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September 30, 2013

VIA E-MAILMr. Joseph L. Andrus
Head of Transfer Pricing Unit
Tax Treaty, Transfer Pricing & Financial Transactions Division
Centre for Tax Policy & Administration
Organisation for Economic Co-operation and Development
2, rue André-Pascal
75016 Paris
France**Re: TPWG Comments on White Paper on Transfer Pricing Documentation**

Dear Mr. Andrus,

We are writing to share the views of the Treaty Policy Working Group on the White Paper on Transfer Pricing Documentation, released by the OECD for comment on July 30, 2013.

The Treaty Policy Working Group is an informal association of large global companies based throughout the world, which represent a broad spectrum of industry sectors. The TPWG has been working since 2005 with the OECD, and more recently with the UN, to analyze and address tax policy and administration concerns regarding transfer pricing, profit attribution, permanent establishment, and related issues that are critical to the avoidance of double taxation and the conduct of cross-border trade and investment. We appreciate the OECD's continued leadership in developing guidance on these important issues.

TPWG members welcome the OECD's initiative to improve current transfer pricing documentation practices and are pleased to offer comments on the White Paper on Transfer Pricing Documentation. The White Paper reflects a generally sophisticated understanding of the role of transfer pricing documentation and its benefits and costs to tax administrations and taxpayers. We appreciate the desire to reduce the substantial compliance burdens that have been created by the growth and variety of transfer pricing documentation requirements and the increase in cross-border transactions over the past two decades. We also support the White Paper's goal of making transfer pricing documentation more useful to tax administrations than it sometimes may be at present. We agree that these goals could, in principle, be furthered by the two major suggestions of the White Paper, if properly designed and implemented: a "tiered" approach to the preparation of documentation, and a phased approach to the provision of that documentation. We believe that a more targeted documentation approach of this sort—providing the right information at the right times to the right authorities—could make not only transfer pricing administration and examination but also compliance more efficient and effective.

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General Comments

- ***Tiered Approach***

The concept of a tiered approach that distinguishes information of general relevance to all jurisdictions in which a group operates from information that is relevant to a particular jurisdiction seems appropriate in concept. Ensuring the relevance of the information provided to each jurisdiction should improve the utility of transfer pricing documentation and reduce the tax administration resources required to analyze it.

- ***Phased Approach***

We also agree with the suggestion that any initial documentation requirement should be kept at a high level and used only to address risk assessment needs. Companies would still need to perform relevant contemporaneous analyses to ensure that their transfer pricing is at arm's length, but a phased approach would eliminate the needless additional burden now imposed routinely in many countries on taxpayers not selected for transfer pricing examinations. We believe that the application of expansive documentation requirements merely to encourage well-considered transfer pricing positions is now outmoded and unnecessary, with companies ranking transfer pricing as their top international tax concern and with other adequate compliance incentives. Information not relevant to the initial risk assessment can be requested in a later phase on an as-needed basis, if and when the company is selected for an examination to which additional information is relevant.

- ***Coordination of Tiered and Phased Approaches***

Ideally, the first phase of documentation would correspond to the general tier, to minimize administration and compliance burdens. However, it is important to ensure both (1) that information requested for the first phase be narrowly targeted for transfer pricing risk assessment purposes, and (2) that the general documentation information be relevant to all jurisdictions to which it is provided. Unfortunately, as discussed below, the general "masterfile" information presently proposed by the White Paper is not well-suited to either of these purposes.

It should also be made clear that high-level risk assessment information cannot substitute for the additional information needed to perform a full transfer pricing analysis. This is important to ensure that the initial risk assessment information is not relied upon as the basis for proposed transfer pricing adjustments.

- ***Basis for Reporting***

We fully agree as well with the White Paper's pragmatic suggestion that multinational enterprise groups should be permitted to prepare and provide documentation on either an entity basis or a line-of-business basis. As the White Paper recognizes, such groups may manage and account for their operations on either basis. Any requirement to produce figures on a basis not already captured by the company would create very substantial new compliance burdens, with lengthy systems reprogramming delays in many cases.

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Specific Comments

While its general direction on many points seems very helpful, the White Paper does not fully address some issues. We offer our recommendations on some key remaining concerns below, followed by specific comments on the masterfile / local file proposal.

- ***Burden Reduction***

We appreciate the White Paper's recognition of the importance of reducing the compliance burdens and costs currently imposed by the multiplicity of transfer pricing documentation requirements. However, we are concerned that some of the proposals included in the White Paper would have the opposite effect. We see three main concerns:

First, while the White Paper appropriately acknowledges the need for materiality thresholds to reduce burden, it does not propose such thresholds or provide a methodology for establishing them. While we appreciate that this may not be an easy task, we urge the OECD to develop specific guidelines on this point so that its work on documentation does not result in increased burden.

Second, as discussed below, while the information contemplated in Table 2 of the White Paper for the local files to be provided to particular jurisdictions generally seems reasonable, the masterfile information contemplated in Table 1 requests much additional information that is not currently provided in transfer pricing documentation or even generally maintained by companies. As currently proposed, these requirements would create, not reduce, burdens.

Finally, the White Paper does not recommend a mechanism for achieving consistency among the domestic law provisions that currently establish transfer pricing documentation requirements. As the White Paper itself notes, more "streamlined" country requirements are the benefit offered to business in the 'balanced trade-off' that it proposes. We appreciate that the OECD has not historically spoken on most domestic law provisions, but we submit that it will need to take creative and proactive steps to coordinate and impose limits on domestic transfer pricing documentation requirements if the work in this area is to produce burden reductions instead of significant increases in burden. Fortunately, this seems perhaps more feasible than it has in the past, given the BEPS Action Plan's focus on many domestic law issues and the coordination efforts on transfer pricing documentation already underway within the EU. However, if the OECD is serious about these efforts, it will need to press for, and provide effective incentives for the adoption of, mandatory measures such as international agreements or provisions in the multilateral instrument contemplated by the BEPS Action Plan. Such action could, for example, be encouraged by tying it explicitly to the provision of information under the new country-by-country reporting requirements, as implied by Action 13 of the Action Plan.

- ***Confidentiality***

Much of the information proposed for inclusion in documentation, particularly the proposed new masterfile, divulges very sensitive business strategies or even trade secrets. This includes, for example, the value drivers analysis, the supply chain information, the main markets information, the list of material

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intangibles, and the strategy for the development, ownership and exploitation of intangibles, as well as aspects of the functional analysis. The disclosure or misuse of such information could cause serious competitive harm to the business. It is, therefore, critical that any such information provided in transfer pricing documentation be adequately protected from disclosure or use for impermissible purposes.

The White Paper does not address this concern. It is critical, however, that if a masterfile is to be provided directly to all relevant jurisdictions, including jurisdictions with inadequate confidentiality provisions in their domestic laws or exchange of information agreements (if any), the use and disclosure of that information will need to be legally restricted with adequate penalties for noncompliance. Such restrictions must be established in tandem with and as a legally binding precondition for the application of expanded information requirements such as those proposed by the White Paper.

- *Relevance*

The White Paper proposes the preparation of a new masterfile with “[i]nformation relevant to all countries ... assembled one time on an MNE wide basis,” which would be provided “to any country requesting documentation.” The broad scope of what the White Paper considers “relevant” to all countries and the proposed disclosure of the masterfile to any country requesting it presumably reflect the view expressed in the Paper that all tax administrations need a “big picture” of the global operations of MNE groups for risk assessment purposes and to serve as a starting basis for examinations. This approach goes well beyond the EU approach that inspired the proposal, however, which makes the masterfile available only to the EU “Member States concerned” and may be produced in differing formats for different Member States or exclude group companies where appropriate. Indeed, the White Paper’s proposal seems to go further even than the BEPS Action Plan, which contains some similar discussion but contemplates the provision of information only to “all relevant governments.”

We support more targeted risk assessments but are concerned that the broad content of the masterfile documentation envisioned by the White Paper would go well beyond what is subject to the taxing rights of the great majority of jurisdictions that receive it. This troubles us because, in our experience, the tax administrations most eager to receive company information on a global basis tend to be those that have the most expansive and unprincipled views of their own taxing rights, notwithstanding domestic laws or treaty provisions to the contrary. For example, we find that requests for global consolidated financial figures are not infrequently followed by assessments asserting the right to tax a considerable percentage, or even all, of the worldwide system profit.

We are particularly concerned that the proposed masterfile approach would inspire competition among multiple jurisdictions to assert new taxing rights over any income they may see as too lightly taxed. Given the current lack of consensus on either the existence or the relative priority of any such rights, we fear that the result of the proposed masterfile approach would be an increase in double or multiple taxation, creating a level of controversy approaching chaos. These concerns are further heightened by the lack of adequate confidentiality safeguards in many jurisdictions.

Part of the difficulty may lie in the fact that the White Paper seems to regard expanded transfer pricing documentation in part as a vehicle for addressing other policy issues currently under discussion, such as interest deductibility, double non-taxation, and harmful tax practices. We respectfully submit that transfer

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pricing documentation will be more effective as such if it continues to focus on issues directly relevant to transfer pricing and allows other issues to be addressed elsewhere. We therefore urge the OECD to take a more considered view of the relevance of the information it proposes for transfer pricing documentation and to eliminate items that do not bear on transfer pricing.

The BEPS Action Plan and the country-by-country reporting recently endorsed by the G20 and the G8 allow room for this distinction. With their focus on the “global allocation of the income, economic activity and taxes paid among countries” (in the BEPS Action Plan) and on profits and taxes paid (in the recent G20 and G8 statements), those initiatives differ in nature and scope from transfer pricing administration and compliance and should be addressed elsewhere, so as not to preclude improvements to transfer pricing documentation for transfer pricing purposes.

The White Paper itself seems to depart from transfer pricing principles in its discussion of income “allocation” among countries and of the geographical location of employees and intangibles and other assets. These factors are relevant to formulary apportionment systems but are largely inconsistent with current OECD transfer pricing guidance. The revamping of transfer pricing documentation in anticipation of such substantial changes seems premature at this time. We, therefore, plan to consider these aspects separately in future comments on the BEPS Action Plan and focus here on the improvement of documentation for current transfer pricing documentation purposes.

- ***Penalty Protection***

The White Paper does not affirmatively address protection from the transfer pricing documentation-related penalties that have, increasingly, been imposed under many domestic law provisions. If a coordinated documentation approach is to succeed, it will need to replace both the current patchwork of domestic law documentation requirements and the accompanying penalty provisions. Clear penalty relief provisions will, therefore, needed to be added to the package.

- ***Masterfile / Local File Proposals***

While we believe a masterfile / local file approach may prove promising, many of the above concerns become apparent when the White Paper’s specific proposals for these files are considered.

We support the use of local files to ensure that the information provided to a tax administration is relevant to its administration of applicable transfer pricing provisions. In addition to facilitating the preparation and analysis of that information, we believe this more targeted approach would provide businesses with at least some degree of comfort that their often sensitive financial and tax information will not be circulated more widely than is necessary for tax administration purposes.

The list of information suggested in Table 2 for the local file seems to us to be generally well-targeted, assuming that it is focused on transactions in which the jurisdiction to which it is provided has a potential income taxation right. We believe that it would be helpful, however, to clarify the intent of the questions regarding management structure of the local entity and location of “senior executives,” the reference to indirect effects on pricing of controlled transactions, and the apparent reconciliation requirement for financial data, as they raise obvious definitional and scope issues. We also believe that it would be

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appropriate to evaluate carefully the relevance of these items to the transfer pricing analysis, as they contemplate the creation of documentation that is not presently prepared and would thus create new and sometimes significant compliance burdens.

The list of information suggested for inclusion in the masterfile in Table 1 likewise includes a number of items that would seem relevant to all jurisdictions in which a taxpayer operates. However, it also includes much information that would not ordinarily be relevant to more than a few (perhaps only one or two) jurisdictions. In a few instances, Table 1 seems to suggest that relevant information should be provided by line of business, without recognizing that such information is not readily available in groups that maintain their information on a different basis. These include the following information, which is requested for the entire multinational enterprise group except as indicated otherwise:

- Chart illustrating the MNE's legal and ownership structure
- Geographical location of key management personnel
- Supply chain for material products and services (requested for line of business)
- Chart showing important related party service arrangements other than R&D services (requested for line of business)
- A written functional analysis showing the principal contributions to value creation by individual entities within the group (requested for line of business)
- A description of the MNE's strategy for the development, ownership and exploitation of intangibles ...
- A list of material intangibles or groups of intangibles of the MNE group and details as to which companies are entitled to returns from relevant intangibles.
- A list of important related party agreements related to intangibles, including cost contribution arrangements, principal research service agreements and important license agreements
- A description of any material transfers of interests in intangibles during the relevant year, including the entities, geographies, and compensation involved
- A description of material intercompany loans and other financial arrangements (e.g. loans, hybrid financial instruments, performance guarantees, financial guarantees and similar transactions) including:
 - Related parties involved (directly or indirectly) and geographic location
 - Principal amounts involved in the arrangement

Table 1 also requests information that is not relevant to a transfer pricing analysis, at least under OECD principles, for example:

- A list and brief description of the MNE group's applicable unilateral or bilateral/multilateral APAs
- A list and brief description of other relevant tax rulings related to the allocation of income to particular jurisdictions
- A list and brief description of transfer pricing matters pending under treaty MAP processes or resolved in MAP during the last two years
- The number of employees in each country in which the MNE group does business

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A more refined approach should be considered to ensure that the information that goes in the masterfile would be relevant to (1) the income taxing rights of all of the countries entitled to receive it, and (2) the application of a transfer pricing analysis.

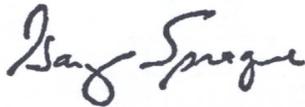
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The Treaty Policy Working Group hopes that these comments will be helpful as the Working Party as it continues its deliberations on these important issues. Please let us know if you have any questions.

Sincerely yours,



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On behalf of the Treaty Policy Working Group