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Via email: TransferPricing@oecd.org

February 23, 2014

Dear Sirs and Madams,

Comments on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting

Thank you for the opportunity to provide comments on the Discussion Draft on Transfer Pricing Documentation and CbC Reporting (the “Discussion Draft”) dated January 30, 2014. As a general matter, PwC supports the OECD’s work on simplification of transfer pricing documentation and the goal of increased transparency. We recognize the legitimate desire of tax authorities in jurisdictions around the world to have access to relevant tax reporting information. Further, we support the simplification of reporting and recognize that the use of tailored standard forms and questionnaires across jurisdictions enables information to be gathered more efficiently.

However, as currently drafted, PwC does not consider that the approach proposed in the Discussion Draft achieves the stated goal of balancing “the usefulness of the data to tax administrators for risk assessment and other purposes with any increased compliance burdens placed on taxpayers.”¹ Nor do we consider that the OECD’s stated goal of increased transparency of information relevant to transfer pricing risk assessment is delivered by these proposals. Further, we are concerned with the speed with which these proposals are being developed. We commend the OECD’s efforts to engage business input, but we are concerned that the timing of this proposal will not permit sufficient opportunity for input from, and consultation with, the business community to ensure that the guidance ultimately adopted can be successfully implemented in practice. The OECD has, itself, acknowledged that the compressed time frame has allowed for limited consideration of the issues to date. Perhaps, then, given the significant impact this guidance will have on all parties, the OECD could consider issuing another draft and holding another consultation or comment period.

Aside from the speed with which the project is progressing, we have two additional specific concerns in relation to the proposals. First, we are concerned that the proposed two-tiered approach to transfer pricing documentation will result in a significant implementation and compliance burden on taxpayers which is out of proportion to any benefits that may be secured from the process. Second, we have concerns relating to the treatment of what may often be proprietary and sensitive information. For the above reasons, PwC requests the OECD to seek:

¹ Paragraph 4, Discussion Draft



- a better cost/benefit balance with respect to the information to be gathered by taxpayers under these proposals;
- a more stringent confidentiality regime - i.e., requiring the master file and CbC template to be submitted to the parent company's home tax authority and distributed only through relevant provision and upon request (together with real sanctions for countries that violate confidentiality provisions);
- uniformity, globally, in the implementation of the master file and CbC template, with this goal of uniformity being applied also to the contents of the local file of transfer pricing documentation;
- a single commencement date for all countries adopting the requirements;
- flexibility regarding the derivation and form of the data to be collected;
- the application of materiality thresholds for small or low risk entities or transactions; and
- improved dispute resolution mechanisms to address transfer pricing controversy, including improved arbitration provisions, potentially also including "baseball-style" arbitration.

Cost/benefit balance

1. With respect to the comment above on cost/benefit analysis, there are a number of ways a better balance might be achieved. First, we recommend revisiting the purpose of the master file and CbC template. As risk assessment documents, the level of information requested should be commensurate with the risk assessment goal. In our view, the current proposal goes materially beyond what is required and relevant in that context. Feedback from taxpayers indicates that the current proposals would result in not only a significant compliance burden, but also a considerable investment in systems and resources in order to compile the information accurately and appropriately.
2. The information requested on the CbC template could be reduced to country and/or constituent entity, business code, revenues, earnings before income taxes, and income taxes paid. Tangible assets would preferably be reported in the local file only, as they are currently under accepted transfer pricing documentation practices, given that they are a necessary part of the functional analysis required under the arm's length standard. In our view, it is not clear what useful purpose is served by the additional required reporting of these items in the CbC template. Intercompany flows regarding royalties, interest, and service fees should in our view also be removed from the CbC template. Any individual country should be aware of the amount of the tax deduction being claimed in its jurisdiction for these types of expenses because it will be reported on the tax return itself. We recognize that data on the number of employees may be seen as useful information for risk assessment purposes and that employee expense will be generally indicative of value. However, detailed guidance regarding the definition of "employee" and the calculation of employee expense will be necessary before these items can meaningfully be reported on by taxpayers.
3. We are concerned that the scope of the information sought in the master file is not aligned with its stated purpose of facilitating a high-level transfer pricing risk assessment. We recommend leaving the second category of information required, that regarding business descriptions, to the local file.



Further, we suggest that any financing arrangements with third parties or agreements with tax authorities should not be included in the master file. These would seem to be documents that could be requested on audit to the extent necessary.

4. Further, in the spirit of fostering compliance and simplification, we recommend the OECD consider including an option of exemption from CbC reporting if a local entity proactively obtains and holds an effective unilateral ruling or Advance Pricing Agreement (“APA”) with its respective tax jurisdiction. Such an agreement or ruling should indicate a high level of cooperation and good governance on the part of the tax payer and provide for increased information sharing between the local entity and corresponding tax authority. We believe that not requiring such entities to complete the CbC template would help alleviate compliance burdens and promote simplicity.

Confidentiality

5. Confidentiality is of course a paramount concern for taxpayers. We recommend that strict confidentiality requirements be observed by tax authorities regarding both the master file and CbC template. PwC believes the information should be filed only with the parent company’s home tax authority and shared on request under treaty information exchange provisions or, in the absence of an applicable treaty, under strong confidentiality provisions. There may be circumstances in which certain country tax authorities are unable to obtain information from the parent’s home country tax authority due to lack of an income tax treaty and applicable restrictions under the home country’s domestic law. Weighing concerns regarding confidentiality of the data of the master file and CbC template, the taxpayer/local affiliate in such other country may provide information including the local file and other reasonably relevant information as requested under local law provisions.

Uniformity

6. Regarding consistency, we are concerned that unless states adopt in a uniform manner the documentation proposal as ultimately approved by the OECD, there will be an ever increasing burden on taxpayers to comply with the peculiarities of each tax authority’s approach to, and interpretation of, the proposal. Accordingly, we would urge the OECD to convey to participant states a clear message as to the importance of a uniform approach to applying these requirements in practice. Additionally, we consider that a single given date for implementation will give taxpayers time to prepare systems to comply with the new requirements on a global basis.

Flexibility

7. Flexibility is important in order for taxpayers to meet the demands of the data requested in the CbC template and the master file. In this context, we regard flexibility as being important in both the derivation and form of the required information. Provided that taxpayers are consistent in the information they provide (i.e., whether top-down or bottom-up financial data is used, etc.), tax administrators should get sufficient information in order to perform the risk assessment that is the goal of these requirements.

Materiality

8. PwC recommends that the OECD should give guidance with respect to materiality thresholds for purposes of applying the reporting requirements under the new regime. We observe that materiality should be addressed from a consistency standard in the context of other transparency



initiatives (e.g., EU Reporting under the Capital Requirements Directive IV and the Extractive Industries Transparency Initiative). We note that the absence of any significant materiality threshold would result in an undue administrative burden for taxpayers with little benefit toward greater transparency and disclosure.

Dispute Resolution

9. We should also note our concerns that the level of detail currently required in the CbC template could encourage tax authorities to pursue challenges that have more in common with a formulary apportionment approach, despite the OECD's comments that such an approach is not intended to replace the arm's length standard. The CbC template asks for country by country reporting of taxpayers' payroll, property, and sales, which are the same factors commonly used to allocate income under a formulary apportionment system. We recommend that the OECD adopt a vigilant approach to this issue, preferably reinforcing that such an approach would be misconceived and a misuse of the data collected.
10. Having regard to the concerns expressed above, we consider it all the more important to improve the available mechanisms for dispute resolution. Specifically, we propose that the OECD include a formal means of dispute resolution (preferably, binding baseball-style arbitration) as a required dispute resolution mechanism contained within the transfer pricing documentation proposals.
11. We also recommend that the OECD allow more time for the development of its transfer pricing documentation and CbC reporting requirements to further consider the potential consequences and costs to taxpayers of these proposals, including the need to develop adequate reporting systems and establish controls to comply with these requirements.
12. Our more detailed comments on specific questions posed by the OECD on the Discussion Draft are provided below.

Question 1 - Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template. Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

13. PwC supports the simplification of reporting and recognizes that the use of tailored standard forms and questionnaires across jurisdictions enables information to be gathered more efficiently. As such, PwC supports the proposal for new, standard forms and questionnaires but considers it vital that they simplify and replace the existing documentation and information reporting that is currently required by various tax jurisdictions. The new forms and questionnaires, as well as the master file and CbC template, should therefore minimize to a reasonable extent possible incremental costs. In our view, therefore, the OECD should recommend explicitly that individual states should do everything possible to remove duplicative reporting forms in their respective jurisdictions as a pre-condition to adopting and applying the OECD proposals within the Discussion Draft.
14. PwC recommends that to the extent taxpayers are required to complete standard forms or questionnaires, the OECD should support flexibility in taxpayer responses (e.g., with the provision



of meaningful and relevant reporting on a “top down” or “bottom up” approach), so long as the method is applied consistently. Such flexibility would help balance the additional compliance burden for taxpayer’s data for the tax authorities.

15. In meeting the objective of mitigating the compliance burden on taxpayers, PwC also supports the adoption of safe harbors. For example, we recommend safe harbors for (a) small and medium enterprises, (b) individual legal entities that are immaterial to the taxpayer, or (c) routine or easily benchmarked services.
16. PwC believes it is both appropriate and essential for tax authorities to share and discuss their risk assessment with taxpayers at a very early stage in the audit cycle. Such information sharing would effectively promote transparency and assist taxpayers in allocating resources to manage tax risks and corresponding compliance efforts. A risk assessment process conducted by taxing authorities with an outcome unknown to the taxpayer is not likely to foster tax authority transparency.

Question 2 - Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

17. PwC notes that information required in the master file and CbC template (e.g., key value drivers, most highly remunerated employees, intellectual property strategies) may include commercially-sensitive information. Disclosure of such information to unauthorized or inappropriate parties, such as the taxpayer’s business competitors, poses a significant risk to a taxpayer’s business operations.
18. To help mitigate this risk, it is essential that appropriately strong confidentiality requirements are adopted in relation to the data contained in the master file and CbC template. We recommend that these documents be submitted to the home tax authority of the taxpayer’s ultimate parent. Strong protection regarding the dissemination and use of the information in the master file and CbC template would then need to be observed. Giving weight to confidentiality of taxpayer information, we consider treaty exchange of information provisions or, in the absence of an applicable treaty, similarly strong provisions agreed between countries, should be the mechanism for transmitting the master file, CbC template, or other documents requested by taxing authorities.
19. We urge the OECD to consider any additional requirements relating to the production of information and documents on a basis consistent with and pursuant to the OECD’s Model Income Tax Treaty framework. To mitigate the risk of overly-excessive compliance burdens being imposed on taxpayers, PwC recommends the OECD encourage tax authorities to be reasonable and demonstrate relevancy in their information requests of taxpayers.
20. We believe it would be helpful if the taxpayer’s parent office were notified in advance of information being exchanged between taxing authorities for enhanced transparency. The OECD standard on tax treaty information exchange does not provide for advance taxpayer notification and we would suggest this should be revisited to address the confidentiality and information protection concerns raised by the reporting requirements of the Discussion Draft, and also consider a standard of consistency as such advance notice may be required under domestic law in some countries.



21. Further, we recommend that misuse or inappropriate sharing of the CbC template and master file should result in sanctions, such as future withholding of information from the offending tax authority by the tax authority initially exchanging the information.

Question 3 - Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis. Consideration should be given to the level of flexibility that can be accommodated in terms of sharing different business line information among relevant countries. Consideration should also be given to how governments could ensure that the master file covers all MNE income and activities if line of business reporting is permitted.

22. PwC recommends that taxpayers should be provided with the flexibility to prepare the master file on a line of business or entity wide basis, depending on the facts and circumstances of individual multinational enterprises. Allowing for such flexibility should provide sufficient information for a high level risk assessment while also taking account of the compliance burden placed on taxpayers.
23. Further, where relevant, PwC recommends that Multinational Enterprises (“MNEs”) should have the option to (a) prepare the master file based on a major line of business; and (b) allow local taxpayers to provide only the information relevant to that business line to local tax authorities as it relates to operations in such country and abroad for such business line. This option would streamline the information reviewed by local tax authorities and exclude non-relevant information.

Question 4 - A number of difficult technical questions arise in designing the country-by-country template on which there were a wide variety of views expressed by countries at the meeting of Working Party n°6 held in November 2013. Specific comments are requested on the following issues, as well on any other issues commentators may identify:

Question 4(a) - Should the country-by-country report be part of the master file or should it be a completely separate document?

24. While PwC notes that including the CbC template with the master file may reduce the risk that the information in the CbC template is used in isolation for transfer pricing risk assessment purposes, without considering the overall value chain of the business discussed in the master file, we recommend separating the CbC template from the master file. We do suggest, however, that the OECD recommend that the CbC template be used by a tax authority in conjunction with the master file in performing the transfer pricing risk assessment in order to appreciate more fully the MNE’s risk profile.
25. PwC recommends the two documents be separated because it increases the chances of retaining the confidential nature of the master file information and assists with filing deadlines.
26. The Discussion Draft notes that the master file should be prepared no later than the fiscal year tax return tax due date. The CbC template is proposed to be due one year following the last day of the fiscal year of the ultimate parent of the MNE. To allow adequate time for MNEs to complete both the master file and CbC template based upon the proposed timing of the Discussion Draft, the two



documents should be separated. PwC expects that 12 months following the last day of the fiscal year of the ultimate parent of the MNE may be a reasonable time period to complete the CbC template while noting that a potential longer period may be necessary to initially implement the template.

Question 4(b) - Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries? What are the additional systems requirements and compliance costs, if any, that would need to be taken into account for either the “bottom-up” or “top-down” approach?

27. PwC recommends that MNEs should be provided with the flexibility to elect either the “bottom up” or “top down” approach, so long as individual MNEs report via the method selected consistently. Different taxpayers produce their internal information in different ways and they should be allowed to report such information in a way that most naturally fits with their internal systems. We are aware of no compelling reason for tax authorities to prefer one approach over another. Additionally, allowing for such flexibility should provide sufficient information for high level risk assessment while also considering the compliance burden placed on taxpayers.

Question 4(c) - Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used? Those suggesting top-down reporting usually suggest reporting one aggregate revenue and income number per country. In responding, commenters should understand that it is the tentative view of WP6 that to be useful, top-down reporting would need to reflect revenue and earnings attributable to cross-border transactions between associated enterprises but eliminate revenue and transactions between group entities within the same country. Would a requirement for separate individual country consolidations impose significant additional burdens on taxpayers? What additional guidance would be required regarding source and characterisation of income and allocation of costs to permit consistent country-by-country reporting under a top-down model?

28. PwC recommends that taxpayers should be provided with the flexibility to elect either the “entity by entity” or consolidated “individual country” approach, so long as individual MNEs report via the method selected consistently. Again, different taxpayers produce their internal information in different ways and they should be allowed to report such information in a way that most naturally fits with their internal systems. There appears to be no compelling reason for tax authorities to prefer one approach over another. Also, allowing for such flexibility should provide sufficient information for high level risk assessment while also considering the compliance burden placed on taxpayers.
29. We note that some MNEs do not perform individual country consolidations, and consequently, a requirement for individual country consolidations would be extremely burdensome.

Question 4(d) - Should the country-by-country template require one aggregate number



for corporate income tax paid on a cash or due basis per country? Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?

30. PwC considers that a requirement to report tax, on either a cash or accrual basis, should be tempered with guidance on factors that may impact this number and any transfer pricing risk assessment. Specifically, there may be numerous book/tax differences, tax attributes, credits, and other items, separate from and not relevant to the application of the arm's length principle in determining appropriate income and expense items, which impact the determination of a tax liability. Further, cash tax paid will typically not be relevant to arm's length transfer pricing and the determination of reportable net income subject to tax.
31. Notwithstanding the above comments, PwC supports the provision of one aggregate number for corporate income tax, per entity or per country, depending on the MNE's election. We recommend that MNEs be provided with flexibility to report either tax paid or accrued, so long as the individual MNEs report information consistently. However, we note that the current tax accrual would provide for better matching, as it is consistent with revenue and earnings reported in the CbC template. Further, as many organizations operate on an accrual basis, such information may be more readily accessible and provide a lesser reporting burden for MNEs.
32. PwC recommends the removal of the requirement to report withholding tax. PwC anticipates that collecting such information may impose significant unnecessary burdens on taxpayers. We also note that withholding tax information should be available to tax authorities at the local level through relevant tax filings.

Question 4(e) - Should reporting of aggregate cross-border payments between associated enterprises be required? If so at what level of detail? Would a requirement for reporting intra-group payments of royalties, interest and service fees impose significant additional burdens on taxpayers?

33. We believe that aggregate cross border payments of these types of expense should be excluded from the CbC template as largely irrelevant for risk assessment purposes. As noted earlier, any individual tax administration will necessarily have access to data regarding the amount of the tax deduction claimed for these types of expenses from the amounts reported on the local tax return. In our view, the primary question of relevance is whether the amount deducted in that particular country is correct. The aggregate amount of cross border payments would seem to be irrelevant in answering that question.

Question 4(f) - Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction? Are there any features of specialist sectors that would need to be accommodated in such an approach? Would a requirement for reporting the nature of the business activities carried out in a jurisdiction impose significant additional burdens on taxpayers? What other measures of economic activity should be reported?

34. PwC is aware of the discussion relating to the potential use of business activity codes. We believe that, generally, the business activity codes are appropriate for the intended function of the CbC



template. The OECD may consider an additional code for “Regulated Financial Services.” For more specific detail on individual legal entities, PwC observes such information would be maintained in the local file. Reiterating our comment under Question #4(a) above, we again suggest that the OECD recommend that the CbC template, inclusive of the business activity codes, be used by a tax authority in conjunction with the master file in performing the transfer pricing risk assessment in order to appreciate more fully the MNE’s risk profile. This, we believe, is necessary for putting the business activity codes in a qualitative context.

Question 5 - Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take.

35. As noted above, we observe that materiality should be discussed in the context of other transparency initiatives (e.g., EU Reporting under the Capital Requirements Directive IV and the Extractive Industries Transparency Initiative). We recommend such initiatives to be understood and considered to provide a well-balanced approach to materiality thresholds across reporting requirements.
36. The absence of any significant materiality threshold would result in an undue administrative burden for taxpayers with little benefit toward greater transparency and disclosure.

Question 6 - Comments are requested regarding reasonable measures that could be taken to simplify the documentation process. Is the suggestion in paragraph 34 helpful? Does it raise issues regarding consistent application of the most appropriate transfer pricing method?

37. We consider that the suggestion in paragraph 34 of the Discussion Draft is helpful, but it does not go far enough.
38. We believe it is important that there should be uniformity of the local files required under the OECD and the jurisdiction-specific local documentation requirements. An explicit statement that requires legislatures and tax authorities to modify their respective jurisdictions’ transfer pricing requirements to conform with OECD guidelines prior to implementing the proposals within the Discussion Draft would enhance consistency of reporting and assist in mitigating compliance burdens for taxpayers.
39. With respect to comparables, and the need to perform updates, PwC suggests that there should be an acceptance of regional comparables “where the compliance burden associated with preparing local comparable searches is disproportionate to the size of the transaction, the risk posed or where local comparables databases are not available.” Geographic differences often do not exist that are material to the validity of the outcome (e.g., for entities with limited functionality and risk profile which are traditionally the tested parties). Consequently, local searches are often not necessary to obtain a reliable result. Additionally, we recommend that the OECD address and clarify other issues regarding documentation, such as timing mismatches in the comparable data available for the fiscal year being tested when the documentation is prepared and specific guidance on the level of documentation and analysis required of MNEs annually in instances when the facts and circumstance remain unchanged.



40. As discussed in the response to Question #1 above, with the introduction of the CbC template, in our view there should be an attempt to remove any unnecessary or duplicative filings, such as tax return disclosures already requiring reporting of related party affiliate transactions.
41. The measures to simplify the documentation process do not raise issues regarding consistent application of the most appropriate transfer pricing method.

Question 7 - Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

42. PwC supports the proposition that the master file (and CbC template) be completed in English and filed with the MNE's ultimate parent's home tax authority.
43. Further, we recommend taxpayers be given a reasonable amount of time to translate the master file and CbC template, if requested by a tax authority (assuming that such requests are limited to circumstances of need only).

Question 8 - Comments are requested as to measures that can be taken to safeguard the confidentiality of sensitive information without limiting tax administration access to relevant information.

44. As discussed in response to Question #2 above, we consider exchange of information provisions should be the mechanism for transmitting the CbC template and master file data. We recommend that information shared with tax authorities should be tracked and monitored, and the MNE's parent office should be notified when information is exchanged between tax authorities to improve transparency. Further, misuse or inappropriate sharing of sensitive information should result in sanctions. As noted above, there may be circumstances in which certain country tax authorities are unable to obtain information from the parent's home country tax authority due to lack of an income tax treaty exchange of information provision. Weighing concerns regarding confidentiality of the data of the master file and CbC template, the taxpayer/local affiliate in such other country may be required to provide information including the local file and other reasonably relevant information under local law provisions.

Question 9 - Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:

- ***The direct local filing of the information by MNE group members subject to tax in the jurisdiction;***
 - ***Filing of information in the parent company's jurisdiction and sharing it under treaty information exchange provisions;***
 - ***Some combination of the above.***
45. As discussed in response to Question #2 above, PwC believes it is essential that the master file and CbC template be submitted only to the home tax authority of the MNE's ultimate parent. Exchange of information provisions should be the mechanism for transmitting information due to sensitivity about the confidentiality of the data in question.



Question 10 - Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file.

46. PwC does not believe that APAs, MAPs, and other tax rulings should be part of the master file.
47. These agreements are private agreements, based on facts and circumstances, typically, peculiar to the jurisdiction in which they were settled. Such agreements are binding on taxing authorities. Disclosure of these agreements may be a sensitive matter from a tax authority perspective and may make accommodations and settlement in future difficult (for example, as a result of being interpreted – inappropriately – as having a precedential value).

On behalf of the global network of PwC Member Firms, we submit our response to the Discussion Draft on Transfer Pricing Documentation and CbC Reporting. For any clarification of this response, please do not hesitate to contact the undersigned.

Yours faithfully,

A handwritten signature in black ink that reads "Kathryn O'Brien".

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