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By E-Mail: [TransferPricing@oecd.org](mailto:TransferPricing@oecd.org)

**Mr. Joseph L. Andrus**  
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**Re: Public Comments on the White Paper on Transfer Pricing Documentation**

Dear Mr. Andrus,

Thank you for the opportunity to provide comments on the Organization for Economic Co-operation and Development ("OECD")'s White Paper on Transfer Pricing Documentation ("White Paper"). Please find below our comments and suggestions of issues to address.

## **Objectives of the White Paper**

1. The main objectives of the White Paper appear to be on the one hand, from the taxpayer's perspective, to facilitate and simplify compliance (for example, paragraph 3 of the White Paper states "...one business representative reported that his company had gone from producing around ten documentation studies per year in the early 1990s to approximately two thousand separate transfer pricing studies by 2007."). On the other hand, for the tax administrations, the main objective is to ensure useful and complete information is provided to allow for effective tax enforcement.
2. These two objectives, at times, can be conflicting because simplification for the taxpayer may mean less information for the tax administration and the goal would be to attain an appropriate balance. This is clearly expressed in the feedback received from both taxpayers and tax administrations in the White Paper (paragraphs 40 and 46 of the White Paper). What is required, then, is to balance out these opposing objectives with a clear articulation of three factors that impact this question:
  - a. the purpose of transfer pricing documentation,
  - b. how it will be used, and

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- c. the purpose and role of any standardized documentation requirements versus domestically legislated requirements.

### **The Purpose for and Use of Transfer Pricing Documentation**

3. The White Paper outlines the first and second factors very well in paragraphs 45 to 62. The main purpose for transfer pricing documentation is to develop a “culture of mindful compliance” in taxpayers. In other words, to ensure taxpayers thoughtfully and purposefully develop transfer pricing models that respect the arm’s length standard<sup>1</sup>. Moreover, preparation of transfer pricing documentation provides taxpayers with the opportunity to explain and support their position contemporaneously.
4. For tax administrations, however, it is unclear whether the purpose of transfer pricing documentation is for documentation to be used as a risk assessment tool or for purposes of carrying out a transfer pricing audit. Presumably the objective varies from one tax administration to another and there is no general agreement on the extent of the use of transfer pricing documentation.
5. Moreover, it is our experience that tax administrations will want to err on the side of caution and will ask for more rather than less information lest they be restricted afterwards. This is a main reason why we believe that standardized documentation will likely not be successfully legislated among many countries because tax administrations will want to ensure that they have the flexibility to demand additional information as the need arises.

### **The Purpose and Role of Standardized Documentation**

6. This brings us to the last factor, which is the purpose of developing standardized documentation. As the White Paper points out, various organizations or groups have attempted to provide standardized guidelines, from the Pacific Association of Tax Administrators (“PATA”) to the Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union (“EUTPD”) to the International Chamber of Commerce (“ICC”). All have had marginal success in gaining taxpayer participation to these guidelines, which speaks to the difficulties and the perceived compliance burden in following the EUTPD or PATA guidelines. Part of the problem, as in the case of PATA, is that typically, standardized documentation is a product of consensus rather than compromise of the tax authorities and as such, documentation requirements are far too exhaustive and therefore present an onerous burden to the taxpayer.
7. The two-tiered approach to transfer pricing documentation provided in the White Paper would lead to a similar outcome as PATA due to the comprehensive information that is required. This will create a heavier burden on taxpayers and unless there is some materiality threshold, it will likely cause serious hardship especially to

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<sup>1</sup> A purpose of promoting a culture of mindful compliance is based on a belief that there is a willingness by most taxpayers to comply with the arm’s length standard in establishing transfer pricing policies, while a purpose that has, as its primary aim, to avoid penalties or to identify “high-risk” transactions may be seen to be based on an assumption that a multinational enterprise (“MNE”)’s transfer pricing policies are motivated by tax avoidance objectives. We have seen a trend in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration (“OECD Guidelines”) to move toward anti-avoidance motivated guidelines and we believe that this not the right direction for the OECD Guidelines to be taking. We believe that OECD Guidelines ought to provide neutral guidance on the application of the arm’s length standard without being influenced by a biased belief that MNEs use transfer pricing as a tax avoidance tool. We believe anti-avoidance measures should rest within the purview of domestic tax legislation of each country and should not be a pervasive overtone in the OECD Guidelines.

smaller MNEs<sup>2</sup>. We believe a major factor of non-compliance is attributable to the perceived costs and burden of compliance. Therefore if one objective is to ensure greater compliance with documentation requirements, then the requirements must be reasonable.

8. What would be recommended instead is a guideline of best practices and recommendations that can be used by tax administrations in administering and implementing their own transfer pricing documentation requirements. The documentation guidelines would include the existing general business and industry overview, value drivers of the business and functional and economic analysis, with the objective of creating a culture of “mindful compliance” by the taxpayers. This should be the starting point for both taxpayers and tax administrations to assess transfer pricing practices. The extent and nature of additional information should be left up to the discretion of each tax administration while conducting a transfer pricing examination and based on the facts of each situation.
9. The guideline can also provide best practices for effective transfer pricing risk assessment, whether questionnaires or forms to be filed with annual tax returns. We believe the objective of effective transfer pricing risk assessment for tax administrations is best achieved through other means such as questionnaires or forms filed with the annual tax returns, rather than through contemporaneous documentation.

## **A Proposed Framework of Transfer Pricing Documentation Guidance**

10. We recommend that the OECD focus on outlining guidelines regarding transfer pricing documentation requirements as part of the OECD Guidelines. We submit that publishing model legislation, as currently suggested<sup>3</sup>, would not provide additional value to independent countries, particularly since the acceptance and the application is at the discretion of each independent country.
11. It is in this context that we propose the following framework for transfer pricing documentation best practices.
  - a) Purpose of contemporaneous documentation
    - The framework should include the purpose of contemporaneous documentation from both the taxpayer’s perspective, all well as the tax administration’s perspective, as discussed in greater detail above.
  - b) Information to include in transfer pricing documentation
    - General business and company overview (including overall MNE group structure)
    - Overview of the industry in which the MNE operates (including key value drivers and market conditions)
    - Overall transfer pricing model (by business line, if applicable)
    - Description of specific intercompany transactions (for the relevant jurisdictions)
    - Legal Agreements in support of the intercompany transactions

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<sup>2</sup> This is particularly evident in the case of small and medium enterprises (“SME”) for whom compliance with transfer pricing legislation has proven to be extremely burdensome, placing an undue hardship on this group of taxpayers. The proposed two-tiered system would require SMEs to maintain two separate sets of documentation, imposing an additional compliance burden for which they do not have the adequate resources.

<sup>3</sup> White Paper, paragraph 83

- Functional analysis supporting the transfer pricing model
- Description of the transfer pricing policy
- Economic analysis to support intercompany pricing

c) Materiality

- Materiality standards should be considered in the context of transfer pricing compliance and should act as guides in determining which transactions require documentation, as well as the level of detail required for disclosure.
- Guidance should be established, indicating how materiality guidelines would be determined.
- Materiality thresholds will thus meet the objective of simplifying compliance, while allowing for tax administrators to perform risk assessment procedures.<sup>4</sup> These standards will not preclude taxpayers from complying with transfer pricing rules and regulations but will reduce the resources required for compliance.

d) Timing of preparation and/or submission of documentation

- The OECD Guidelines should present the factors to be considered in determining what information (including transfer pricing documentation) should be submitted with annual tax returns or only upon an examination. Such determination would consider what information should necessarily be provided to tax authorities to perform risk assessment procedures, while not placing undue compliance burden on taxpayers.<sup>5</sup>

e) Additional information that can be requested upon examination

- In the course of an examination or audit, tax administrators may request additional information to validate a taxpayer's transfer pricing documentation.<sup>6</sup>
- However, taxpayers should not be required to produce additional information or analysis that is not already produced in the course of the normal business operations or that substantiates an alternative transfer pricing model as this would place an undue burden on taxpayers.

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<sup>4</sup> Materiality standards exist in some transfer pricing aspects. For example, in Canada, taxpayers must file a prescribed form ("Form T106") for each taxation year in respect of non-arm's length transactions with non-residents if the total reportable transactions with all non-residents exceed CAD \$1,000,000.

<sup>5</sup> To this point, we again refer to Canadian tax legislation and Form T106, which requires taxpayers to provide, amongst other information, the amounts of the intercompany transactions, the transfer pricing methodology and a representation that contemporaneous documentation has been prepared.

<sup>6</sup> To the extent that additional information is required, other risk assessment tools exist (discussed in greater detail in the Draft Handbook on Transfer Pricing Risk Assessment, published by the OECD on April 30, 2013). One tool that may be considered for risk assessment is a questionnaire, which may identify types of transactions or events that could signal higher risk (e.g. restructuring, royalties to related parties, and transactions with no tax jurisdictions).

- Rather, the burden of proof is on the tax administration to produce information or evidence that substantiates an alternative transfer pricing model to the one taken by the taxpayer.

## **Conclusion**

Thank you again for the opportunity to share our comments with the OECD on transfer pricing matters. As always, we welcome guidance from the OECD to facilitate the application of transfer pricing principles for both tax administrations and taxpayers. As requested, we submit that we have no objections with posting our comments on the OECD website, and that we submit these comments in the capacity as a professional organization that provides transfer pricing and other business services to small, medium and large enterprises.

Yours very truly,

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