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September 15, 2010

Mr. Jeffrey Owens  
Director  
Centre for Tax Policy and Administration  
Organisation for Economic Co-operation and Development  
2, rue André-Pascal  
75775 Paris Cedex 16  
France

**Re: Transfer Pricing Aspects of Intangibles**

Dear Mr. Owens:

We are writing to share the views of the Treaty Policy Working Group on the proposed new OECD project on Transfer Pricing Aspects of Intangibles, announced on 2 July 2010 (the "Intangibles Project").

The Treaty Policy Working Group is an informal association of large global companies based throughout the world, which represent a broad spectrum of sectors. Our member companies began working together in 2005 to analyze and address tax policy and administration concerns regarding permanent establishment, profit attribution, transfer pricing, and related issues. The development of clear guidance reflecting an international consensus on transfer pricing issues is critically important to us, as global companies seeking to avoid double or unexpected taxation and the resulting uncertainty and cross-border controversies. We appreciate the OECD's leadership in providing a forum for the development of such guidance.

We share the view that transfer pricing issues relating to what are widely referred to simply as "intangibles" are growing in importance. Cross-border transfer pricing adjustments today invariably involve issues relating to actual or deemed transfers of intangibles. Both taxpayer valuations of intangible property and adjustments proposed with respect to intangibles often significantly exceed those relating to tangible property transactions. At the same time, controversies involving intangibles typically prove more difficult to resolve at every level of tax administration, including in mutual agreement procedures. Even among OECD member countries, the level of consensus regarding the appropriate identification, valuation, and taxation of intangibles is decreasing. Therefore, in our view, the proposed Intangibles Project is a well-timed one that offers the OECD an opportunity to demonstrate its continuing leadership capacity.

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Treaty Policy Working Group members will be pleased to offer substantive comments on particular issues as the Intangible Project moves forward, but our comments at this point will focus exclusively on the scoping of the Project and the form of any resulting guidance.

Treaty Policy Working Group members believe that the proposed Intangibles Project could be very helpful for tax administrations and businesses alike in establishing a broad consensus and clear guidance on emerging transfer pricing issues relating to intangibles. It will be important for the Project to proceed, like other OECD transfer pricing work, within the framework of the arm's length principle as articulated by the OECD Transfer Pricing Guidelines, with the goal of avoiding double taxation and minimizing transfer pricing controversies.

We believe that the Intangibles Project could do much to further these important goals if it is focused on the issues most in need of clarification and consensus. The scoping of the Intangibles Project will be critical to its success. A project with an ill-defined or overbroad scope could do more harm than good, by increasing, rather than lessening, the current confusion and controversy surrounding some issues regarding intangibles. Nor would it seem either necessary or productive for the OECD to revisit issues relating to transactions involving intangible property that the OECD has already adequately addressed.

The critical first step for the Intangibles Project will be to clearly articulate the issues to be addressed. The terms "intangible property" and "intangibles" are very ambiguous terms, and can be interpreted by different people to encompass quite different things. Accordingly, the first step should be to precisely define the types of intangible property to be addressed and the emerging issues currently faced in practice, so that the Project will focus on those areas which are truly in need of clarification.

We understand from recent public comments by OECD representatives that the current thinking is that the Intangibles Project will focus on what they have referred to as "soft intangibles", such as goodwill, going concern value, workforce in place, business opportunities, and similar "intangible" items. We agree that this is an appropriate focus and an area in need of further clarity and consensus.

It will be critical, however, to define precisely which types of intangibles and which issues are included in the scope of the Intangibles Project. It will be equally critical to articulate what is *not* covered by the Project. Otherwise, the Project could easily be misunderstood as endorsing either unprincipled pricing approaches inconsistent with the arm's length principle or an indeterminate expansion of taxing jurisdiction,

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either of which would prompt increased controversy among member countries and between tax administrations and taxpayers.

Conversely, it does not seem either necessary or helpful to revisit other, relatively well-settled issues relating to intangibles. The Intangibles Project should not call into question the results of the substantial body of recent OECD work in the area of intangible property. Thanks to this prior work, considerable OECD guidance now exists on taxation of the transfer of items of property which include intangible elements and the provision of services which are provided through the use of intangible property. The OECD has, quite correctly, recognized that the normal principles of taxation can be applied to such transactions.

For example, Chapter VI of the Transfer Pricing Guidelines addresses transactions involving legally protected intellectual properties such as patents, trademarks, and copyrights, and certain other specified intellectual properties such as trade names, models, designs, know-how, and trade secrets. We believe that, by and large, the principles expressed in the Guidelines have been applied successfully by taxpayers and tax administrators for many years to transactions in these intangible properties. Even though such transactions may have increased in frequency over the years, we do not see any significant deficiencies in the principles or methodologies adopted in Chapter VI, and do not believe that they require any significant revision or elaboration.

The situation is the same with respect to services. Chapters II and III of the Transfer Pricing Guidelines adequately address services transactions with a significant intangible component. Since services transactions do not transfer to the service recipient the right to further exploit the intangible, it again has been the experience of business that the pricing methods set forth in the Guidelines have been adequate to determine an arm's length price for services transactions, even in those cases where the service provider has utilized intangible property to deliver its services. A similar example of prior work that need not be revisited is the guidance in the Commentary on Article 12 dealing with the characterization of transactions in software and other digital products. We believe that these transactions are also appropriately addressed in Chapters II and III of the Transfer Pricing Guidelines.

We suggest, therefore, that the upcoming OECD work address only that area which has been least developed in the Transfer Pricing Guidelines to date, namely applying the principles and methods of the Guidelines to those "soft intangibles" that are agreed to be in greatest need of clarification.

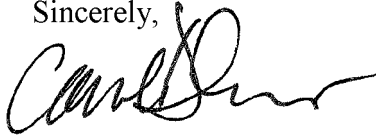
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As for the form of any guidance that may result from the Intangibles Project, we would urge the OECD and its member countries to strive, as usual, for the broadest possible international consensus and to incorporate any resulting guidance within the Transfer Pricing Guidelines. If, however, complete consensus does not prove achievable on every issue, Treaty Policy Working Group members would encourage the adoption of a transparent approach that clearly identifies the points of disagreement and the positions taken by each member country, as that will maximize the utility and reliability of such guidance.

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We would welcome the opportunity to participate in the meeting with Working Party No. 6 at the OECD on 9 November. Please let us know if we can provide further information or be of assistance in any way.

Sincerely,



Carol A. Dunahoo



Gary D. Sprague

For the Treaty Policy Working Group

cc: Michelle Levac  
Mary C. Bennett  
Caroline Silberztein