAS. REG. § 1.6038-4

- Comments due to Treasury March 22, 2016
 - U.S. persons required to file and who is a constituent entity
 - Treatment of reverse hybrids
 - How to count employees
 - Criteria for national security reporting exception





THANK YOU!



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BRIAN DAVIS is a partner in the Washington, D.C. office of Ivins, Phillips & Barker. He has practiced in all areas of U.S. federal income taxation, with considerable experience assisting public and private businesses with U.S. corporate tax and global tax planning matters. He regularly serves as a trusted tax adviser to Fortune 100 companies, and has also worked in industry as Director of International Tax for a publicly-traded global media conglomerate. Brian is regularly engaged by corporate, tax and accounting executives seeking proficient and pragmatic advice regarding domestic and cross-border tax structuring and execution matters, and troubleshooting of domestic and international tax issues.

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