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Via Email: Jeffrey.owens@oecd.org

Mr. Jeffrey Owens
Director of OECD
Centre For Tax Policy And Administration

Re: Comments on Scope of OECD Intangibles Transfer Pricing Project

Dear Mr. Owens:

I. Introduction

This letter is in response to the request of the Committee on Fiscal Affairs of the Organisation for Economic Co-Operation and Development ("OECD") for comments on the scope of a new project involving the transfer pricing aspects of intangibles. This project, as described in the OECD Announcement of July 2, 2010, could result in a revision of Chapters VI and VII of the OECD's *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* of 1995, as supplemented and modified through July 2010 ("*OECD Guidelines*"). The Committee on Fiscal Affairs has requested the views of interested parties on:

A. What they see as the most significant issues encountered in practice in relation to the transfer pricing aspects of intangibles;

B. What shortfalls, if any, they identify in the existing OECD guidance;

C. What the areas are in which they believe the OECD could usefully do their work; and

D. What they believe the format of the final output of the OECD work should be.

This letter sets forth the responses of the Transfer Pricing Discussion Group to the above questions.

By way of background, the Transfer Pricing Discussion Group (the "Group") consists of U.S. and foreign-based multinationals in numerous industries. Among the industries represented in the Group are automotive, consumer durable goods, chemicals, media, industrial equipment, news, pharmaceuticals and technical information.[1] Participants in the Group have a wide range of activities relevant to the OECD's proposed IP project, including research and development, licensing, buying and selling intellectual property ("IP"), such as patents, for products and processes and creating or acquiring IP, such as trademarks, brand-names and copyrights, that relate to marketing.

[1] As members of the Group are not primarily engaged in the banking industry, its comments do not focus on issues within that industry.

The Group meets regularly to discuss matters directly and indirectly related to transfer pricing. The Group also submits comments to the OECD, as well as to the U.S. Department of the Treasury and the Internal Revenue Service, on transfer pricing matters. As you may recall, the Group submitted comments to the OECD on its 2009 *Proposed Revision of Chapters I-III of the Transfer Pricing Guidelines,*[2] as well as on the *OECD's* September 19, 2008 *Transfer Pricing Aspects of Business Restructuring: Discussion Draft for Public Comment.*[3] Both of these other OECD projects, which were approved by the OECD Council on July 22, 2010,[4] involve updated guidance for intangibles. The Group hopes that its prior contributions to the OECD were helpful and that the comments in this letter on the proposed project will also be of assistance.

II. <u>Comments</u>

The Transfer Pricing Discussion Group's responses are organized below, using as headings the four questions posed in the OECD's July 2, 2010 announcement.

A. <u>The Most Significant Issues Encountered in Practice in Re Transfer Pricing For Intangibles</u>

[2] See the letter from the undersigned dated January 8, 2010.
[3] See the letter of February 18, 2009 from the undersigned.
[4] Review of *Comparability and of Profits Methods: Revision of Chapters I-III of the Transfer Pricing Guidelines*, 22 July 2010. *Report on the Transfer Pricing Aspects of Business Restructuring; Chapter IX of the Transfer Pricing Guidelines*, 22 July 2010. Both are incorporated in the July 2010 revised edition of the *OECD Guidelines*.

1. Definitional Issues

The mobility and frequency of transfers of intangibles and their inclusion in cost sharing and cost contribution arrangements (collectively, "CCAs"), sales, licenses and business restructurings, together with the complexities of identification and valuation, mean that intangibles merit separate attention in the context of transfer pricing and the arm's length standard. Indeed, the details of transfer pricing rules for intangibles can differ from those of transfer pricing rules applicable to other matters, such as the performance of services or the sale of tangible property, even though all must adhere to arm's length principles.[5] For this and other reasons, including the application of withholding taxes on cross-border IP royalties, a question commonly encountered in practice is, what is an "intangible"?

While there is general agreement among taxpayers and tax authorities that various items, such as patents, trademarks and copyrights, *are* intangibles for transfer pricing and other tax purposes, some tax authorities would like to expand the ordinary legal definition of intangible for transfer pricing so as to include other items such as "valuable services" or the use of a "workforce in place." Sometimes tax authorities inappropriately assert, for example, that a service is really an intangible for transfer pricing purposes; one objective is to force a profit split analysis. Historically, the performance of services has, appropriately, not been considered for transfer pricing or other tax purposes as an

5 For instance, the United States "commensurate with the income" standard applies only to intangibles.

intangible, or a transfer of an intangible, no matter how valuable the services are. In this connection, the OECD should consider whether absent some special local law authority, there is likely to be a legal basis for attempting to define “intangible property” more broadly for transfer pricing purposes than for other tax purposes. Does the OECD want the *OECD Guidelines* to provide a “legal” basis for such a differentiation (e.g., in a country that in practice relies on the *OECD Guidelines* without enacting them)?

Another question encountered in practice is whether something is properly defined as an intangible if it is not legally enforceable or protectable or, alternatively, whether the presence or lack of enforceability affects the value of the matter rather than its proper characterization as an intangible or, for example, as a service.

Periodically issues arise as to whether an intangible is legally transferrable. For instance, if a government issues a license to a particular corporate entity and precludes an assignment of legal ownership, the owner may still be able to transfer certain rights to another party. Even if a legal assignment is precluded, the legal owner may agree with another party by contract that the latter will obtain financial benefits and burdens by way of the business arrangements between the two. Transfer pricing should respect the financial and other consequences of such arrangements. These topics are addressed in parts two (Identification of Intangibles Transfers) and three (Economic Ownership) in the paragraphs below.

2. Identification of Intangibles Transfers

Once an improved definition of intangibles is provided, clarification is needed to determine if and when an intangible is transferred. This is a common question in practice. An outright sale or license of intangible property clearly constitutes a transfer. It is less clear whether there is a transfer of an intangible when the provision of services may involve an element that tax authorities might deem to be intangible property. Moreover, even if the services provided are supported by intangibles, this does not mean that there has been a transfer of rights to the intangibles.

It would be useful for taxpayers and tax authorities if the OECD confirmed when a transfer does *not* occur. Helpful examples would illustrate when a taxpayer should not be viewed as having engaged in a transfer of an intangible, including upon the transfer of a patented or trademarked product to be resold.

3. Economic Ownership

Practical issues that arise include distinguishing economic versus legal and contractual ownership as well as confirming interests where more than one party has contributed to the development of an intangible in the absence of a contractual arrangement such as a CCA. In the absence of a written contract, will each of the contributing parties be considered owners to some degree, particularly if the development has occurred over many years? Will partial ownership in the absence of a written contract be treated for tax purposes as a potential license, a partnership or a joint venture?

In a related vein, will partial economic owners of intangible property for transfer pricing purposes also have rights under other provisions of the tax law, such as R&D credits? While eligibility for a particular local law tax benefit (e.g., the R&D credit) is a matter for that law to decide, the OECD can address the usefulness and appropriateness of a state maintaining consistency on the issues of economic ownership of an intangible for transfer pricing and other tax purposes.

Some local rules define legal owners of the intangible as those who are registered holders,[6] but ownership rights may also be obtained or transferred by an explicit or implicit agreement. Legal title to an intangible may be held by a party that is not the economic owner. For instance, legal centralization of title within a multinational group often reduces administrative burdens of maintaining intangibles under IP and commercial law. As an example, all trademarks or patents for a group may be registered in the name of one affiliate that may have no active operations in the development or use of the intangibles. Centralization in this respect should not interfere with the income being attributable for tax purposes to the economic owner that is involved in the development or use of the intangible, as opposed to the purely legal owner. Confirmation from the OECD on this point would be particularly welcome as the meaning and treatment of economic ownership may differ from jurisdiction to jurisdiction.

[6] U.S. Treas. Reg. Sec. 1.482-4(f).

4. Valuation of Intangibles

The task of valuing an intangible can be challenging, particularly if the transfer occurs during the period of development when full commercial potential is uncertain. Yet despite the challenges, particularly for what later becomes a highly valuable unique intangible, taxpayers and tax authorities must arrive at compensation for its transfer. When there is uncertainty as to the value at the time of the transaction, taxpayers still generally rely on those valuation techniques commonly employed in the open marketplace (e.g., discounted cash flow analysis), and would expect these to be consistent with the arm's length standard. However, some methods strain or run counter to the arm's length standard; e.g., an analysis that relies on hindsight.

There is controversy as to whether and how the synergies generated by related parties might be used in valuing an intangible. For example, the Internal Revenue Service ("IRS") argues that synergies "give the whole greater value than each asset standing alone."[7] This concept was rejected by the Tax Court and is being appealed. OECD guidance on the impact of synergies on the arm's length valuation of intangibles would be welcome.

[7] See the IRS Coordinated Issue Paper of 2007 and the IRS arguments in *Veritas Software Corporation,* 133 TC_, No. 14, December 10, 2009.

5. Characterization and Valuation of Intangibles Not Transferred In Isolation

Chapters VI and IX of the *OECD Guidelines* already recognize that identifiable intangibles are not always transferred in isolation. In practice, transfers of intangibles (e.g., trademarks) involve the transfers of tangible assets, activities or going concern, such as in restructuring or sale of part or all of a business. Such transactions are common. When such transactions occur, there can be uncertainty as to the valuation of the transferred intangible or the character of the transferred intangible. These questions would, as described below, benefit from additional OECD guidance.

6. Cost Contribution Arrangements

There is an important link between CCAs and the treatment of intangibles for transfer pricing purposes generally. The development and beneficial ownership of intangible property is perhaps the primary focus of more CCAs than is any other activity.[8] Even for a CCA that has services or assets other than intangible property as its subject matter, the contribution of intangibles to the CCA and the valuation of those intangibles can in practice raise significant transfer pricing issues. The Transfer Pricing Discussion Group therefore believes that it would be appropriate to include a review of the existing guidance on CCAs within the scope of any OECD guidance project on the treatment of intangibles for transfer pricing purposes.

[8] *OECD Guidelines*, paragraph 8.6

B/ C. Shortfalls in Existing OECD Guidance; Areas For Future OECD Work

1. Definitional Issues

Chapter VI of the *OECD Guidelines* addresses "special considerations" for intangible property. It provides an illustrative definition of "intangible property" by listing items such as patents and trademarks.[9] The guidance distinguishes "commercial" intangibles from, presumably, "other" intangibles and then creates two subsets of commercial intangibles: marketing intangibles and commercial intangibles other than marketing intangibles (i.e., referred to as "trade intangibles").[10] Chapter VI mentions that some marketing intangibles may be protected by the law of the country concerned.[11] It also refers to know-how and trade secrets as being proprietary information, although not registered for protection in the manner of a trademark, but does not address whether know-how and trade secrets can be otherwise protected under law (e.g., by contract).[12] Chapter VI mentions valuation issues in the context of discussing, if not defining, "commercial intangibles."[13] Chapter VI notes that the treatments of know-how and service contracts are dealt with differently according to a jurisdiction's internal tax legislation or tax treaties.[14] Whether such contracts might constitute services, intangibles or goods was left open for further attention by OECD Working Party No. 1.

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9 *OECD Guidelines*, paragraph 6.2.
10 *OECD Guidelines*, paragraph 6.3.
11 *OECD Guidelines*, paragraph 6.4.
12 *OECD Guidelines,* paragraph 6.5
13 *OECD Guidelines,* paragraph 6.5 et. seq.
14 *OECD Guidelines*, paragraph 6.19

As just indicated, the *OECD Guidelines* already contain descriptions of intangibles that are definitional in nature. However, the existing guidelines could be improved by clarifying and expanding such definitions and by carefully separating definitions from valuation guidance. In the course of such work, it will be helpful to delve more deeply into (1) the different specific rights in intangibles that can exist and (2) whether and how protectabilty of rights under statute or contract affects whether an item is intangible property or, instead, merely affects its valuation. It will be useful, in this connection, to add examples that illustrate, separately, (1) the definition of intangible property and (2) certain valuation aspects of intangible property that relate to the nature of the rights in that property.

The current OECD distinction between trade and marketing intangibles under the heading of commercial intangibles should be re-examined. For example, are there intangibles other than "commercial" intangibles, and, if so, what are they? Whatever the true scope and significance of the "commercial" category,[15] it is frequently important to distinguish intangibles relevant to making a product (e.g., a patent) versus intangibles relevant to the marketing of that product. There may be advantages in finding a new label for the former other than "trade." For example, today's parlance frequently distinguishes between product and process intangibles versus marketing intangibles.

[15] The *Glossary* to the *OECD Guidelines* defines "commercial intangible" broadly; it is unclear what benefit arises from distinguishing between "commercial" and "non-commercial" intangibles.

In conclusion on this topic, it would be worthwhile for the OECD to produce additional clarifications and illustrations of the definition of "intangible property" and various rights in intangibles. An important part of this work would be to address views that "valuable services," the use of a "workforce in place," or other items that traditionally have not been intangibles (so-called "soft intangibles") should be now defined or treated as intangibles.

2. Identification of Intangibles Transfers

The July 22, 2010 revisions to the *OECD Guidelines* in Chapter IX[16] mention the possibility that transfers of intangible assets result from restructurings. For example, Chapter IX states that "a business restructuring may involve cross-border transfers of something of value, *e.g.,* of valuable intangibles…"[17] It would be useful if, in addition, the OECD used examples to provide more greater clarity on when a transfer of an intangible does or does not occur in that context.[18] For example, if there is no transfer of an intangible under local IP or commercial law, is that dispositive for transfer pricing purposes under the *OECD Guidelines*?

Part IV of Chapter IX addresses the recognition of actual transactions undertaken, and states that in "exceptional circumstances" tax administrations may legitimately and

[16] *Report on the Transfer Pricing Aspects of Business Restructuring; Chapter IX of the Transfer Pricing Guidelines.*
[17] *OECD Guidelines*, paragraph 9.48. See also paragraph 9.82.
[18] Section D.2 of Part II of Chapter IX has examples that state as a fact that intangibles have been transferred. Paragraphs 9.89 and 9.90 note that there can be questions about whether or not a restructuring causes or involves the transfer of intangibles, but do not provide guidance on the standards to be used to analyze and resolve these questions.

appropriately not recognize the transaction[19]. However, Part IV also states that any such non-recognition is only for the purposes of transfer pricing.[20] This comment and others raise the question as to why a transaction, such as one involving an intangible, should be recognized generally for tax purposes as structured by the taxpayer but recharacterized for transfer pricing purposes. The Transfer Pricing Discussion Group suggests that this topic be given further consideration.

Chapter IX acknowledges that multinationals are free to organize as they see fit and cannot be coerced to have a particular structure or business presence in any country.[21] The inherent concept of this provision and the one requiring the recognition of actual transactions as undertaken should help counter arguments from tax authorities such as that no entity possessing potentially valuable intangibles (known as the “crown jewels”) would ever dispose of them. If the OECD agrees that this is intended, then it might want to strengthen the wording of its guidance.

The overlay of analyzing an intercompany transaction from both the transferor’s and transferee’s perspectives complicates matters. A transferor of an intangible that proves in the future to be highly valuable may find such transaction questioned by the transferor’s tax authority, while a transferee of an intangible that is less valuable or leads to financial losses will find the transaction questioned by its tax authority. The *OECD Guidelines* should make clear that the transfer of intangibles for Chapter VI and

[19] *OECD Guidelines*, paragraph 9.161.
[20] *OECD Guidelines*, paragraph 9.162.
[21] *OECD Guidelines,* paragraph 9.163.

IX purposes cannot be disregarded by either of the tax authorities or, as discussed further below, valued by them using hindsight or in a manner that could not have been utilized by the parties at the date of the transaction.

Chapter VI mentions that intangibles transactions are difficult to evaluate for tax purposes, and lists outright sales and licenses of an intangible as ways in which an intangible might be transferred, as well as a transfer that occurs as part of a package or bundle that includes the transfer of goods.[22] Guidance should be considered on whether the know-how and services mentioned in paragraph 6.18 as being part of a package contract should be viewed as being transferred.

3. Economic Ownership

The current *OECD Guidelines* do not directly define "ownership" with regard to intangible property. Paragraph 6.3 of the *OECD Guidelines* mentions both legal and economic ownership arising from research activity by a developer in its own name or through contract research on behalf of a beneficiary. The paragraph does not distinguish between these two types of ownership and does not address what happens if the economic ownership and the legal ownership are not with the same entity.

In the new project on intangibles, it would be useful to focus on how economic ownership of an intangible arises separately from legal or contractual ownership. While economic ownership appears to be a straightforward and factual question, it would be

[22] *OECD Guidelines*, paragraphs 6.1 and 6.16.

useful for the OECD to confirm its meaning. Also, a number of related issues can be addressed in the project as well: requirements to demonstrate ownership, multiple owners and legal title not held by the economic owner.

The clarification is needed primarily with regard to what is currently referred to as "trade" intangibles (e.g., product and process patents). Chapter VI already address many of the issues arising with regard to marketing intangibles.[23]

It would be helpful for the OECD to identify the type of information that would demonstrate that one party in a multinational group had developed the intangible property either directly or as principal in a contract R&D arrangement and therefore is the economic owner. For example, is it necessary that all direct costs of developing the intangible be identified and tracked? This may be ideal, but in many cases, parties may not specifically track accounting cost by project and maintain those records for an extended period of time. However, it may be clear from other records, such as project management systems, personnel records, etc., that only one entity engaged in such intangible development.

4. Valuation of Intangibles

The foundation of the *OECD Guidelines,* including for valuations of intangibles, rests upon the arm's length standard. Chapter VI asserts that the arm's length principle will pertain equally to transfer pricing for intangibles as well as for tangible goods

[23] *OECD Guidelines*, paragraphs 6.36 through 6.39.

transfers.[24] In re-examining the *OECD Guidelines*, the OECD should comment critically on valuation techniques for intangibles that are potentially inconsistent with or undermine the arm's length standard. For example, valuations could, and in practice at times do, assume the value of an intangible into perpetuity. Is this type of valuation supported in marketplace transactions?

Another valuation topic involves a statement that often the fair market value of an intangible is not related to the costs of developing the property.[25] If a taxpayer or tax authority uses development costs or investments as the valuation method, despite evidence of other arm's length valuation methods, is this consistent with the arm's length standard? However, if there is no other method available, can the use of the cost of development then be considered to be consistent with the arm's length standard?

The OECD recognizes that multinational groups are composed of related entities, and have the opportunity to structure their operations in order to achieve efficiencies not available in the same way to independent enterprises. At the same time, Chapter I recognizes that the application of the arm's length principle can be difficult due to the transactions that associated enterprises engage in that independent enterprises would not undertake.[26]

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[24] *OECD Guidelines*, paragraph 6.13.
[25] *OECD Guidelines*, paragraph 6.27.
[26] *OECD Guidelines*, paragraph 1.10.

Chapter IX recognizes that while centralization of intangible property rights may have sound commercial reasons, it does not necessarily ensure that the transaction is at arm's length from the perspectives of the transferor and transferee.[27] Chapter VI states that if independent enterprises would have insisted on a price adjustment clause under comparable circumstances, then the tax administration should be permitted to determine the pricing on the "basis of such a clause."[28]

Both statements should be clarified to state, consistent with the other OECD guidance mentioned above, that although the transaction is accepted as structured (e.g., with centralization or without a price adjustment clause), there may still be a question as to whether the amount of compensation for the taxpayer's transaction, as actually structured, is at arm's length. For example, the absence of an adjustment clause may affect the determination of the amount of arm's length compensation <u>if</u> the third party contracts to which the taxpayer's compensation is being compared have price adjustment clauses.

Chapter VI helpfully states that tax authorities should not use hindsight in challenging taxpayer projections.[29] The Transfer Pricing Discussion Group also commends the OECD for including an example that, based on its facts, concludes that the use of hindsight has no place in the application of the arm's length standard.[30] However, the

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[27] *OECD Guidelines*, paragraph 9.84.
[28] *OECD Guidelines*, paragraph 6.34.
[29] *OECD Guidelines*, paragraph 6.32.
[30] *OECD Guidelines*, Annex to Chapter IV, *Example 1*.

facts of the example are narrowly drawn and may be inappropriately read restrictively if not coupled with improved language in some of the paragraphs in C.4 of Chapter VI[31] or if not supported by examples with facts more realistic than those in *Examples 2* and *3* of the Annex to Chapter VI.

Also, a potential contradiction to requiring valuation at the time of the transaction is a statement that a tax administration has the ability to adjust the amount of consideration for all open years up to the time when an audit occurs on the basis of information that independent enterprises would have used in comparable circumstances to set the pricing.[32] The OECD should clarify that, as mentioned above, the use of such information is justified in the audit only if the information was available to the taxpayer at the time of the transaction.

5. Characterization and Valuation of Intangibles Not Transferred in Isolation

Both Chapter VI and Chapter IX acknowledge that it is not uncommon for intangibles to be transferred in the context of a restructuring or as part of a package in the sale of finished goods or provision of services. Chapter VI indicates that in certain cases bundled intangibles may need to be evaluated separately.[33] Chapter VI mentions factors relating to comparability between controlled and uncontrolled transactions that

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[31] *OECD Guidelines,* paragraphs 6.29, 6.31, 6.33, 6.34.
[32] *OECD Guidelines*, paragraph 6.35.
[33] *OECD Guidelines*, paragraph 6.18.

need to be considered in valuing intangibles.[34] Chapter IX discusses the fact that in business restructurings a transfer of activity and/or going concern may include a transfer of intangibles.

The *OECD Guidelines* should, however, provide more guidance on the standards relevant to whether there is a transfer and, if so, the appropriate valuation or character of the intangibles included in the transfer. For instance, the guidance provided on valuation for an integrated business unit, including intangibles, states that arm's length remuneration "if any" would be based on "a transfer of an ongoing concern between independent parties."[35] It would be useful to supplement this limited guidance so as to reduce the uncertainty about how best to determine the value of a bundle of transferred intangibles and other parts of an integrated business. Thus, the OECD might consider providing guidelines that would contain (1) additional examples of situations where intangibles are not transferred in isolation and (2) more details on how to identify and value those intangibles, including when compensation is provided currently or delayed.

6. Should OECD Guidance on Intangibles Be Industry Specific?

The OECD asks whether it should consider formulating specific industry guidance for the treatment of intangibles. Set forth below are some of the potential difficulties that may result from providing industry pricing guidance;

[34] *OECD Guidelines*, paragraph 6.20.
[35] *OECD Guidelines*, paragraphs 9.93-9.95.

it will make administration difficult in terms of keeping the guidance current with the dynamic business and economic environment;

it will likely create uncertainty, complexity and controversy for taxpayers having broad-based business models that span multiple categories (or having different affiliates that focus on various specific industries or contain a variety);

it may inappropriately restrict a taxpayer's ability to apply basic and accepted economic principles or to select generally accepted methods in determining its transfer pricing for intangibles;

it may encourage tax authorities to (mis)characterize a taxpayer on an industry basis, even prior to the commencement of an audit, in order to use the industry specific pricing guidance;

it runs the risk that taxpayers and tax authorities will not be able to give proper consideration to the facts and circumstances of a particular transaction.

Newly revised Chapters I-III provide a lengthy discussion in support of the arm's length standard and the proper application and selection of methods in establishing transfer prices. Chapter I states:

> Experience under the arm's length principle has become sufficiently broad and sophisticated to establish a substantial body of common understanding among the business community and tax administrations. This shared understanding is of great practical value in achieving the

> objectives of securing the appropriate tax base in each jurisdiction and avoiding double taxation.[36]

Chapter II, regarding transfer pricing methods and selection of methods, goes on to conclude that: “No one method is suitable in every possible situation, nor is it necessary to prove that a particular method is not suitable under the circumstances.”[37]

These two statements, along with others in Chapters I – III, indicate that adherence to the arm’s length standard entails having the capacity to properly chose pricing methods based on the facts and circumstances, not generalities or assumptions. These statements, and others, correctly suggest that industry-specific guidance may be too limiting. Thus, the Transfer Pricing Discussion Group recommends that this topic not be within the scope of the proposed intangibles project. The question of whether to provide industry specific guidance is one of broad application, not just for intangibles. Of course, new or clarified guidance on a principle of general application affecting intangibles can be illustrated by way of an example that involves the application of the general principle in the context of a particular industry.

7. Cost Contribution Arrangements

Before discussing the possible shortfalls in the current *OECD Guidelines* on the subject of CCAs, the Transfer Pricing Discussion Group would like to commend the OECD on the guidance it has provided. Indeed, the Group believes that certain basic principles

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[36] *OECD Guidelines,* paragraph 1.15.
[37] *OECD Guidelines,* paragraph 2.2.

already identified by the OECD as underlying the establishment and administration of CCAs should inform future efforts to improve guidance on the transfer pricing of intangibles.

One such principle regards the ownership of intangibles produced via a CCA. A central tenet of current CCA guidance is that participants are "effective owners" of any intangibles produced under these arrangements regardless of whether they are also legal owners.[38] As the subject of intangibles ownership is developed generally as part of the proposed OECD project, it will be important to retain the simple, straightforward concept of full economic ownership that is at the heart of existing CCA guidance.

The extent to which a CCA produces arm's length results often depends significantly on the proper identification and valuation of the initial contributions of property and commitments of resources and personnel made by participants at the outset as well as those made later by a new participant. The OECD's existing guidance acknowledges the difficulties that already exist in this area in stating that "[i]t is unlikely to be a straightforward matter to determine the relative value of each participant's contribution except where all contributions are made wholly in cash . . ."[39]

As indicated above, the Group is of the view that any effort to expand the traditional meaning of intangibles for transfer pricing purposes is troublesome generally. It could also unnecessarily complicate the process of identifying and valuing CCA contributions

[38] *OECD Guidelines*, paragraphs 8.3, 8.4.
[39] *OECD Guidelines*, paragraph 8.15.

to such an extent as to remove the CCA as a viable option for taxpayers seeking to comply with the arm's length standard in a practical, administrable manner.

For example, if the definition of intangible property is expanded generally to cover the various services or other resources (so-called "soft intangibles") that may be deemed to be contributed to the CCA to produce intangibles, then additional guidance specific to their identification, valuation and ownership will be vital for CCAs. CCAs can often be some of the longest running corporate arrangements in existence; some of the Group's members' CCAs have been in place for decades. Any such expansion of the definition could mean, in the CCA context, that if a participant is deemed to contribute a commitment to perform R&D or the benefit of an assembled R&D workforce, then the responsibility for maintaining or enhancing that resource shifts to all of the participants by operation of the CCA.

In conclusion on CCAs, the OECD can and should provide guidance on this topic rather than just focusing on intangibles generally.

D. Format For Final Output of OECD Work

The Transfer Pricing Discussion Group believes that it may be too early to decide the exact format for the OECD's final output. However, a revised version of the *OECD Guidelines* is a likely candidate for at least some if not all of the output. It may be useful for Chapter VI, among other chapters, to be revised. The Group suggests revisiting the topic of “format” periodically as the substance and scope of the likely guidance develops.

III. Conclusions

The Transfer Pricing Discussion Group appreciates the opportunity to participate in these early stages of the proposed intangibles project by offering suggestions for the scope of the project. There is no doubt that the transfer pricing of intangibles is a key tax issue internationally from many perspectives. It affects tax burdens, the ability to manage a group’s business, tax compliance and associated burdens on taxpayers and tax authorities, as well as tax policy and politics.

The Group notes that the OECD may invite a few commentators to participate in a working group for the intangibles project, with a meeting of the working group to occur in November. The Group is interested in participating in this way and would be honored to be asked to join in this effort.

Please contact the undersigned with any questions or comments.

Sincerely yours,

Steven Hannes

Steven P. Hannes