Section of Taxation

4th Floor
1050 Connecticut Ave., N.W.
Washington, DC 20005-1022
202-662-8670
FAX: 202-662-8682
E-mail: tax@americanbar.org

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March 23, 2016

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

The Honorable Mark Mazur
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

Re: Comments on Country-by-Country Reporting Proposed Regulations

Dear Messrs. Koskinen and Mazur:

Enclosed please find comments pertaining to the proposed regulations on country-by-country reporting for multinational enterprise parent entities ("Comments"). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,

George C. Howell, III
Chair, Section of Taxation

Enclosure

CCs: William Wilkins, Chief Counsel, Internal Revenue Service
Erik Corwin, Deputy Chief Counsel (Technical), Internal Revenue Service
Steven Musher, Associate Chief Counsel (International), Internal Revenue Service
Melinda Harvey, Attorney-Advisor, Office of the Associate Chief Counsel (International), Internal Revenue Service
Emily McMahon, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
Robert Stack, Deputy Assistant Secretary (International), Department of the Treasury
Danielle Rolfes, International Tax Counsel, Department of the Treasury

AMERICAN BAR ASSOCIATION
SECTION OF TAXATION

COMMENTS AND RECOMMENDATIONS PERTAINING TO THE PROPOSED REGULATIONS (REG-109822-15) ON COUNTRY-BY-COUNTRY REPORTING FOR MULTINATIONAL ENTERPRISE PARENT ENTITIES

These comments ("Comments") are submitted on behalf of the American Bar Association Section of Taxation (the "Section") and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

These Comments were prepared primarily by members of the Section's Committee on Transfer Pricing (the "Committee"). Principal responsibility for preparing these Comments was exercised, and substantive contributions were made by Paul Burns, Christopher Desmond, Matthew Frank, Itai Grinberg, and Fred Murray. Substantive contributions were also made by Paul Crispino and Kimberly Tan Majure of the Section's Committee on Foreign Activities of U.S. Taxpayers ("FAUST"). The Comments were reviewed by John Breen, one of the Vice-Chairs of the Committee, and Darrin Litsky, on behalf of the Section's Committee on Government Submissions. The Comments were further reviewed by Carol P. Tello, Council Director for the Committee, and Peter H. Blessing, the Section's Vice Chair (Government Relations).

Although some of the members of the Section who participated in preparing these Comments have clients who might be affected by the federal income tax reporting requirements addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Contact: John Breen
202-371-7385
John.Breen@skadden.com

Date: March 23, 2016

COMMENTS AND RECOMMENDATIONS PERTAINING TO THE PROPOSED REGULATIONS (REG-109822-15) ON COUNTRY-BY-COUNTRY REPORTING FOR MULTINATIONAL ENTERPRISE PARENT ENTITIES

We appreciate the opportunity to comment on the proposed regulations on country-by-country ("CBC") reporting for multinational enterprise ("MNE") parent entities (the "Proposed Regulations").[1] The Proposed Regulations reflect a thoughtful approach to the implementation of the CBC reporting regime endorsed by the United States and by other members of the Organisation for Economic Co-operation and Development ("OECD") and the Group of Twenty ("G20").[2]

We support the decision reflected in the Proposed Regulations to adopt the model template without alteration. We share the hope, expressed in the Preamble, that the adoption of the model template "will promote consistency of reporting obligations across tax jurisdictions and reduce the risk that other countries will depart from the agreed standard by imposing inconsistent and overlapping reporting obligations on U.S. MNE groups." In our view, any gain we would hope to achieve by recommending changes to the U.S. template would be outweighed by the risk of undermining the international consensus to adhere to a single, agreed template.

We welcome the assurances in the Preamble that the CBC report will be treated as confidential taxpayer information and that the U.S. will take steps to ensure that other countries will afford it similar protection. We applaud also the clear delineation of the permissible uses of the CBC report information – namely, for high-level transfer pricing risk assessment – and the assurance that the CBC report will not be used as a substitute for a proper transfer pricing analysis based on the arm's length standard or to usher in transfer pricing approaches based on formulary apportionment.[3]

The Proposed Regulations correctly allow taxpayers a certain amount of flexibility in choosing how to complete the report, *e.g.*, choosing the source of financial data, changing the sources of financial data, deciding on the appropriate supplemental disclosures, and choosing a reasonable convention for reporting employee headcount. These are proper accommodations given the practical burdens taxpayers will face and entirely consistent with the overriding purpose of the CBC report, which is to facilitate a high-level risk assessment rather than to drive a specific transfer pricing examination. The Treasury Department ("Treasury") and the Internal Revenue Service ("Service") are to be commended for avoiding the sometimes natural inclination in a guidance project to become overly prescriptive. As this project moves to completion, we encourage the drafters to continue with the approach reflected in the Proposed Regulations and to

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1 REG–109822–1580, Fed. Reg. 79,795 (December 23, 2015).

2 See OECD (2015), *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project ("OECD Action 13")*.

3 This commitment may not be shared by all countries, and we therefore encourage Treasury and the Service to consider ways to monitor the use of CBC report information outside the United States. The design and implementation of any such mechanism is beyond the scope of this regulation project and consequently is not addressed in these comments.

preserve the maximum scope for taxpayers to exercise reasonable discretion in completing the report consonant with the goal of producing a report that will facilitate a high-level transfer pricing risk assessment.[4]

We have prepared the comments below to offer some additional thoughts that may be of assistance in formulating final guidance. Our comments focus on a few areas where the Proposed Regulations invite comment as well as areas where we think further consideration is appropriate. The comments below are not intended to be exhaustive. The Proposed Regulations and the Form XXXX raise many questions, some apparent at the outset, that do not go to the core purpose of the CBC reporting regime and we expect were deliberately left unaddressed to afford flexibility. As the drafters continue their work, we would be happy to supplement these comments on any point desired.

Effective date of CBC reporting requirements. The Proposed Regulations provide for CBC reports to be filed for taxable years beginning on or after the date of publication of the final regulations.[5] Assuming that final regulations are issued by mid-2016, calendar year-end U.S. MNEs subject to the regulations will have to file U.S. CBC reports not earlier than with respect to their taxable year starting in 2017. This is one year later than recommended by the OECD final report, which recommends that "the first Country-by-Country Reports be required to be filed for MNE fiscal years beginning on or after 1 January 2016."[6] Many countries have signaled that they will follow the OECD recommended timetable and require filing of CBC reports for fiscal year 2016.

We join the concerns expressed by many that the delay of the U.S. effective date will cause hardships for U.S. companies because they will be required to submit CBC reports directly to foreign tax authorities for fiscal year 2016 with the concomitant problems of multiple filings and potentially weaker data confidentiality protections. These concerns have received ample attention in the press; we will not belabor them but mention them here to underline their importance to a large number of U.S. taxpayers. We are heartened by reports that there is good faith among countries to work towards a sensible fix to this problem.[7] We support Treasury's and the Service's efforts to work toward such a solution.

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[4] We encourage Treasury and the Service to revisit the required frequency of the CBC report at some future date. We submit that a high-level risk assessment report would be more meaningful if it were filed every few years, capturing multiple years of data, rather than annually, capturing just a single year. A multi-year perspective would provide a more meaningful representation of the MNE group's transfer pricing posture, eliminating some of the distractions and "noise" that can affect single year results and focusing tax authority risk assessment consideration on structures more deserving of scrutiny.

[5] Prop. Reg. § 1.6038-4(j), 80 Fed. Reg. 79795 (2015).

[6] *See* OECD Action 13, page 20, ¶ 50.

[7] Kevin Bell, *Mind the Gap: U.K. Prepares to Accept 'Surrogate' Filings of U.S. Entities' Country-by-Country Reports, ITM Issue No. 30 (2016)*; Molly Moses, *Stack: U.S. Country-by-Country Rules Expected by June 30*, 24 TAX MGMT. TRANS. PRICING REP. (BNA) 1290 (2016).

A second point regarding the effective date arises when, as is often the case, a U.S. MNE has foreign constituent entities with annual accounting periods that differ from the U.S. parent's taxable year. Proposed Regulations section 1.6038-4(j) states that the CBC report filing obligation begins with the first taxable year of the ultimate parent entity that begins on or after the publication date *and that includes annual accounting periods determined under 6038(e)(4) of all foreign constituent entities … beginning on or after the date of publication.* This language suggests that, if the Proposed Regulations are finalized in mid-2016 as contemplated, a calendar year-end U.S. MNE may have no filing obligation for its taxable year beginning January 1, 2017 provided that any of its foreign constituent entities has a 2016 annual accounting period that begins before the publication date of the final regulations and carries over into 2017. We understand there is some difference of opinion among commentators on this point and suggest the final regulations confirm or clarify the intent.

Time and Manner of CBC report filing. The Proposed Regulations provide for CBC reports to be filed with the U.S. MNE parent's timely filed income tax return.[8] This deadline is earlier than the deadline recommended by the OECD, which would allow the CBC report to be filed within 12 months after the end of the accounting period to which the report relates.[9]

The accelerated deadline in the Proposed Regulations should be reconsidered because it may impose a significant burden on U.S. MNEs and undermine the flexibility afforded to them elsewhere in the Proposed Regulations to choose the source of the data used to generate their CBC reports. Proposed Regulations section 1.6038-4(e)(2) allows taxpayers to draw data from their financial statements, from the books and records of their constituent entities, or from records used for tax reporting purposes. The option to draw financial data from local tax reporting systems is valuable because, where it is possible to do so, companies will be able to report financial data in their CBC reports that align closely with the information on their local tax returns. This will minimize local tax authority confusion and the burden on taxpayers of having to field questions from local revenue agents and reconcile for them the numbers in the CBC report with the numbers on the local return. This is an important consideration for minimizing the hardship on U.S. MNEs who are required to comply on a global scale with the new CBC reporting regime.

As a practical matter, however, the proposed filing deadline undermines the flexibility that Proposed Regulations section 1.6038-4(e)(2) envisions because it will often not be possible to use local tax reporting if the CBC report must be filed with the U.S. return. The deadline for statutory accounts or tax filings in many countries falls

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8 Prop. Reg. § 1.6038-4(f).

9 OECD Action 13, page 17 ¶ 30 ("it is recognised that in some instances final statutory financial statements and other financial information that may be relevant … may not be finalised until after the due date for tax returns in some countries for a given fiscal year. Under the given circumstances, the date for completion… may be extended to one year following the last day of the fiscal year of the ultimate parent of the MNE group.").

months after the U.S. tax return date. The local tax return data for these countries may not be available in time. Instead, many U.S. MNEs will be forced to use financial statement information with respect to at least some jurisdictions that will not tie easily to local tax returns. This will lead to heightened scrutiny by the local tax authority and will disadvantage U.S. MNEs versus their international competitors who are afforded a few extra months under the OECD's recommended deadline to file CBC reports using local statutory or tax reporting data.

We urge two steps to address this problem. First, we urge that the final regulations confirm that a taxpayer may use local tax reporting data for jurisdictions where the data are available while using other approved sources of data for jurisdictions where local tax reporting data are not available. We think it would be a mistake to prohibit use of tax reporting data across the board merely because such data are not available for some jurisdictions at the time of the U.S. filing. The benefits of consistency would not be compromised by affording this flexibility. The standards governing local tax reporting differ from one jurisdiction to the next, complicating any apples-to-apples comparison of data across jurisdictions (which is not required for a high-level transfer pricing risk assessment in any event). A taxpayer's use of local tax reporting data in one jurisdiction and use of local books and records or financial reporting data in another would not create inconsistencies different from those in a regime that uses different local tax reporting standards in each jurisdiction. Moreover, if necessary, taxpayers may report in the supplemental disclosure section of the CBC Form situations involving mixed-sourced data to highlight and facilitate understanding of the data sources. We believe the Proposed Regulations appropriately afford taxpayers the ability to use mixed-source financial data. To remove any doubt, however, we urge that the final regulations confirm this view.

We also urge the drafters to reconsider accelerating the CBC report filing deadline and to permit U.S. MNEs to file their report with their U.S. return or separate from their U.S. return within the 12-month period described in the OECD recommendations. We expect this would align the U.S. deadline with the deadline of most other countries and would afford U.S. MNEs the flexibility to complete their CBC forms using local tax reporting data.

Tie-breaker rules for residency determinations. Proposed Regulations section 1.6038-4(b)(6) contains tie-breaker rules intended to address situations in which a party (including a U.S. DRE) is considered a resident of more than one jurisdiction. That section provides that if residency cannot be determined by reference to the applicable income tax treaty, or if no tax treaty is applicable, residency is to be determined based on the "effective place of management," evaluated in accordance with Article 4 of the OECD Model Tax Convention (2014).[10] Proposed Regulations section 1.6038-4(b)(6) thus appears to provide a comprehensive means to resolve the multiple residency

[10] The United States reserved on Article 4 of the OECD Model Tax Convention, retaining the right to determine the residence of a corporation based on place of incorporation, and barring that, to deny benefits to a dual resident company under the Convention.

scenario. We note, however, that the "effective place of management" test under the OECD Model is sometimes uncertain and subject to second guessing.

In this context, where residency is being used to define information reporting obligations and not to determine substantive rights under an income tax convention, we urge Treasury and the Service to consider an alternative, bright-line tie-breaker rule to address situations in which a party may be subject to CBC reporting in more than one jurisdiction.

Treatment of territorial income. The Proposed Regulations should clarify the meaning of "tax jurisdiction of residence" in Proposed Regulations section 1.6038-4(b)(6). The second sentence of that provision states that a "business entity is considered a resident in a tax jurisdiction if, under the laws of that tax jurisdiction, the business entity is liable to tax therein based on place of management, place of organization, or another similar criterion." The third sentence then states, "However, a business entity will not be considered a resident in a tax jurisdiction if such business entity is liable to tax in such tax jurisdiction solely with respect to income from sources in such tax jurisdiction, or capital situated in such tax jurisdiction." Some commentators interpret this third sentence as covering "pure" territorial tax regimes, such as Hong Kong and Panama, meaning that entities organized in such jurisdictions may be considered stateless, and their data may need to be reported on an aggregate basis with other stateless income in the group. We urge that the final guidance clarify that this is not the intent.

We note that the sentence in question is virtually identical to the second sentence in Article 4.1 of the OECD Model Tax Convention, which defines the term "resident of a Contracting State." The Commentary under that Article makes it clear that in the broader tax treaty context, the language is not intended to exclude residents of countries that adopt a territorial principle of taxation.[11] By way of example, Hong Kong in fact taxes Hong Kong sourced income and it would be confusing to have a single entity that has income that would be characterized as Hong Kong sourced income as well as stateless income. In any event, we urge that the final regulations clarify the meaning of the term "tax jurisdiction of residence" in Proposed Regulations section 1.6038-4(b)(6) as applied to territorial tax regimes.

Treatment of Subpart F income and similar items. The Proposed Regulations define "revenue" to include all amounts typically regarded as revenue and to exclude "payments received from other constituent entities that are treated as dividends in the

[11] The second sentence of Article 4.1 of the OECD Model Tax Convention on Income and on Capital states "This term ['resident of a Contracting State'], however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein." Paragraph 8.3 of the accompanying Commentary states "The application of the second sentence, however, has inherent difficulties and limitations. It has to be interpreted in the light of its object and purpose, which is to exclude persons who are not subjected to comprehensive taxation (full liability to tax) in a State, because it might otherwise exclude from the scope of the Convention all residents of countries adopting a territorial principle in their taxation, a result which is clearly not intended."

payor's tax jurisdiction of residence."[12] This clarification is welcome but we urge that it be expressly extended to all forms of imputed earnings or deemed dividends. This would include, but not necessarily be limited to, Subpart F income, all-earnings-and-profits amounts, Section 1248 amounts, and similar items. Including such income items in the attributes of the U.S. ultimate parent entity would result in potentially misleading double-counting. In the case of Subpart F income, that income would be included in the attributes of the controlled foreign corporation that actually earns it and assigned to the CFC's country of residence. Counting that income a second time would not advance the goals of CBC reporting because it has no potential to reveal potentially non-arm's-length transfer pricing. In the case of all-E&P amounts and Section 1248 amounts, the inclusion of such items represents, in effect, advance repatriation of E&P of foreign subsidiaries. The logic of excluding actual dividends from the definition of revenue applies equally to deemed dividends and like amounts. This may be the intent of the current language. We urge that this be made clear in the final regulations.

Partnership issues. Finally, we recommend further guidance with respect to treatment of partnerships and partnership attributes. One issue concerns the reporting requirement where a partnership has revenues that exceed the $850 million threshold but is not resident in a CBC reporting jurisdiction and has multiple partners whose own revenues fall below the CBC reporting level. We recommend that the drafters consider further clarifications concerning the treatment of such partnerships and partnership tax attributes as it relates to the threshold determination.

A separate issue arises because the Proposed Regulations apparently contemplate that the partnership itself, as a constituent entity, would be listed as stateless on Table 1, but the U.S. ultimate parent entity's distributive share of the partnership items of income and loss, and the partnership's other relevant attributes, would be assigned on Table 2 to the jurisdiction(s) in which the partner is subject to tax. This separate reporting on Tables 1 and 2, assuming that is in fact intended, has the potential to cause confusion. We recommend that the drafters consult with other treaty partners concerning the intended reporting treatment for such items, in order to ensure that reporting is consistent across countries.

[12] Prop. Reg. § 1.6038-4(d)(3)(ii).