



30 September 2013

Mr. Joseph L. Andrus  
Head of Transfer Pricing Unit  
Centre for Tax Policy and Administration  
Organisation for Economic Co-Operation and Development  
2, rue André Pascal  
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France

**Re: White Paper on Transfer Pricing Documentation, issued on 30 July 2013**

Dear Mr. Andrus,

I am pleased to respond to the OECD's request for comments.

The White Paper thoroughly describes the pros and cons of transfer pricing documentation. The attached comments are intended to make documentation simpler and more straight-forward, while at the same time providing tax authorities with more focused and useful information.

I am interested in attending the public consultation to be held on 12 - 13 November 2013.

Sincerely,

Matthew Wall CA CBV

Cc: Ms. Michelle Levac, Chair of Working Party No. 6 and of its  
Special Session on the Transfer Pricing Aspects of Intangibles

## Introduction

Respectfully, to balance the interests of both taxpayers and tax authorities, guidance for documentation should follow the general principle that high risk transactions require more information and analysis, and low risk transactions require less information and analysis.

For greater efficiency, documentation should be prepared and used in the following order:

1. Annual Information Return filed each year by the taxpayer, which the tax authority uses to complete their risk assessment and selection of which taxpayers to audit;
2. Contemporaneous Documentation prepared by the taxpayer each year, kept on file, and given to the tax authority at their request which is the start of an audit; and,
3. Information Requests issued by the tax authority to the taxpayer during an audit.

## Annual Information Return

Annex 2 of the White Paper shows 17 of 25 countries require taxpayers to disclose transfer pricing details using a specific form filed with the taxpayer's annual tax return. This includes the T106 in Canada, Form 5472 in the US, and other country forms like this as described in Annex 2.

Generally, most taxpayers know tax authorities use the "annual information return" for selecting which taxpayers to audit, and which transactions to focus on. It would help taxpayers to know how tax authorities use this information to assess their transactions as low, medium or high risk.

If taxpayers knew the general approach used by tax authorities for conducting risk assessments, they would then be able to conduct their own self-assessment, identify high risk transactions, and might then use their resources differently to document high risk transactions in greater detail.

For these reasons, if revised, the OECD should include guidance in Chapter V on Documentation regarding the: (i) details to be included in the annual information return; (ii) approach used by tax authorities for conducting risk assessments of related party transactions; and, (iii) the appropriate level of documentation required for low, medium and high risk transactions.

## Contemporaneous Documentation

Annex 1 of the White Paper shows 19 of 25 countries have a statutory requirement for documentation. This suggests that most, if not all, tax authorities support the requirement for contemporaneous documentation, something taxpayers have come to realize. Therefore, if revised, Chapter V on Documentation must do more than just formalize the format and standards most commonly used by the 19 countries that have documentation requirements.

However, improving on the guidance for documentation is difficult, like opening a Pandora's Box.



For example, the White Paper explains the lessons learned in 2003 by Australia, Canada, Japan and the U.S. when creating uniform transfer pricing documentation for the Pacific Association of Tax Administrators (“PATA”). These countries reached consensus on documentation requirements by demanding everything in their domestic requirements, which increased the requirement for documentation. This might explain why very few taxpayers use the PATA documentation.

Further, the White Paper cautions the “definition of “reasonable efforts” is left to the local laws” and goes on to warn “what constitutes “reasonable efforts” do not converge in all cases.”

The main problems with transfer pricing documentation are best described in paragraph 40 of the White Paper for the taxpayer’s concerns and paragraph 55 for the tax authority’s concerns. If revised, Chapter V on Documentation must address these concerns to meet the mutual objectives of simpler and straight-forward documentation that provides more focused and useful information.

The problems described in paragraphs 40 and 55 also apply to the two parts of a master file plus country specific documentation which the European Union implemented in 2006, which is concerning since this is the same or similar approach recommended in the White Paper.

Therefore, if revised, the OECD should consider guidance in Chapter V on Documentation that:

- (i) link risk assessments for related party transactions with the purpose and use for documentation;
- (ii) distinguish the different levels of documentation for related party transactions assessed as low, medium and high risk; (iii) does not increase the quantity of information required by taxpayers;
- (iv) defines with examples what constitutes a “reasonable effort” for complete documentation; and,
- (v) recommends penalties for failing to determine, use and document arm’s length prices.

## Information Requests

Information requests are separate from, and a supplement to, contemporaneous documentation.

Improving on the guidance for documentation involves managing the “expectation gap”, since most taxpayer’s wrongly assume delivering contemporaneous documentation is the end of their audit, while tax authorities know this is just the beginning, followed by requests for more information.

Chapter V on Documentation already includes some guidance on information requests, which should be reviewed and might need revisions pending other changes under consideration.

## BEPS focus group on documentation

The above comments are preliminary in nature. If requested, I will provide more detailed comments to help the BEPS focus group regarding Action 13 – Re-examine transfer pricing documentation.

