



UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

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VIA EMAIL

Mr. Pascal Saint-Amans
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France
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Re: USCIB Comments on the OECD Discussion Draft on Transfer Pricing Documentation and Country-by Country Reporting

Dear Mr. Saint-Amans,

The United States Council for International Business is pleased to provide comments on the OECD's Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting. We appreciate that the OECD is seeking early input on these important topics. USCIB supports the BIAC consensus comments. We will not repeat those comments here, but rather would like to emphasize some key points that we believe are critical to successful implementation of improved transfer pricing documentation and country-by-country reporting.

Taxpayer burden must be reduced. Multinational enterprises already provide an enormous amount of information to tax authorities to explain their operations and, in particular, justify their transfer prices. The goal of the TP documentation revision is to improve the quality of the information while at the same time reducing taxpayer burden. It seems that the burden reduction aspects have been given short shrift. As USCIB pointed out in our comments on the OECD's Draft Handbook on Risk Assessment:

It is critical that the risk assessment begin with a good understanding of the big picture aspects of the business, including the taxpayer's attitude towards compliance, disclosure, and cooperation, before proceeding to a narrower assessment of transfer pricing risk.

USCIB believes that up-front dialogue is essential to achieve this understanding. The draft transfer pricing documentation rules and country-by-country report rely on the production of written materials. This is unlikely to produce useful information because the sheer volume of information will make it difficult for tax authorities to separate the important from the unimportant. USCIB believes that at least some of this reliance on documentation stems from distrust of taxpayers, that governments feel they need to spell out everything they might need in order to ensure that a document will be available if needed. There must, however, be some recognition that taxpayer's must have discretion to identify what is important and what is not. Without such discretion, taxpayers will waste significant resources producing documentation that is not useful to governments.

The lack of burden reduction may be, least in part, due to the nature of the OECD guidelines. As "soft law" the guidelines are in large part aspirational. The potential benefit to taxpayers of these guidelines will only be achieved if countries use the information provided in the master file, local country file and

country-by-country report in lieu of requiring other documentation (recognizing that additional information can be requested during an audit). If burden reduction is not achieved these rules will be a substantial detriment to taxpayers because they will represent an explosion of required information. Thus, the OECD must go beyond aspirations and must create some incentives for countries to adopt the guidelines in substitution for local country transfer pricing documentation rules. One possible method might be to deny access to the master file and country-by-country file if the country requires additional transfer pricing documentation prior to the determination that a more detailed audit is necessary. Another possibility would be to adopt the transfer pricing documentation as part of a multi-lateral agreement that limits the collection of other information, provides confidentiality protections and is peer reviewed. If countries do not sign onto and comply with the agreement, then they cannot get access to the master file and country-by-country report.

Excess information is detrimental to both taxpayer and governments. Nuggets of useful information can be buried in piles of irrelevant material. So, governments as well as taxpayers have an interest in limiting the amount of information provided. Business is concerned that much effort will be required to produce extensive documentation that will infrequently be reviewed.

Another element to burden reduction is reducing the burden on medium and low-risk taxpayers. The OECD should work to identify these taxpayers in some standardized way and their burden should be reduced by, for example, requiring less frequent updates. We would be willing to work with the OECD to define medium and low-risk taxpayers.

Similarly, there should be ways to limit the burden for large MNE groups by eliminating or relaxing the need for TPD for smaller business lines or smaller members of the MNE group; or have lesser requirements for lower-risk transactions.

Flexibility is critical to successful implementation of these proposals. No one system will work for all businesses. Throughout the Discussion Draft the OECD poses questions concerning whether one option is preferable to another. In USCIB's view, in these cases both or multiple options may be reasonable and the choice among reasonable options ought to be left to the taxpayer. As long as taxpayers are consistent in their approach, then the information provided should permit tax authorities to perform a high-level risk assessment to help inform allocation of audit resources. If the guidance does not permit flexibility, then burden will be significantly increased. If the OECD is concerned about burden minimization, then in cases where there are choices to be made, the OECD should leave the choice to the taxpayer.

Confidentiality must be preserved. These documents will contain extremely sensitive information that tax authorities must protect from disclosure. Protection requires, at a minimum, that the master file and the country-by-country report be maintained by the home country of the ultimate parent and be available only under exchange of information provisions of tax treaties (or other exchange of information provisions in other agreements). There also need to be consequences for jurisdictions that do not respect confidentiality. Relevance is an important part of confidentiality. The more widely dispersed information is, the more likely is that the information will be disclosed, whether intentionally or unintentionally. It is therefore critical that there be a requirement of relevance before information is made available to any particular country.

Transition rules that recognize the scope of the proposed changes are essential. Taxpayers cannot be expected immediately to be able to comply with the requirements of a new system. A new system may require new hardware, software, procedures and people, as well as significant changes to data collection and analysis. This requires budgeting and hiring. This process takes time. IT and personnel budgets are done in advance and planning must occur. These time constraints must be accommodated. One possibility would be for an extended phase-in of the requirements starting with the country-by-country report, moving to the local country requirements and finally to the master file. This would also allow “debugging” as implementation moves forward and also for the OECD to assess whether more limited information can successfully be used for risk assessment purposes.

Tax administrations should recognize taxpayer initiated transfer pricing adjustments. Taxpayers need to be able to “keep their TP books open” while they prepare TP documentation. Taxpayers will routinely need to adjust their transfer prices after fiscal year-end based on the outcome of their TP studies. Tax administrations on both sides of the transaction should be required to accept these adjustments (both upward and downward) in order to achieve arm's length pricing consistent with these studies.

Dispute resolution must be improved. Business is very concerned that the BEPS changes, including increasing the information available to tax authorities, will lead to increased transfer pricing disputes. Dispute resolution must be improved to deal with this increase, including especially a greater emphasis on mandatory, binding, “baseball-style” arbitration.

Finally, USCIB understands the OECD's need to move quickly on these documents. We are putting together additional comments on the annexes and will forward those as soon as possible, hopefully within the next week.

Sincerely,



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